

EMPLOYMENT LAW UPDATE

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by

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LEGISLATION AND ADMINISTRATIVE ACTION

New COBRA information required by October 1, 2013. The Department of Labor has issued guidance on the new COBRA Notice regarding the new health care exchanges. As of October 1, 2013, employers must provide the new notice to all new hires within 14 days of the start date. Existing employees should receive the new notice no later than October 1, 2013.

- Model notice for employers who offer a health plan to some or all employees, available at <http://www.dol.gov/ebsa/pdf/FLSAwithplans.pdf>.
- Model notice for employers who do not offer a health plan, available at <http://www.dol.gov/ebsa/pdf/FLSAwithoutplans.pdf>.

For the COBRA update, a model notice can be found at:

<http://www.dol.gov/ebsa/modelectionnotice.doc>. A redline version showing the changes can be found at: <http://www.dol.gov/ebsa/modelectionnoticeredline.doc>.

[For more information, see the article Deadline for Providing Health Insurance Notice by Attorney Andy DeClercq: <http://www.boardmanclark.com/reading-room/>.]

Wellness Programs - final rules update. The Department of Labor's Employee Benefits Security Administration updated its website with the information regarding workplace wellness programs:

- Final regulations, available at http://www.ofr.gov/OFRUpload/OFRData/2013-12916_PI.pdf
- Workplace Wellness Programs Study: Final Report, available at <http://www.dol.gov/ebsa/pdf/workplacewellnessstudyfinal.pdf> and the HHS cover letter, available at http://aspe.hhs.gov/hsp/13/WorkplaceWellness/rpt_wellness.cfm.

LITIGATION

The Legal Update includes new developments and matters of interest throughout the United States. Be aware that our various federal circuit courts reach somewhat differing conclusions. So a federal court decision in another part of the country, and especially a different state's court decision, may not quite be "the law" in your jurisdiction. Some courts lead the way; others lag behind. The Legal Update lets you see the overall trends and compare them with your jurisdiction. Wisconsin is part of the Federal Seventh Circuit (Wisconsin, Illinois and Indiana).

Employment Contracts

H-1B visa application creates contract of employment. A company offered a technology job to a university graduate student from India. It then completed the application for an H-1B visa. The application included description of salary and benefits which the employee would receive. The employee started work, but the company did not follow through on all the pay and benefits that it had promised. The employee sued. The company claimed it was an *employer at will* and could alter duration, terms and conditions of employment *at will*. The court disagreed. The H-1B application had all of the terms needed to create a binding contract guaranteeing the stated wages, benefits and terms of employment. It eliminated any *at-will* relationship. *Kausal v. EPIE* (NY App. Ct., 2013).

Employment Policies

Be careful of zero-tolerance policies and contradictory policies. Zero tolerance is generally taken to mean discharge for any violation, no matter how small. This may be a reasonable approach for major issues of honesty and significant safety rules. However, zero tolerance may be difficult to enforce on lesser infractions and lead to discrimination suits. In *Brockbank v. U.S. Bancorp.* (9th Cir., 2013), an older employee was fired under the supposed zero tolerance policy for abuse of the business credit card. She put personal expenses on the company card, including payments for home Internet service. Unfortunately for the bank, there was evidence that younger employees had also put personal charges on their company cards, without being disciplined. Also, another company policy on reimbursable expenses allowed "reasonable" non-reimbursable personal use of credit cards and prohibited only "excessive use." The court found that the inconsistency in enforcement and the inconsistency between policies created an appearance of "pretext" in the discharge and created grounds for an age discrimination case.

Warning! There are many more "policies" than those listed in the employee handbook. Numerous "protocols," "guidance," "procedures" or "work rules" are spun out

by each department. (The larger the organization, the more directors make their own sets of rules for their own various purposes, often without any central overview and without any thought about what is in the employee handbook.) They are all "policies" which can bind the company to liability. This case illustrates how a zero tolerance policy in a handbook can be totally undermined by the reimbursement guidance which is spun-off by the finance or bookkeeping unit. Coordination and overview is crucial.

Discrimination

Age

Dumb statement by bearer of bad news was not illegal, but still cost a lot. A company won an age discrimination case but spent a huge amount on defense costs due to a stupid statement by a supervisor. A 61-year old Rental Agent was fired. On a rating scale of 100 -- with 80 as minimum acceptable -- she rarely achieved even 56. Corporate headquarters reviewed overall performance of all agents, plus her violation of several important policies, and ordered her to be fired due to her ratings. Her supervisor had no role in this decision but had to deliver the message. In the meeting, the supervisor called the employee "old Rose" and opined that "you're slipping and getting too old for your job." The fired agent filed an age discrimination case under the ADEA and the Michigan Elliott Larson Act. The court dismissed the case because the supervisor's statements were unrelated to the actual termination decision. The decision was made at a higher level, for valid non-discriminatory reasons. *Marsh v. Associated Estates Realty Corp.* (6th Cir., 2013).

Did the company really "win"? A federal case often costs the company over \$100,000 in defense costs. Improper statements by supervisors cost employers countless dollars in lost profits or budgets even if the case is eventually "won." This case would never have occurred except for the supervisor's unprofessional comments. All supervisors should see this case comment or be required to read the article [*It Was Just a Joke*](#), Boardman & Clark, in order to avoid this scenario.

National Origin and Religion

Failure to accommodate Muslim prayer creates case, but trying to accommodate Ramadan creates strike by Hispanic employees. The EEOC may maintain a case against a meatpacking plant for a pattern of denying the accommodation of appropriate break time for 150 Somali Muslim employees. However, the firing of 80 Somali Muslim employees was upheld due to their reaction to an Anti-Ramadan strike by Hispanic employees. When the company altered the work schedule and breaks to accommodate the Muslim workers for the Ramadan period, a large number of Hispanic workers went on strike to protest the changes to their schedule. The company then delayed the Ramadan schedule alteration to try to work out the issues. Eighty Somali Muslims left and refused

to return. The court found no religious discrimination since the fired workers were refusing to engage in continuing the "interactive process" so their claims for discriminatory discharge were dismissed. [This was not an NLRA case over rights to strike. The Teamsters Union tried to be on both sides, approving the Ramadan schedule change, then also supporting the Hispanic workers who struck against the union's approved Ramadan accommodation.] *EEOC v. JBS USA, LLC* (D. Neb., 2013).

Fashion company should allow hijab. Abercrombie & Fitch denied a job to a Muslim teenage applicant because she wore her hijab head covering to the job interview. The EEOC charges that the company found the head covering was not consistent with its "look policy" requiring employees to wear clothing which is sold in Abercrombie stores - and prohibited employees from wearing "hats." The court found sufficient evidence that the company failed to meet its reasonable accommodation obligation under Title VII. *EEOC v. Abercrombie & Fitch Stores, Inc.* (N.D. Cal., 2013).

Sex

Goodwill settles case for discrimination against men. In *OFCCP v. Goodwill of S. California* (2013), the EEOC alleged that there was systemic discrimination against male employees in hiring and promotion. The case alleged that Goodwill favored women at local donation centers due to a stereotype that women have better customer service skills. Goodwill will pay \$130,000 in back pay and agree to provide jobs or promotions to 18 men. It will also take extensive monitoring and training efforts regarding its employment practices.

Disability

Rat phobia may be a disability, but company was not required to accommodate. There are no perfect jobs. Some jobs are very difficult and full of unpleasant circumstances. (See the April 2013 Update case on social workers' requirement to tolerate and counsel abusive clients.) Many warehouses have rats. Regardless of all eradication efforts, warehouses still have rats. A warehouse worker had an anxiety disability, including fear of rats and insects. The warehouse had both, despite eradication efforts. The warehouse worker requested a complete cure in the warehouse or reassignment to a rodent-free and insect-free environment. There were no open positions. The employee took leave and would not return to the warehouse. No other positions opened except a Human Resource Specialist job. The employee was terminated. In the ensuing Rehabilitation Act case, the court found that the employer could not reasonably create a pristine environment. Though it was not listed as a job requirement on the position description, rats and insects are a fact of life in many warehouses, which cannot be completely eliminated. The ADA requires accommodation of placing a disabled person in a vacancy, however, one must be qualified for the job. The warehouse worker had no qualifications for the HR position.

So, it was not a viable or reasonable accommodation. *Murray v. General Services Admin.* (5th Cir., 2013).

DOT certification was essential function for trucking supervisor. A food processing company delivery manager lost his federal DOT driving certification due to an eye condition. The position description required a DOT certification to supervise drivers and to do driving as needed. The manager claimed he should be exempt from driving and could do all the "management" duties otherwise. He was terminated, and he then filed an ADA suit. The court held that driving and the DOT certification was essential for the manager's position and dismissed the case. *Knutson v. Schwan Home Services, Inc.* (8th Cir., 2013).

DOT and commercial certification was NOT an essential function. A gas company supervisor was terminated when the company determined he was not qualified to hold a DOT driving certification. The company's Position Description required a certification. However, the actual duties did not require driving commercial vehicles. He supervised mechanics and drivers. He had to ride along and observe their performance. He had to go to road locations to meet drivers or observe mechanics -- in a regular car. He never actually had to drive a commercial vehicle to accomplish the job. CDL/Commercial Certification may have been "preferred" for the position. It was not "required." Thus, the manager had a valid ADA case. *Bailey v. Ameri Gas Propane, Inc.* (D. Md., 2013).

Having another employee do lifting was not a reasonable request for accommodation. An employee with a permanent 20-pound lifting restriction applied for a promotion to a position requiring lifting of parts for inspection. Many parts were in excess of 20 pounds. She requested the accommodation of having another employee present to lift those parts. The company declined and did not promote her. She sued under the ADA. The court ruled that the employee was not a "Qualified Person with a disability" since she could not perform an essential function of the job. The requested accommodation was not reasonable since the 20-pound lifting was ongoing, not occasional. Thus, the employer would substantially have to pay two people to perform one job. *Majors v. General Electric Company* (7th Cir., 2013).

Employer bound by contract; union unwilling to grant accommodation. An equipment operator/driver lost a leg in an accident. He could no longer do the essential job functions of operating excavating equipment and driving "big rig" trucks. The company tried to accommodate by assigning him to a smaller truck which he could operate and did not require the same loading/unloading duties. However, the Collective Bargaining Agreement seniority provisions required the union and other employees to agree. The other employees and the union would not agree to waive the seniority rights of others to the smaller truck assignment. The employee sued under the ADA for failure to

accommodate. The court dismissed the case. The ADA gives contract rights priority over accommodation; the company was bound by the contract. *Hernschel v. Clare County Road Comm.* (S.D. Mich., 2013).

Genetic Information Nondiscrimination Act

Company settles case over requests for family medical history. The EEOC has settled a case regarding a company's violation of GINA's prohibition against requesting "genetic information," which includes family medical history, in employment decisions. After a job offer, the company requested a medical exam (as permitted under the ADA as a post-offer contingency). However, the doctors gave a questionnaire asking about medical conditions "that ran in the family." When a person was then denied the position, she filed with the EEOC. The EEOC then pursued an action for all employees. The questionnaire clearly violated GINA, which has been in effect since 2009. The company should have known that. The doctors should know that! Even if the evaluating doctor inserted the questionnaire without company knowledge (employers rely on the medical clinics they select), the employer is still liable for the acts of its "agents." [If this was the case, perhaps the company can sue the medical clinic for violating its professional responsibility to do legally compliant pre-employment evaluations.] *EEOC v. Fabricut* (Settlement, 2013).