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LABOR WATCH

A MONTHLY REPORT ON THE DEVELOPMENTS IN LABOR RELATIONS, EMPLOYMENT LITIGATION, IMMIGRATION, AND HUMAN RESOURCE MANAGEMENT

TO GOOGLE OR NOT TO GOOGLE

According to a survey conducted by the Society for Human Resource Management, four out of five employers perform criminal background checks, and one out of three employers perform credit checks on prospective employees. Unfortunately, the survey did not address a growing reference tool commonly used by employers. In recent years many employers have added to the traditional background and credit checks by "Googling" applicants.

For those unfamiliar with the term, Googling is the investigation of a person by the use of the search engine Google or a similar product. In essence, it is as easy as typing a name into the search engine and looking at the results. When considering the cost to recruit and train prospective employees, it is of little surprise that employers would go to greater lengths to investigate applicants.

At present, no United States jurisdiction has specifically outlawed the practice of Googling prospective employees.[1] However, merely because the practice is not specifically regulated does not mean employers should necessarily make Googling an applicant a standard part of the employment protocol. Prior to investigating an applicant by Googling, the following considerations should be made:

- **Discrimination potential.** When reviewing the Google results of an applicant, it is likely that information that is unavailable through the traditional interview process will be found. For example, age, race, military service, sexual orientation, or religion information may be available. Employers must be careful to disregard this information or risk potential discrimination claims.
- **Irrelevance of information.** Many people have the same name, and it is often difficult to determine what information belongs to your particular applicant. For example, this author Googled his name and uncovered a memorial ice fishing tournament of the same name in Wisconsin. The Internet is certainly not free from incorrect information, and it is possible that other parties have written incorrect information about an applicant.
- **Negligent hiring.** If negative information is discovered about an applicant but disregarded, the door has been left open for a future negligent hiring claim.
- **Lack of training.** If a Google search is conducted, it is often conducted by an employee inexperienced and untrained in background checks. Consequently, the above considerations can be magnified.

Obviously, Googling an applicant can be an added layer of security prior to investing significant resources in training and retaining an employee. However, if not done properly, it can potentially cause more harm than good. As a bottom-line, employers interested in Googling applicants must instruct "investigators" what to look for and what is irrelevant. If conducted properly,

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EXPANSION OF FEDERAL MENTAL HEALTH PARITY LAW IN THE WORKS

Earlier this year, the Senate Health, Education, Labor, and Pensions Committee approved the Mental Health Parity Act of 2007 (S.558), only two days after its initial introduction to the Senate. "Mental health parity" involves the concept of providing equal benefits and coverage for mental healthcare and for physical-related healthcare, such as treatment for cancer, heart disease, and diabetes. Many states have passed mental health parity laws, but federal courts have determined that more-generous state mental health parity laws are preempted, or superseded, by the federal law.[1]

The Mental Health Parity Act of 1996 became effective, as one would expect, in 1996, and it provided parity for annual and lifetime limits between mental health coverage and medical surgical coverage. The 1996 MHPA, however, was only effective for a limited time, and its provisions have since been extended only through 2007.

As a result, the Senate is now reviewing the 2007 MHPA, which would include permanent coverage with much broader provisions. The 2007 MHPA expands parity to deductibles, coinsurance, copayments, out-of-pocket expenditures, covered hospital days, and covered outpatient visits. Thus, any existing insurance plan would have to make sure that coverage was equal with respect to those items for mental and physical healthcare. There are, however, exemptions from the law for employers with fewer than 50 employees. But, what does the 2007 MHPA mean for larger employers in terms of financial costs?

PricewaterhouseCoopers has estimated, for example, that the new mental health parity law will cost employers an extra $1.32 per employee per month. However, this insurance-related cost may benefit employers in the long run by reducing lost productivity, absence, and turnover costs. For instance, the U.S. Surgeon General has estimated that untreated mental illness costs U.S. businesses nearly $70 billion per year in lost productivity and inflated sick leave costs. This cost savings may explain why the 2007 MHPA bill was cosponsored by a bi-partisan collection of 42 Senators and has been widely supported by many well-reputed institutions, including the American Medical Association.

Because the bill making up the 2007 MHPA made it through committee in a slim two-day period and was cosponsored by almost half the U.S. Senate, it is likely that it will pass in the near future. We will keep you updated on its status and what employers can expect from the 2007 MHPA if/when it passes.

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[1]For example, this author successfully argued a case before the United States Court of Appeals for the Eighth Circuit in which the court determined that Nebraska's mental health parity law was preempted by federal law.

TO GOOGLE OR NOT TO GOOGLE *(Continued from page 4)*

Googling can provide undesirable applicant infor-mation that would be unavailable by traditional means and could eliminate problem employees prior to their first day.

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[1]The practice of Googling applicants has been explicitly prohibited in other countries.

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PROACTIVE STEPS TO AVOID EMPLOYMENT LITIGATION

Employment litigation is on the rise. Litigation risk and related expenses are also up significantly and go directly to a company's bottom line. The costs of employment litigation include not only the actual costs of defending the lawsuit but also the possible indirect effect on employee morale, job satisfaction, and job performance. Because of the high risk and significant expense of employment litigation, employers should take immediate steps to reduce the opportunity for this type of lawsuit.

Avoidance of employment litigation requires a specific strategy that encompasses the following:

- Identifying the specific reasons for employee unrest and dissatisfaction;
- Education of employment law and application to management practices; and,
- Developing specific prevention practices.

"Clearly, all supervisors should be thoroughly trained and familiar with the law. Failure to provide such training simply increases the opportunity for employment litigation and monetary exposure."

Step 1: Identifying Employee Dissatisfaction

Although every employee has a different motive for filing a lawsuit, there are generally specific circumstances within a company that cause employees to sue. They include the following:

1. Breaking the Law

Many times, employers have not properly trained their management team about ever-changing federal and state laws that govern the workplace. Consequently, employment laws are broken causing employees to seek redress through litigation. Specific and timely training on employment laws is a must for all employers.

2. Unhappy Employees

The majority of employment litigation does not result from specific factual circumstances, but a general attitude of dissatisfaction. Dissatisfaction can result from many things, including uncompetitive wages and benefits, as well as a perceived poor management attitude toward hourly employees.

3. Lack of Due Process

Many times a fertile environment for employment litigation comes from employees not believing they have a "voice" or an opportunity to be heard should they have a grievance. Providing the employee a clear written mechanism to air complaints and a "fair" opportunity to appeal significant decisions should be strongly considered.

Step 2: Awareness of Employment Laws

A significant amount of employment litigation comes from employers' ignorance of basic EEO laws. Employers must not only familiarize themselves and their employees with EEO laws, they must understand that employment laws apply throughout the employment relationship including interviewing, hiring, discipline, and termination (if necessary). Prepared employers will examine all stages of the employment relationship to ensure compliance with all employment laws including, but not limited to:

- Civil Rights Act
- Equal Pay Act
- Age Discrimination Employment Act
- Americans with Disabilities Act
- Pregnancy Discrimination Act
- OSHA
- Fair Labor Standards Act
- National Labor Relations Act
- Family and Medical Leave Act

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DISCHARGED FOR EATING GARBAGE: DOES THE PENALTY FIT THE CRIME?

Let's role play for a minute: you're a baker. You arrive at work early one morning, pour yourself a hot cup of coffee, and see a box of delicious, day-old pastries sitting on the counter waiting to be thrown out. Do you try one? After all, you haven't had breakfast, and there's no sense letting good (okay . . . mediocre) food go to waste, right? Well, a Montana baker gave in to temptation and paid the ultimate price. His employer, Costco, terminated his employment pursuant to its strict "no grazing" policy. The baker sued for wrongful discharge, and the matter has been tied up in litigation over the last several years. Although this lawsuit ultimately involves an issue unique to Montana law, it serves as an interesting example of the dangers of arbitrary policy enforcement and disproportionate penalties for minor policy infractions.

In the *Costco* case, the plaintiff worked as a baker in the Costco bakery in Billings, Montana. At all points during his employment, there existed a no-grazing policy that prohibited employees from eating Costco's perishable merchandise. Grazing was considered grounds for immediate termination. When baked goods were not sold after a certain period of time, the goods were considered "salvage" and then either thrown out or donated to a rescue mission. The no-grazing policy applied equally to salvage goods.

Throughout his employment, the plaintiff, his fellow employees and, presumably, Costco supervisors, liberally interpreted the company's no-grazing policy. According to testimony, it was not uncommon for employees to eat pieces of food to test product quality or even as a snack. In July 2001, a new general manager took over and decided to re-implement the policy. Accordingly, she held a meeting in response to a grazing incident and explained that any future violations of the policy could result in immediate termination. The plaintiff attended this meeting.

On February 25, 2003, when he reported to work, the plaintiff picked up a box of salvage pastries and took a bite of one. Unsatisfied with its quality, he immediately threw it away along with the rest of the box. A coworker witnessed the incident and reported the plaintiff to her supervisor. In response, Costco terminated the employee for "eating a piece of salvage danish" in violation of the no-grazing policy. The employee had no other

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PROACTIVE STEPS TO AVOID EMPLOYMENT LITIGATION *(Continued from page 3)*

As most employers know, ignorance of the law is not a defense. Consequently, regular and exhaustive training on these and other employment laws should be a requirement for all employees.

The general basis of these EEO laws is to require that employees are to be treated equally at every step of the employment relationship. Clearly, all supervisors should be thoroughly trained and familiar with the law. Failure to provide such training simply increases the opportunity for employment litigation and monetary exposure.

Step 3: Proactive Practices For Employers

Although it is admittedly difficult to understand and apply the vast myriad of employment laws to employment practices for any employer, it is necessary. Consequently, "front end" proactive steps should be taken to ensure adherence and application to pertinent EEO laws. These proactive steps would include:

- Implementation of regular (at least annual) **training** for all employees on understanding employment laws and applying those laws to employment practices.
- **Auditing** (annual recommended) of all employment practices to determine compliance with updated and ever-changing legislation.
- Employers should consider implementing a policy of **alternative dispute resolution**. In large num-bers, employers are moving towards imp-lementation of a form of arbitration in lieu of allowing employees to take advantage of the state and federal court system. Such a system allows employees to take griev-ances and disputes to an impartial decision-maker without going to court. In light of the success of various forms of alternative dispute resolution policies, every employer should investigate this concept.
- Most employers miss the opportunity to **empower their human resource departments** as trainers, auditors, and "proactive" agents to ensure that proper employment policies are created, objectively implemented and uniformly enforced in compliance with the law. Properly em-powered human resource departments can be the "gatekeeper" in significantly decreasing or, in many cases, eliminating the risk of employment litigation.

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ARE YOU PREPARED FOR YOUNG SUMMER WORKERS?

Next month summer break will start for most high school and college students. During this time most students drop their books and pick up a timecard. In fact, research suggests that between 70% and 80% of teenagers work for pay at some point during high school.[1] While this influx of young workers often comes as a relief to employers, workers between the ages of 14 and 18 are typically less experienced, have less training, and are physically and mentally less mature than older workers. The end result is a greater risk for work injury, which makes now the perfect time to make sure you are ready to provide a safe workplace for young workers.

Approximately 70 workers between the ages 14 and 18 suffer fatal work accidents each year and over 200,000 suffer nonfatal work injuries each year.[2] According to a study done by the national Council on Compensation Insurance, workers aged 20 to 24 suffer nearly twice as many injuries per 1,000 workers as workers aged 45 to 64.[3] But the higher injury rate may not be as costly as it appears at first glance.

Research suggests that while younger workers suffer more workplace injuries, the cost per claim is less when compared to injuries suffered by older workers. The difference is significant as the average cost of a younger worker's claim is approximately $12,000 compared to more than $27,000 per claim for older workers. The difference is attributable to both the cost of indemnity and medical payments. In the case of indemnity, the difference is attributable mainly to older workers needing more time off and having higher salaries. In regard to medical costs, the differing treatments recommended are mostly to blame for the higher cost of older workers' claims.[4]

While the reduced cost of younger workers' claims acts as a partial offset to the increased number of injuries, an employer must still be prepared for the summer influx of young workers in order to provide a safe workplace. In addition, an unprepared employer could end up facing higher workers' compensation premiums because injury rates would likely increase.

Younger workers are more likely to engage in tasks for which they are not trained or have no experience performing and are often not experienced enough to recognize specific workplace dangers. Further, employers need to be aware that limits exist on the hours and work that can be performed by 14 to 15 year olds and that workers aged 16 to 18 are also restricted from certain occupations that are deemed hazardous.

Therefore, employers are encouraged to:

- Emphasize and focus on training;
- Provide adequate supervision;
- Enforce safety policies and provide safety equipment;
- Follow all OSHA safety guidelines; and,
- Comply with federal and state child labor laws.

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DISCHARGED FOR EATING GARBAGE: DOES THE PENALTY FIT THE CRIME?

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documented performance or conduct problems. Thereafter, a deli employee was seen eating a piece of pie dough but received no disciplinary action and remained employed by Costco. The danish-eating employee sued, and the Montana Supreme Court recently ruled that he may proceed to trial to challenge the arbitrary application of Costco's policy under the Montana Wrongful Discharge from Employment Act.

IMPACT

Although this case involved the application of Montana's "good cause" standard, it illustrates two important lessons for employers in at-will employment states: (1) make the punishment fit the crime; and, (2) always enforce policies in a consistent manner. By designating termination as the penalty for such a seemingly minor infraction (e.g., taking a bite of a pastry headed for the garbage), Costco virtually ensured the inconsistent enforcement of its policy. Some supervisors will undoubtedly feel this policy is unreasonable on its face and be willing to apply the policies liberally, while others will follow it to the letter. Consequently, potential plaintiffs discharged for this offense would have no trouble finding examples of disparate treatment to support their claims of discrimination or wrongful discharge.

Regardless, incongruent penalties, even in the absence of disparate treatment, reek of pretext and ulterior motives, which could potentially have a negative influence on a jury or EEOC investigator. Moreover, it will generate ill will amongst employees leading to higher turnover rates and, potentially, union organizing campaigns. Accordingly, employers are well advised to ensure that the penalties for infractions under their employee conduct policies are reasonably suited to the severity of the infraction.

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EEOC RELEASES FACT SHEET ON HOW THE ADA APPLIES IN HEALTH FIELDS

The Equal Employment Opportunity Commission recently released the publication of a question-and-answer fact sheet on how the Americans with Disabilities Act applies to job applicants and employees in the growing healthcare industry.[1] The EEOC noted that healthcare is the largest industry in the United States economy and that it is expected to account for 19% of all new jobs created between 2004 and 2014, which is the most of any sector. It added that the healthcare industry has a high incidence of occupational illness and injury and that many health care jobs are physically demanding and mentally stressful.

Although rules under Title I of the ADA are the same for employers and individuals with disabilities in all industries,[2] the fact sheet is intended to explain how the Act applies in "unique situations that may arise in the health care setting." Among the topics discussed in the fact sheet are: "employee" versus independent contractor; when someone is an "individual with a disability" under the ADA; how to determine if a health care applicant or employee with a disability is "qualified" under the act; reasonable accommodation; when an employer may ask applicants or employees about their medical conditions or require medical exams; and, how a healthcare employer should handle safety concerns about applicants and employees.

Although applicants or employees in the health care industry can experience impairments of all kinds just like workers in any field, the National Institute for Public Safety and Health report that certain impairments more commonly occur in the health care field, such as needle stick injuries, back injuries, latex allergy, and stress.

The new publication is available on EEOC's Web site at http://www.eeoc.gov/facts/health_care_workers.html.

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[1] The healthcare industry includes public and private hospitals, nursing and residential care facilities, offices of physicians, dentists, and other healthcare practitioners, home health care services, outpatient care centers and other ambulatory healthcare services, and medical and diagnostic laboratories.

[2] Title I of the Americans with Disabilities Act of 1990 prohibits private employers, state and local governments, employment agencies, and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.

ARE YOU PREPARED FOR YOUNG SUMMER WORKERS? (Continued from page 4)

A push is currently on at both the federal and state levels to reduce the number of injuries to teenage workers. For further information on protecting teen workers as well as child labor overall, visit the Department of Labor's website (http://www.dol.gov/) and the National Institute for Occupational Safety and Health topic page on Young Worker Safety and Health (http://www.cdc.gov/niosh/topics/youth/).

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[1] NIOSH Alert: Preventing Deaths, Injuries, and Illnesses of Young Workers, Department of Health and Human Services, July 2003. The full document can be found at http://www.cdc.gov/niosh/docs/2003-128/pdfs/2003128.pdf.

[2] Id.

[3] Age as a Driver of Frequency and Severity, a study conducted by the National Council on Compensation Insurance. More information on the study can be found at www.ncci.com.

[4] Id.

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