Ask Fisher Phillips: Our Top 10 Questions From Dealers (Part Three)

Insights
8.03.15

This edition of "Ask Fisher Phillips" picks up where our last newsletter left off – here is the concluding segment of the "Top 10 Questions from Dealers" from the past year.

1. 1. **What Are My Immigration Obligations?**

QUESTION:
When do we need to complete the I-9 form for new hires?

ANSWER:
You must have employees complete their portion of the I-9 form and present the required original documents no later than their first day of employment for pay. You must then certify that you inspected the original documents (not copies) that the employees presented, and sign a statement to that effect within three days of their start date. If an employee cannot present the required documents, you must terminate that employee.

If you operate in a state which requires you to use the E-Verify system, you also need to enter each new employee's information into that computerized system to determine their employment eligibility.

1. 1. **There's Something Fishy Going On Here . . .**

QUESTION:
We have an employee who we suspect has an issue with drugs or alcohol, but we don't know how handle the matter. This employee has been written up a handful of times for missing work and the patterns are always the same: after every pay day, he does not show up to work the next day. What is the correct way to handle this situation? Should we send him for a drug test?

ANSWER:
Unless you have some evidence of alcohol or drug use at work (i.e., slurred speech, inability to function, smell of alcohol, etc.), then there is no need to engage in testing or even address this as a drug/alcohol issue. Doing that would only complicate things. Alcoholism and past drug use are disabilities under the Americans with Disabilities Act (ADA), so accusing employees of engaging in alcohol or drug use during non-working hours could land you in legal hot water. You might trigger a

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

duty to accommodate, or even risk a claim that you are discriminating against them because you regard them as being disabled.

It is better to simply focus on the effects of the problem (i.e., tardiness, absenteeism) and then counsel or terminate the individual for his poor attendance rather than raising his suspected alcohol or drug use.

1. 1. **I Appreciate His Service To Our Country, But He's Going To Be Gone An Awfully Long Time!**

QUESTION:
How long does our dealership need to hold an employee's position while the employee is on active duty military leave? What about an employee who is in the reserves, not active duty? Is there a limit on military leave? Can the dealership require that the employee use vacation time before going on unpaid leave? May the employee opt to go unpaid for the entire military time?

ANSWER:
Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), you must "reemploy" any employee who is absent from work due to the employee's "service in the uniformed services" as long as their service is less than five years. This includes time off for active duty, training, and fitness for duty examinations. And yes, "uniformed services" also includes those in the reserves.

Employees may opt to use vacation to get paid for military leave, but you cannot require that they do so. You are required to reinstate employees to their prior positions once they return from leave, and you can offer them (but not require that they take) vacation during their time off.

1. 1. **How Do We Recover An Employee's Health Insurance Premiums While On FMLA?**

QUESTION:
An employee on Family and Medical Leave Act (FMLA) leave did not follow policy and failed to pay the required health insurance premiums during the 12 weeks of FMLA leave. We were remiss and did not send her a notification letter cancelling the coverage. Instead, we just paid her share of premiums. Now that she has returned to work, can we recover the premiums we paid on her behalf?

ANSWER:
The dealership may recover an employee's share of any premium payments missed by the employee for any FMLA leave period during which the dealership maintains health coverage by paying the employee's share after the premium payment is missed. This can be done by requiring the employee to re-pay the amount owed in a lump sum or installment payments set out in a promissory note, or through payroll deductions.

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

However, we recommend obtaining the employee's signed authorization for the payroll deductions, as well as any other requirements that may be necessary under state law. We also recommend that such deductions not cut into any minimum wage or overtime owed to the employee, to the extent that any is owed.

1. 1. **What Can I Say About A Former Employee?**

QUESTION:
What can we legally say about a former employee? We received a verification of employment request from the government. This former employee voluntarily resigned after having a confrontation with another employee. She did not work well with her co-workers and had a hard time controlling her temper. Can I say that on the verification of employment?

ANSWER:
Legally, you can say anything you want to about a former employee that is true and does not disclose medical or otherwise private information. But if you provide too much detail regarding a former employee, you may get sued for defamation. She could claim that you provided inaccurate information with the intent to deny her certain benefits or future employment to which she is entitled. While these lawsuits are rarely successful, they are costly to defend. As such, we recommend providing simple, objective facts such as dates of employment, job titles, and rates of pay rather than opinions as to quality of work.

Industry Focus

Automotive Dealership

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.