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Supervisors LEGAL UPDATE™

A fast-read source of information to help managers understand and comply with federal and state employment laws

September 1, 2020

OUR TOP STORY

Should supervisor have told pregnant employee about transfer sooner?

ONLINE

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Management Minutes

6-point checklist to document better

Stay Legal!

7 questions to ask yourself before deciding whether to fire someone

INSIDE

Boss on the hook for pregnancy bias after suggesting job transfer

After 20 weeks on leave, new mom returns to bad news

"Hey, thanks for letting me in," Shelly Hopkins said. "I swiped my card but nothing happened."

"Well welcome back," said supervisor Don Hudson said. "It's good to see you."

"All the security cards expired last month," Don told her. "I figured I'd deal with yours when you got back."

"And here I am," Shelly said proudly. "Five months postpartum – and I'm ready to get back to work."

"That's good to know," Don said, "because I've been wondering what your plans are."

"My plans?" Shelly repeated.

"Yeah, you caught me by surprise this morning," Don said. "I'll stop back in a few minutes and we'll catch up."

Just as she left it

After Don walked away, Shelly went to her work station. Everything was as she'd left it when she went on maternity leave 20 weeks earlier.

But there was one difference. Her computer password no longer worked and she was unable to log in to the

*Please see **On the hook …** on Page 2*

Sharpen Your Judgment

Worker fired for discussing his own discipline

"I have had it with Marvin!" Megan exclaimed. "You remember I had to discipline him for cursing at other employees?"

"Sure," HR manager Louise Howell said. "You gave him a written warning, and we put a copy in his file."

"Well," Megan explained, "now he's running around here, waving his copy of the warning in front of everyone and giving them all the details – his version, of course – after I told him not to."

Louise shook her head as she spoke: "That sounds like something he'd do. You really want to go ahead and fire him for it?"

"Yes, it's not only a violation of confidentiality, but it's also a total disruption and disrespectful."

"I get it," Louise said. "Let's consider something first, however. I know he's a pain in the neck, but I'm not sure how much we can limit him discussing his own discipline. It would be different if it were about him talking about other people."

"I don't care who he's talking about," Megan said. "He has to go."

Breaking confidentiality

Marvin sued the company for wrongful termination, saying he couldn't be fired for talking about disciplinary action that had been taken against him.

The company said the supervisor had a right to fire the employee for breaking confidentiality.

Did the company win?

This regular feature sharpens your thinking and helps keep both you and your firm out of trouble. It describes a real legal conflict and lets you judge the outcome.

Make your decision, then please turn to Page 4 for the court's ruling.

On the hook …

(continued from Page 1)

system and access her files.

"Were you even expecting me to come back?" Shelly asked Don when he swung by her desk a short time later.

"I was sure hoping you would," he told her. "Why do you ask?"

Been through a lot

"Well, first I can't even get in the front door, and now I can't log in to my computer," she said. "What's with that?

"Oh, don't be paranoid," Don assured her. "I know you've been through a lot with this pregnancy.

"But I distinctly remember you telling me you were coming back sooner."

"I don't recall that," Shelly said, "and if I did say that, why didn't you follow up after I didn't show?"

"You were out on approved medical leave," Don said, "and I didn't think it wise to bother you, or create any false expectations.

"I knew you'd be back when you were good and ready."

'One other thing … '

"And I'm here," Shelly said. "So please have them fix my computer access as soon as possible."

"There's one other thing before we do that," Don told her. "My plan is to transfer you to the new facility when it opens next month."

"Wait, what?" Shelly exclaimed. "But that's clear across the state. I'd have to move my entire family."

A tough decision

"Why are you telling me all this now?" Shelly said, growing agitated. "You could have told me this before I came back."

"I knew it would be a tough decision and I didn't want to disturb you," Don said.

"So you did it on my first day back?" she exclaimed. "You know I can't move!"

"You don't have to make a decision right now," Don told her. "You can tell me next week."

Instead, Shelly quit and sued her employer for pregnancy discrimination.

She claimed telling her about the transfer on her first day back was designed to make her quit.

The firm fought to get the case dismissed.

Decision: The company won when a court tossed out the lawsuit.

The judge noted the employee did experience a string of negative experiences that were unfortunate but simply coincidental.

Since she didn't give her boss a chance to work the situation out, she couldn't claim "constructive discharge."

Case: Manni v. ORS Nasco.

What you need to know:

Transfers can be seen as adverse actions that can put your company at risk for discrimination lawsuits.

That's why it's so important to button-up your decision-making and document your reasons. Work with HR to give employees:

- a clear description of what they can expect when they return from a medical/pregnancy leave, and
- as full an explanation as possible of your reasons for any changes that could be viewed as adverse to the employee. As this case shows, try not to wait til the last minute when it feels like you're springing it on the employee.

TEST YOUR KNOWLEDGE

Coronavirus screenings as people return to work

As employers grapple with how to screen employees for the coronavirus upon returning to the workplace, several federal agencies have issued new testing rules and guidance.

To test your knowledge of what employers can and can't do under recent rulings, answer *True* or *False* to the following:

1. It is perfectly legal to require coronavirus antibody testing as long as you require that ALL employees take the exact same test.
2. The key reason antibody testing is so controversial is it's hard to determine who pays for it.
3. Employers and businesses are required to foot the bill for an employee's first COVID-19 test, but all subsequent tests for the same employees must be paid for by the employee.

ANSWERS

Answers to the quiz:

1. *False.* Since the Centers for Disease Control and Prevention (CDC) has recognized the reliability of antibody testing for the coronavirus is questionable, it doesn't meet the ADA's standard for medical testing, the EEOC says.
2. *False.* The key reason antibody testing is controversial is it fails to meet the ADA's "job related and consistent with business necessity" standard. To be job-related, there would have to be concerns about a "direct threat" to employees' health, not that they may have had the disease sometime in the past. That's why employers can't require the test as a condition of returning to work.
3. *False.* Health insurers are required to provide coverage for all COVID-19 testing without cost-sharing on the same person, including all second, third, etc., tests that are recommended by a health professional.

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Where other supervisors went wrong

News you can use to head off expensive lawsuits

This feature highlights violations of workplace laws. You can learn how other supervisors got off track, what the mistakes cost and how to avoid them.

McDonald's franchise out $12K for sex harassment

What happened: A male manager at a McDonald's in Fayetteville, NC, sexually harassed a female employee, who was only 16 years old at the time. The EEOC charged the employee was subjected to sexual comments, sexual requests, and unwanted touching from her male supervisor. The complaint alleged that the supervisor offered her money for nude pictures of herself, asked her explicit sexual questions, and ultimately sexually assaulted her.

Decision: Along with paying the employee $12,500, the employer agreed to revise its policy on sexual harassment and to post a notice concerning the lawsuit and employee rights under federal anti-discrimination laws. The business must also conduct annual training for all employees on the requirements of Title VII and its prohibition against sexual harassment in the workplace, and on the company's sexual harassment policy.

Cite: EEOC v. Par Ventures, Inc. d/b/a McDonald's.

Norfolk Southern pays $2.5M for disability bias

What happened: Norfolk Southern Corporation and Norfolk Southern Railway Company medically disqualified workers from employment based on a range of actual or perceived disabilities, or a history of such disabilities, disclosed during preemployment or return-to-work medical evaluations. The EEOC alleged that Norfolk Southern's Pittsburgh operations engaged in a practice of medically disqualifying workers without proper consideration of whether, or to what extent, their conditions might affect their ability to perform the jobs safely.

Decision: The railway agreed to pay $2.5 million to 37 workers and agreed to implement measures to prevent workplace disability discrimination related to medical evaluations, such as policies and procedures, training, and appointment of a company decree compliance monitor.

Cite: EEOC v. Norfolk Southern Corp.

United Airlines sued for religious discrimination

What happened: The EEOC sued United Airlines after it allegedly discriminated against a Buddhist pilot on the basis of his religion when it refused to modify its addiction treatment program to change a requirement that conflicted with his religious beliefs.

United operates a program for its pilots with substance abuse problems. The pilot, who is Buddhist, objected to the religious content of AA meetings and sought to substitute regular attendance at a Buddhism-based peer support group. United refused to accommodate his religious objection.

Decision: The case is pending. The EEOC filed suit after first attempting to reach a prelitigation settlement through its conciliation process.

Cite: EEOC v. United Airlines.

STOP, LOOK, LISTEN ...

Get your message across in virtual Zoom meetings

After several months of working from home now, most of us are pros at virtual communication and setting up video calls.

You've probably even found the best spot in your home to have Zoom meetings and perfected your body language.

But here's one thing that's trickier to improve: your voice.

Most people inherently hate the sound of their own voice when heard through a speaker or headphones.

Sounding strong

And while you may be confident you have a strong speaking voice face to face, the rules are a different when communicating virtually.

Here are four tips to sounding your best on Zoom, from author and communication expert Carmine Gallo.

4 Zoom keys

1. Slow down. In a casual conversation, the average person speaks about 170 words a minute. But digital conversations are a different animal. Connections can lag and glitch, which makes it tough for your team to keep up with you if you don't adjust your pace. So be sure to speak a little more slowly and deliberately.

2. Pause for impact. Going along with speed, don't be afraid to pause after an important point to let it sink in. Don't give in to the pressure to fill every second with something – this can result in filler words like "uh" and "um."

3. Enunciate. In typical conversations, we often clip words at the end. While not a big deal in person, it can make video calls tougher to understand. You can improve on your enunciation by practicing tongue twisters.

4. Invest in a better mic. If you're doing a ton of virtual calls or will be working remotely for the foreseeable future, it might be worth it to invest in a headset that comes with a better microphone than the one built into your computer.

SUPERVISORS SCENARIO

Co-worker gave her unwanted flowers and compliments – and she wants him gone!

Boss agrees it's annoying, but declines to treat it as harassment

"What's this?" Bill asked as Ilene dropped a piece of paper on his desk.

"*This* is a list of the number and type of contacts Sam has made with me in the last three months, even *after* I told him to cut it out," Ilene said loudly.

"That's quite a detailed list you have," Will said, as he looked it over.

"Let's see here, you say Sam called you at home, called you at work, sent you flowers, sent you candy …"

"It goes on and on," Ilene interrupted. "I want it to stop. I want you to make it stop even if you have to fire Sam."

"Whoa, now hold on," Bill said. "You're not even sure it's Sam who is doing this. You say this is all being done anonymously. And if it is Sam, I mean, he's sending you flowers, after all. What's the big deal?"

Never touched her

"It's not just the flowers," Ilene said sharply. "It's everything. It's creepy. It's scaring me. It has to stop."

"Let me ask you this," Bill said. "Has Sam touched you in any way? Has he said anything directly to you?

"No, he has never touched me," Ilene responded. "He acts like he doesn't know what I'm talking about. But who else can it be?

"He's driving me crazy with all this. There are 25 incidents on that list," she said. "Twenty-five!"

"Do me a favor?" Bill said. "Just try to ignore this. It'll stop."

Ilene refused to ignore it and instead sued the company for tolerating sexual harassment. The firm claimed none of the incidents rose to the level of harassment.

Decision: The firm lost at trial. A jury awarded the employee $500,000 in compensatory damages and $150,000 in punitive damages.

Key: The jury agreed that the length of time involved suggested a pattern of harassment meant to cause the employee emotional distress.

Case: Riske v. King Soopers.

What you need to know:

Sometimes you can give someone the benefit of the doubt that he or she doesn't understand what's harmless and what's harassment.

But that can't go on forever, or even a few times. At the first sign of trouble, it pays to:

- Sit the person down and explain the problem and why the behavior has to stop – immediately.
- Bring HR into the discussion early to explain why and how the employee is putting you and the company at significant legal risk – and expense.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

No. The company lost.

The dispute ended up in a hearing before the National Labor Relations Board, which passes judgment on some cases involving what employees may or may not discuss in the workplace.

The NLRB ruled the employee had a right to discuss – and even complain about – an "employment action" such as discipline, when the employee himself was the subject.

That meant the supervisor couldn't put a confidentiality clamp on the discussions with the employee or discipline the employee for speaking out about them.

Had the worker repeated the action for which he was disciplined, then the supervisor would have had full authority to take action. But just talking about the discipline wasn't enough to warrant termination.

How they usually rule

The NLRB has ruled, in general, that supervisors can't curtail employee conversations about work matters unless such conversations violate the privacy rights of another worker or greatly interfere with business.

Note: Some employers believe such employee rights under the NLRB cover only union workplaces. Not true. The rights cover union and non-union situations.

Case: Philips Electronics North America and Lee Craft, NLRB, No.26-CA-085613

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