Legal Matters®

Employment
summer 2023

State 'pay transparency' laws causing issues for employers

In an era in which workers are successfully pushing state legislatures to strengthen employee rights, a number of states have responded by enacting "pay transparency" laws that require employers to disclose information about how they compensate employees either to the public or to employees themselves.

Depending on the state, pay transparency laws may require the employer to provide job applicants the exact salary range for the position at a certain time during the hiring process; to provide the salary range to employees upon request, when changing jobs or when hired; or to provide the salary range in the job posting itself.

As of the start of 2023, pay transparency laws have taken effect in seven states and a handful of municipalities, with laws being considered in several more states.

With this in mind, it would serve employers well to check in with a local employment attorney to review their policies and procedures regarding disclosure of salary information. That's because these laws — even if they're a legitimate way to protect workers from discrimination and exploitation — can create some thorny issues for employers everywhere.

For example, say your state does not have a pay transparency law but you post job openings at sites that may draw applicants from all over the country. Are you then obligated to comply with pay transparency laws in other states from which candidates may be applying?

While there's no simple answer to that question, you may be tempted to sidestep the issue by avoiding candidates from states with stringent pay

transparency laws in place. But that comes with its own risks. For one thing, you may be missing out on the best candidate for the opening.

Additionally, you could suffer bad publicity as a result. That's what happened when Colorado passed a pay transparency law. Employers in other states simply refrained from hiring Colorado residents. In response, disgruntled Coloradans launched a website to bring negative attention to companies that weren't complying with the Colorado law.

The issue becomes even more stark if the employer posts a job that can be performed remotely. In that case, even if the laws of the state where the employee lives do not require employers to post exact salary ranges during

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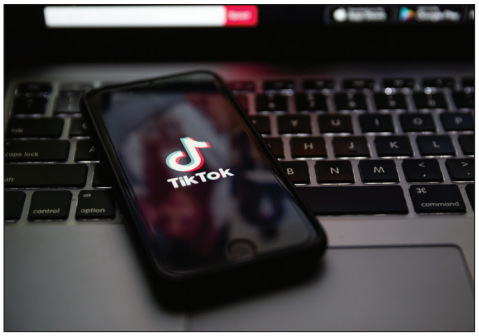
Is it time to update your social media policy?



Social media has changed rapidly over the last decade. In the past, with static platforms like the early version of Facebook dominating the scene, it was generally enough for employers to bar employees from using company devices to post nonwork-related content online and to mandate that work posts be business appropriate.

But with social media evolving to platforms like TikTok (where users can upload videos to be filtered through a feed and shared with millions of other users) taking over, it's probably time to call an employment lawyer familiar with social media trends to review and update your policy.

In the interim, while you may be tempted to ban employees from posting on TikTok or similar apps, that may not be a great idea. After all, employees who are active on social media may be in a good position to understand the social pulse of your customer base. And enabling employees to make company-sponsored posts demonstrates a sense of trust, which can make employees feel more valued.

Additionally, a new generation of employees are accustomed to networking, collaborating and problem-solving via social media. Enabling this in your workplace might make your company more desirable to Gen Z and younger millennial applicants.

Still, it's important to make sure your policy has the right provisions to address legal and business concerns. A big one is privacy and confidentiality, both at the official jobsite and in remote work settings. For example, an employee who makes a TikTok recording of their cool at-home workspace while a Zoom meeting is in progress could be broadcasting proprietary information to the world.

Additionally, from a reputational standpoint, social media consumers prefer posts that seem authentic and un-staged, which means people posting are trying to be "real." This can result in employees sharing information that makes the company look bad (for example, complaints about colleagues or working conditions). This kind of posting needs to be addressed in a social media policy.

So what, then, should an updated policy include? First, it should include a reminder that all existing workplace policies — including anti-discrimination, anti-harassment and confidentiality policies — apply in a social-media context. It should also address unique risks that arise in a setting where employees are encouraged to engage with the brand and where the company is trying to maintain a strong social media presence.

The policy also needs to be in writing and followed consistently. But these are just broad parameters. You need an attorney to help you fill in the details.

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NLRB cracks down on provisions in severance agreements

It's long been common for employers, when laying off workers, to provide severance pay. In exchange, the company will demand that the worker release any claims they might have against the company. However, a recent ruling by the National Labor Relations Board has called into question certain common severance provisions, suggesting that it's probably a good time to review your own severance agreements with an attorney.

In the case in question, a hospital operator offered severance agreements to 11 union workers at a Michigan hospital after they were permanently furloughed during the pandemic. The employer made a direct severance offer without going through the union. The agreements had a "confidentiality clause" that barred the workers from discussing the terms of the severance agreement with anyone else, and they had a "non-disparagement clause" that forbade them from saying anything that could hurt the employer's reputation.

But the NLRB found that those provisions violated federal labor law. Specifically, the board found that they violate a worker's right to engage in "concerted activities" — in other words, joint efforts by employees to improve their wages and working conditions.

Not only did the NLRB deem the provisions unlawful, it also found that merely offering a severance agreement with such terms was illegal, even though the departing employee had the right not to accept the offer.

Meanwhile, the board found that it was illegal for the company to offer the packages directly to the employees instead of going through their union.

While the decision only impacts line employees and not supervisory employees, it's very important that you contact a labor employment attorney to examine your severance agreements to make sure you're not setting yourself up for legal liability.

FMLA didn't bar employer from terminating worker with attendance, performance issues

The federal Family and Medical Leave Act (FMLA) allows employees to take unpaid, job-protected leave to deal with a serious medical condition or to care for a family member with such a condition. To be eligible for FMLA leave, a worker needs to have worked at least 1,250 hours during the 12 months prior to the leave and work at a location where the employer has at least 50 employees within 75 miles. A worker also needs to have been with the employer for 12 months.

It's illegal for an employer to discourage a worker from taking FMLA leave or to retaliate against an employee for taking leave. But a recent Iowa case underscores that the FMLA does not protect a worker from getting fired for poor attendance or bad performance.

That case involved a Drake University employee with multiple sclerosis who had worked for a number of years without requesting FMLA leave.

A new dean arrived at the school and soon became displeased by the employee's allegedly erratic schedule and performance.

At this point the employee asked for FMLA leave for the first time, which was approved.

After that, the employee missed work time for non-FMLA-related reasons and on some occasions did not inform the dean of her absences.

When the dean continued to speak with the employee about her attendance and performance concerns, the employee complained of harassment.

She was subsequently put on a performance improvement plan that required her to give notice of any absences. The employer kept her FMLA leave time separate in its recordkeeping and documented all performance and absence issues.

When those issues didn't improve, Drake terminated the employee, who then sued the university claiming FMLA retaliation.

The case reached the 8th U.S. Circuit Court of Appeals, which ruled in Drake's favor, noting that the university thoroughly documented legitimate reasons for the termination while the employee provided no evidence that the university's explanation for the firing was a pretext for discrimination or retaliation. Most noteworthy, the court explicitly stated that an employee who takes FMLA leave has no more protection against being fired for reasons unrelated to the FMLA than any other employee.

If there's a lesson for employers to take from this case, it's to document performance and attendance issues the way Drake did, and to check in with an attorney to ensure a particular termination won't leave you vulnerable to a lawsuit.

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the hiring process, but they do require disclosure to employees on request, an employer would seemingly be bound by that law even if the employer is located thousands of miles away.

Meanwhile, pay transparency laws could cause employers headaches in even trying to determine how to set compensation in the first place, particularly given the reality of an increasingly remote workforce. After all, huge disparities in pay scales and costs of living in different parts of the country mean that a job being performed in Boston, New York or San Francisco would normally call for a different salary level than one being performed in, say, suburban Kansas City or rural Minnesota.

The ultimate question is whether an employer should be creating job postings with the most restrictive state laws or the least restrictive state laws in mind. The answer may be to look for a "sweet spot" that meets the requirements of as many state and local laws as possible. But this is something you would absolutely want to discuss with an attorney who can look at your company's unique situation and provide the best advice possible.

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Federal appeals court declares updated standard on 'exempt' employees

Employers should take note of a recent ruling from the 1st U.S. Circuit Court of Appeals regarding who is considered an "administrative" employee exempt from overtime requirements under the federal Fair Labor Standards Act (FLSA).

The case involved dispatchers and controllers working for Unitil Service, a company that operates electrical grids and gas pipelines for power companies across New England.

The job of "dispatcher" involved around-the-clock monitoring and control of electric transmission and distributions for the various power companies in the Unitil network. The job of "controller" entailed overseeing operation and control of each company's gas transmission distribution system.

Dispatchers and controllers were also charged with ensuring that operations complied with local, state and federal regulations.

The U.S. Department of Labor brought a legal action against Unitil Service claiming it violated the FLSA by classifying the controllers and dispatchers as administrative employees who weren't entitled to overtime pay.

A U.S. District Court judge threw out the case, ruling that the employees' primary duties were directly related to the general business operations of Unitil's customers. This made them "administrative" and therefore exempt from the FLSA, the judge ruled.

But the 1st Circuit reversed the decision.

Specifically, the higher court found that the employer had not shown that the workers' primary duty consisted of work "directly related" to the management and general business operations of its customers.

The case isn't over yet; it was sent back to the District Court for further findings. But in the meantime, it highlights for employers just how complicated the process of classifying workers for FLSA purposes can be. In order to avoid running afoul of the law, it would be a good idea to talk to local counsel.