THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER
HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES
PREPARED BY ATTORNEYS BETTY BECHTEL, MICHAEL SANTO,
DEAN HARRIS, AND ELISA CHEN

3rd Quarter **BECHTEL & SANTO, LLP** **2014**

"LOVE IS LIKE EMPLOYMENT AT WILL"

Abi Tapia, an acoustic guitar player from Austin, Texas, once sang:

> Love is like employment at will.
> Anyone can leave at any time for
> any reason/when I said I quit I
> guess what I meant was/ I want a
> raise and another weeks vacation.

With all due respect to Ms. Tapia, the increasing number of lawsuits being filed against organizations by former employees probably causes one to wonder if Colorado is still an employment at-will state. And, if it is, whether Colorado employers can still rely on it to terminate employees. The first question is still answered affirmatively – Colorado remains an at-will state. Unfortunately, as with so many other questions in the employment-law context, the second question is probably best answered with, "Well, it depends."

Initially, the concept of employment at will allows either party to end the employment relationship with or without notice and with or without cause(s). And while it remains the law in Colorado, that is not very unusual; the vast majority of states recognize the doctrine of employment at will in some form. The at-will doctrine arose in the 19th Century, in opposition to the common law "English Rule," which presumed that an employee was hired for a one-year term. So, in essence, the at-will doctrine was developed to "get around" that term requirement.

Colorado courts were actually slow to recognize the at-will employment doctrine. The first mention of it in a Colorado decision in the employment context wasn't until 1921. Fortunately, in recent years, many cases have reinforced the principle that "[a]n employee who is hired ... for an indefinite period of time is an 'at-will employee,' whose employment may be terminated by either party without cause and without notice, and whose termination does not give rise to a cause of action." *Cont'l Air Lines, Inc. v. Keenan,* 731 P.2d 708, 711 (Colo. 1987).

But it is equally true that the doctrine of at-will employment only allows employers to terminate a person's employment for legal reasons. That is, Colorado and federal courts recognize numerous exceptions to at-will employment, including unlawfully discriminatory terminations, wrongful discharge in violation of public policy, and retaliatory terminations. And when faced with such a claim, employers are better served if they

THE EMPLOYER'S ADVISORY is published quarterly by BECHTEL & SANTO, LLP, 205 N. 4th Street, Grand Junction, Colorado 81501, (970) 683-5888. Legal editors are Betty C. Bechtel, Michael C. Santo, Dean Harris, and Elisa Chen. The publication is designed to provide information about legal issues facing employers, but not to provide legal advice with regard to specific circumstances. Readers with legal questions should address them to their legal counsel. Downloadable versions available at www.bechtelsanto.com.

can point to a particular reason for terminating the employee, instead of relying solely on their at-will rights.

Consider the hypothetical case of Mary Smith, who previously worked for XYZ Corp. When XYZ terminated Ms. Smith, it told her that it was exercising its "at-will rights." Ms. Smith, who was over 60, believed that the real reason for termination was her age and she filed a claim with the EEOC; it didn't help that Ms. Smith's replacement was less than half her age. In such a claim, Ms. Smith will be able to establish her initial burden – she's over 40, was performing satisfactorily, and the employer terminated her and hired someone younger. The EEOC will then turn to XYZ and ask it to articulate its reason for her termination. XYZ, in this example, will say, "We didn't have one. We just decided to terminate her under our at-will rights." It's not difficult to imagine that in such a situation, the EEOC investigator may wonder, "Who does something for absolutely no reason? I bet XYZ had a reason. And, since it didn't tell me one, I bet it's an illegal one."

For this reason, the Employer's Advisory recommends that employers articulate their reasons to terminated employees and then be prepared to defend that reason/those reason. Of course, employers aren't "required" to prove "just cause." But it's easier to defend your employment decisions when unlawful motives are alleged if the organization can quantify the reason(s) for its decision.

TRUST, BUT VERIFY
Colorado's New Affirmation Form

On October 1, 2014, the Colorado Department of Labor and Employment announced that Colorado employers must start using the new Affirmation of Legal Work Status form. *See* https://www.colorado.gov/pacific/cdle/evr to download the new form.

Colorado has a few unique requirements that are different than the federal I-9 form.

1. Employers must complete the affirmation within 20 days after hiring an employee.

2. Employers must copy the documents the employee presented.

If you fail to copy the legal work status documents, as required in #2, or fail to complete the affirmation form within 20 days, as required in #1, you've missed your chance to complete it because under statute, the Colorado form must be completed within 20 days or not at all.

Practical Tip. While most employers are aware of the I-9 form, the Colorado Authorization form garners much less attention. But that doesn't mean it should be overlooked. In fact, a Colorado employer is more likely to be audited on the State form than it is on the Federal form. Additionally, while 20 days seems like a long time, that deadline has a funny way of coming up rather quickly. So, we recommend employers set up calendar reminders upon hiring new employees.

THE FLSA's PROFESSIONAL EXEMPTION

To classify an employee as "exempt" under the Fair Labor Standards Act, an employer must establish that it: (1) paid the employee on a salary basis; and (2) can establish one of the duty-based exemption tests.

While the salary test is fairly straight forward (*i.e.,* pay the employee a guaranteed minimum amount every workweek and don't deduct, generally, for the employee working less than a full schedule), the duty-based tests are anything but clear. It doesn't help that there are so many exemption tests; some of which are just plain odd. For example, the FLSA provides an exemption for creative professionals whose duties include the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

One of the more common duty-based tests is the professional exemption. To meet this exemption, an employee's primary duty "must be (1) predominantly intellectual in character and . . . require the consistent exercise of discretion and judgment [*i.e.*, "advanced knowledge"], (2) in a field of science or learning, which includes accounting, and (3) of a type where specialized academic training is a standard prerequisite for entrance into the profession."

To illustrate this exemption, consider the recent case from the 2nd Circuit Court of Appeals regarding entry-level accountants: *Pippins v. KPMG, LLP.* In that case, a group of former junior-level accountants filed suit against their employer, KPMG for, according to the plaintiffs, failing to pay them for time worked in excess of 40 hours in a week as required by the FLSA. KPMG defended the claim on the basis that as employees covered by the professional exemption, KPMG didn't owe any overtime to the accountants.

Initially in the case, there was no dispute that the second test was met because accounting is considered a field of science or learning. So, the Court focused on the first and third elements of the exemption (*i.e.,* (1) advanced knowledge and (3) the position requires the employee to perform the duties of the position using a specialized academic training.)

The Court determined that "advanced knowledge," as referenced in the first test, required the "exercise [of] intellectual judgment within the domain of their particular expertise." So, based on this determination, the court stated that the first prong was satisfied "if the workers rely on advanced knowledge of their specialty to exercise discretion and judgment that is characteristic of their field of intellectual endeavor."

In response, the plaintiffs tried to trivialize their work by arguing that it was mostly routine in nature. But the Court held that entry-level accountants, despite the occasional routine nature of their work, practiced the necessary professional skepticism by bringing a "questioning mind to the performance of their duties," which was central to the performance of their job.

The Court also found the entry-level accountants' professional judgment crucial in the performance of core accounting tasks, including analyzing information, interviewing the client, testing controls, performing inventory reviews, and producing written work. In fact, the Court cautioned that one should not "confuse being an entry-level member of a profession with not being a professional at all."

Additionally, the Court based its decision on its conclusion that "identification of errors or anomalies during the audit process itself is an exercise of accounting knowledge and professional judgment that a non-accountant would not possess. It is a hallmark of informed professional judgment to understand when a problem can be dealt with by the professional herself, and when the issue needs to be brought to the attention of a senior colleague with greater experience, wisdom, or authority."

Turning to the third prong, the Court found it critical that the "vast majority of Audit Associates had accounting degrees and were eligible to take the CPA Exam." The court determined this so-called "education" requirement is likely met by a few years of relevant training if that training is specialized to the job or profession at issue. The court did not find persuasive the plaintiffs' argument that they did not have the necessary previous intellectual instruction because the entry-level accountants "gain the necessary knowledge to act as accountants through a one-week introductory training course, followed by on-the-job training." Indeed, the court found that "the average classics or biochemistry major could not understand the materials, or develop the requisite understanding of the audit function on the basis of a brief training period."

So, based on these determinations, the Court concluded that the audit associates were "learned professionals who perform work requiring advanced knowledge requiring the consistent exercise of discretion and judgment, and who have customarily received this advanced knowledge through a prolonged course of specialized intellectual instruction."

Practical Tip: While not every employer employs accountants, the case is very helpful for employers because it walked through the analysis employed by the Court in determining whether a position meets the professional exemption.

THE EEOC QUESTIONS YOUR TRAINING EFFORTS

While investigating charges of discrimination filed by employees, the EEOC often asks employers a myriad of questions and to produce certain documents. Generally, those questions concern the reason the employer terminated the employee, information about similar terminations, and background information regarding the employer. Recently, the EEOC added a line of questioning that comes, slightly, out of left field. In short, when investigating charges the EEOC now requests employers to identify their efforts to train supervisors about lawfully hiring and firing employees.

This question may harken back to the United States Supreme Court's opinions in *Faragher v. Boca Raton* and *Burlington Industries, Inc. v. Ellerth*. In those cases from 1998, the Supreme Court provided employers a partial defense to certain harassment claims if the employer provided training to its supervisors and employees and, after that training, the employee failed to take advantage of the employer's complaint procedures.

Whether this is why the EEOC is now requesting this information is, probably, irrelevant. After all, the key is that the question ("What training do you provide employees and supervisors?") is now being asked by the EEOC in investigations. And while failing to train supervisors and employees may not be a *per se* violation of any law, the EEOC treats such a lack of training with particular skepticism.

Practical Tip: No matter whether employers are "required" to train supervisors, employers are strongly encouraged to provide supervisors and employees such training. After all, not only will it be helpful in responding to charges from the EEOC/CCRD, juries will be more sympathetic to employers who undertake efforts to train employees regarding the proper complaint procedures.

PAST CONVICTIONS – STILL A LAWFUL QUESTION AT THE APPLICATION STAGE

It seems that you can't read any employment law publication these days without the writer opining that employers shouldn't ask applicants about past convictions because "it's against the law." So, has that really become the law?

The short answer to this query is "Nope, conviction information remains a lawful area of inquiry as long as it's correctly posed." To correctly address convictions at the application stage, private employers should ask the applicant whether they've been convicted and, if so, when the conviction occurred and the reason for the conviction. Based on the answers, employers can then ask the applicant additional information if needed before making a hiring decision.

In a recent publication, the EEOC stated that it does not believe that employers asking applicants about previous convictions is *per se* unlawful. But the EEOC emphasized that when reviewing an applicant's criminal background employers must consider: (1) the nature of the crime; (2) the time elapsed since the conviction; and (3) the nature of the job duties that the applicant is applying for. After reviewing this information, the employer should then conduct an individualized assessment to determine if the conviction is related to the position's job duties. For example, it would be related if the applicant that was applying for the CFO position had been convicted for embezzlement, but it would not be relevant if an applicant had a DUI conviction when the position the applicant was applying for didn't require the individual to drive.

Practical Tip: Simply asking an applicant if the applicant has ever been convicted is probably not a great idea. Instead, ask the applicant questions that elicit the above information. Then ask the applicant follow up questions to determine how recent the conviction was and if it is related to the job duties of the position. The more recent the conviction and the more related it is to the duties of the position, the more an employer can legally use that conviction to make a non-hiring decision.

WHITE HOUSE DELAYS HOME-CARE WORKER REGULATIONS

On October 7, 2014, the Federal Labor Department announced its plans to delay enforcement of new minimum wage and overtime regulations covering the country's home-care workers; though the protections will go into effect as planned.

As background, the FLSA previously exempted from minimum wage and overtime requirements all workers who cared for the elderly and disabled individuals. Then last year, the White House announced it was removing that exemption for those workers effective January 1, 2015. Thus, starting on that date, employers were going to have to pay those workers minimum wage and overtime.

In its October 7th announcement, the Labor Department stated that the new rules would still go into effect on January 1st, as scheduled, but that the agency would not enforce them for the first six months. For the six months following that, the agency would enforce the rules at its discretion. By delaying enforcement, the Labor Department gives states and companies more time to adjust to the new rules. But that announcement is unlikely to end the debate. So, stay tuned.

Q & A

Q. We have a small bagel shop, and mid-day is our busiest time of the day. Is it okay for us to have our employees eat behind the counter to be available when customers enter the shop?

A. Initially, federal law does not mandate that employers provide a meal break to employees; although Colorado state law requires it for certain employers. But if an employer does provide an employee a meal break, then federal law imposes a few requirements. First, to be a "meal break," which time may then be treated as unpaid time, the time off must be duty-free and uninterrupted. Therefore, you should pay an employee who spends his meal period behind a counter or working at his desk. Second, federal regulations require that if an employee receives less than 30 minutes for a meal period, the employer must pay the employee for the entire time. For example, an employee that only takes 18 minutes of a 30-minute meal period would still be entitled to receive compensation for the entire 30 minutes, not just the 12 minutes that they worked. In sum, to be a bona-fide meal period, it must be duty free and last at least 30 minutes; anything less must be treated as work time even though the employee may not have worked the entire time.

Q. Clumsy Carly fell down the stairs during work as she rushed to a meeting. She filed a claim for workers' compensation. Now, Carly is telling us that she doesn't like any of the treating physicians we offered her. She requests that we provide her more options for a treating physician. Are we required to comply with Carly's request to come up with other options?

A. "No," for now. But soon, the answer changes to "yes." In short, while Clumsy Carly is out of luck this year, employers are going to be out of luck next year on this issue. On June 5, 2014, Colorado passed House Bill 14-1383. This bill changes the Colorado workers' compensation law to allow injured workers more choice of physicians. Currently, an employer or workers' compensation insurer must provide a list of at least two physicians or corporate medical providers from which an injured employee may select a treating physician. Under this new law, employers must provide a minimum of four physicians to injured employees. This law becomes effective April 1, 2015.

Q. An employee recently filed a sex discrimination case against us because she did not get a raise when everybody else did. We feel that her filing a charge evidences her disloyalty toward the company and we would like to fire her. Any reason we shouldn't?

A. Yes. Title VII of the 1964 Civil Rights Act protects employees who file discrimination charges from retaliation. Even if the employee's discrimination charge is meritless, the employee's right to bring that claim is protected. If the employer takes any adverse action against the employee for filing the charge, a new claim of retaliation is created. The retaliation claim may be successful even though the original discrimination claim is a loser for the employee. Only if the employee's claim is intentionally false and malicious is the protection against retaliation lost.