

Employment and Labor Law Changes in Review - 2016

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Unemployment Law

HB 3373 – effective 090115:

- protects reimbursing employers from reimbursement liability if the work separation was for misconduct connected with the work or was voluntary without good cause connected with the work
- extra cost will be passed on to private taxed employers



Federal Actions

- New U.S. Department of Labor regulations pertaining to salaried exempt employees will take effect on December 1, 2016
- New minimum salary for white-collar exempt employees will be \$913/week (\$47,476/year)
- The regulation calls for yearly increases based on inflation, as determined by DOL - no decreases, though
- Door left open for revision of the duties test for each category
- Federal contract employees: NLRA rights notice; \$10.10/hour minimum wage; right to discuss pay; EEO for LGBT employees; enhanced protection for pregnancy and caregiver roles



Increased Agency Enforcement

- DOL and IRS have teamed up for a major initiative to discourage misclassification of employees as independent contractors
- DOL has hired hundreds of new wage and hour investigators
- USCIS / ICE have ramped up their I-9 audits – less lenience toward I-9 violations (even clerical errors)
- OSHA is getting more aggressive toward retaliation issues
- EEOC issued new regulations for the ADAAA – focus is on reasonable accommodation, not whether something is a disability
- EEOC is also looking closely at discrimination against the unemployed



New EEOC Guidelines on Use of Arrest and Conviction Records

- http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm
- If criminal background exclusion has disparate impact, EEOC requires “targeted screen”:
 - Nature/gravity of crime, time passed, specific duties
- Excluded applicants get the following:
 - Individualized assessments (is the hiring standard “job-related & consistent with business necessity”?)
 - Opportunity to explain why exclusion should not be applied
 - Consideration by employer of whether any new information from the applicant justifies an exception
- Remember FCRA requirements: prior notice and written authorization



Sexual Orientation/Transgender Issues

- In *Schroer v. Billington, Librarian of Congress*, 577 F.Supp.2d 293 (2008): a male-to-female transgender individual had been offered a job as male, but upon presenting herself as female, the offer was withdrawn
- The district court found the following:
 - Alleged inability to obtain security clearance, lack of trust, distraction concerns, and loss of military contacts were pretextual; and
 - Withdrawal of job offer constituted sex-stereotyping and discrimination “because of sex” in violation of Title VII.
- EEOC and courts generally follow the “failure to conform to gender stereotypes” rationale (*Macy v. DOJ* (Appeal No. 0120120821 - 2012); *EEOC v Boh Brothers Const. Co., L.L.C.*, 731 F.3d 444 (5th Cir. 2013))



New Law for Nursing Mothers

- ACA health care reform bill contained an amendment to the FLSA (new section 207(r) (1)) requiring employers to give breaks for nursing
- a non-exempt employee is entitled to a "reasonable break time" to express breast milk for her nursing child, each time the employee needs to express the milk, for up to one year following the child's birth
- nursing mom has the right to a private, non-bathroom place where the employee will not be disturbed while expressing the milk
- such breaks do not need to be compensated
- employers with fewer than 50 employees are excused from this requirement if to comply would cause them undue hardship
- state laws are not preempted:
 - Sec. 165.002. A mother is entitled to breast-feed her baby in any location in which the mother is authorized to be.
 - Sec. 165.003. (a) A business may use the designation "mother-friendly" in its promotional materials if the business develops a policy supporting the practice of worksite breast-feeding ...



NLRB on Social Media

- Several cases are under investigation in which NLRB has questioned employer policies regarding employees' comments about the work or the company on social media sites
- No real changes to the labor laws – what was protected activity before is still protected, while what was unprotected before is still unprotected
- NLRB's focus is on the primary intent of the posting – if it relates to the terms and conditions of employment, chances are it will be protected
- The law does not protect violations of others' rights, such as statements that are themselves defamatory, discriminatory, or create a hostile work environment that would violate EEO laws
- Theft of employer secrets is of course not protected activity



Current Workplace Issues

- Increment weather pay:
 - none for hourly employees
 - salaried non-exempt – written authorization to deduct unpaid leave
 - salaried exempt – full salary must be paid
- Employer can require use of paid leave in all cases, consistent with paid leave policy



Current Workplace Issues - 2

- Missing work due to bad weather – could be misconduct if roads are passable, but employer has the burden of proof
- Furlough-related unemployment claims
- Partial unemployment benefits – weekly income drops below 125% of the weekly benefit amount as a result of a reduction in hours



Hire Based on Job Requirements

- Use only job-related criteria as hiring standards
- Job-related skills testing is allowed
- Only ask what is necessary to determine who is the best-qualified candidate
- bottom-line defense to a discrimination claim: “we did not hire ‘X’ b/c he or she was not the best-qualified applicant.”



Problem: Illegal Applicant Screening

Problems include, among others:

- Barring applicants on basis of minority characteristics
- Accepting only online applications
- Watch out for blanket prohibition on criminal background, unless required by law – standard is “job-related and consistent with business necessity”
- Code words for discrimination: “young”, “fresh-faced”, “European look”, “recent graduate”, “over-qualified”



Job Applications

- Ask only job-related questions
- Asking anything related to minority categories presents a “fact issue”
- Ask yourself, “Will it help me determine whether the applicant is the best candidate?”
- Include EEO statement
- Warn applicants about employment at will and about the need to supply accurate and complete information, and let them know the information they give will be verified



What Can You Ask?

- Do ask:
- About job-related qualifications and background
- Don't ask:
- About non-job-related things such as family status, financial status, ownership of house or car, minority characteristics, personal or family health
- In case of a legal challenge, the burden is on the company to show a business necessity for a disputed question or qualification



More things you should know about job applications:

- You do not have to accept them if you have no job openings
- Unsolicited applications or resumes can be discarded, but be consistent
- Solicited applications should be kept at least one year, according to the EEOC



Problem: Non-Job-Related Interviews

- Just like with applications, keep the questions as job-related as possible
- Keep in mind that the applicant may be tape-recording the entire interview
- Careful with note-taking - anything in writing or otherwise recorded is discoverable in a claim or lawsuit
- Avoid unkind comments about a person's physical appearance



Medical Inquiries and the ADA

- ADA – applies with 15 or more employees
- no pre-employment medical questions
 - not even prior workers' comp history
 - exception: after job offer, but ask all offerees (still avoid workers' comp)
- only job-related inquiries are allowed
- keep information in separate, confidential medical file
- drug tests are not considered medical inquiries
- if a disability is revealed, the issue of reasonable accommodation arises



Problem: I-9 Requirements

- Main problem: “document abuse” (going beyond I-9 requirements)
- possible national origin / citizenship discrimination charges
- Not for applicants - only for new hires
- Employer has three business days following hire to get the information
- Accept only unexpired documents to begin with
- Copies of documents are not required, but keeping them helps show they were reviewed
- Keep I-9 documentation for three years after hire or one year after employee leaves, whichever comes last



Classify Workers Correctly

- Law presumes that a worker is an employee
- Burden is on the employer to prove otherwise
- TWC and IRS position on “contract labor”:
“No such thing.”
- Back taxes, interest, and penalties can result from misclassification of workers
- “Contract labor” usually means temporary staff obtained from a temporary staffing firm, or workers supplied by a labor agent
- Reality: Independent contractors exist, but all the legal presumptions are against employers who want to classify workers as such



New Hire Paperwork

- I-9, W-4 forms, notice of workers' comp coverage
- New hire report – within 20 days of hire – include the date of hire or rehire now
- Acknowledgement of receipt of policy HB
- Consent for drug testing / search policy, if applicable
- Consent for video surveillance, if applicable
- Consent for background checks, if not already obtained
- Agreements regarding pay, benefits, schedule, work location, and so on (with employment-at-will disclaimers)



Employment at Will – Right to Work – Which Is It?

- “Right to work” means that employment cannot be conditioned or denied based on membership or non-membership in a union – 24 states have such laws
- “Employment at will” means that either party in an employment relationship may alter or terminate the relationship at any time, for any reason, with or without notice, as long as the change does not violate an express contract or specific statute (some exceptions exist for public policy reasons)



Minimum Wage – Allowable Deductions

- payroll taxes and other legally-required deductions
- court-ordered garnishments (child support)
- meals, lodging, and other facilities
- voluntary wage assignments, loans, and advances
- vacation pay advances
- uniforms and uniform cleaning costs *
- tip credits
- union dues
- cash losses due to misappropriation *
- Keep the Texas Payday Law in mind!



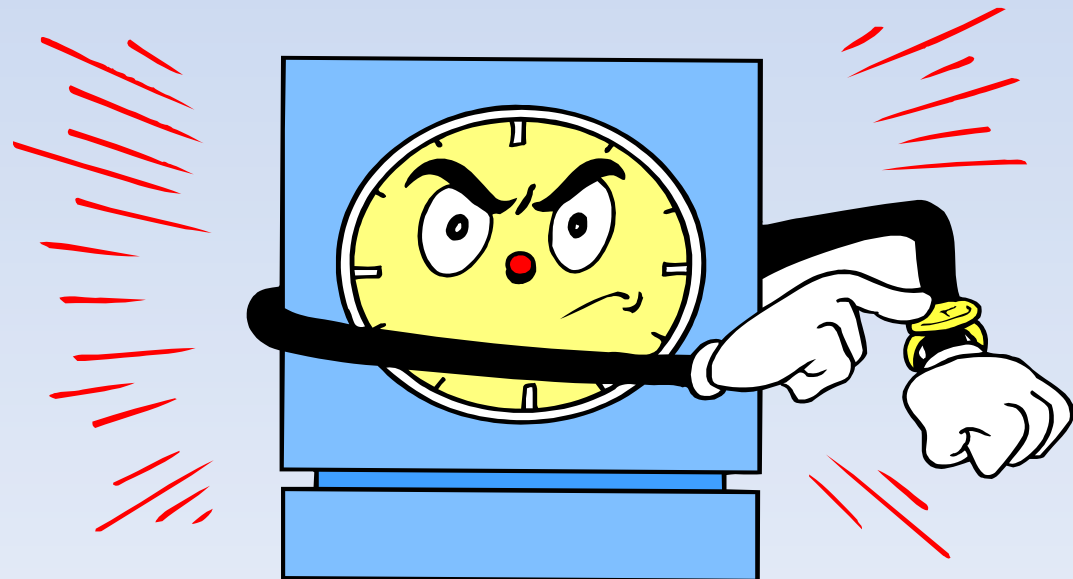
Hours of Work

- Includes all time during which the employee is at the disposal of the employer, i.e., “suffered or permitted to work”
- Waiting or on-call time
- Breaks (rest breaks = work time; meal breaks ≠ work time if the employee is relieved of duties)
- Sleeping time
- Preparatory and concluding activities
- Time spent in meetings and training programs
- Travel time – includes travel between jobsites and extra travel time out of town
- Time worked does not include paid leave or paid holidays



Voluntary or Unauthorized Overtime

- If overtime is worked, employer must pay for it
- Whether it was authorized or wanted is irrelevant
- Employer may handle unauthorized overtime as a disciplinary matter
- Employees may not voluntarily give up the right to overtime pay – agreements to contrary are **void**
- No working “off the clock” allowed



Maintain Good Documentation

- Good documentation can help prove that
 - a particular employee was treated fairly and was not singled out;
 - the employer acted according to known rules;
 - what happened was predictable both from the policy and from past practice; and
 - the alleged violation or problem occurred just as the employer has said.



Work Separations: By the Book

- Establish clear employee policies
- Put them into writing
- Follow them as consistently as possible
- Avoid exceptions
- Fairness and due process are the main considerations
- Give consistent treatment according to known standards



Final Warning

- Do not give a final warning until and unless the company is truly ready to sever ties
- A real final warning lets the employee know:
 - that it is the employee's last chance,
 - that no further chances will be given,
 - and that if the complained-of problem occurs even one more time, the employee will be subject to immediate discharge
- Have the employee sign it (or a witness in the employee's place), and give the employee a copy



Final Straw?

- If the circumstances allow, consider asking the employee to explain the final incident in his or her own words and handwriting on a blank piece of paper
- This allows both sides one last opportunity to stave off a final work separation
- If the employee supplies what amounts to a written admission of misconduct, that would be relevant in any response to an unemployment claim



Termination Checklist

- In general:
 - was there a specific incident close in time to the discharge?
 - has the company followed the stated progressive disciplinary procedure?
 - did the claimant know, or should she have known, that she could be fired for such a reason?
 - have similarly-situated employees been treated more leniently?
- Don't forget final pay and COBRA notice
- Fair and appropriate treatment leads to fewer claims and lawsuits



Types of Work Separations

Voluntary

- Resignation
- Walking off the job
- Job abandonment
- Retirement
- Suspension w/o pay for 3 days or less

Involuntary

- Layoff / RIF
- Discharge / termination
- Mutual agreement
- Resignation in lieu of discharge
- Suspension w/o pay for 4 days or more



Handle UI Claims Properly

- Respond *adequately* and on time
- Adequate response = factual basis for the work separation, including relevant adverse facts
- Return investigators' phone calls
- Furnish relevant information:
 - Firsthand witnesses are critically important
 - Documentation (policies, warnings, logs, etc.)
- Be specific as to the circumstances of the work separation
- Appeal on time at all levels of the process



Base Period

Base Period Quarter 1 ✓	Base Period Quarter 2 ✓	Base Period Quarter 3 ✓	Base Period Quarter 4 ✓	Lag Quarter ✗	Quarter In Progress When Claim Is Filed ✗
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Benefit Amount

- weekly benefit amount is the high quarter wage amount divided by 25
- min. WBA = \$65; max. WBA = \$479



Qualification

- the claimant must be out of work through no fault of his or her own
- the burden of proof is on the party who initiates the work separation
 - if the claimant quit, the claimant must prove good cause connected with the work for quitting
 - if the claimant was fired or laid off, the employer must prove that the work separation resulted from misconduct connected with the work on the claimant's part



What Does An Employer Need to Show?

- Voluntary work separation
 - Show how a reasonable employee would not have quit for such a reason
- Involuntary work separation
 - Show that the discharge resulted from a specific act of misconduct connected with the work that happened close in time to the discharge, **and**
 - That the claimant either knew or should have known that discharge could occur for such a reason.
- Evidence needed: documentation of problems, and firsthand testimony from eyewitnesses



Eligibility Conditions

- medically able to work
- actively searching for full-time work
- authorized to work in the U.S. (clmt has to be able to fulfill I-9 requirements)
- file claim forms on time
- engage in reemployment activities as directed



Excessive Absences

- Excessive absenteeism for avoidable reasons is misconduct
- Medical absences can go either way, depending upon other rules involved, such as giving advance notice of absence
- If the sole problem was excessive medical absences (of the claimant or the claimant's minor child), claimant will most likely not be disqualified, but if the claimant is medically unable to work, that would be an eligibility issue



Poor Performance Cases

- Inability and incompetence are not misconduct
- Failing to do one's best is misconduct
- Best argument for claimant: "I tried my best – it just wasn't good enough."
- Best tactics for employer: documentation, firsthand testimony, past satisfactory performance, claimant passed up training opportunities, work was too simple to mess up (dishwashing precedent)



Poor Performance Cases 2

- Employer has to show how the poor performance was within the claimant's power to control
- Too many breaks / breaks too long
- Excessive visiting and other time-wasting with coworkers
- Excessive personal phone calls
- Too much Internet surfing
- Failing to double-check the work for negligent or avoidable mistakes
- Not enough time devoted to job because of avoidable absences or tardiness



Poor Attitude

- That's not in my job description.
- Why doesn't Joe have to do that?
- Why do you always ask me?
- That's Linda's job.
- You told me to do the other thing first.



How to Handle a Poor Attitude Case

- Don't start off accusing the claimant of having a “bad attitude”.
- Be specific about behavior or conduct that violated a rule or interfered with the work of others.
- Document the warnings that were given.
- Present firsthand testimony from those affected.
- Let the hearing officer independently arrive at the conclusion that the claimant had a bad attitude.



How UI Claims Affect Public Employers

- Reimbursing employers do not have tax rates and do not pay quarterly taxes, but are billed quarterly for benefits paid out that are based on wages reported by them during the base periods of claims
- Taxed governmental employers are in a group that has a pooled tax rate – for 2016, that rate is 1.90% (applied to the first \$9000 of each employee's wages during the calendar year)
- Election to be a reimbursing employer is good for two years
- Limited chargeback protection for either group



Thanks for your attendance
and
Good Luck!

Remember the toll-free number:
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