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Beyond representing clients in lawsuits and administrative actions, Fredrikson & Byron's Employment & Labor lawyers work with employers to develop positive preventive steps of employee communication, supervisor and management training, and problem solving to reduce legal exposure in these sensitive areas. They also assist organizations preparing to hire, promote, or discharge employees.

For more information and contacts within the Employment & Labor Law Group, see page 6. An electronic version of this newsletter is available on the Internet. You can access our home page at www.fredlaw.com.

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PTSD: Post-Termination Separation Dangers



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When Hamlet uttered the immortal words “Revenge should have no bounds,” he probably wasn’t thinking about twenty-first century employers. As it turns out, “revenge” can be costly, particularly when former employees are involved. Title VII, the federal law that prohibits discrimination based on race, gender, and other protected class status, also prohibits retaliation against current—and former—employees who engage in protected conduct. A former employee who has asserted rights under Title VII may have a claim for retaliation when a former employer declines to rehire the employee, provides a negative reference, or opposes an application for unemployment compensation benefits.

Retaliation claims are increasingly common and can be difficult to defend. The Equal Employment Opportunity Commission (EEOC) reports that retaliation claims have risen to their highest level ever and currently account for over one-third of new charges. Successful claims can result in back pay, front pay, damages for emotional distress, punitive damages, and payment of the former employee’s attorneys’ fees.

FAILURE TO REHIRE

An employer’s best defense against a claim of retaliation is often the passage of time. As a rule of thumb, the longer the time between “protected conduct” and the “adverse action,” the more difficult it is for the employee to demonstrate the link between the two that is needed to sustain a claim of retaliation.

However, the passage of time provides little comfort to an employer when the individual claiming retaliation is a former employee. Several courts have measured “proximity in time” in these situations from the time between the protected conduct and the earliest opportunity the employer had to retaliate against the former employee. For example, in *Templeton v. First Tennessee Bank*, a former employee alleged that her former employer’s failure to rehire her two years after she had filed a complaint of harassment and resigned was illegal retaliation, a theory that the court accepted. Other courts have reached similar conclusions, including a 2002 case, *McGuire v. City of Springfield, Ill.*, in which the court held that a former employee stated a viable claim of retaliation where 10 years had passed between the protected activity and the adverse employment action. While the facts of the *McGuire* case are unusual, at least two other federal court decisions have reached similar conclusions.

> PTSD: POST-TERMINATION SEPARATION DANGERS CONTINUED

Although the Eighth Circuit, which handles federal court cases from Minnesota and nearby states, has not faced this issue, it is not hard to imagine that it may adopt the same approach because it has issued several pro-employee decisions in retaliation cases, as has the U.S. Supreme Court. As a final word of caution, the EEOC views “no-rehire” clauses in settlement agreements made after an employee has filed a charge of discrimination as retaliatory.

COMMUNICATIONS WITH PROSPECTIVE EMPLOYERS

References and other information provided to prospective employers can also form the basis for a claim of retaliation. For example, in *Jute v. Hamilton Sundstrand Corp.*, the court held that a false statement by a former employer—that he could not talk about the former employee because she had a lawsuit pending against the company—could form the basis of a retaliation claim when a job offer she had received was withdrawn after the comment was made. Interestingly, the statement was nearly, but not technically, true, as the former employee had filed an EEOC charge, but had not commenced litigation.

Many employers recognize the need to avoid false statements about a former employee to avoid defamation claims. As a result, often it is wise to adopt, and consistently follow, a policy of simply providing only dates of employment and job titles in response to inquiries from prospective employers. This practice also helps avoid claims of retaliation by former employees.

OPPOSING UNEMPLOYMENT COMPENSATION CLAIMS AND TAKING LEGAL ACTION

While it may be tempting to oppose a former employee’s claim for unemployment compensation or sue a former employee to “even the score,” meritless claims also have been the basis of viable claims of illegal retaliation. Courts that have reached this conclusion have relied on the U.S. Supreme Court’s statement in *Burlington Northern & Santa Fe Ry. v. White* that conduct is retaliatory under Title VII if it “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”

For example, the filing of criminal charges against a former employee who filed a Title VII charge has been held to constitute illegal retaliation, as has the threat of filing criminal charges. The same is true with respect to opposing a former employee’s claim for unemployment compensation benefits if the opposition is meritless or contains false statements. While many courts have held that filing a meritless lawsuit can form the basis of a retaliation claim, some have gone further, holding that even a legitimate claim can form the basis for a retaliation claim if the former employee can show that the former employer acted with an improper retaliatory motive.

OUR ADVICE

Remember that Title VII protects not only current employees but also former employees. Think carefully before taking action, and ensure that comments about former employees are limited and factual. If the action is seen as “likely [to] dissuade a reasonable worker from making a claim of discrimination,” the former employer may well face a claim of retaliation. Unfortunately, the retaliation claim may survive even if the underlying claim is dismissed.

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Is Your Employee Handbook Working For or Against You?



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“Think reading an employee manual is dull? Try writing one!” - *Business Columnist Dale Dauten*

The poor employee handbook. Cursed by human resources professionals who struggle to write it and ignored by employees who are supposed to read it. Why should an employer even bother?

Although much maligned, a well-written employee handbook can educate employees, reinforce company culture, and open lines of communication. The employee handbook is a communication tool. It is an opportunity to educate employees about the rules of the workplace and the employer’s expectations. And it can help start a dialog between employer and employees.

HANDBOOK LEGAL PROTECTIONS

A well-written employee handbook also can help an employer win and avoid lawsuits. For example, clear handbook language stating that the employment relationship is “at-will” can help protect against employee breach of contract lawsuits. In Minnesota and many other states, courts will presume that the employment relationship is at-will, meaning that either the employer or the employee may freely terminate the relationship at any time, for any or no reason. By including at-will language in an employee handbook, the employer can reinforce the at-will relationship and counter employee claims that the employer can terminate only in limited circumstances.

But a poorly drafted or outdated employee handbook may create liability. This can happen in many ways. Rigid language in a handbook may restrict the employer’s flexibility and, if the employer deviates from the language, subject the employer to a breach of contract lawsuit. Minnesota and most other states have held that employee handbook policies can become enforceable contracts if a policy’s language is sufficiently definite. For example, if a termination

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ANNE RADOLINSKI NAMED BEST LAWYERS’ 2012 LAWYER OF THE YEAR



Congratulations to Anne Radolinski, who was named Best Lawyers’ 2012 Minneapolis Employment Law—

Management Lawyer of the Year! Only one attorney in each practice area in each community was honored as the “Lawyer of the Year” for 2012. Honorees were selected because they received particularly high ratings from their peers.

policy promises that certain steps will be followed before an employee is terminated, the employer may be liable for breach of contract if it fails to follow each step.

To reduce this risk, most handbook policies should be written using flexible language. Avoid using inflexible words like “will,” “always,” and “never,” and instead use flexible words like “may,” “ordinarily,” “typically,” and “generally.” For example, rather than stating, “Performance reviews will be given annually,” instead state, “Typically, performance reviews are conducted annually.” Or, “Generally, we try to review performance yearly.”

Another important way to preserve flexibility is to include a clear and conspicuous disclaimer in the employee handbook. An effective disclaimer typically includes the following:

- The handbook is not a contract.
- The employee is employed at-will, meaning that either party may terminate the employment relationship at any time, with or without notice.
- The at-will relationship may be altered only by a separate writing signed by a specified employer representative.
- Except for the at-will policy, the employer has the right to change, terminate, or depart from any policy contained in the handbook.
- The handbook replaces and terminates all prior handbooks and written and oral employment policies.

To document that the employee received and agrees to the handbook, the employer should have the employee sign an acknowledgment containing similar disclaimer language.

TWO IMPORTANT POLICIES TO CONSIDER

The policies that an employer includes in its handbook should be based on legal requirements and business needs. Here are two important policies to consider including.

Anti-Harassment. Every employee handbook should contain a policy prohibiting unlawful discrimination and harassment. The policy educates

employees, discourages inappropriate behavior, encourages employees to raise concerns, and gives the employer the opportunity to address a workplace problem before it becomes a costly legal problem. And, if the problem turns into litigation, the policy may give the employer additional legal defenses.

AN EFFECTIVE ANTI-HARASSMENT POLICY SHOULD:

- Prohibit and define unlawful discrimination, sexual and other unlawful harassment, inappropriate behavior, and retaliation.
- Instruct employees to immediately report complaints to the employer.
- Provide multiple complaint avenues, in case, for example, the accused harasser is the person to whom harassment is supposed to be reported.
- Prohibit retaliation for reporting suspected violations.
- Require employees to cooperate with the employer’s investigation.
- Warn that violation of the policy may result in discipline or termination.

FMLA. Employers covered by the Family and Medical Leave Act (FMLA) and who have employees eligible for FMLA leave should have a policy that describes the employees’ rights and responsibilities. Generally, an employer is covered by the FMLA if it has or had 50 or more employees each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Federal regulations require that any employer that has both a handbook and employees who are eligible for FMLA leave include “notice in employee handbooks or other written guidance to employees concerning employee benefits or leave right.”

Sometimes employers not covered by the FMLA voluntarily choose to give employees “FMLA” leave. While voluntarily providing leave is commendable, generally it is better not to treat the leave as “FMLA” leave, since that may subject the employer to all of the FMLA’s legal requirements. Instead, employers not covered by the FMLA that wish to provide leave should adopt a more flexible personal leave policy. That way, the employer can provide employees with leave

time but avoid unintentionally being bound by the FMLA’s broad and complicated requirements.

Finally, employers should regularly have legal counsel review their handbooks to make sure they are creating a handbook that will not betray them.

Robert Boisvert is a shareholder in the Employment & Labor Group.

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We recently launched two employment and labor blogs and invite you to join in the discussions.



Lawyers discussing social media, the Internet, and technology in the workplace. By Teresa Thompson and Norah Olson Bluvshstein, www.networkedlawyers.com

EMPLOYER LAW UPDATE

A timely update of changing employment and labor law for management. By Richard Ross, www.employerlawupdate.com

Employer Obligations to Veterans and Military Members Continue to Expand



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The federal “Veterans Opportunity to Work (VOW) to Hire Heroes Act of 2011” became law on November 21, 2011. The new law amended and expanded employment protections for employees under

the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). In addition, several other federal and Minnesota statutes provide employment protections to employees related to their own military service and the service of their family members. As employees and their family members continue to be called for and return from military service, employers need to ensure compliance with these multiple laws.

VOW TO HIRE HEROES ACT OF 2011

The VOW to Hire Heroes Act contains three main provisions: (1) amends and expands the protections of USERRA; (2) amends the Internal Revenue Code to provide certain tax credits to tax-exempt companies that hire unemployed veterans; and (3) creates new and expanded education, training, and transition programs for veterans within the federal Departments of Labor and Veterans Affairs. Only the first provision affects employers generally.

Very simply, the first provision of the VOW to Hire Heroes Act adds language to USERRA that will allow employees to bring a legal claim against their employer for a “hostile work environment” based on military service and veteran status. It does so by adding the phrase “the terms, conditions, or privileges of employment” to the statute’s definition of the “benefits of employment.” This new language mirrors the definitions found in Title VII of the Civil Rights Act of 1964, which the courts have relied upon to recognize employee “hostile work environment” claims based on race, color, national origin, religion and sex.

No doubt the amendment is at least in part a response to the dismissal by the Fifth Circuit Court of Appeals last year of a potential class action by a group of pilots against their employer Continental Airlines. In *Carder v.*

Continental Airlines, Inc., the pilots alleged that they had been subjected to a hostile work environment in violation of USERRA based on derisive and derogatory comments from managers like, “If you guys take more than three or four days a month in military leave, you’re just taking advantage of the system,” and “I used to be a Guard guy, so I know the scams you guys are running,” and “Continental is your big boss, the Guard is your little boss.” The Fifth Circuit dismissed the claim finding that the definitions in USERRA did not provide for a hostile work environment claim.

In light of the amendment, which took effect immediately, employers should ensure that their harassment prevention policies include protection based on military service and veteran status and that their work environments are free from degrading conduct and speech toward those seeking to serve in the military, currently in the military, and veterans.

USERRA

USERRA is the long-standing federal law that requires employers to provide civilian soldiers job-protected leave for voluntary or involuntary duty in the uniformed services. This includes active duty, inactive duty for training, National Guard duty under a federal statute, any absence for a related fitness-for-duty examination, and to perform funeral honors duty. During uniformed service, the employee is deemed to be on a furlough or leave of absence from the civilian employer. While USERRA generally provides for up to five years of cumulative leave, in fact an employee’s protected absence may extend far beyond five years under certain circumstances often specified in an employee’s military orders. Consequently, employers should obtain and carefully read the employee’s military orders.

Leave under USERRA is unpaid unless the employer is obligated by an individual agreement, or its policy or practice is to pay an employee during all or a portion of the leave. Employers also may choose to pay the difference between the employee’s regular compensation and military pay for some or all of the leave but are not required to do so. Employers must allow, but may

not require, employees to use any accrued vacation or other paid time off during leave. USERRA also provides specific requirements for reinstatement rights, health and other insurance coverage during military leave, contributions to pension or 401(k) plans during and after military leave, and other benefits of employment. USERRA also specifies when an employer may terminate some returning soldiers, requiring “cause” as defined by USERRA to terminate in some circumstances.

Employers also need to post the USERRA poster with other federal and state required postings. A copy can be found at www.dol.gov/vets/programs/userra/poster.htm.

MINNESOTA MILITARY LEAVE

Minnesota law (Minn. Stat. § 192.261) provides most employees up to four years of job-protected, unpaid leave of absence for active service during time of war or other declared emergency in any of the military or naval forces of Minnesota or of the United States. This law also stipulates specific requirements for reinstatement. Generally, USERRA will provide the same or better benefits and must be followed.

FAMILY AND MEDICAL LEAVE ACT MILITARY PROTECTIONS

The federal Family and Medical Leave Act (FMLA) also covers two types of job-protected leave related to military service.

The first includes up to 26 workweeks of annual, job-protected leave for an eligible employee to care for a “covered servicemember” who was injured in the line of duty and who is the employee’s spouse, son, daughter, or parent. Employees also may take this leave if they are the “next of kin” (nearest blood relative) of an injured servicemember. The injured servicemember may be a current, discharged, or retired member of the Armed Forces, including the Guard and Reserve who: (1) has a serious injury or illness suffered in the line of duty on active duty for which he or she is undergoing treatment, recuperation, or therapy; (2) is in outpatient status; or (3) is otherwise on the temporary (not permanent) disability retired list.

The second includes up to 12 workweeks of annual, job-protected leave during a 12-month period designated by the employer for any "qualifying exigency" arising from the fact that the employee's spouse, son, daughter, or parent is on active duty or has been notified of an impending call or order to active duty in the Armed Forces in support of a contingency operation.

"Qualifying exigencies" are broadly defined under the FMLA regulations and include absence for issues related to deployment on short notice (seven days or less); attendance at military events and related activities; arranging for or addressing childcare and school activities (but not childcare on a routine, regular, or everyday basis); making financial and legal arrangements; attending counseling by someone other than a healthcare provider for the employee, for the servicemember, or for a servicemember's child; rest and recuperation with the covered military member (up to five days per instance); attending post-deployment activities; and additional activities as agreed to by employer and employee.

Employers may require a sufficient medical certification from a healthcare provider for injured servicemember leave and a sufficient certification from the employee, with documentation, to support a request for a qualifying exigency leave. The other benefits and requirements of the FMLA also apply to the leave.

Employers with 50 or more employees are covered by the FMLA and employees with a cumulative 12 months of employment and 1,250 hours worked in the previous 12 months are eligible for FMLA leave.

OTHER MINNESOTA MILITARY PROTECTIONS

In addition, three other Minnesota statutes provide employees with job-protected time away from their jobs for military-related activities. They include Minn. Stats. §§ 181.947 and .948, and 192.325. The protections of these three statutes overlap in some respects and, in summary, provide as follows:

1. Employers must allow employees up to two consecutive days and up to six total days per calendar year of unpaid leave to attend departure or return ceremonies upon deployment or return from military service, family training or readiness events sponsored or conducted by the military, and other events held as part of the official reintegration programs for an employee's spouse, parent or child;
2. Employers must allow employees to take one day of unpaid leave per calendar year to attend the military send-off or homecoming ceremony for a grandparent, legal guardian, sibling, grandchild, fiancé or fiancée; and
3. Employers must allow up to 10 working days of unpaid leave for employees, independent contractors, and those working for independent contractors for compensation when a parent, child, grandparent, sibling or spouse has been injured or killed while engaged in active service of the United States Armed Forces.

Finally, Minn. Stat. § 192.261 prohibits employers from asking an applicant for employment if he or she is a member of the National Guard or a reserve component of the United States Armed Forces and from requesting any type of oral or written statement concerning that status.

Employers with questions regarding their obligations related to the military service of their employees or the employees' family members are urged to contact their employment attorney.

Mary M. Krakow is chair of the Employment & Labor Group.

NLRB Proposed Rules Will Make It Easier for Unions to Organize Companies



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On November 30, 2011, the National Labor Relations Board (the NLRB or Board) approved a resolution to adopt new rules affecting the processing of petitions for elections to determine whether employees want to become unionized. The Board currently is drafting the actual language of the proposed new rules.

Originally, on June 21, 2011, the Board issued proposed radical and extremely pro-union new rules that, if adopted, would have made it much easier for unions to organize employees. After receiving more than 65,000 comments to the proposed rules, and because of the political makeup of the Board, the changes in the rules will actually be modest, compared to the originally proposed rules. Here are the six proposed changes as described by the Board on its website:

- The National Labor Relations Act provides for a pre-election hearing to determine whether there is a "question of representation" to be resolved by an election. Currently, parties can raise issues at the hearing that are not relevant to that question, which can result in unnecessary, expensive, and time-consuming litigation for the Board and all parties. The first proposed amendment gives the hearing officer authority to limit the hearing to matters relevant to the question of whether an election should be held.
- Most cases involve only routine issues based on well-known principles of Board law. In such cases, regional Board directors can reach a fair and sound decision based on the record from pre-election hearing, including closing arguments. Parties may currently file briefs after the hearing, but the briefing may add nothing to the Board's decision-making process in such routine cases and may increase the parties' litigation costs. The second proposed amendment authorizes the hearing officer to decide whether to permit briefing depending on whether the case presents issues that would benefit from briefing.

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›NLRB PROPOSED RULES WILL MAKE IT EASIER FOR UNIONS TO ORGANIZE COMPANIES CONTINUED

- The Board's current rules require parties to file two separate appeals to seek Board review of pre-election issues and issues concerning the conduct of the election, respectively. Appeals concerning pre-election issues must be filed before the election, and are often subsequently mooted by the results of the election. The third amendment reduces litigation by consolidating the two appeals into a single post-election procedure and avoiding appeals of issues that become moot as a result of the election.
- The fourth amendment follows directly from the third, by ending the practice of delaying the scheduling of elections to permit time for a pre-election appeal. (In any event, even under the current rules, the delay does not serve its stated purpose because the Board typically permits the election to be conducted and directs that the ballots be impounded while it considers the appeal.)
- In keeping with the effort to avoid multiple appeals in a single case, the fifth amendment would narrow the circumstances in which a request for special permission to appeal to the Board would be granted. Such permission would be granted only in extraordinary circumstances when it appears that the issue addressed in the appeal would otherwise evade review. (Board review would remain available following the election on all issues for which permission to appeal was denied or not sought.)
- The sixth amendment would simplify appeal procedures and avoid litigation of appeals that do not present a serious issue for review by giving the Board discretion to hear and decide any appeals to the election process, whether they concern pre-election or post-election issues.

Once the new rules are drafted, the Republican member of the Board likely will draft his dissent, and then the Rules will be published in the Federal Register. At the time this article was written, it was unknown when the final rules would be published.

The proposed final rules would affect only a small number of petitions that involve legal issues as to the composition of the unit. Currently, if there are legal issues, they must be resolved prior to the election. As a result, many elections are delayed until after the legal issues have been resolved. The new rules will require the election to be held and the legal issues resolved after the election.

Stay tuned

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