Government Agencies Taking Dim View of Employers' "Bright-Line" Policies

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For years, human resources practitioners have been able to confidently rely on a simple principle when dealing with a variety of tough decisions. That principle is "consistency" in applying company policies, meaning that policies should be clear, objective and evenly-applied.

But recent trends among Government agencies may have made practitioners' heads spin. Most notably, the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB) have issued guidance or taken actions that seem to fly in the face of this principle. Upon closer examination, however, employers can understand and deal with these evolving expectations. The key is recognizing that while these agencies still expect consistent *application* of policies, they are demanding that the *policies themselves* move away from hard-and-fast or "bright-line" rules. Instead, the agencies expect detailed, individualized analysis of the underlying facts.

Thus, even if the ultimate decision may turn out the same, employers *must* complete careful, focused analysis and documentation of the circumstances before making certain employment decisions. The bottom line is this: while consistency remains vital, employers can no longer rely comfortably upon policies that contain inflexible or "bright-line" rules. The following examples of EEOC and NLRB guidance illustrate this point and address how employers can protect their interests without violating the law.

EEOC Guidance Regarding Arrests And Convictions
In 2012, the EEOC issued new, detailed guidance regarding employers' consideration of an applicant's criminal history. This guidance is tied to data suggesting that minority applicants are disproportionately arrested and convicted of crimes. Thus, the theory goes, blanket exclusion of applicants on the basis of arrests or convictions may have a disparate (and possibly illegal) impact upon minorities.

While the EEOC's position does not bar you from considering an applicant's history of criminal convictions, it requires a narrowly-tailored evaluation of the applicant's past conduct and how that conduct is relevant to specific requirements and duties of the job being sought. You must also consider factors such as the applicant's age at the time of the criminal activity; the length of time elapsed since the conviction; other positions the applicant has held in the interim, especially similar

positions; and other rehabilitation efforts.

Perhaps most significantly, the employer must be prepared to demonstrate that any exclusion based upon an arrest or criminal conviction is job related and consistent with business necessity. And an actual conviction almost always represents more compelling concerns than an arrest, which might not result in a conviction.

In short, while the conduct underlying an arrest or criminal conviction may be a valid reason to exclude an applicant from consideration, a one-size-fits-all policy, simply rejecting applicants who have a criminal history, will run afoul of the EEOC's expectations. Instead, the employer must demonstrate that it considered the above-listed issues before reaching a decision.

The NLRB's Focus On Nonunion Workplaces

During the past two years, the NLRB has demonstrated an increasing appetite for getting more involved in nonunion settings. In doing so, it contends that companies have used over broad policies to infringe upon employees' rights to band together to address terms and conditions of employment.

Most notably, the Board has issued numerous decisions and memorandums addressing employers' social-media policies. Controversies have arisen primarily from disciplinary actions based upon employee Facebook, Twitter, or other social-media rants about their employer or individual supervisors. Controversial, disturbing decisions have also emerged from the Board's review of employers' efforts to maintain the confidentiality of workplace investigations and even companies' at-will employment statements.

In most of these cases, the same basic rationale applies, but the devil is in the details. Specifically, the Board will not permit broad rules prohibiting or restricting social-media criticism of supervisors or employers. Nor will it allow general bans on the unauthorized use of the company name or logo. Even rules prohibiting rude or offensive comments have been struck down.

The idea, generally, is that when employees express concerns about workplace issues, they have the right to mention their employer and use its logo. And sometimes these discussions will be contentious, even "offensive." Just as would be the case around the water cooler, in the break room, or in lawful picketing, these activities are protected by the National Labor Relations Act (NLRA).

On the other hand, employers have the right to protect their interests and the *obligation* to prohibit certain workplace conduct, such as sexual harassment. Employers must therefore carefully word their policies to address these issues, without infringing upon employees' rights under the NLRA.

For example, you can ban disclosure of confidential information on Facebook or in other ways; and bar employees from falsely representing that statements are being made with the company's authorization, or on behalf of the company. When accompanied by appropriate examples, they can also ban offensive comments that would be considered threatening or harassing on the basis of someone else's race, gender, religion or other such classification.

Employers can also still protect the privacy of workplace investigations, but requirements to maintain confidentiality must be appropriately tailored to the specific circumstances. Again, an automatic, broad confidentiality requirement is unlikely to pass muster.

The Subtle Complexities Of ADA Compliance

Perhaps the most challenging areas in which HR professionals must move away from "bright line" rules arise under the Americans with Disabilities Act (ADA), as amended in 2009. Here, the law unquestionably *requires* employers to engage in an individualized, interactive process with a qualified, disabled employee seeking workplace accommodations.

Although this is far from the only scenario under which this issue arises, the requirements for handling a leave of absence vividly illustrate: a) how important issues are easy to overlook; b) the need to abandon "bright line" rules in favor of individualized assessment; and c) the need to retrain managers and others, to avoid serious and costly mistakes.

The ADA of course *requires* a covered employer to provide a reasonable accommodation to a qualified disabled employee, if the accommodation would enable the employee to perform the essential functions of his job. Courts favor schedule modifications and leaves of absences as forms of reasonable accommodation.

Policies Permitting Limited, Additional "Non-FMLA" Leave Can Backfire

In some cases, employers provide employees with additional leave beyond legally-required FMLA leave, e.g., leave that is *not* required by the Family and Medical Leave Act (FMLA). However, they typically limit the additional leave or they may not ensure that the employee can return to his former position at the end of the non-FMLA leave. Unfortunately, where applicable, these well-intentioned, consistently-applied, and non-discriminatory practices may violate the ADA.

No matter how generous you are in providing additional non-FMLA leave, application of an inflexible (bright-line) limit on such additional leave violates the ADA. Instead, the company mustconduct an individualized assessment of the circumstances. If granting more leave beyond your company's established limit would not create an "undue hardship" and would enable the employee to return to performing the essential functions of the job, youmay have no choice other than to permit the additional time off.

Often, the question comes to, "when does the employee's request create an 'undue hardship,' thus making it unreasonable?" Again, no bright-line rule applies. But an additional one or two weeks off would almost certainly be considered reasonable. On the other hand, a request of an additional two months of leave may not be reasonable, depending upon the circumstances. Of course, a request for continuing, indefinite leave would typically not be considered reasonable.

Whatever the answer, employers must demonstrate that they conducted an individualized analysis, as opposed to simply applying a bright-line rule. Unfortunately, an untrained supervisor who does not understand these requirements may never tell the HR manager about an employee's request for

more time off. Such a communication breakdown could easily make your company liable for an ADA violation.

Analysis of the leave issue does not end here. For an accommodation of additional time off to be viewed a genuine accommodation, employees should be reinstated to their former positions, regardless of whether or not the company actually has an "open" position. In other words, the reinstatement rights related to a leave granted as an ADA accommodation are not unlike reinstatement rights available under the FMLA.

Further, if an employee is unable to perform the essential functions of a job, but another position is available for which the employee *is* qualified, you must take the initiative to explore that option with the employee. If you have such an open position, but do not address its availability with the employee, you have not fulfilled your obligations under the ADA.

Re-Examine Existing Policies And Practices

These examples illustrate the expectations of both the EEOC and the NLRB, requiring employers "put out the lights" on certain rigid, inflexible rules. Instead, HR leaders and supervisors must adopt practices requiring more individualized evaluations of the specific facts of each situation. By showing that they considered the relevant underlying facts and applied appropriate policy parameters, however, employers can still effectively protect their business interests and avoid legal headaches at the same time.

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