



HUMAN RESOURCES UPDATE

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*Happy
Holidays!*

FLSA ISN'T GOING AWAY

We have discussed previously in this newsletter the significantly increased scrutiny by the Department of Labor (DOL) regarding Fair Labor Standards Act (FLSA) compliance. The number of audits with accompanying fines and penalties and associated costs has skyrocketed. There is no question that the FLSA is complex and requires a focused effort to be in compliance. However, another aspect of the FLSA that has been overlooked is that individuals — supervisors, managers, directors, corporate officers — can be held personally liable for willful violations of the Act.

If you and your organization have not completed an FLSA audit recently, you may be skating on thin ice. Businesses change quickly and employees' jobs change right along with those changes. You wouldn't try to do a complete financial audit on your own, so get the professional help you need to comply with the FLSA. FLSA violations can be just as costly as an IRS fine and penalty. In addition, performing FLSA audits on a systematic basis can demonstrate that the company is doing everything reasonable to comply with the law.

NOBODY LIKES A BULLY

We have heard a lot in the news lately about bullies in our schools, but the workplace is far from immune to this kind of behavior. Bullying behavior can be overt or subtle, but is unacceptable in any form. Companies should be sure their policies for workplace conduct include clear language that prohibits bullying, often defined as "consistently aggressive and/or unreasonable behavior." This behavior runs the gamut from rude conduct to outright assault. Not only should the policy address the bully, but also other employees who actively or passively support the bullying behavior. As many as 10 percent of U.S. employees may be victims of bullying, with women and minorities disproportionately affected. Since this type of behavior can certainly be considered as harassment, there is a real risk of legal action. If the bully is not appropriately disciplined, additional claims might result based on discrimination.

The over-riding reason to rid the workplace of bullies is that a positive work environment is more productive and more profitable. There is nothing to be gained but trouble from negative behavior.

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APPEARANCE BIAS - YOU'RE NOT UGLY ENOUGH TO CLAIM DISCRIMINATION! OH YES, I AM!!

Can you imagine such an exchange in a courtroom? If either a new law or current laws around discrimination include bias against appearance, it could happen. Research has shown that there is actually a bias toward more attractive candidates and employees. There have even been cases of such claims. However, those cases actually involved individuals whose discrimination claims were based on age discrimination or pregnancy discrimination, of which appearance was a factor. There have also been unsuccessful claims that appearance was a bona fide occupational qualification. These claims failed since the appearance issue was really around whether males would be viewed as attractive to customers as females.

So what would the criteria be for protection? How ugly is ugly enough to warrant protection under the law? How obese is obese enough? Remember that old adage? "Beauty is in the eye of the beholder!"

USERRA MAY BE TRIGGERED PRIOR TO RECEIVING COPIES OF MILITARY ORDERS

The 1st Circuit Court of Appeals has recently held that an employee's verbal announcement to his employer that he intended to return to active duty after remaining inactive for multiple years was sufficient to trigger protection under USERRA. The employee was inactive for several years, then contracted to return to active duty at the rank of captain. He informed the employer that he was returning to active military duty and would likely be deployed at some point. In the interim, the employee was denied a promotion he felt qualified for and received a significantly diminished performance review — to the extent he was placed on a performance improvement plan. After the employee returned to active military duty he filed a legal action claiming violation of USERRA.

This case makes two important points for employers. First, protection under USERRA can be triggered at any point once an employer has information about an employee's military status on which discriminatory treatment may be based — and formal military orders are not always required to trigger those protections. Second, USERRA does not allow an employer to treat an individual differently because of his military leave, and extending a performance improvement plan simply to "make sure" that an individual retains his performance improvements until he or she returns from an authorized military leave can be viewed by the courts as a violation of the act.

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