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Law @ Work Employer Newsletter

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The savvy employer's guide to legal developments and quirks that affect the workplace

Welcome to the inaugural edition of the Law @ Work Employer Newsletter. For those of you who read the Law @ Work blog, you know that the blog offers in-depth analysis of important legal developments. This Newsletter fills in the blanks, focusing on the overlooked stories that are entertaining and good fodder for learning. Think of it as an ever-evolving employment manual for employers because it is always better to learn from someone else's mistakes.

Gone Phishing?

Talk about adding insult to injury! After Schletter Group, a worldwide manufacturer with headquarters in North Carolina, fell for a phishing scam when it sent its employees' W-2 information in response to a phony email, it was sued by its employees for invasion of privacy and other tort claims. The employees claimed the company ignored the risks identified in a 2015 FBI warning and a 2016 news article about the scam and did not take appropriate steps to protect its employees' private data. While the company initially offered credit monitoring services, the employees sought additional remedies, including monetary damages. Although the company sought to dismiss the employees' claims on the basis that the employer had no intent to make the disclosure, the company's motion failed. The court ruled, at least at the early stages, that the company's arguments that it did not intentionally disclose its employees' data were not enough to toss the suit out of court. The court accepted the employees' argument that this was a disclosure and not a breach and therefore, the element of intent was satisfied at the pleading stage.

Savvy employer takeaways: Encrypt employee data, place strict limits on who has the ability to disclose it, train employees on the risks of cyber scams, and pay attention to FBI and news media warnings.

Tip Strip?

In Philadelphia, a federal court judge entered a nearly $4.6 million judgment in favor of a group of exotic dancers and against a strip club, the Penthouse Club. In the class action, the dancers argued they had been mischaracterized as independent contractors instead of as employees and, as a result, the dancers were deprived of minimum wages and tips they earned. The club argued it was not an employer and merely rented space to the exotic dancers, whom the club treated as independent contractors, but the jury rejected that argument and found the club was an employer. In this case, the club was deemed an employer because, among other things, it had the power to ban dancers (or fire them as if they were employees) for violating club rules. The club required dancers to pay "tip outs" to other club employees such as fees to management, the DJ, the "house moms," the emcee, security workers, and valets. As a result, the dancers argued their wages and tips, which they were entitled to keep as employees, were diverted. This fact pattern is increasingly common because dancers from across the country assert similar claims, but it also extends to other businesses that use similar pay models, such as exercise studios.

Savvy employer takeaways: Proceed with the utmost caution when using the independent contractor designation for service providers, ensure tipped employees are paid in accordance with applicable federal and state laws, and impose limits on tip-pooling and other tip-sharing rules.

Quitters Sometimes Win?

In a ruling that challenges the adage that quitters never win, the New Jersey Appellate Division determined that an employee who resigned her job was eligible for benefits, reversing a decision of the Unemployment Appeals Tribunal. In re Cottman, the applicant was denied unemployment benefits on the basis that she voluntarily resigned her employment. Cottman did not dispute that she resigned her employment when her babysitter cancelled and she had no child care available for her child. When Cottman tried to call out of work, her former employer did not dispute that Cottman was told by her supervisor she may be terminated if she did not appear for work or find a replacement to cover for her shift. While the Appellate Division acknowledged that leaving work for personal reasons, no matter how compelling, ordinarily disqualifies an applicant from receiving benefits, the Court held Cottman was not disqualified because she only resigned under the threat of being terminated. The Court found her violation of her employer's policy would have led to termination based on its past practice even though her supervisor used the word "may." Since the Court found Cottman would have been qualified for benefits if she were terminated and she only resigned under the threat of termination, it reversed the Appeals Tribunal's decision denying benefits.

Savvy employer takeaways: Employers should not threaten employees with termination unless they really mean it, and they should understand that employees who react to such threats by resigning may, under the right circumstances, be eligible to collect unemployment.

Employment Law Myth Busters

During a layoff or non-voluntary reduction in force, the topic of how much time employers need to give employees to consider severance packages and what disclosures must be made creates considerable confusion in the media, with much being made of employers' supposed failure to make required disclosures (see example). Here is the deal: if employers are subject to the Age Discrimination in Employment Act ("ADEA") (generally, private employers with 20 or more employees), and ask employees who are 40 years of age or older to release ADEA claims in exchange for a severance package that is part of a termination, then they must abide by specific regulations. Those regulations are meant as safeguards for employees protected under the Older Worker Benefit Protection Act ("OWBPA") which amended the ADEA. That means covered employers may need to give employees up to 21 days to consider the severance offer, or 45 days in the case of a layoff of more than one employee, and a seven-day period after signing to revoke the release of the ADEA/OWBPA claims. Also, employers have a duty to disclose the age and title of the workers who are chosen for layoff and the selection criteria. The OWBPA has additional requirements and there are other best practices an employer's counsel can and should use when drafting a release to help guard against challenges, so it is always best to consult an attorney familiar with these types of matters so that the employer gets the broad release they are seeking in exchange for severance. Employers who are not covered by the ADEA and employers who are conducting a layoff of employees who are not protected by the ADEA do not have to rigidly adhere to these requirements. In the case of a separation that is not part of a reduction in force, (for instance, a termination for cause) the employer may not need to abide by these rules either. Even if the ADEA/OWBPA rules do not apply, employers are wise to give employees a reasonable period of time to consider a severance package to help protect against arguments that the waiver of claims should be unenforceable because of coercion or other reasons.

Savvy employer takeaways: Employers should know what is and what is not required to make their separation agreements and releases enforceable and should use reasonable means to give employees enough time to thoughtfully consider them.

For more information, including news, updates and links to important information pertaining to legal developments that affect businesses ranging from cyber security liability arising from electronically-stored information to evolving issues with employees, subscribe to my blog, or follow me on Twitter @AdamGersh.