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Human Resource and Workplace Law Developments

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1. Handbooks Revisited by the NLRB:

The NLRB's General Counsel issued a "Guidance" to all NLRB Regional Directors on handbook provisions that should be found lawful and distinguished those from the type of provisions that are unlawful. Many of the recent, strained NLRB interpretations had found unlawful what in many instances had been clear handbook language existing for many years. These interpretations have been overturned by the Guidance.

SH&Q OBSERVATION: *The "Guidance" should prompt employers to revisit the employee handbook. Use the Guidance to issue clear and legal provisions.*

2. Employer Job Ads on Facebook Face Lawsuit:

A U.S. Court lawsuit alleges that a Facebook algorithm, which determines which user sees an ad, excludes older workers. The lawsuit seeks a class action against a number of major employers. Alleged is that Facebook disproportionately directs ads to younger users and, at Facebook's prompting, employers are limiting the audience that views their job ads to those younger than 40; a violation of the ADEA. Companies alleged to have done so include *Amazon, Cox Communications, T-Mobile U.S. Inc., Ikea and Enterprise Rent-a-Car.*

3. Court Lawsuit Blocked by Handbook Arbitration Policy:

A federal court ruled that an employee claiming sexual harassment must pursue the claim in arbitration and not in court. The employee had signed a handbook acknowledgment that referred to the arbitration policy. The court said the employee was bound by the arbitration policy even though she had only signed the handbook acknowledgement and not an actual arbitration agreement.

SH&Q OBSERVATION: *Employers that have a court-blocking arbitration program should, nevertheless, have employees sign the specific dispute resolution program-agreement. But this case again demonstrates the effectiveness of these programs in blocking court lawsuits when an employee sues over an employment controversy.*

4. Beware of Well-Intended Marketing Being Evidence of Age Discrimination:

IBM is the latest employer facing an age discrimination lawsuit because of rebranding and promotional efforts to attract millennial customers and employees. Companies aiming at future business success among the millennial and computer-savvy generation are finding their marketing, branding and promotional efforts being alleged as influencing their employee retention and recruitment practices.

SH&Q OBSERVATION: *Employers finding themselves defending in these cases have, nevertheless, asserted their compliance with anti-age discrimination laws. Employers need to have in place feedback or upward communication programs to uncover employee feelings of perceived corporate cultural bias; as well as monitoring programs to identify workforce population changes and impacts on recruitment, retention and evaluation policies.*

5. Workers Have Been Hurt by the NLRB:

The National Labor Relations Board ("NLRB") Chairman is reported to have said at a Cornell University conference that NLRB rulings have hurt workers more than they have helped. He said the Agency's focus on protecting workers' rights has protected many right out of jobs. He said the NLRB should cut unnecessary rules and regulations that make it difficult to start or maintain a business, bring clarity and predictability to its interpretations of labor law, to speed up its decisions and to be absolutely neutral in protecting equally all workers and parties.

6. \$5.1 Million Awarded in "Onionhead" Religion Case:

Eleven Long Island (NY) employees have been awarded \$5.1 million by a Brooklyn federal jury for having had "Onionhead" religious practices forced on them. An executive, who went by the name "Denali," required employees to hold hands in a prayer circle, read spiritual texts, burn incense to remove bad energy and use low lighting because demons came through the overhead lights. Denali's belief that she proselytize to employees was referred to as "Harnessing Happiness" or "Onionhead." Two employees who pushed back against the practices were removed from their office and replaced with a Buddha statue. The EEOC prosecuted the company for violation of Title VII of the Civil Rights Act.

7. Sex Harassment Case - A Teaching Moment for Employers:

Despite the employer's victory in a U.S. Court of Appeals case, the Court's decision contains several points of which each employer should be aware. The plaintiff, a female manager, had quit, claiming the denial of a bonus resulted from her having refused her boss's suggestion that she date a wealthy prospective customer.

SH&Q OBSERVATION: The Learning Points! *As the Court opined: who the third party beneficiary of a quid pro quo harassment is, is of no consequences. It doesn't have to be the supervisor if the superior is conditioning a job benefit or detriment on sexual favors.*

A second lesson for employers is to carefully analyze complaints, internal and those filed with compliance agencies. The Court found that the former employee had never included in her complaint that the alleged harassment

forced her to quit. Thus, she had not exhausted her administrative remedies.

8. Misclassifying Workers is Costly:

Another \$½-million settlement of a misclassification claim has been announced by the Massachusetts Attorney General. The Attorney General said the employer had a disproportionate number of unpaid interns who had been performing work similar to that performed by paid employees.

SH&Q OBSERVATION: *Employers can use interns. But, like other employment exemptions such as exemption from overtime or use of independent contractors, employers need to first carefully and thoughtfully analyze and establish the job duties designed to accomplish the employer's objective.*

9. Filling Vacant Jobs Becoming an Employer Challenge:

Employers are revisiting hiring/entry rates and the ripple impact of increasing pay rates in light of the expanding workforce, falling unemployment and the anticipated increase in the workforce participation rate. The unemployment rate was 3.8% in May 2018, the lowest in eighteen years.

10. Non-Profits Subject to New Excise Tax:

The newly-enacted Tax Cuts & Jobs Act of 2017 created a new IRC 21% excise tax on compensation paid to an executive in excess of \$1 million. The tax is paid by the non-profit organization and not by the individual. Compensation includes any remuneration which could consist of certain prerequisites, other benefits, vested amounts included in IRC Section 457(f) gross income and certain deferred compensation.

In addition to the compensation-based tax, there is an excise tax on payments that are contingent upon a covered employee's employment separation. This can cover a lesser compensated executive. The excise tax applies if the aggregated present value of payments to an employee exceeds three times the average compensation during the five years preceding separation.

SH&Q OBSERVATION: *Non-profits need to review employment agreements and compensation provisions, including determining if deferred compensation arrangements are considered compensation under the new law.*

11. Casual Friday (and Monday, Tuesday, Wednesday and Thursday):

A survey among large companies reports that six out of seven professionals and 80% of managers are of the opinion that how one dresses at work affects promotion. Forty-four percent of managers reported having to counsel employees on appropriate clothing, with 32% of them having sent workers home.

12. Employee Retention Program at Walmart:

In an effort to retain and engage employees, Walmart has offered employees, full- and part-timers, college degrees for \$1.00 per day at three non-profit colleges that focus on adult learning with flexible online programs. There is no requirement to continue working at Walmart after graduating. Other Walmart retention steps include expanding its maternity and parental leave and increasing wage rates.

13. Vermont Prohibits Salary Questions:

A new state law prohibiting questions of applicants about their salary history has been enacted.

Sullivan, Hayes & Quinn, LLC | 413-736-4538 | lawoffice@sullivanandhayes.com |
<http://www.sullivanandhayes.com>
One Monarch Place, Suite 1200
Springfield, MA 01144

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