Legal Update Article

Beyond Mere Legal Compliance

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As claims stemming from widespread workforce reductions or failure to comply with the myriad of COVID-19-related leave laws begin to gain full steam, it is clear that an employer's treatment of its employees — beyond termination decision-making or strict legal compliance — may affect whether employees feel they have been treated fairly.

While companies should always focus on the legal risks associated with their employment decisions, often it is the less obvious, non-legal issues and the *way an* employer treats its employees that lead to claims.

For example, in manufacturing where production schedules are critical and staffing often already lean, employers may be less inclined to be flexible in allowing workplace accommodations relating to COVID-19. Since March and now, as schools are back in session, businesses are inundated with requests for work from home, schedule modifications, or time off as employees deal with childcare issues, online schooling, and as COVID-19 exposure and infection incidents rise. Often, these employers may be quick to respond, "We don't do that," "That's not our policy," "We can't allow that," or "If we let you take time off, everyone will want to take off."

While employers not covered by new legislation like the Families First Coronavirus Response Act or applicable state laws may not be *legally* obligated to provide workplace accommodations or time off due to childcare, school closings, or other pandemic-related absences, engaging with employees before simply rejecting these requests may lead to better outcomes. Employers will be well-served if they can find a way to keep their workforce productive while being a bit more flexible than they may be under normal circumstances. Working with employees to find creative solutions will pay off with high morale, loyal workers, less turnover, and likely increased productivity. As employment attorneys regularly preach to managers dealing with leave or disability accommodation issues, "Avoid harsh results!" This applies equally to handling requests for COVID-19-related accommodations and beyond just mere strict compliance with rapidly evolving federal and state laws.

What type of solutions may be possible? It depends on the business, workforce size, hours of operation, union contracts, among other factors. In manufacturing, temporary shift or schedule changes may allow accommodations relating to childcare or school issues. Cross training employees or using temporary workers also may allow more flexibility in scheduling and allowing time off. Reducing hours and moving an employee into a part-time role or offering weekend shifts may be another possibility.

When furloughing or separating employees, the *way* an employer treats an exiting employee can be as important as the selection process itself. It is crucial during this complicated and stressful time to remind managers to treat employees with dignity and respect in terminations and to be honest, direct, and, as always, tell them the reason for the separation. Requiring a long-term employee to pack up his or her belongings immediately and exit the building escorted by security (assuming safety is not an issue)

can be humiliating.

Now is also a great time to review your company separation agreements. Sometimes, these agreements contain provisions more properly suited for *settlement* agreements. Often, it seems as if the drafters failed to realize that most of them will be used for mid- or lower-level employees, not attorneys. As a result, they frequently are over-lawyered with too much legal jargon, are not "user friendly" or understandable, and are way too long. Instead, the agreements should be easily comprehended by employees. For example, while a no rehire provision may be common in settlement agreements and is lawful, such provisions in a separation agreement as part of a reduction-in-force may conjure up bad feelings by the employee or create questions about the real reason for the separation.

Reviewing your separation agreements, especially those for employees age 40 or over involved in a group separation and that require the Older Workers' Benefit Protection Act disclosures, is a critical piece of the process and may affect how separated employees feel about their treatment and their response.

Jackson Lewis attorneys are available to assist employers with workplace issues.