

Hot Topic Employment Issues - What Should you be Doing to Protect Your Company?

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Today's Hot Topics

- Collective and class actions
- ADA Accommodations
- Expansion of LGBTQ protection and dealing with transgender issues in the workplace
- Workplace challenges stemming from new marijuana laws
- NLRB scrutiny over confidentiality agreements, investigations and social media

Ripped from recent headlines

- ***Class Certification Granted to AT&T Call Center Reps in Overtime Suit (May 2017)***
 - Employees in Illinois allege that they were forced to work overtime without compensation (arrive early to boot up software programs, clock out when shift ended even if still on a call, manually file for OT even though electronic records tracked time at computers)
- ***US Bancorp Inks \$7m Wage Deal with CA Workers (May 2017)***
 - Employees in California alleged that the bank failed to compensate them for meal periods (forced to work > 5 hours without a meal break) and failed to provide itemized wage statements
- ***BB&T Call Center Collection Reps Win Conditional FLSA Class Certification (May 2017)***
 - Judge in North Carolina grants conditional certification to a class of 100+ employees required to report 10 mins before shift to log in – not paid for that time
- ***Wells Fargo Settles Customer Service Unpaid Bootup Time Lawsuit (April 2017)***
 - Settlement with a class of over 2000 current and former employees in California claiming that the bank failed to pay for the time uploading customer applications before logging in (avg of 15 mins total per week)

Spotting Wage and Hour Issues

- Private OT class and collective actions continue to be a major issue – have you seen the commercials on TV?
- Federal and state laws are already on the books so the change in the administration in DC not likely to greatly impact litigation (big incentive is the award of attorney\$ fee\$)
- What starts in California makes it's way across the country
- Analogous state law wage payment and collection suits (often include a multiple of damages and payment of attorneys fees)
- Other issues like pay for meal periods, rest periods, etc.

Tip – Know the law and pay employees properly

Accommodating disabilities in call centers

Williams v. AT&T Mobility Services LLC, 2016 (W.D. Tenn. June 6, 2016)

- Employee's job as customer service representative was to answer calls and assist with technical support and billing. Consistent and regular attendance was an essential function
- Employee with depression and anxiety asked for an accommodation that would allow her to work a flexible schedule (leeway on start and end time, extra breaks for panic attacks). After a series of attendance issues, employee was terminated and sued under the ADA for failure to accommodate her disability
- Under the ADA, employers are required to offer **reasonable** accommodation so that employees can perform the essential functions of the job. Court granted summary judgment in favor of employer:
 - Regular attendance (including punctuality) was essential function of the job
 - Workforce scheduling based on anticipated volume of calls routed to call center
 - Operation was impacted by employee's absences
 - Unscheduled absence = requirement to spread call volume among remaining reps thereby increasing work load, potentially slowing responses which could lead to increased customer dissatisfaction, adding to employee pressure and lower morale

Tip – Determine if accommodation is reasonable under the circumstances

Title VII of the Civil Rights Act & LGBTQ

- Title VII prohibits discrimination on the basis of race, color, religion, sex or national origin. EEOC believes that discrimination against LGBTQ is a form of sex discrimination
- Courts previously ruled that sexual harassment is a form of sex discrimination
- *Hively v. Ivy Tech Community College of Indiana* (7th Cir. which covers IL, IN, WI) ruled that Title VII extends to sexual orientation. Moderate appellate court
- Congressional democrats have now introduced a bill to amend Title VII to explicitly prohibit LGBTQ discrimination

Transgender Issues

- Bathroom use became a big issue with the NC law
- EEOC and DOL recommend that workers allowed to use restroom matching their gender identity or only have single-occupancy unisex bathrooms. If another employee complains, cannot tell the transgender employee to use a different bathroom
- Unacceptable to relocate a gay/trans employee to another location because another worker complains
- Impt to work with the employee on a date when the transition can be communicated to colleagues. Managers should not announce
- Intentional and malicious misgendering by co-workers is actionable by the EEOC
- Can't inquire "did you have the surgery yet?"
- Can't bar employees from dressing according to their gender identity

Tip – Proper EEO Training of Supervisors and Employees is Essential

Marijuana Accommodations – Smoke or Fire?

- Smoking marijuana is still illegal under federal law
- Employers are generally allowed to drug test
- Under the ADA, current illegal drug users are not “individuals with disabilities.” Nonetheless, employees are challenging terminations for failing a drug test claiming that marijuana was the treatment for a disability. To date, no court has required an employer to offer this accommodation
- The future – some states (AZ, DE and MN) have language in their statutes explicitly requiring employees to accommodate legal out-of-work marijuana consumption unless the employer can show negative impact on performance

TIP – It is Still Permissible to Insist on a Drug Free Workplace

The NLRB and the Non-Union Workplace

- Challenging employer confidentiality and nondisclosure policies because they interfere with employees rights to engage in “concerted activities”
 - *“Do not discuss customer or employee information outside of work, including phone numbers and addresses”* is an policy the NLRB would likely find to be overbroad
- Policies requiring that internal investigations be kept confidential are unlawful absent a specific need for such a policy
- Cannot terminate employees for using social media to complain about the employer
- Trump administration could have major impact on the direction of the NLRB

Tip – Consider Revisions to Polcies, Procedures and Handbooks