THE EMPLOYER'S ADVISORY

A PERIODICAL HIGHLIGHTING
CURRENT EMPLOYMENT-LAW ISSUES

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NLRB Issues New Ruling Changing the Legal Standard for Employee Handbooks

With all the Employee Handbook changes necessitated by the recent Colorado legislative session, a recent decision from the National Labor Relations Board just added a few more things that Colorado employers should also review. For example, do you have a policy that prohibits employees from talking about their work or their supervisors on social media? Do you have a policy that says employees cannot discuss their pay or benefits with their co-workers? If you do, that new NLRB decision requires some additional changes to your Handbook.

An employer may be thinking, "I don't have to worry about that decision because my company does not have a union." Unfortunately, the protections guaranteed by the National Labor Relations Act, and the National Labor Relations Board has very broad jurisdiction over most businesses. That is, the NLRA protects "concerted activities" of employees whether those employees are in a union or not. Concerted activity includes any activity between co-workers or on behalf of co-workers that addresses work-related issues. This includes employees discussing wages, working conditions, petitioning for better hours or more time off, refusing to work due to unsafe conditions, or any other activity an employee may engage in to improve their working conditions. In short, under the NLRA an employer cannot discharge, discipline, or threaten an employee for engaging in these activities.

And now, in that recent decision, the NLRB, which handles NLRA matters, determined that an employer cannot have a policy that "chills or coerces" employees from engaging in these concerted activity behaviors. This means that having a policy that discourages an employee from engaging in one of these behaviors (e.g., complaining about their supervisor on social media; sharing their wage information with other employees) will violate the NLRA. Any violation could result in a complaint to the NLRB and an employer having to navigate the NLRB administrative process.

What if an employer has a good reason for their policy? In that recent decision, the NLRB indicated that if an employer has a policy that discourages concerted activities, the employer may still be able to keep that policy only if they can show that the policy advances a legitimate and substantial business interest, and that the employer would not be able to advance that interest with a more narrowly tailored rule. Unfortunately, the NLRB did not provide a clear understanding of this standard. But an example that may fit this definition is a policy that prohibits employees from photographing or recording patients in a medical center due to the requirements of HIPAA. Though a blanket no photographs or video of the workplace policy may no longer meet the new standard as employees generally use photographic evidence to prove unsafe or inappropriate workplace conditions.

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In sum, Colorado employers should review their handbook and any written or unwritten policies regarding employees discussing wages, disagreeing with supervisors, slandering or disparaging the company or supervisors either at work or in the public (to include social media), and acts of insubordination related to an employee's beliefs related to their working environment. If such a policy exists that affects one of these things, the employer should review it to see if there is a legitimate and substantial business reason for this policy. Business reputation alone will likely not be a good enough reason for such a policy. But if there is a good reason for the policy, such as protecting confidential information or to comply with a law (e.g., HIPAA), then the employer should review the policy and determine if it is written so that it specifically focuses on this legitimate concern (confidentiality, HIPAA, etc.). If the policy is broad and focuses on other areas of concern, then the employer should narrow the policy so that it only addresses the concern. All this analysis should be written and saved in case an employee files an NLRB action against the company.

Of course, as long as you're reviewing your Handbook on that issue, you should update your policies on the following:

1) Update to Healthy Families. In 2020, Colorado passed the Healthy Families and Workplaces Act (HFWA) that provides sick leave to employees for various reasons. In the recently-completed legislative session, the Colorado legislature included new reasons that an employee can use HFWA, which requires organizations to update their policies.

2) Colorado Family and Medical Leave Insurance. The Family and Medical Leave Insurance program has already started by the initiation of deductions to employee's wages this last year. But starting in January 2024, employees can start submitting requests for leave under this program. A company should review their policies to see if they need to make changes to their leave benefits to accommodate this new law. In particular, it is important to ensure that employees understand that when they are requesting FAMLI leave through the CDLE, they also must provide their employer notice that they are going to miss work. Some employees may believe that simply requesting leave through the CDLE is sufficient to provide the employer notice.

3) Equal Employment Opportunity Policies. Employers should revise their harassment policies to reflect the new requirements under Protecting Opportunities and Workers' Rights Act (POWR). Under POWR, the employee no longer has to show that behavior was severe or pervasive when experiencing harassment/unfair treatment based on a protected class. Accordingly, all harassment complaints are required to be investigated. Additionally, POWR requires employers to keep a log on all complaints. Employers should create a policy for investigations that complies with these requirements and supervisors should be trained to refer to the proper channel all harassment complaints for this purpose.

4) Workers' Compensation. Colorado recently changed the Workers Compensation laws to include a 10-day reporting period. Additionally, an employee can report an occupational disease 30 days after they have symptoms of the disease. Previously the employee had 30 days from contracting the disease to report.

5) Equal Pay Act. An employer should have a policy that indicates the employer's dedication to following the Equal Pay Act. This policy should indicate that the employer will post all open positions in compliance with the law and will notify employees when a position has been filled as required by the law.

In short, there's no time like the present to start reviewing those policies.

Now is the time to review and revise policies! If an employer has questions about these changes or needs assistance with a policy, Bechtel & Santo is here to help. Please contact us for assistance.

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