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A Reminder:

The purpose of this update is to review the latest developments in human resource matters. The information contained herein has been abridged from numerous sources and should not be construed as legal advice or opinion, and is not a substitute for the advice of counsel.

Retaliation: A Growing Concern for Employers

Claims of workplace retaliation are a growing concern for employers. Nearly 30% of all claims filed with the Equal Employment Opportunity Commission (EEOC) dealt with retaliation. This can be a huge financial drain on any organization, especially a nonprofit whose funding and resources may be limited.

It is critical that training about retaliation and implementation of anti-retaliation policies become standard in your organization.

Retaliation, as defined by Webster's Dictionary, is revenge, the seeking out and repayment of an action like for like. Retaliation in the workplace is specifically linked to the conduct of an employer to an employee after that employee has filed a complaint or claim of discrimination.

A simple example would be: Susan reports to her supervisor that the sexual innuendoes and talk used by the men in her department make her feel uncomfortable. After she makes this claim, Susan is moved to a different department, with less responsibility and a decrease in pay. Susan now has two justifiable disputes with her employer: (1) Sexual harassment, and (2) retaliation.

The laws that prohibit discrimination within the work environment also prohibit actions of retaliation by an employer against an employee who has made a claim of discrimination under those same laws. Employees are protected from retaliation for:

- Reasonably exercising employee rights under the law
- Reporting alleged employer violations to a supervisor, Human Resource Department, or to the authorities, either through the proper enforcing government office or through an attorney
- Participating in proceedings under the law, as a plaintiff or a witness

Susan, above, was exercising her right to work in an environment free of discrimination. Unfortunately, Susan's employer made the decision to move her within the organization but without keeping her job duties and income the same. Essentially, Susan was punished for reporting a workplace violation, and thus her employer's actions would be considered retaliation.

Once the initial claim has been made, either to you, a government office, or an attorney, any actions your organization takes thereafter towards the employee may be construed as retaliation. Adverse employment actions that could be considered retaliation include:

- Termination
- Demotion or lack of promotion
- Alteration of job responsibilities
- Salary or benefit changes
- Job title change

More complex examples of illegal retaliation include:

- Refusing to hire an employee because he sued his previous employer for discrimination
- Removing an employee from her office and giving her a less attractive work space because she took a legally protected leave of absence
- Giving an unwarranted negative performance review to an employee because he complained about unfair pay practices
- Excluding a person from meetings or business lunches because she claimed certain sales practices were illegal
- Allowing rudeness, exclusionary behavior, criticism, joking, and actions to embarrass the employee into quitting, because the employee reported discrimination

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Communication is, as always, a key component to preventing a retaliation charge. The process begins when the employee makes the first notification of a discrimination claim. No matter how this employee has acted in the past or whether you believe it is a false claim or not, document everything. Communicate with the employee making the charge that a thorough investigation will occur. It is imperative that any further decisions regarding this employee be made with the surest intent of upholding her/his rights, and, again, document all communications and interactions with the employee.

Complications can arise when the employee who has filed the discriminatory complaint has a record of disciplinary issues. Before the discrimination claim was placed, what might have constituted a legitimate reason for not promoting this employee may now be viewed as an act of retaliation.

Documentation is your best defense. You can expect that all employer actions will be highly scrutinized. If you have practiced progressive discipline, made clear that actions taken were performance-related, followed standard procedures, treated this employee the same before and after the claim was made, and kept communication open between the employee and her/his supervisor even after the claim was made, you will have a strong base against a retaliation charge. Any holes in your documentation process will create an opening for even the slightest question of retaliation to occur, and it will be harder for you to prove your actions as appropriate and not as actions of retaliation.

Train management to recognize possible retaliatory conduct. Retaliation can be very subjective, and sometimes good management decisions appear as retaliation to the employee. Transferring an employee to an equivalent position in a new department may be a wise solution but may feel retaliatory to the

employee who, as a result of the move, now feels cut-off from friends and familiar co-workers.

Heightened awareness and open communication need to be encouraged between management and employees. You can prevent surprises and diminish the risk of a misunderstood action if you explain all motives and intentions to the employee as the process unfolds.

Follow-up all your decisions and actions with clear and direct communication, and always document these interactions. Check in with the employee and keep an interactive conversation going throughout the investigation, and beyond.

Retaliation claims are costly and time consuming, but they can be prevented. The basic steps to remember are:

1. Handle every discrimination complaint equally, and document all actions and communications.
2. Train managers to be aware of possible retaliatory conduct, and keep communication open among all parties.
3. Follow up with the employee during and after the discrimination investigation, and continue to do so throughout her/his employment.
4. We repeat: Document what you have said and done. No matter how valid your position is, it very likely will not win the day if you don't support it with clear documentation.

Even when you have done your best to anticipate problems and avoid a retaliation claim, you may be hit with one anyway. Odds are growing in that direction, but if you have kept yourself true to your policies and have strong documentation, you will at least have a chance at fighting back.

For a checklist of best practices regarding retaliation and whistle blowing, contact HR Services at [800-358-2163](tel:800-358-2163) or HRServices@501c.com.

From the Editor...

Happy New Year from all of us at HR Services. This begins our 16th year of providing human resources tools and information to nonprofit employers. Our Human Resource professionals can be a sounding board to help you make important personnel decisions that can help to limit your organization's liability.

Whether you need help defining HR policies or you just need a second opinion about an HR issue, please call us. Our toll-free hotline number is (800) 358-2163.

The lead article in this issue discusses a growing problem in the HR world: claims of employer retaliation for something the employee has done. The article is one we not only recommend that you read but also that you share with managers and supervisors in your organization. It has specific suggestions for two things you can do to increase the chances your organization will prevail if it is ever confronted with a retaliation claim:

- Educate managers and supervisors as to what can be construed as retaliation so that they can avoid such behavior.
- Encourage them to follow the cardinal rules of disciplining an employee: document every step of the process and keep the employee informed along of the way.

If you have questions after reading this, please call us.



Contact Us

If You Have HR-Related Questions

HR Services is an important benefit available to your organization. If you have any questions regarding any of these articles or any other HR-related question, please do not hesitate to call us at [800.358.2163](tel:800.358.2163) or send an email to: hrrservices@501c.com.

Legislative Updates

State

California: Governor Signs Military Spousal Leave Act

On October 9, 2007, Governor Arnold Schwarzenegger signed AB 392, which requires employers with 25 or more employees to give qualified employees as many as 10 unpaid days off when their spouse is on leave from military deployment. A qualified employee is one who works for more than 20 hours per week whose spouse is a member of the Armed Forces, National Guard or Reserves who has been deployed during a period of military conflict. The employee must provide the employer with notice that s/he wishes to take leave within at least two business days of receiving official notice that the spouse will be on leave from deployment. The employee must also provide the employer with written documentation certifying the spouse will be on leave from deployment. This statute is effective immediately for all employers with 25 or more employees.

Colorado Raises Minimum Wage

On January 1, 2008, the minimum wage in Colorado increased from \$6.85 to \$7.02.

Oregon: Governor Signs Violence in the Workplace Law

Oregon Governor Theodore R. Kulongoski signed Executive Order 07-17 requiring the Department of Administrative Services (DAS) to adopt a statewide written policy regarding issues of domestic violence, sexual assault or stalking involving agency employees by February 1, 2008. The policy shall include the following elements: 1) guidance for employees and management in addressing incidents of domestic violence, sexual assault and stalking and their effects in the workplace; 2) a requirement that the agency maintain, publish and post in locations of high visibility such as bulletin boards, break rooms and online sources, a statewide list with contact information for counseling, advocacy and referral resources for victims of domestic violence, sexual assault and stalking, as well as counseling resources for perpetrators; and 3) a clear prohibition of discrimination against employees on the basis of their victimization.

New York Requires Leave for Blood Donations

As of December 13, 2007 most New York employers are required to provide employees with leave time so that they may donate blood. Section 202-j, which has been added to New York's Labor Law, requires that employers who employ 20 or more employees at one or more work sites to provide employees with no fewer than three hours of leave time to donate blood within any twelve-month period. All employees who work an average of 20 or more hours per week are eligible. No stipulation yet on whether this is to be a paid or unpaid leave.

Ohio Delays Pregnancy Leave Rule

Ohio's Pregnancy Leave would extend the requirements of the Federal Family Medical Leave Act (FMLA) to most Ohio employers. The proposed rule would require employers with four or more employees to provide a minimum of 12 weeks of maternity leave regardless of the length of service with their employer. Further consideration of this rulemaking is not expected to commence until March 2008 at the earliest. We will keep you posted.

Vermont Ups Minimum Wage

On January 1, 2008 the minimum wage increased from \$7.53 per hour to \$7.68 per hour.

Federal

Special Notice: Employers Must Now Use New Form I-9

The U.S. Citizenship and Immigration Services (USCIS), the federal agency that enforces the employment verification requirements, has announced that employers must begin using the revised Form I-9 no later than December 26, 2007. For your convenience, you can download a copy of the new [Form I-9](#) at www.uscis.gov/files/forms/i-9.pdf. You will also find a copy of the revised USCIS Handbook for Employers, [Form M-247](#) at www.uscis.gov/files/nativedocuments/m-247.pdf, which explains the I-9 process in detail and includes questions and answers on filling out the form, examples of the acceptable documents, and a copy of the new Form I-9.

The revision seeks to achieve full compliance with the document reduction requirements for the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 which reduced the number of documents employers may accept from newly hired employees during the employment eligibility verification process.

Among the changes:

Five documents were removed from List A of the List of Acceptable Documents:

- Certificate of U.S. Citizenship (Form N-560 or N-561)
- Certificate of Naturalization (Form N-550 or N-570)
- Alien Registration Receipt Card (I-151)
- Unexpired Reentry Permit (Form I-327)
- Unexpired Refugee Travel Document (Form I-571)

One document was added to List A of the List of Acceptable Documents: the Unexpired Employment Authorization Document (I-766)

All Employment Authorization Documents with photographs (I-688, I-688A, I-688B, I-766) were consolidated as one item on List A.

Instructions now indicate that an employee is not obligated to provide his or her Social Security number in Section 1 of Form I-9, unless he or she is employed by an employer who participates in E-verify.

Instructions now indicate that employers may sign and retain Forms I-9 electronically.

A Spanish version of the form was also released, but only employers in Puerto Rico may have employees complete this version. Other employers may use the Spanish version as a translation guide for Spanish-speaking employees, but must complete the English version for their records.

Employers must use the amended Form I-9 for all individuals hired on or after November 7, 2007. However, DHS will not seek penalties against employers for using a previous version of the form on or before December 26, 2007.

HR Services Responds to a Recent Call

Q: We had an employee who was on FMLA leave through the first week in December. Should we have paid this employee for Thanksgiving and the Friday after Thanksgiving?

A: As a general rule, you are not required to allow employees to continue to accrue seniority or any other benefits such as vacation, sick leave, and holiday pay during an unpaid FMLA leave. (If the employees are taking paid FMLA leave, for example because they are using paid vacation or sick days, then the employee should continue to accrue benefits such as paid time off and holidays just as they normally would if taking the paid vacation or sick time.) Thus, if you do not want your employees to be eligible for paid leave during unpaid FMLA leave, your leave, vacation, sick, and holiday pay policies should clearly state this provision.

As far as holidays go, the key issue is not just how holidays are accrued, but whether your policies have any other eligibility requirements. A permissible limiting requirement would be one that requires employees to work the day before and after the holiday, unless they are on paid vacation or sick leave.

So, for example, “Benefits that accrue according to length of service (such as paid vacation, holiday, personal, and sick days) do not accrue during periods of unpaid leave or during periods in which the employee receives workers’ compensation or disability benefits unless otherwise specifically provided by the terms of the benefit plan document or policy.”

Another sample policy: “To receive holiday pay, an eligible employee must be at work or taking an approved absence on the work days immediately preceding and immediately following the day on which the holiday is observed. An approved absence is a day of paid vacation or paid short-term absence.”

Both of these policies support the employer’s right to deny holiday pay during an unpaid FMLA leave.

Of course, you also must implement your policy as it is written to ensure you are treating employees on FMLA leave fairly. So in the policy language above, if you do not consistently deny holiday pay to employees who have not worked the day before and after a holiday, you should not deny holiday pay to employees on FMLA leave.

