2025 DMEC ANNUAL CONFERENCE
How Employment Laws Impact Communication with Employees

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I. The Application Process

A. Does your State have a Ban the Box Rule that Prohibits Criminal History Inquiries on Job Applications?

There has been a nationwide trend toward removing obstacles that preclude applicants with criminal histories from gainful employment. One law that focuses on this goal is referred to as "ban the box" because it prohibits employers from denying employment solely on the basis of, or inquiring about, a job applicant's prior arrests, criminal charges, or convictions on an initial employment application, unless certain exceptions apply. Employment application forms that include questions concerning an applicant's criminal history may be required to contain a notice, in clear and conspicuous language, that the applicant is not required to disclose the existence of any erased arrest, criminal charge, or conviction. States that currently have Ban the Box legislation include: California, Colorado, Connecticut, Georgia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington.

B. Using Social Media

Can employers access an applicant's social media during the interview process? This could reveal information to the employer that cannot be considered during the pre-conditional job offer stage, such as medical history or current problems, sexual orientation, religion, or other protected characteristics. An employer cannot refuse to hire an applicant for a discriminatory reason regardless of how the information is discovered.

If an employer is going to seek out social media sites before a conditional job offer is made, there are some general rules of good practice to follow:

- confine the search to websites available to the public – do not "friend" an applicant in order to gain access to nonpublic sites;

- consider letting applicants know of any intent to view social media sites;

- consider using an employee not involved in the hiring decision to conduct the searches, so that if protected information is on the sites it can be shielded from the decisionmaker;

- treat all applicants in the same way- if you search for additional information on one applicant, do the same for all.

POINTER: waiting to look for social media until after a conditional job offer is made (as part of general background checking) will protect against some potential discriminatory concerns.

If an employer finds negative, nondiscriminatory information or information that contradicts what the applicant has offered that affects the decision as to that applicant, ask the applicant about it to ensure the information found is accurate and is not a case of mistaken identity.

Be sure to check your state law for any restrictions.

II. Remote Work

Communication issues are a very important element of remote work. Before agreeing to a remote work arrangement, employers should ensure there is a Memorandum of Understanding or contract in place that addresses, among other things:

- whether the work is to be done exclusively from home or whether the employee will be expected to spend a certain number of hours in the workplace;

- whether the employee will have clerical support and, if so, how that will work;

- whether the employee will be expected to make reports to the employer on a regular basis;

- whether clients or vendors are going to visit the employee in his or her home office;

- what hours the employee will keep, including whether the employee has to be available to the employer or clients/customers during certain times of day.

One of the most important considerations is timekeeping. Employers must make every effort to be sure that nonexempt employees accurately record all of their remote work time to ensure payment for time worked (which includes responding to phone calls and emails, no matter the time of day). If hardware or software that is normally used to track time in an office is unavailable to an employee working from home, then any method that allows the employee to self-report his or her working time (e.g., an Excel spreadsheet) is acceptable. Employers must clearly communicate with employees how to track their time and ensure that the time is accurately entered into the company's timekeeping system on a regular basis. As an example, employers should not assume an employee takes an assigned break time without confirmation in a time tracking system.

Several years ago, the Department of Labor's Wage and Hour Division released a field assistance bulletin providing guidance to employers on compliance with the Fair Labor Standards Act (FLSA) for employees working remotely. The FLSA requires an employer to pay its employees for all hours the employees are "suffered or permitted" to work. This means that employees are entitled to compensation not just for their scheduled hours, but also for time spent working outside their schedule if the employer either knows or has reason to know that the employee is working that extra time. If employers do not want employees to work outside of their schedule, they bear the burden to prevent it.

Employers may be able to reduce possible liability by exercising reasonable diligence to keep track of the time remote workers spend doing work. For example, according to the guidance, employers exercise reasonable diligence when they establish a process by which employees can report extra time spent working. If an employee fails to report his or her time through the established process, according to the DOL's guidance, the employer "is not required to undergo impractical efforts to investigate further to uncover unreported hours of

work and provide compensation for those hours." However, the DOL also warns that the employer cannot prevent or discourage an employee from accurately reporting his or her work time and reminds that employees cannot waive their right to compensation for such time. Also, if an employer knows an employee may be working additional hours that are not reported, the employer must take steps to prevent it and to pay for the time worked. If that appears to be an issue, an employer should consider auditing or other review of information that might reveal any red flags about off-the-clock work.

III. Ban on Mandatory Employer-Sponsored Meetings

Some states have laws that prohibit an employer from taking any adverse employment action against an employee because the employee declines to attend or participate in an employer-sponsored meeting or declines to receive or listen to a communication from the employer if the employer's purpose is to communicate the opinion of the employer about religious or political matters.

The original intent of these laws was to prohibit employers from holding employer-sponsored meetings during a union organizing campaign for the purpose of discouraging organizing. However, the language of some state laws is significantly broader and may impact an employer's ability to conduct meetings which address discrimination and harassment training, or which promote inclusion, equity, and diversity.

Many of the state laws have language exempting certain communications, including information that the employer is required by law to communicate, but only to the extent of the lawful requirement. Many of the laws also do not limit the rights of an employer to conduct meetings or communications involving religious matters or political matters as long as attendance or listening is wholly voluntary, or from communicating to its employees any information that is necessary for employees to perform their lawfully required job duties.

IV. Federal (and State) Family Medical Leave Acts

The Federal Family and Medical Leave Act (FMLA) requires an employee seeking FMLA leave due to a serious health condition of him/herself or a covered family member to submit a medical certification issued by the employee's (or employee's family member's) health care provider.

The employer is to request certification either at the time of a request or within 5 business days after leave starts, unless there is a good reason why it can't happen in that time period. The employee has to provide requested certification within 15 days of employer's request. It is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. The regulations provide that if an employee makes diligent, good faith efforts but is still unable to meet the deadline for submission, the employee is entitled to additional time to provide the certification. In that case, the employer may not deny the leave for the period that the certification was late.

An employee may choose to comply with the certification requirement by providing the employer with an authorization, release, or waiver allowing the employer to communicate directly with the health care provider of the employee or his or her covered family member, but the employee may not be required to provide such an authorization, release, or waiver. Also, an employer should seriously consider whether they would want to take this route rather than simply requiring the certification.

The Department of Labor provides forms to be used for the purpose of collecting medical information to support the request. The current forms include one for employees seeking leave for their own serious health condition (Form WH-380E), and one to be used for employees seeking leave to care for a family member (Form WH-380F).

If the certification is **incomplete** or **insufficient**, the employer has to tell the employee in writing what additional information is necessary Incomplete means one or more questions are not completed; insufficient means the form is complete but the information is vague, ambiguous, or non-responsive. An employee has seven days to provide the additional information and cure any deficiency – otherwise the employer can delay leave.

If an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider. However, the employer may contact the health care provider for purposes of **clarification** and **authentication** of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies. To make such contact, the employer must use

a health care provider, a human resources professional, a leave administrator, or a management official. Under no circumstances may the employee's direct supervisor contact the employee's health care provider. For purposes of the FMLA regulations, "authentication" means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document - but, no additional medical information may be requested. "Clarification" means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response.

In the event of a request for recertification, an employer can ask the doctor about specific performance issues, such as an absence pattern. The regulations say "As part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern."

V. Americans with Disabilities Act

Generally, the need for contact with an employee's physician under the ADA arises in two situations: 1) to determine whether the employee has a disability; and 2) to determine what kind of reasonable accommodation, if any, is necessary.

The EEOC regulations state when an employee asks for reasonable accommodation an employer may ask the employee for

- reasonable documentation about his/her disability

- functional limitations if the disability and/or the need for accommodation is not obvious (if the disability is obvious, the employer cannot require supporting medical information).

Reasonable documentation describes the

- nature, severity and duration of the employee's impairment,

- the activities limited by the impairment and

- the extent of that limitation, and substantiates why the reasonable accommodation is needed.

This DOES NOT mean an employer can simply ask for an employee's complete medical records because the records are likely to contain information unrelated to the disability at issue and the need for accommodation.

If the employee provides insufficient information to determine whether he/she has a disability or requires reasonable accommodation, the regulations provide for several options. Documentation is insufficient if it does not specify the existence of an ADA disability and explain the need for reasonable accommodation. Documentation also might be insufficient where, for example: (1) the health care professional does not have the expertise to give an opinion about the employee's medical condition and the limitations imposed by it; (2) the information does not specify the functional limitations due to the disability; or, (3) other factors indicate that the information provided is not credible or is fraudulent. If an employee provides insufficient documentation, an employer does not have to provide reasonable accommodation until sufficient documentation is provided.

Options to obtain appropriate documentation include explaining to the employee why the documentation is insufficient and allow the employee an opportunity to provide the missing information in a timely manner; requiring the employee to go to an appropriate medical provider of the employer's choice (as long as the purpose is job-related and consistent with business necessity, i.e. determining the existence of an ADA disability and the functional limitations that require reasonable accommodation); asking the employee to sign a limited release allowing the employer to submit a list of specific questions to the employee's health care provider; or having the employer's physician consult with the employee's physician, as long as the employee consents.

Unreasonably requiring an employee to provide medical information about the existence of a disability and/or the need for reasonable accommodation once the employee has already provided sufficient documentation can lead to a retaliation claim.

Interaction between laws:

If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to request additional information from the employee's workers' compensation health care provider, the FMLA does not prevent the employer from following the workers' compensation provisions and information received under those provisions may be considered in determining the employee's entitlement to FMLA-protected leave.

An employer may request additional information in accordance with a paid leave policy or disability plan that requires greater information to qualify for payments or benefits, provided that the employer informs the employee that the additional information only needs to be provided in connection with receipt of such payments or benefits. Any information received pursuant to such policy or plan may be considered in determining the employee's entitlement to FMLA-protected leave. However, if the employee fails to provide the information required for receipt of such payments or benefits, such failure will not affect the employee's entitlement to take unpaid FMLA leave.

If an employee's serious health condition may also be a disability within the meaning of the ADA, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA. Any information received pursuant to these procedures may be considered in determining the employee's entitlement to FMLA-protected leave.

VI. Drug Use/Recovery in the Workplace

Alcoholism and drug addiction may be disabilities under the ADA.

A person who currently uses alcohol is not automatically denied protection simply because of the alcohol use. An alcoholic is a person with a disability under the ADA and may be entitled to consideration of accommodation, if s/he is qualified to perform the essential functions of a job.

Current illegal drug use is not protected, but recovering addicts are protected under the ADA. According to the EEOC's manual, "Persons addicted to drugs, but who are no longer using drugs illegally and are receiving treatment for drug addiction or who have been rehabilitated successfully, are protected by the ADA from discrimination on the basis of past drug addiction."

A former drug *addict* may be protected under the ADA because the addiction may be considered a substantially limiting impairment. However, according to the EEOC Technical Assistance Manual on the ADA, a former *casual* drug user is not protected:

> [A] person who casually used drugs illegally in the past, but did not become addicted is not an individual with a disability based on the past drug use. In order for a person to be substantially limited because of drug use, s/he must be addicted to the drug.

An individual who is currently engaging in the illegal use of drugs is not an individual with a disability when the employer acts on the basis of such use. The EEOC has defined current to mean that the illegal drug use occurred recently enough to justify the employer's reasonable belief that drug use is an ongoing problem:

- If an individual tests positive on a drug test, he or she will be considered a current drug user, so long as the test is accurate.

- Current drug use is the illegal use of drugs that has occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an ongoing problem.

- Current is not limited to the day of use, or recent weeks or days, but is determined on a case-by-case basis

Does an employer have to accommodate illegal drug or alcohol use?

An employer may prohibit the use of drugs and alcohol in the workplace and require that employees not be under the influence of alcohol or drugs in the workplace. If a recovering drug addict is not currently illegally using drugs, then he or she may be entitled to reasonable accommodation. This might include a

modified work schedule so the employee could attend Narcotics Anonymous meetings or a leave of absence so the employee could seek treatment. Employers can discipline, discharge or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct to the extent that s/he is not qualified. Example: If alcoholic often is late to work, or is unable to perform the responsibilities of his/her job, an employer can take disciplinary action on the basis of the poor job performance and conduct. However, an employer may not discipline an alcoholic employee more severely than it does employees for the same performance or conduct. Reasonable accommodation for an alcoholic might involve a modified work schedule so the employee could attend Alcoholics Anonymous meetings, or a leave of absence so the employee could seek treatment.

What about legal drug use?

The ADA protects an employee who is presently experiencing addiction to lawfully used opioids. An employer may not deny employment to an applicant or terminate the employment of a current employee solely because the employee uses legal drugs unless the employee "cannot do the job safely and effectively" or is "disqualified under another federal law." If the employer believes that an employee's legal opioid use could present a safety risk or hinder effective job performance, the employer may be required to engage in an interactive process and provide a reasonable accommodation that addresses those concerns if it is not an undue hardship on the employer.

VII. NLRB and Handbook Policies

Communication with employees through handbooks and policies should be carefully reviewed following a landmark decision ruling by the National Labor Relations Board, titled *Stericycle*. In that case, the employer was found to have violated the NLRA by maintaining rules for its employees that addressed some specific actions, including personal conduct and confidentiality.

The decision applies to all companies covered by the National Labor Relations Act (NLRA). It held the following:

- A facially neutral work rule is presumed to be unlawful where the General Counsel makes a showing that it has a reasonable tendency to chill employees' exercise of their Section 7 rights.

- Whether the rule has a "tendency" to do so will be viewed from the perspective of an employee who is predisposed to engaging in protected concerted activity, not any other regular employee.

- The employer's intention in maintaining a rule is immaterial.

- To the extent the rule is ambiguous, the rule will be interpreted against the drafter (i.e., employer).

- To rebut the General Counsel's presumption, the employer must prove that legitimate and substantial business interests support the rule, and those interests cannot be achieved through less restrictive means.

Employers should reevaluate written policies under this standard, particularly policies that touch on confidentiality and workplace communications. Employers should also communicate employees' rights under Section 7.

Examples of policies that likely need to be reviewed and rewritten to be aligned with the new board standard, include work rules that restrict employee's use of social media or overall criticism or negativity toward company management or services; rules that prohibit insubordination; rules that require confidentiality of complaint investigations; rules that too strictly limit employee's use of cameras or recording devices in the workplace; rules that limit employee's use of company communication platforms or limit recording of meetings; rules that restricting meetings with co-workers; or rules that limiting comments to the media or governmental agencies.