THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER
HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES
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4th Quarter **BECHTEL & SANTO, LLP** **2013**

RESOLUTIONS FOR 2014

Yes, it's that time of the year again. Time for winter driving, sunsets at 5:00 p.m., college-football bowl games, and, of course, resolutions for the new year. So, to join in this long-standing tradition, the Employer's Advisory created the following ten resolutions for employers for 2014 (in no particular order):

10. *Make sure you're filling out both the federal I-9 Form and State of Colorado Affirmation Form for all newly-hired employees.* While the I-9 Form gets all the press, Colorado has its own State Affirmation Form that employers must complete within 20 days of hiring a new employee for work in Colorado. This Form, like the I-9 Form, should not be kept in an employee's personnel file. And should be kept in separate I-9 and State Affirmation Form files.

9. *Make sure job descriptions accurately describe the duties you want the employee to perform*. Job descriptions not only convey to employees what they should be accomplishing, but they are invaluable in discrimination claims. Job descriptions identify to the EEOC, courts, etc. what the employer considers to be the essential functions of the position; the crux of many claims under the Americans with Disabilities Act.

8. *Make sure supervisors receive training regarding the organization's policies and procedures*. Do your supervisors understand the finer points of the Americans with Disabilities Act? Do they understand that unlawful harassment and discrimination claims are not limited to sex, but can include religion, age, race, ethnicity, disability, and marital status? Do they understand when a subordinate becomes eligible for FMLA leave? These are just a few examples of training that supervisors should receive.

7. *Document an employee's performance with written reprimands*. A Shakespearean play is not required every time you document a performance problem. Instead, identify in a straight-forward manner what rule, procedure, etc. the employee violated, the date the violation occurred, and what the employee needs to do to improve. Stay away from "why" something occurred, and focus on what actually occurred. Reprimands should also include the language that "future violations of this policy, practice, or another policy, practice, etc. of the organization could lead to future discipline up to and including termination of employment."

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.

6. *Prepare accurate performance evaluations*. Reviews given to motivate employees, mask ongoing performance problems, or to avoid confrontations, only result in a positive record that an employee can use to the employee's advantage in litigation. Performance evaluations should accurately describe performance.

5. *Ensure that your organization's harassment and discrimination policy contains an effective and lawful complaint procedure.* One of the best defenses to a harassment claim is that an employer has a well-documented anti-harassment policy and complaint procedure. Employers without these policies put themselves in a weaker position should they need to defend a harassment claim from a current or former employee.

4. *Treat every email as though it could be "Jury Exhibit #1."* Many people look at emails as more "casual" than documents, letters, etc. But they aren't. Further, hitting that "delete" button doesn't erase the email from the system; they can be discovered by a plaintiff's attorney years later. So, all employees within your organization should be advised to read emails from this perspective.

3. *Si sus trabajadores hablan varios idiomas, las políticas de la compañía deben estar en varios idiomas.* If you didn't understand that, perhaps you shouldn't expect employees who predominantly speak Spanish to understand the organization's English-only policies. In short, consider having your key employment policies (*e.g.*, at-will employment, discrimination and harassment, Family and Medical Leave Act, workers' compensation, etc.) translated into Spanish for workers that predominantly speak Spanish.

2. *Analyze whether your organization is correctly classifying its independent contractors.* By far the hot-button issue right now in Colorado has been the State of Colorado's relentless auditing of organizations to ensure that they are correctly classifying their workers. So, all employers should carefully analyze these classifications.

1. *Make sure you're quantifying your responses to requests for reasonable accommodations under the Americans with Disabilities Act.* The Americans with Disabilities Act and the Colorado Anti-Discrimination Act not only prohibit employers from discriminating against those with disabilities, they also impose a duty on employers to "reasonably accommodate" their disabled employees, so they can perform essential job functions. Accommodations may include assistive devices, a modified work schedule, leave of absences, or a restructuring of job duties.

RIGHTtoPRIVACY.COM

Bob E. Gates works for MacroTough, Inc., a well reputed manufacturer of boxing gear. MacroTough provides email access to its employees for business purposes only. One dark, lonely night, Bob, still at work, got an idea and emailed it to his friends. The email read, "first I'm going to take over MacroTough, and then I'll corner the entire boxing gear market ...hahahahaaaaaa." The next morning, Bob's supervisor was checking the previous day's sent email when he discovered Bob's late-night message. When the supervisor learned of Bob's plan, he terminated him immediately. Did Bob's supervisor act in accordance with the law?

With the ever-rising use of electronic mail and .coms and .orgs, employers must consider the consequences of having e-mail and internet access in the workplace. The above scenario gives rise to the question of whether Bob had an expectation of

privacy in his email, making his termination a violation of public policy. There is a legal claim called "invasion of privacy," or "intrusion upon seclusion." Intrusion upon seclusion is defined as, "one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns." In determining whether an invasion of privacy occurred, courts consider the individuals' "reasonable expectation of privacy" in whatever act was intruded upon.

Back to Bob: according to a case from the 11th Circuit, Bob did not have a reasonable expectation of privacy in his email sent over the company system. In *Smyth v. Pillsbury Company*, 914 F.Supp. 97 (11th Cir. 1996), an employee was terminated for transmitting inappropriate comments over the employer's email system. The court held that the employee was properly terminated because there is no expectation of privacy in voluntary email communications sent over the company's system.

Practical Tip: Employers can reduce the risk of liability for intercepted email by telling employees they have no reasonable expectation of privacy when using company email, and other electronic equipment. So, employers should also develop a policy that clearly states that employees have no expectation of privacy in their emails or their internet usage because the system belongs to the employer. Additionally, not only is the material subject to review and distribution by the employer, but in any litigation, emails and internet records may be subpoenaed and become evidence. Such a policy should also state that employees may not email or download from the Internet any offensive or inappropriate messages or materials, and that doing so will lead to discipline, up to and including discharge. Employers may also wish to prohibit the transmittal of confidential information to sources outside of the company's system.

MY MANAGER IS THE DEVIL @ FACEBOOK.COM

Now that your organization has policies regarding how it treats e-mails, what are the rules for social media? Do employees have a right to privacy in their social media accounts? Do the rules changes when they mention you in their posts?

For example, let's suppose that an employee in your organization sends Human Resources an anonymous letter informing them that Roberta is posting on the Facebook *My Manager Is the Devil* page. Not only that, but Anonymous informs you that Roberta has posted her resume on Linked In. That is outrageous! You visit *My Manager Is the Devil*, but the page is private, and you cannot access it. You confront Roberta and ask her to give you her Facebook password so you can see what Roberta is saying about the company. You then find the resume Roberta posted on LinkedIn, which has the stated purpose: "To find a job with a company who treats employees right unlike my current job at Froofram Industries." Are your actions with Roberta lawful?

In short, not entirely. A recent Colorado statute limits an employer's ability to access an employee's or applicant's social media accounts even when the employee does so on the employer's computer. Employers may not (1) request or even suggest that employees or applicants provide the employer their social media user names and/or passwords or other means for accessing their personal accounts; (2) compel employees or applicants to add anyone to their list of contacts; or (3) require employees or applicants to change privacy settings associated with a social networking account.

Therefore, the organization violated the law when it demanded Roberta's password and it is subject to fines up to $1000 for the first offense and $5000 for subsequent offenses.

But can you take action against Roberta for her disloyalty if Anonymous includes his or her password to *My Manager Is the Devil* and tells you that "you need to see this?" Probably not. In a similar case, a restaurant worker at a national steakhouse chain set up a password-protected My Space account accessible only by invitation for employees to air their grievances about management. When a manager coerced another employee into providing her password and eventually fired two employees, including the one who set up the group, the employees challenged in court the employer's practices that resulted in their termination. In a mixed decision for employers, the court found that the monitoring did not violate state law against intrusion on privacy because the two employees did not have a reasonable expectation of privacy in the postings. But the jury found that the monitoring violated the Federal Stored Communications Act and state wiretapping laws because the manager accessed the site without authorization. *Pietrylo v. Hillstone Restaurant Group d/b/a Houston's*, (D.N.J.).

So is it okay to access only public postings? Again, maybe. After seeing Roberta's public resume posting on LinkedIn, you checked your own internal network and found that Roberta spends an hour every day on the clock surfing job postings. It is legal to take disciplinary action against Roberta for improperly using your electronic systems and for conducting personal business on company time if the organization prohibits that conduct in a written policy.

Practical Tip: Employers should adopt policies that prohibit any disruptive or inappropriate communications about coworkers whether in conversation, print or electronic form. Access social media websites only if you have an articulable reason, and we recommend that you contact counsel before accessing or using any nonpublic information that does not fall clearly into an exception granted by law. Finally, investigate. Before you rely on information gathered from a social media website, ask the employee or applicant for an explanation. What they reveal independently about the website may give you good grounds to take a legal employment action.

IS THE PURPLE HAZE UPON US?

Retail marijuana sales in Colorado begin on January 1, 2014. Does that change things for employers? In a word, no. Here is a quick tutorial on how to answer employees' questions and remarks on marijuana use.

> *I have a prescription for marijuana. You can't keep me from smoking marijuana on my break.*

First, no one has a "prescription" for marijuana. Marijuana is a Schedule I controlled substance under federal law and cannot be prescribed. The employee, instead, may have a recommendation from their doctor to use marijuana for a medicinal use and have a registry card. But Colorado organizations are not required to treat an employee's marijuana usage, possession, intoxication, or a positive drug test any differently than it would for another employee without a registry card.

> *But marijuana is legal now. You can't tell an employee he cannot smoke marijuana off duty.*

First, marijuana is still illegal under federal law. Second, the Colorado Amendment that decriminalized marijuana specifically states that employers are not required to accommodate an employee's use of it, nor are employers required to stop drug testing employees for marijuana.

> *But marijuana stays in my system for a long time... at least longer than when I use alcohol. Can you fire me or discipline me for a positive drug test when I am not high?*

Yes, organizations can. In short, if an employee fails an employer-provided drug test, the employee can be terminated for violation of policy. In fact, Colorado's unemployment statute still provides for a disqualification from benefits for employees that test positive for marijuana.

But organizations shouldn't just rely solely on a test result that can be rejected as evidence because of minor technical deficiencies. Instead, start with a good drug and alcohol policy. Your policy should not only reserve the right to test for drugs, including marijuana, or alcohol, but it should allow you to terminate an employee if you have reasonable suspicion that an individual is working after the apparent use of alcohol or drugs.

Also, training supervisors and managers on reasonable suspicion of drug and alcohol use is critical. A manager's testimony at an unemployment hearing that "Bob was obviously higher than a kite" is a sure way to lose the hearing. The manager's factual observation that "Bob came to work with bloodshot eyes, clothes smelling of marijuana, and sat at his desk nodding off" is a much more effective description of the organization's decision to invoke reasonable-suspicion drug testing.

Practical Tip: All organizations should ensure that their policies identify the bases for alcohol and drug testing. Employers should also let employees know that all marijuana usage is prohibited by the organization.

CHANGES TO COLORADO'S MINIMUM WAGE

Colorado's Division of Labor has adopted Colorado Minimum Wage Order Number 30 to reflect the new state minimum wage of $8.00 per hour effective January 1, 2014. In accord with this change, the tipped employee wage increased to $4.98.

Colorado's constitution requires that the Colorado minimum wage be adjusted annually for inflation, as measured by the Consumer Price Index used for Colorado, and states that no more than $3.02 per hour in tip income may be used to offset the minimum wage of tipped employees.

FAREWELL TO JENNIFER SPRINGER, HELLO TO ELISA CHEN

Jennifer Springer, an editor of The Employer's Advisory since 2012, has left the firm to return to the Mesa County District Attorney's Office. Those of you who know Jennifer know we will miss her terribly, and wish her much happiness in her new career.

The Employer's Advisory welcomes its newest contributor, Elisa Chen. Elisa is joining Bechtel & Santo, LLP, after more than four years with Stettner Miller, P.C. and Ogletree, Deakins in Denver. We're very excited about the wealth of experience and knowledge that Elisa will offer to companies on the Western Slope.

Q & A

Q. What is the employer's obligation to pay employees when they are on jury duty?

A. Colorado law requires employers to pay employees their regular rate of pay for the first three days of jury duty, up to a maximum of $50 per day. This requirement applies to both full-time and part-time employees, regular and temporary employees. Hourly employees who regularly earn more than $50 per day have no claim for more than $50 during jury duty, unless the employer has a policy that requires it to pay more. But federal law requires employers to pay salaried exempt employees their full salary without deductions for jury duty. Reducing the exempt employee's salary for jury duty could make the employer liable for overtime pay for all hours worked in excess of 40 per workweek during the past two years. So, exempt employees should receive their full salary when they are on jury duty.

Q. Is there any law requiring us to post job vacancies internally? Must we give preference to current employees in hiring?

A. There is no law requiring private employers to post vacancies or to hire internally. But employers must follow their own policies. So, employers should review their personnel policies to see if their policy requires posting or preference for internal candidates. Although posting and internal promotions are good practices that assure consideration of existing employees and may engender loyalty, they reduce the employer's flexibility and can interfere with hiring the best person for the job. So, employers should avoid promising employees that posting and internal hiring are the rule in all situations.

Q. *If an employee is absent because of a work-related injury, can that employee also be on FMLA leave?*

A. Most definitely! The Family Medical Leave Act allows employees who work for employers with 50 or more employees, who have worked for 12 months, and have 1,250 work hours in the past 12 months, up to 12 weeks of unpaid leave in a 12-month period for a serious health condition. A serious health condition can be due to a work-related injury that is also covered by workers' compensation benefits. Anytime an employee misses time because of a job injury, you should determine whether the employee has a condition covered by the FMLA. Get a doctor's certification regarding this issue. If it is a serious health condition, notify the employee that he or she is on FMLA leave anytime he or she is absent related to the injury.

Q. What breaks are required by law?

A. The current Colorado Minimum Wage requires certain employers to give a ten minute paid break to employees during each four-hour work period and a 30-minute unpaid meal break if the employee's shift is more than five hours. The employers covered by the Order are in the following industries: retail and service, food & beverage, commercial support service, health and medical.