Labor & Employment News

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Contents

Accolades

Please join us in congratulating Austin Associate **Eric J. Hansum** on becoming Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization. Eric is one of five Board Certified attorneys in our section: Ryan Griffitts, Elizabeth Marsh, John Ross, and Sherry Travers.

Arbitration Agreements in Employee Handbooks: Are they Enforceable?

Employees in Texas are generally considered "at-will" employees. This means the employer may modify the terms and conditions of an employee's employment at any time with or without cause, or notice. If the employer notifies the employee of the modifications, and the employee continues working after being notified of them, the employee is deemed to have accepted those changes. Mutual promises to submit employment disputes to arbitration are also legally enforceable because both parties are bound by promises to arbitrate.

Problems can occur, however, when the arbitration agreement is contained in an employee handbook, especially when it is a handbook the employer retains the right to unilaterally change. If an employer has the unilateral, unrestricted right to modify the handbook, and the arbitration agreement is in the handbook, there is a good chance a court would find the agreement unenforceable. This is because the employer's ability to arbitrarily change the arbitration agreement theoretically permits the employer to cancel or void arbitration agreements, and its employees would, consequently, receive nothing in exchange for their unconditional promises to arbitrate. The end result is that a court would, in all likelihood, refuse to enforce the arbitration agreement and the employee would be free to pursue her claims in court.

To be safe, employers should not include arbitration agreements in their employee handbooks. Instead, arbitration agreements should be stand-alone documents. Employers whose arbitration agreements are contained in employee handbooks should ensure their handbook's unilateral modification language does not apply to the arbitration provisions.

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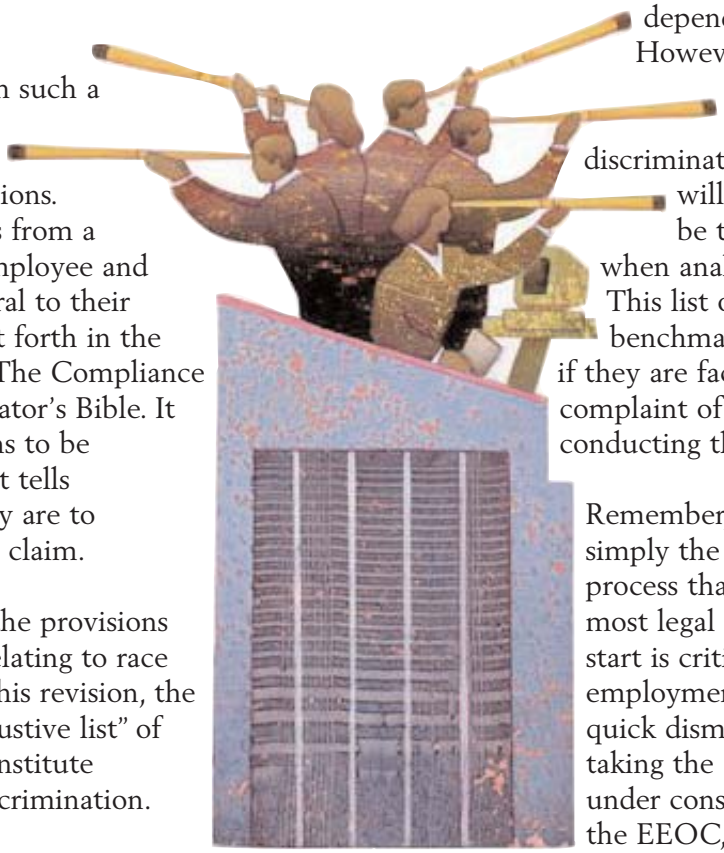
Pages from the Opposition's Playbook: The EEOC Revises its Compliance Manual

If your company has ever had a charge of discrimination filed with the EEOC by an applicant, employee or former employee, the process probably went something like this: you received notice of the charge, were given a few weeks to respond to the charge, and you (or your company attorney) submitted a "position statement" to the EEOC. In your position statement, the company's story was told, setting forth the reasons why the events at issue were not discriminatory. At that point, an EEOC investigator reviewed the position statement and either dismissed the charge, finding no evidence of discrimination, or took further action, such as the issuance of the dreaded and feared "cause-finding" (in other words, the investigator found cause to believe that your company had engaged in some type of harassing or discriminatory conduct).



If you have ever been through such a situation, you may have asked yourself how the investigators make their decisions. Obviously, part of that comes from a determination of what the employee and employer tell them. But central to their decision are the guidelines set forth in the EEOC Compliance Manual. The Compliance Manual is the EEOC investigator's Bible. It sets forth rules and regulations to be followed. More importantly, it tells investigators what factors they are to consider when investigating a claim.

Recently, the EEOC revised the provisions of the Compliance Manual relating to race and color discrimination. In this revision, the EEOC sets forth a "non-exhaustive list" of types of evidence that can constitute potential evidence of race discrimination. This list includes:

- Race-related statements (oral or written) made by decisionmakers or persons influential to the decision;
- Comparative treatment evidence, i.e., evidence that similarly situated persons of a different race were treated differently from the charging party;
- "Relevant background facts." This catch-all category includes items such as race-related attitudes, the general work environment, and the context of the challenged employment decision;
- Whether the employer complied with the relevant personnel policies;
- The race of the decisionmaker;
- Statistical evidence; and
- The credibility of the employer's explanation.

As the Compliance Manual explains, this list is not exhaustive, and the relevance of particular facts will depend on the nature of the case. However, it is important to consider these factors if your company is faced with a charge of race discrimination, since the investigators will typically find these factors to be the most important factors when analyzing the data before them. This list of factors is also a good benchmark for employers to consider if they are faced with an internal complaint of discrimination and are conducting their own investigation.

Remember, a charge of discrimination is simply the beginning of what can be a process that ends with litigation. As with most legal matters, getting off to a good start is critical, and in the world of employment law, that means obtaining a quick dismissal of the EEOC charge. By taking the Compliance Manual revisions under consideration when dealing with the EEOC, you can increase your chances of a good result at the administrative level. The new manual provisions can be viewed online at <www.eeoc.gov/policy/docs/race-color.html>.

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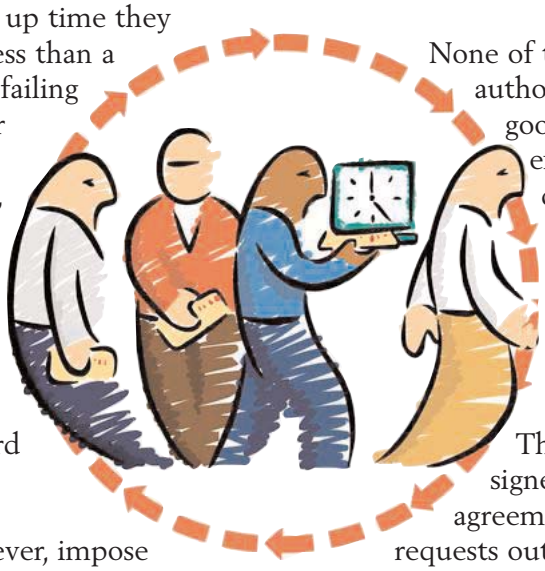
DOL Opinions: Timekeeping Policies and Pay Deductions for Exempt Employees

The US Department of Labor ("DOL") recently issued two key opinion letters regarding timekeeping and compensation practices for exempt employees. These employees are exempt from the Fair Labor Standards Act's ("FLSA") minimum wage and overtime requirements because they are employed in a bona fide executive, administrative, or professional capacity and receive a guaranteed salary of at least $455 per week.

In the first opinion, DOL examined an employer's policy that requires exempt employees to work a minimum of 45-50 hours weekly. The employer also required exempt employees to make up time they missed due to personal absences of less than a day. Employees were not docked for failing to meet either requirement, but their consistent failure to observe these rules would result in discipline up to, and including, termination.



DOL concluded that employers can require exempt employees to make up lost time without jeopardizing their exempt status. Employers can also require these employees to record and track time and work specified schedules without jeopardizing their exemptions. Employers cannot, however, impose disciplinary suspensions under the FLSA for an exempt employee's refusal to comply with these rules because the employee's refusal does not constitute a violation of a "workplace conduct rule" within the meaning of the new white collar regulations. §*29 CFR 541.602(b)(5)*. Employers may only impose disciplinary suspensions on exempt employees if the rule allegedly violated applies to all employees and relates to workplace conduct, not performance or attendance issues. *FLSA 2006-6*.

In the second case, DOL addressed an employer's policy regarding pay deductions from exempt employees' salaries for lost or damaged company equipment. DOL regulation §*29 CFR 541.602(b)* contains an exclusive list of the five permissible exceptions under which an employer may make pay deductions without jeopardizing the exempt employee's status:

- Full-day deductions if the employee is absent for personal reasons besides sickness or disability;
- Deductions for one or more full-day absences caused by sickness or disability if the deductions are made pursuant to a bona fide sick leave/disability plan, policy, or custom;
- Offsets for military pay and jury or witness fees;
- Deductions for penalties imposed in good faith for violations of significant safety rules; and
- Deductions for unpaid disciplinary suspensions of one or more full days imposed in good faith for violations of workplace conduct rules.

None of these regulatory exceptions authorize deductions for lost or damaged goods. Accordingly, deductions from an exempt employee's salary for lost, damaged, or destroyed funds or property resulting from the employee's failure to properly carry out her duties defeats the exemption because her weekly salary is not guaranteed.

This is true even if the employee has signed a deduction authorization agreement and even if the employer requests out-of-pocket reimbursement rather than making an outright deduction from the employee's paycheck. Further, these kinds of deductions also violate the regulatory prohibition against reductions in compensation due to the quality of an employee's work. *FLSA 2006-7*.

These opinions do not apply to non-exempt employees. Accordingly, Texas employers remain free to make deductions from their wages for lost, damaged, or destroyed property so long as the employer has the employee's written authorization to do so and the deduction does not reduce the employee's hourly rate below the FLSA's $5.15 minimum wage.

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Employees Can't Use FMLA Leave for Unscheduled Workplace Breaks

Recently, the Fifth Circuit Court of Appeals—the federal appellate court covering Texas—in *Mauder v. Metropolitan Transit Authority of Harris County, Texas*, addressed the novel issue of whether an employee was entitled to leave under the Family Medical and Leave Act ("FMLA") for alleged incapacitation while in the workplace. The plaintiff, Kenneth Mauder, was a diabetic who worked as a technical support employee in a customer call site. Mauder requested he be permitted to use FMLA leave for frequent, unscheduled, and extended restroom breaks he claimed were caused by his diabetes and diabetic medicine. FMLA cases traditionally involve leave requests for employees who are physically absent from the workplace. This case, however, examined whether or not an employee is entitled to temporary FMLA leave for periodic time away from her desk during the workday.

The FMLA allows eligible employees to take up to 12 weeks of unpaid leave during a 12-month period for a "serious health condition" that makes the employee unable to perform her job. A serious health condition is defined as an illness, injury, impairment, or physical condition that involves either (a) inpatient care or (b) continuing treatment by a health care provider.

Mauder's case was examined under the second prong because he did not require inpatient care. "Continuing treatment by a health care provider" includes: (a) a period of incapacity exceeding three consecutive days; (b) any period of incapacity due to pregnancy or prenatal care; or (c) any period of incapacity or treatment if the incapacity is due to a chronic, serious health condition. "Incapacity" is defined as an inability to work due to a serious health condition, treatment therefore, or recovery therefrom. Further, the incapacity can be either episodic or permanent in nature. In other words, the serious health condition at issue may cause only an episodic rather than a continuing period of incapacity. The FMLA recognizes diabetes as an example of a chronic, serious health condition that causes episodic incapacity.

Mauder could not qualify for the first two categories of "continuing treatment" because he never missed more than three consecutive days of work and was obviously never pregnant. Consequently, Mauder was forced to argue that he was entitled to temporary FMLA leave under the third category of continuing treatment on the basis that diarrhea rendered him incapable of performing his job. The Court disagreed, noting that all of the cases that granted FMLA leave to an employee with severe diarrhea involved situations where the medical condition was so dehabilitating the employee could not physically go to work. Based on these prior holdings, the Court held that, in order to prove incapacitation within the meaning of the FMLA, the employee must prove they are medically incapacitated to the point they cannot attend work. Mauder could not prove his condition incapacitated him to such a degree or that it otherwise prevented him from attending work and so his FMLA claim failed.

Based on this case, it will be difficult for an employee to ever be able to prove they are entitled to use FMLA leave for unscheduled breaks during the workday, regardless of whether the need for breaks is caused by the employee's medical condition or is a side effect of medication. Employees should only be permitted to use FMLA leave for absences that render them unable to work; in other words, FMLA leave will likely be unavailable unless the employee is either physically unable to go to work or must, because of her incapacitation, leave work during the course of the day.

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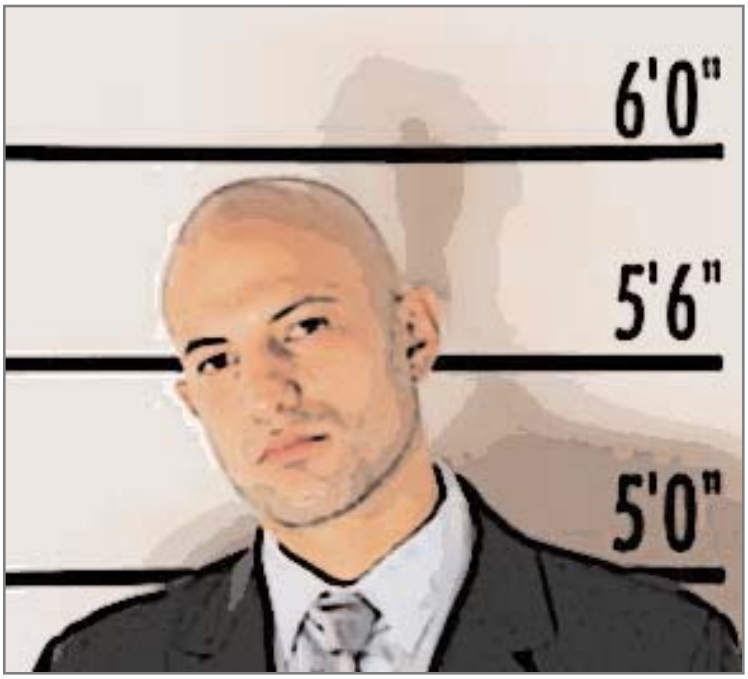
The Application Process: How to Avoid Hiring the Bad Employee

Having represented countless employers sued by current or former employees for all types of alleged discrimination and harassment, I have come to believe that many of these suits could have been avoided at the hiring stage. In many cases, the problem employee slipped through the cracks of the hiring process, often because the company's written application allowed the applicant to camouflage the problem spots in his or her past. So, since an ounce of prevention is worth a pound of cure, here are a few tips for the application process that will help you weed out the future plaintiff.



- **Retool your Applications.** Employers often pay close attention to their personnel documents, such as employee handbooks, time off requests, and written disciplinary forms. However, for some reason, they very rarely scrutinize the information applicants provide on their employment applications. These documents are usually old and outdated, and frankly are used simply because they are hand-me-downs from the last human resources manager. If you have not done so lately, take a good, hard look at your company's employment application. Is it really designed to give you quality information about the applicant? Does it inform the applicant that providing false or incomplete information is grounds for non-selection or termination? Does it make them specify whether they resigned or were terminated from prior jobs? A good application and good interview can help you avoid the bad employee most of the time.

- **Always Get the Questions Answered.** When we handle a case for a new client, all too often the plaintiff's application is incomplete. Sometimes, very important questions, such as criminal history or whether the employee has ever been terminated, are simply left unanswered. What's more, the employer never questions the applicant about it. This should never be allowed to happen. Your company should require that all questions on the application be answered. Every question, all the time. This way, if an applicant fails to answer all questions, that failure alone constitutes the legitimate grounds for the denial of employment, provided that you apply this rule consistently.

- **No Resumes, Please.** Often applicants will try to avoid filling out some or all of the company's employment application by submitting a resume instead. Don't let them. When the applicant submits a resume instead of an application, the applicant, not the company, controls the information. Applications force applicants to present information the way you want; resumes present information the way the applicant wants. Sure, employees can lie on both an application and a resume, but it is easier to flush out those lies when they are in the format that your application requires. If the applicant wants to submit her resume along with her fully completed application, that's fine, as long as it does not act as a substitute for any part of the application.

Remember, hiring good employees is the best way to avoid lawsuits. The employment application is an important tool to help you find good employees, or at least weed out the bad ones.

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Employers Must Comply with State and Federal Document Disposal Rules

As we reported in our Summer 2005 newsletter ("Employers Bound by FTC's New Consumer Information Disposal Rule," which can be found on-line at <www.thompsoncoe.com/default.aspx?ArticleId=217&ctl=AttPub&TabId=139&mid=900>), the Federal Trade Commission ("FTC") instituted a sweeping rule that provides severe penalties for the improper disposal of personal identifying information, including social security numbers, names, addresses, phone numbers, etc. Now, in addition to the FTC rule, Texas employers, excluding certain financial institutions and insurance companies, must also comply with Texas House Bill 698 ("HB 698").

Like the FTC rule, HB 698 was implemented to prevent fraud and identity theft by prohibiting the improper disposal of sensitive personal information. However, unlike the broader FTC rule governing all consumer information (e.g., personal identifying information in employee personnel files), HB 698 is specifically directed at the improper disposal of "personal identifying information" of a "customer of a business." Despite its narrower focus, all employers should be aware of HB 698 and train their employees to properly dispose of documents in compliance with this statute. Employers should also ensure their document disposal policies are updated to include all state and federal disposal requirements.

HB 698 defines personal identifying information as:

> an individual's first name or initial and last name in combination with any one or more of the following items: (a) date of birth; (b) social security number or other government-issued identification number; (c) mother's maiden name; (d) unique biometric data, including the individual's fingerprint, voice print, and retina or iris image; (e) unique electronic identification number, address, or routing code; (f) telecommunication access device, including debit and credit card information; or (g) financial institution account number or any other financial information.

Clearly, this definition is far-reaching and encompasses an extensive range of customer information—for instance, any document containing an individual's name and ***"any . . . financial information."*** Therefore, companies would be wise to assume all customer files contain some information subject to HB 698. To comply with HB 698 in the disposal of personal identifying information, a business must "modify" the records "by shredding, erasing, or other means, the personal identifying information to make it unreadable or undecipherable." Obviously, all businesses should be careful to shred (or burn or otherwise totally destroy) all such documents. Companies disposing of large volumes of customer information may create a safe harbor from liability by hiring an outside vendor "engaged in the business of disposing of records."

Businesses failing to properly dispose of customer records containing personal identifying information are subject to fines of up to $500 per "record," plus costs and attorney fees. Accordingly, HB 698 creates the potential for any company, large or small, to feel the sting if it is caught red-handed after having failed to properly dispose of records containing sensitive customer information.

Employers should also be mindful that Congress is considering federal identity theft legislation that may soon be effective. We will tell you more about this legislation if it is enacted.

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USERRA Claims are Subject to Binding Arbitration

The Uniformed Services Employment and Reemployment Rights Act ("USERRA") is the federal law that regulates employment rights for military service members. In a recent opinion interpreting USERRA (*Garrett v. Circuit City Stores, Inc.*), the U.S. Court of Appeals for the Fifth Circuit held that statutory USERRA claims are procedurally no different than any other federal employment claim (i.e., race, sex, disability, age discrimination). Accordingly, employees subject to legally valid arbitration agreements can be required to arbitrate alleged USERAA violations, just as they can be required to arbitrate any other type of employment claim. For further information regarding what constitutes an enforceable arbitration agreement, please see "Arbitration Agreements in Employee Handbooks: Are they Enforceable?" on the first page of this issue, as well as our prior newsletter article entitled "Texas Supreme Court Embraces Binding Arbitration in Employment Disputes," which can be found on the Thompson Coe web site at <www.thompsoncoe.com/default.aspx?ArticleId=77&ctl=AttPub&TabId=139&mid=900>.

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QuickTips

- All U.S. employers are responsible for completing and retaining I-9 Forms for each individual they hire for employment in the United States. The employer must verify the employment eligibility and identity documents presented by the employee and record the document information on the Form I-9. Although the most-current I-9 form available (Rev. 05/31/05) lists several documents that may be used to establish both identity and employment eligibility, the Department of Homeland Services has recently declared that five of the still-listed documents are no longer legally acceptable: (a) Forms N-560 and N-561 (Certificate of U.S. Citizenship); (b) Forms N-550 and N-570 (Certificate of Naturalization); (c) Form I-151 (Permanent Resident Card); (d) Form I-327 (Unexpired Reentry Permit); and (e) Form I-571 (Unexpired Refugee Travel Document). Employers should exercise care to make sure they do not accept one of these prohibited documents as part of the I-9 verification process. One way to avoid this problem is to cross or mark out the five invalid documents on the back of a master I-9 Form and use only copies of that edited master form for verification purposes.
- When documenting employee performance issues, provide concrete factual descriptions of the unacceptable behavior. For example, instead of making general comments such as "Bob is not a team player," say, "Bob refused to share information regarding the sales matrix with Susan, resulting in unnecessary duplication of effort and wasted time." Providing your employees with specific feedback ensures they understand what you find acceptable and unacceptable. In addition, should the employee make a claim against the company, you will have objective evidence demonstrating the challenged employment action was warranted.
- Does your company include the "magic" release language required by the Older Worker Benefits Protection Act in its separation agreements for employees 40 years of age or older? Generally, a valid release for an age discrimination claim must: (a) be in writing and be understandable; (b) specifically refer to age-related rights or claims; (c) not waive rights or claims that may arise in the future; (d) be in exchange for valuable consideration; (e) advise the individual in writing to consult an attorney before signing the waiver; and (f) provide the individual at least 21 days to consider the agreement and at least 7 days to revoke the agreement after signing it. A release agreement that fails to contain all these statutory provisions is legally insufficient to waive an age claim under the Age Discrimination in Employment Act.
- As long as an employee is eligible for FMLA leave, it is immaterial whether the employer or employee triggers the leave. Accordingly, an employer may place an ill or injured employee on involuntary FMLA leave. An employee placed on forced FMLA leave must timely provide their employer with adequate medical information explaining the nature of her serious health condition and the reasons for the needed leave. This information must be provided at the time the employer designates the leave as FMLA-qualifying. If the employee fails to timely provide the employer this information, the leave will not be FMLA-eligible and the employee will not be entitled to the maximum 12 weeks of unpaid leave. Nor will the employee be protected by the FMLA's anti-retaliation provisions.

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The Attorneys in the Labor & Employment Section of Thompson Coe counsel public and private sector management in connection with all federal, state and local laws regulating employment. Our experienced attorneys can help clients by simplifying the employment law maze, resolving sensitive employment-related issues and reducing the risk of costly lawsuits.

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