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Weekly Employment Brief

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Due to the important nature of the following articles, this week's WEB is a departure from the usual format of short brief paragraphs. We will return to the standard format next week.

Detailed Documentation Is Critical In Workforce Reductions

Just as an employer should keep solid documentation of the reason it terminates an individual employee, employers should carefully document the reasons for terminating employees in a workforce reduction. In fact, the need for this documentation is much greater in a workforce reduction because the chances of a lawsuit are increased by the fact that multiple terminations are taking place at the same time.

Some employers have found themselves in the unenviable position of trying to defend lawsuits that challenged why particular employees were selected for layoffs with no documentation that showed why particular employees were selected or not selected. Sometimes these lawsuits are not filed until years after the workforce reduction. Without detailed documentation concerning why the company selected particular employees for layoff, an employer often has tremendous difficulty explaining why particular employees were selected or not selected for layoff. Memories fade over the years and it is likely that many members of management who participated in deciding whom to lay off will also be working elsewhere by the time a lawsuit is filed. Documentation made after a lawsuit has been filed can lack credibility to a court or jury for obvious reasons (*i.e.*, the employer has incentive to make up a lawful reason for a termination once it has been sued).

Perhaps the best proof that an employer lawfully selected employees for layoffs is a detailed memorandum ***made at the time of the workforce reduction*** that:

(1) explains the reasons for the workforce reduction;

(2) explains the criteria the company used to select employees for layoff within the affected area(s) of the company;

(3) a detailed table listing every employee in the affected areas of the company that indicates:

   (a) whether or not the employee is being laid off; and,
   (b) why the employee was, or was not, selected for layoff.

When preparing this documentation, you should keep in mind the ultimate potential audience: the average juror (in California, drawn from the California Department of Motor Vehicles database). The documentation should not use any legalese but, rather, plain and simple language that someone with no experience in employment law or human resources could understand easily and quickly. The documentation should come across as objective and fair description of the planned workforce reduction. The company should keep this memorandum in a confidential file (it should be distributed to employees only on a need-to-know basis).

EEOC Guidance Clarifies ADA Obligations Of Employers To Staffing Agency Employees

The Equal Employment Opportunity Commission (EEOC) has issued a written guidance which addresses the applicability of the Americans with Disabilities Act (ADA) to employees from staffing agencies, and the liability that employers and staffing firms face under the ADA for disability discrimination against contingent workers. The guidance can be accessed from the following Internet link: http://www.eeoc.gov/docs/guidance-contingent.html. This article summarizes some of the more important parts of the guidance.

The guidance clarifies when a "job offer" is deemed to be made in the context of staffing agency hiring. The answer to this question is important because the ADA strictly prohibits disability-related questions and medical examinations prior to a job offer being made. The guidance states that a "job offer" is made only when the worker is assigned to a particular host company, not when the worker is merely put on the agency's roster.

The guidance opines that only the staffing agency is required to make reasonable accommodation for the application process, unless the host company refers employment applicants to the agency. In addition, the guidance states that even if the host company does not refer applicants to the agency, the host company will violate the ADA "if it continues to obtain workers through a staffing firm although it knows or has reason to know that the firm does not provide reasonable accommodation for the application process."

Where the staffing agency and host company are "joint employers," they are both required to reasonably accommodate a worker's disability. In situations where it is unclear what reasonable accommodation should be provided, the guidance states the two companies should "engage in an informal interactive process with the worker" to identify the appropriate accommodation. The companies may claim an "undue hardship" if it is not possible to provide the worker with the reasonable accommodation in the time the host company needs to have a worker assigned to the job. The guidance warns, however, that many reasonable accommodations can be provided in a "very short period of time" (citing sign language interpreters as an example).

The guidance provides that if either the agency or the host has insufficient resources to provide a reasonable accommodation, that company may claim undue hardship as long as it makes a good faith effort to obtain assistance from the other company to provide the reasonable accommodation. If one company improperly fails to assist the other to provide a reasonable accommodation, then the guidance suggests that the former will violate the ADA if it continues to do business with the latter (until the latter agrees to provide a reasonable accommodation). If one company has sufficient resources to provide a reasonable accommodation, it must provide the reasonable accommodation—even if the other company refuses to assist.

The guidance also provides that if one company uses selection criteria that improperly exclude disabled persons, then the other company will also be held liable if it knew or had reason to know of the practice and continued to do business with the former.