



## **New Year's Resolutions: Five Areas Of Focus For 2014**

Insights

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The Affordable Care Act has dominated the headlines of employment newsletters (justifiably) for the last six months. It will continue to be an area of focus for all employers. But don't lose sight of the fact that all the other employment laws remain on the books and continue to pose significant compliance issues in the retail arena.

The following are five areas that repeatedly seem to be the subject of EEOC charges and claims, along with some recommendations on how to fix them.

### **ADA Accommodations Vs. Light Duty**

The vast majority of jobs in retail stores require that an individual be able to perform a broad range of physical tasks from stooping and bending to stock low shelves, to lifting items for scanning at the cash register, to pushing and pulling carts of goods for stocking. Medical restrictions on an employee's physical abilities can be extremely hard to accommodate within the concept of reasonable accommodation under the ADA. That is, in many cases, the only way to allow someone with a physical restriction to continue to work is either by a transfer to a different position with lesser physical requirements or by removing essential functions.

A stocker with a "no-climbing" restriction would have to be relieved of the duty of stocking high shelves that require a ladder to reach. Removing such an essential function is not required by the ADA. If there are no vacant positions that do not require climbing, the ADA would not mandate creating such a position. In these cases, from an operational standpoint, the most efficient solution is often to place the employee on leave while the restriction lasts. This avoids a possibility of employees exerting themselves beyond their restrictions and causing themselves further harm, while allowing hours of work to be filled with fully capable employees.

When an employee's restrictions derive from an on the job injury, this operational efficiency is countered by the cost of workers' compensation benefits to the organization along with the belief that the sooner employees return to any work, the more likely it is they will recover to full duty. From this perspective, those managing your workers' compensation program want injured employees to return to work as quickly as possible regardless of restrictions. In some cases, companies will create light-duty jobs for these injured workers.

Problems arise when store managers try to apply practices utilized in work-related injury scenarios

to non-work-related situations. Having been instructed to provide light duty to one employee, they will often take it upon themselves to treat the next situation in the same manner because that's what they did last time, without comprehending the distinction between work-related and non-work-related injuries. Risk managers, on the other hand, can become singularly focused on getting employees back to work to reduce the company's workers' compensation costs, creating hardships for store managers.

Retailers should assess how they are handling employee restrictions arising from workplace injuries from the perspective of all elements involved. Particularly, are the disruptions to the store being appropriately considered before returning an employee to work? Does the risk department have the ability to offer particularized guidance to store managers depending on the severity of the restrictions? Are the managers at the store level being trained how to work with the risk department to achieve its goals? Ensuring that consideration is given to all affected departments should result in a balanced approach to achieve the company's goals.

### **FMLA Leave**

Store managers would likely rank regular attendance as one of the most important aspects of an individual's performance. With the lean staffing demanded by today's competitive retail market, one employee not appearing for one scheduled shift can throw off the store's work for the whole week.

Because of this, store managers quickly become unsympathetic to employees who often miss work. Rather than terminating the employee, a process requiring paperwork and review by higher-level decision makers, store managers take other steps such as reducing the employee's scheduled hours or scheduling them for undesirable shifts in an effort to minimize the impact of the employee's poor attendance. These efforts are often undetectable by the company if the employee does not come forward to complain.

Given the complexity of the FMLA, it is difficult if not impossible for these managers to distinguish between attendance issues for reasons that the FMLA protects and those that it does not. There is no requirement under the FMLA that an employee complain in order to have a claim. As such, store managers can easily unwittingly be creating FMLA liability for the company by their actions.

Training store managers directly on the FMLA is rarely effective. Avoiding liability for FMLA claims requires the involvement of individuals who understand the FMLA. Companies should assess their attendance policies and what level of decision maker is required to act on a violation. Don't authorize store managers to terminate employees for attendance issues without consulting higher-level management.

### **Malicious-Prosecution Cases**

Shrink is a never-ending problem for retailers. Companies rightfully want to prosecute employees and customers caught stealing. But once an employer makes a report of theft to law enforcement, it loses control over the process and the chances of the thief ultimately being convicted are not high.

There are numerous reasons for this. Police sometimes perform poor investigations. Overworked assistant district attorneys do not want to invest their time in small-dollar thefts. Grand juries may refuse to indict and juries may refuse to convict even when the evidence is solid. No one is more likely to lash out with a lawsuit than an individual who, having been "exonerated," believes charges were unfairly brought.

Establish a set of best practices to apply when reporting theft. These can include items such as keeping a copy of all statements made and all evidence turned over to the police because by the time a lawsuit is filed, the individual may have had the record expunged and the original evidence may have been destroyed.

No one individual should have the discretion to make a decision to report a theft to the police. Having two individuals assess a situation before taking that action doubles the chances that a witness will be available to explain the decision making process if a suit gets filed. Investigate the willingness of local law enforcement to prosecute small-theft claims. In some jurisdictions, authorities simply do not prioritize these claims, almost guaranteeing no conviction will come. Having a game plan and following it will increase the chances of successfully defending these claims.

### **Criminal-Background Checks**

The EEOC's recent criminal-background check guidance has not changed in spite of its repeated court losses in trying to enforce those policies. Likewise, the EEOC's focus is not changing and its enforcement efforts remain high. Unfortunately, the EEOC's losses are generally focused on problems in the evidence in the particular case before the court, so the rulings are not changing the underlying law.

Retailers need to assess their individual approach to criminal-background checks for defensibility should a claim arise. While the high-profile cases against Fortune 500 companies dominate the headlines, they are a small part of the enforcement efforts in this arena. Many companies simply do not have the resources to engage in protracted litigation with the EEOC on these issues and find themselves settling claims that include provisions changing their policies in ways they do not desire.

One good step to take is to review the list of crimes that disqualify an individual from employment and ensure there is a logical connection between the crimes and the job, i.e., credit-card fraud for a position that includes handling customer credit cards. Documenting the reasons for including the crimes in the list prior to a challenge over the use of a particular crime as a disqualifier should buttress the company's position on its use.

### **Recordkeeping**

Any human resources professional who has attended any employment lawyer's presentation on almost any subject has heard the phrase "document, document, document" *ad nauseum*. But it has not been said too often and the logic behind the advice is sound. Of course, documenting at the store level in the retail environment is easier said than done. Particularly during peak seasons, such as Christmas and Easter, managers prioritize their time and working on employee problems falls to the

Christmas and Easter, managers prioritize their time and working on employee problems falls to the bottom of the list. This leads to inconsistencies in enforcement of policies that can be used as evidence of discrimination.

Documentation is also increasingly important in defending the growing number of retaliation claims. Employees often make a claim of discrimination in an attempt to shield themselves when they feel their job is in jeopardy. If documentation of the employee's poor performance or misbehavior begins only after the complaint has been made, terminating these employees carries a higher risk and handcuffs the company with a poor performer.

The new year would be a good time to take a global look at all documentation processes. There are two keys to maintaining good documentation. The first is to make the process easy for managers. The more complex documentation is, the less likely it is that managers will complete it. Forms that require the manager to provide a lengthy written explanation are much less likely to be completed than forms that allow for the manager to check off the problems and provide a short explanation.

The second key is holding the managers accountable for their failures to document. Doing so often requires a shift in prioritizing. District managers routinely walk stores for compliance with company policy on appearance, stocking, inventory, shrink control, etc. Rarely do a company's review practices include a requirement that during store visits the district manager converse with the store manager about problems with employees, and review documentation of those problems. Changing store-review policies to include this oversight would increase compliance by store managers.

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