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Work Matters

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THE BIG SIX

Key Things GCs Need to Know About Employment Laws

Here are the single most important things a corporate counsel needs to know about each of six employment law topics.

No. 1: The Family and Medical Leave Act. When an employee is about to be terminated for excessive absenteeism, ask this: Were any of the absences covered by the FMLA? If they are, the company is buying into an FMLA suit. If the company has enough information to conclude that the absences are FMLA-covered, then firing the employee violates the law, even if the employee never sought FMLA leave.

The lesson: Put the brakes on — and I don't mean tap them — an absence-based termination and crunch the absence information through the FMLA regs on what is FMLA-qualified.

No 2: Section 1981 of the Civil Rights Act of 1964. Section 1981 prohibits discrimination based on ethnicity, so its coverage is expansive: Being Polish, Arab or French — and much more — are protected classifications. It also covers Caucasians and retaliation for protesting employer actions based on §1981 characteristics. The statute of limitations? A leisurely four years. Damages? Uncapped punitive and compensatory. Exhaustion of administrative remedies? Dream on. Put §1981 on the risk management check list.

No. 3: Pregnancy Discrimination Act. Sounds simple, doesn't it? Not so. Despite its name, the PDA covers much more than pregnancy. Announcing an intention to conceive is protected activity, even if the employee never does so. Guess our parents were wrong: You can be just a little bit pregnant. Considering abortion is covered as well, as are medical procedures designed to help one conceive. The PDA — it's just not about pregnancy.

No 4: Retaliation — the participation clause and the opposition clause. Retaliation comes in two flavors: employees suffering adverse employment actions because they protest unlawful conduct; and those suffering adverse employment actions because they participate in a proceeding relating to a discrimination claim.

The first way for anti-retaliation law to protect someone is if he protests. The single most important thing for the GC to remember is that, to be protected, the employee needs only to protest something that comes within a wide orbit of what constitutes unlawful discrimination. A C- guess as to what constitutes unlawful conduct is as good as an A+ guess. A mile-wide protest is as much protected activity as a ground-zero one.

The second way for anti-retaliation law to protect someone is if he participates. Remember this: Less than sterling people are protected if they participate. The manager who admits to harassing conduct in a suit can't be fired for what he says in a deposition. The marginal employee who gives a statement to the U.S. Equal Employment Opportunity Commission is now protected from retaliation. Considering firing an employee in these circumstances? Go to yellow alert.

No. 5: The Sarbanes-Oxley Act of 2002. Speaking of retaliation, are SOX whistleblower claims a big deal or a minor irritant? The answer: I have no earthly idea. The law is coming up on its third-year anniversary, and most lawyers still don't know whether the law will allow whistle-blower claims for protesting minor matters, such as a complaint about circumventing internal accounting controls with little materiality to shareholders, or whether it will allow only claims involving blowing the whistle on big-ticket items such as revenue recognition. The point for in-house lawyers: Acknowledge uncertainty.

No. 6: Summary judgment. Once, these rulings were plentiful. A defense lawyer could bag his limit and then some. Life was good. But, along came the U.S. Supreme Court's decisions in 2000's *Reeves v. Sanderson Plumbing Products Inc.* and 2003's *Desert Palace Inc. v. Costa* with this unmistakable message from the high court: Judges are granting too many summary judgment motions, the law requires greater scrutiny and employees deserve their day in court. And, just last week, the court, in a per curiam opinion in *Ash, et al. v. Tyson Foods Inc.*, reiterated this point of view, when it said that the 11th U.S. Circuit Court of Appeals needed to reconsider its decision that calling an African-American man a "boy" did not evidence discrimination. Summary judgment is no longer a given.

GCs need the view from 30,000 feet, not the count-every-tree-in-the-forest perspective. When a general counsel finds herself becoming mired in the mud, just ask this: What is the single thing I need to know? Trust me, it brings clarity. IHT

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