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Hot topics in the employment law world

Labor and employment law is a constantly changing area and it can be tough to keep up with the most recent developments that affect employers' and employees' rights in the workplace. To help you stay up to date, here are two areas where companies have been getting in trouble recently:

- **Disability, medical leave and privacy issues**

Dealing with employee health issues can be a minefield for employers, as home-improvement retailer Lowe's found out recently when it had to settle a disability discrimination claim brought by the Equal Employment Opportunity Commission for $8.6 million. The EEOC accused Lowe's of violating the Americans with Disabilities Act (ADA) by firing workers who had been on medical leave longer than the limits the company had set. It seems Lowe's made two mistakes here: It imposed an arbitrary medical leave limit that may have contradicted what employees were entitled to under the Family and Medical Leave Act (FMLA) *and* it apparently refused to accommodate workers with disabilities by allowing longer leaves that wouldn't have imposed an unreasonable hardship on the company.

A case out of Pennsylvania also shows that employers must be careful when dealing with employees who need time off to deal with a medical situation. In that case, a worker took two months off to care for ailing parents. When she called to check in, she was told she would be fired if she didn't resign on her own. Though it's disputed as to whether the worker formally requested FMLA leave, a federal judge said it didn't matter. It was enough that as soon as it was possible to do so she informed the employer of her need to take leave and told them why.

Employers have also found themselves in hot water recently over medical privacy issues. A fairly new federal law, the Genetic Information Nondisclosure Act (GINA), prohibits employers from asking questions on health history forms that could reveal genetic information. Meanwhile, the ADA bars employers from asking medical questions until they've extended a job offer. Yet a company in Missouri that was seeking warehouse workers made applicants fill out a seven-page online application with several dozen medical questions covering everything from allergies to sexually transmitted diseases. The EEOC filed suit on behalf of a would-be applicant who was scared off by the form and a federal judge found that the form violated both laws.

Meanwhile, a federal judge in Michigan found that another company looking for warehouse workers committed sex discrimination by imposing a strength test to weed women out of the applicant pool. Like the company in Missouri, it had to pay damages and has presumably learned the hard way to check with a lawyer to make sure its application procedures aren't violating the law.

- **Wage, hour and labor issues**

Wage, hour and labor issues can be tricky too, as employers in different locations have recently found.

For example, the transit authority in Washington, D.C. hired a private contractor to provide van drivers to transport disabled passengers, presumably to save money. 15 of the contractor's employees "oversaw" the drivers, filing reports and recommendations. These

employees wanted to unionize, but they'd been classified as "supervisors" who couldn't join a union. However the National Labor Relations Board (NLRB) found that they weren't really supervisors because they had no ability to discipline drivers. The NLRB also found that such misclassification constitutes an unfair labor practice.

In a separate case, the Department of Labor recently socked a farming operation that supplies produce to major grocery chains with a $1.4 million fine for paying American employees a lower rate than foreign workers it had hired through the H-2A temporary agricultural visa program. The minimum wage for foreign guest workers is higher than the regular minimum wage, but when a company hires both American workers and guest workers, the law requires that they both get the same pay and benefits.

Finally, employers have been running afoul of labor laws through heavy-handed attempts to limit employees' online activities.

For example, casino giant Caesars Entertainment Corp. recently got into trouble with the NLRB due to a company rule that employees couldn't use the company email system to distribute any "non-business" information. Such a restriction was overbroad, since it could prevent employees from discussing working conditions. These sorts of communications are protected under federal labor law as "concerted activity." In other words, workers have a right to engage in these types of conversations online because it's part of their right to organize.

Similarly, a worker at a Chipotle restaurant outside Philadelphia was fired a year ago for sending out a "tweet" on Twitter complaining about his wages. An administrative law judge with the Department of Labor ruled that Chipotle had committed an unfair labor practice, and now the worker gets back pay and could have had his job back if he still wanted it.

Beware the 'cat's paw' and investigate before you act

The oddly named "cat's paw" theory (which comes from one of Aesop's Fables) refers to a scenario where an employer disciplines or fires an employee for what it thinks are legitimate reasons, but does so based on information from a supervisor who had illegal motivations. In most cases, it means the supervisor who reported the worker for discipline was motivated by racial or religious prejudice or a desire to retaliate against the worker for asserting certain rights. In these situations, a court can still hold the employer responsible for unlawful discrimination or retaliation.

A recent decision from a federal appeals court suggests that the cat's paw theory may be wider-reaching than many of us thought. In that case, a female employee complained to supervisors about an explicit photo sent to her by a co-worker. The co-worker then apparently manipulated text messages on his phone to make it look like the woman had willingly taken part in sexually charged conversations and that he had been a target of sexual harassment. Relying on the co-worker's so-called evidence, the employer fired her. The employer also apparently conducted no investigation and rebuffed the woman's offer to display her own phone to rebut the co-worker's version of events.

She sued the company in federal court claiming she was fired in retaliation for complaining about sexual harassment.

The employer argued that even under the cat's paw rule it couldn't be held accountable for the retaliatory intent of the co-worker because he was a low-level co-worker and not a supervisor.

But a federal appeals court disagreed, deciding that in cases where an employer doesn't conduct a meaningful investigation it's perfectly fair to hold it responsible. Previously the cat's paw doctrine was understood as only extending to the discriminatory attitudes of managers and supervisors, so this represents an expansion. That means employers need to take note: Before making any disciplinary decisions in highly charged situations, contact an employment attorney to help you manage the investigation and decision-making process without running afoul of the law. And if you're a worker dealing with harassment, discrimination or other unfair treatment in the workplace, call a lawyer to find out what your rights might be.

RIF of worker on medical leave creates problems

Under the Family and Medical Leave Act, people who work for companies with more than 50 employees are generally entitled to take up to 12 weeks of unpaid leave per year in order to deal with a medical condition, care for a new baby or tend to a sick family member. But can an employer lay off a worker on FMLA leave for economic reasons, like as part of a companywide "reduction in force" (RIF)?

In most cases, the answer is "Yes." But employers still need to tread carefully, because if the employee can show evidence that his or her FMLA leave contributed to his or her inclusion in the layoffs, the employer could get hit with an FMLA retaliation claim.

This happened recently in Connecticut where a line supervisor at a Sikorsky helicopter plant took leave to care for his parents, who had serious health issues. He received 80 days of intermittent leave per year, usually taking about two days of leave per week.

Ultimately he became one of 250 employees who lost their jobs in a RIF after receiving low scores in the company's RIF assessment.

The employee sued, claiming his termination constituted illegal retaliation for taking FMLA leave. He also argued that the low employee ratings he received during the company's RIF assessment weren't the real reason he was fired — they were simply a "pretext."

Sikorsky moved to dismiss, but a federal judge said the case could proceed to trial. Specifically, the court found enough evidence to suggest that a manager's supposedly neutral evaluation of the employee in the RIF assessment was influenced by hostile feelings over his use of FMLA leave. For example, the manager had on previous occasions acted disgusted by the employee's inability to be at work every day. The manager had also apparently required counseling from HR about employees' FMLA rights and had at one point tried to transfer the employee to a lesser position due to unhappiness over his leave.

So if you're a worker who lost your job in a mass layoff but you think you were included for unfair reasons, talk to an attorney to see what kind of case you might have. And if you're an employer contemplating a RIF, consult with an attorney to make sure you're doing it in the most neutral, objective way possible, or you could find yourself in court.

Company burned in court for misleading job candidate

Competition is tight for highly skilled workers. And it's understandable that as an employer, when you need to fill a position quickly you're going to try and sell the position in the best light possible. But it's a really bad idea to withhold important information from a job candidate, especially if the opportunity in question is less than secure.

Take for example a recent case out of Massachusetts. The employer, Boston-based Loomis, Sayles & Co., was planning to launch a new hedge fund. To staff the launch, Loomis set its

sights on Vishal Bhammer, who was working in finance in Hong Kong. During the recruitment process, Loomis made numerous promises to Bhammer about its commitment to the launch and the resources it planned to dedicate to the fund.
Ultimately Bhammer accepted an offer. And relying on Loomis's assurances that it was safe to do so, he gave notice to his employer and moved to Singapore as the position required. But two weeks later, Loomis told Bhammer it had abandoned the launch and there was no job for him.
Bhammer sued the company, claiming misrepresentation, and a federal judge in Massachusetts gave the lawsuit the go-ahead.
In denying Loomis's motion to dismiss, the judge said there was sufficient evidence that the company knew it wasn't telling the truth at the time it made all its promises. As a result, said the judge, the case could proceed to trial.
The lesson here is that optimism is acceptable when recruiting employees. But deliberately withholding key facts when a job candidate depends on your honesty is a recipe for disaster.

'Critical' and 'hostile' work environment not the same thing
If you're subject to pervasive harassment, intimidation and/or abuse and it's so bad that you can't work there anymore, you may be able to bring a "hostile environment" claim.
In some cases, these claims have resulted in employers paying significant damages. However, employees need to clear a pretty high bar to establish a hostile environment. As a recent Pennsylvania case shows, just having a mean boss who maintains an unpleasant working environment isn't necessarily enough.
In that case, Cassandra Ballard-Carter worked for mutual-fund company Vanguard Group in an administrative role. In 2011, she began reporting to a new boss, who she claimed criticized her spelling, grammar and communication skills in an unpleasant and sometimes profane manner. She told human resources she felt the boss was creating a hostile environment. HR investigated and concluded that the boss could improve his management style, but his conduct hadn't risen to the level she claimed.
In 2013, Ballard-Carter was diagnosed with partial hearing loss and dyslexia. She continued to receive critical feedback from the boss, who she claimed was unsympathetic about her disabilities. A few months after receiving a negative performance review, she took medical leave for a hip problem and never returned.
She later sued Vanguard, bringing a hostile environment claim. But a federal judge dismissed the case, stating that while Ballard-Carter certainly seemed to be encountering high levels of criticism and sporadic potentially offensive comments, the law does not require a happy workplace and the boss's conduct didn't constitute pervasive abuse.
Employers need to beware, however. The standard can be somewhat subjective and another judge might have disagreed. Meanwhile, there are countless other reasons why it's a bad idea to keep supervisors around who treat workers badly. So even if you don't end up losing a trial over it, it's a good idea to try to rein in any horrible bosses who might work for you.