



EMPLOYMENT LAW ALERT

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H1N1 Pandemic Amidst Severe Recession: Employment Law Compliance Challenges for Employers

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A White House panel recently warned that the H1N1 virus or “swine flu” could infect half of all Americans and kill 90,000 within six months. The World Health Organization forecasts the possibility of an influenza pandemic in which the virus mutates as it circles the globe and returns next flu season in a more deadly, drug-resistant form. The President has just issued an emergency declaration to enable the nation’s hospitals to cope with the rush of flu-infected individuals to emergency rooms and intensive care units by opening remote treatment facilities.

In the midst of economic crisis, the nation now faces a public health crisis involving a potentially lethal infectious disease. In this situation, employers will need to consider how to protect employees from infection, manage absenteeism, control the costs of employee health care, sustain business operations, keep customers, and manage financial risks of all kinds, including those associated with employment litigation.

Some workforce management principles are well-accepted: assure that the employment policies in the company manual exist not just on paper or online, but that supervisors knowledgeable and consistently

apply them in daily operations; reexamine employment practices periodically to confirm that they comport with prevailing law; train the workforce on compliance with company policies; and provide for ongoing consultation between line management, human resources offices, and employment lawyers.

The unprecedented scope of the anticipated crisis will necessitate flawless execution of staffing initiatives so that business operations continue. Well-prepared companies can emerge from the crisis with sustainable competitive advantages.

An employment dispute that leads to litigation is likely to involve a number of federal and state employment laws. Review the following fact pattern and sit with your management team to discuss whether the issues it presents have arisen in your company and how they will be addressed if they were to arise again:

Alma and Betsy work in adjoining cubicles. Alma is a salaried non-exempt employee who earns considerable overtime pay. She has taken twenty one days off this year due to family health concerns. Her daughter became infected with H1N1 virus for ten days. Her son’s child care

center closed for eleven days due to widespread infections, though he was not infected. While Alma was away on leave for these twenty-one days, Betsy, a highly proficient and cheerfully cooperative computer analyst who is classified as exempt, pitched in to perform tasks that Alma typically performs.

But Betsy’s assistance with Alma’s work has infuriated Bob, Betsy’s underperforming peer because his workload has increased as a result. Through his network, which includes a friend in the Benefits department, Bob has learned about the reasons for the reimbursements that Alma received from the company’s health insurer, that Alma took leave of absence for all twenty-one days under the Family Medical Leave Act (“FMLA”), and that she is genetically susceptible to an obscure disease. Bob tells Betsy that he has informed federal workplace safety officials of his concerns that their employer is not taking suitable steps to protect employees from infection from the H1N1 virus and other workplace hazards, including the strange diseases of some co-workers. Bob tries to persuade Betsy that both of them should seek overtime pay. He describes what he heard a lawyer say about overtime pay in a very intriguing TV commercial.

In an effort to arouse resentments and gain an ally, Bob tells Betsy that Alma's compensation, including salary and overtime payments, exceeds theirs, even though they are "professionals" and Alma is not. He exhibits unspeakable bigotry and sexism in speculating about the reasons for Alma's success in getting leave and overtime pay. Betsy promptly reports Bob to her supervisor, who had earlier provided a formal written warning to Bob for poor performance. Right after receiving that warning, Bob filed a charge of age discrimination with the EEOC.

Bob's supervisor sought to persuade his HR business partner to authorize immediate termination of Bob. But HR sought more time to gather facts, confer with senior management, and assess Bob's prospects for morphing a dubious claim for wrongful termination into colorable claims for retaliation for demanding overtime payments, charging age discrimination, and complaining to OSHA.

This hypothetical fact pattern implicates eight federal

employment laws pertaining to family medical leaves of absence, payment of wages and overtime, protection of privacy, non-discrimination, and workplace safety. The acronyms for these employment laws, already quite familiar to HR officers through their consultations with employment lawyers, will likely become increasingly familiar to senior management in a crisis scenario that involves not just one each of Alma, Betsy, and Bob, but multiples of them.

To the list of employment law acronyms implicated by this fact pattern, FMLA, FLSA, HIPPA, ADA, ADEA, Title VII, and OSHA, Congress added a new law that takes effect November 21, 2009. It is GINA, the Genetic Information Non-Discrimination Act. It prohibits deliberate acquisition and disclosure of genetic information by employers (and genetic discrimination in the employment context).

The proposed regulations to implement GINA have created uncertainties about whether some well-accepted medical cost-containment practices, such

as the taking of family medical histories upon entry into health care benefit plans and corporate wellness programs, may become prohibited. The proposed regulations have incited numerous objections.

If you are a supervisor, manager, executive, or business owner, verify whether or not your company has up to date policies and practices to guide decision-making in situations that involve multiple disputes over leave, overtime, privacy, disabilities, non-discrimination, workplace safety, and retaliation. Do you have any variation of the Alma-Betsy-Bob story in your business?

If the legal issues and associated financial exposure presented by this hypothetical fact pattern are not readily apparent, or if the answers to your questions are not reassuring, take immediate action: Authorize your team to update the company's employment policies. Strengthen your company's readiness to apply its policies in a context of crisis, fear, disruption, and contention. ■



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