HR SPECIALIST

Pennsylvania Employment Law

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Trusted compliance advice for Pennsylvania employers

Contributing Editor: Susan K. Lessack, Esq., Pepper Hamilton LLP, Philadelphia

In the News . . .

State revenue boss gets probation for harassment

Albert Forlizzi II has fallen a long way. Now unemployed, the former supervisor at the State Department of Revenue and former mayor of Penbrook has been sentenced to four years probation after pleading no contest to charges of indecent assault and official oppression.

Forlizzi will also have to register as a sex offender and pay $2,000 in fines.

A contrite Forlizzi apologized to the court and said he would "do whatever the court wants [him] to do." He claims he has been rejected for 15 jobs because of his conviction.

Forlizzi harassed a long-time state employee from November 2011 to August 2013, telling her he was the one who "saved her job" and therefore she "owed" him.

Note: Sexual harassers seldom think of long-term consequences of their behavior. One way to deter harassment may be to make it clear that offenses could have dire legal consequences.

New OSHA site on violence prevention in health care

Noting that health care workers are more than four times more likely than other employees to experience workplace violence, the Occupational Safety and Health Administration

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Hourly pay for temps could create 'employees'

The 3rd Circuit Court of Appeals, which has jurisdiction over Pennsylvania employers, has ruled that paying an hourly rate for temporary employees coming from an outside agency may mean those workers are your "employees" under anti-discrimination laws.

Recent case: Matthew, who is black, worked for Labor Ready, a staffing firm that provided temporary workers for a number of clients, including discount retailer Tuesday Morning. The retailer was opening a store in Pennsylvania and needed temps to unload merchandise, set up display shelves and stock merchandise on shelves in preparation for the store's grand opening.

Matthew worked at the store for a total of 10 days, generally with about eight other Labor Ready workers.

Soon, Matthew started complaining that he and several black co-workers were being racially harassed. For example, he claimed that the Tuesday Morning store manager accused him of stealing two eye-liner pencils, and assigned him to work in the back near the trash containers. Matthew also complained that a white Tuesday Morning employee blocked his way and called him a racial slur.

Soon after, Matthew alleged, the black temps were all told not to come back.

Matthew sued Tuesday Morning

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State Supreme Court rules on noncompetes

The Pennsylvania Supreme Court has clarified rules for noncompete agreements entered into after an employee has been hired. It has concluded for the first time that the employer must offer the employee (and the employee must accept) something of value beyond just a mutual promise to make the agreement binding.

This has practical consequences for employers adopting or modifying employment agreements.

Recent case: David worked for a basement waterproofing company in Pennsylvania. During his employment, his employer presented him with a noncompete agreement in which he promised for two years not to work for a competitor in any state in which his employer did business if he was separated from employment. The parties signed the agreement with a mutual promise that it would bind them.

Two years later, David quit. He then took a job with a basement waterproofing company located in Camp Hill. Soon, his former employer told the new company about the noncompete agreement and threatened to sue.

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and his case was dismissed on the premise that he was not a Tuesday Morning employee.

But he appealed, and the 3rd Circuit Court of Appeals reinstated his lawsuit. It looked at some of the specific arrangements between Labor Ready and Tuesday Morning. It found, for example, that Tuesday Morning paid a set fee for each hour the Labor Ready employees worked, not a flat fee for services. That was an indication that they were employees of both Labor Ready and Tuesday Morning, making the retailer responsible for any employment discrimination the black temps might have experienced. The case was sent back for trial. (*Faush v. Tuesday Morning*, No. 14-1452, 3rd Cir., 2015)

Noncompetes

(Cont. from page 1)

The new company then fired David, who sued his old company, arguing that the noncompete agreement was invalid because it had been signed mid-employment and David had not received anything of value for agreeing to the terms.

The case ended up in the Pennsylvania Supreme Court, which ruled that continued employment was not enough "consideration" to seal the deal. The employee had to receive something of value like a bonus, a raise or other benefit. (*Socko v. Mid-Atlantic Systems*, No. J-40-2015, Pennsylvania Supreme Court, 2015)

Final note: Consult your attorney to see if your noncompete agreements will be valid under this new ruling or if you need to make modifications.

Investigation reveals bogus use of FMLA leave? You can and should discipline employee

Some employees seem to think that if they are approved for FMLA leave, their employers have to accept their time off as legitimate. That's true to a point. But it doesn't mean employers can't ferret out leave abuse if they have reason to believe the employee isn't being honest.

Take, for example, intermittent FMLA leave. An employee with approved intermittent leave may call off in a pattern that looks suspect—such as on Mondays or Fridays or before holidays. That may warrant an investigation.

You can ferret out FMLA leave abuse if you have reason to believe the employee isn't being honest.

If you find evidence that the employee may be using approved FMLA leave as extra personal time off or for some other illegitimate reason, feel free to discipline the worker. Courts generally won't second-guess that decision.

Recent case: Frederick worked as a mixing technician at a candy manufacturer. His job involved adding ingredients to and operating a mixing machine that makes dough.

He developed avascular necrosis, a degenerative bone disease and had hip replacement surgery. After he healed, Frederick returned to work, but requested intermittent FMLA leave. The employer approved his initial request and over the next decade, renewed the intermittent leave plan every six months with his doctor's certification.

Frederick was allowed intermittent leave for up to two episodes of leg pain per month during those 10 years. Each episode could last up to 14 days and required either bed rest or staying home, taking pain medication to reduce inflammation. He called off on a Monday and Tuesday in early 2013 and came to work on Wednesday. The next day, he again called off, using intermittent FMLA leave for leg pain as he had earlier in the week.

Frederick then went out to a bar with friends for dinner and drinks; he had three beers and shots. He was pulled over on his way home after police received a call about someone driving on the wrong side of the road. His blood alcohol level measured over 0.339—four times the legal limit in Pennsylvania. Police arrested him and kept him overnight until he was released in the early morning hours. He then called off with leg pain again.

Over a year later, someone sent an anonymous newspaper clipping to HR with an article on the arrest and subsequent legal proceedings. HR investigated and asked Frederick to explain. Absenteeism records showed that he had also called off on days when he was scheduled for court.

The company fired him for dishonesty, reasoning he had abused his intermittent FMLA leave.

He sued, alleging retaliation for taking FMLA leave. But the court tossed out the case. It said an employer has the right to check out suspected leave abuse. In this case, the employer concluded Frederick had abused his leave by taking time off for legal matters. The court said that even if the employer were wrong, its decision should not be second-guessed provided it acted reasonably. (*Capps v. Mondelez Global*, No. 14-04331, ED PA, 2015)

Final note: In this case, it was clear that the employer routinely approved intermittent leave. It did so without incident for over 10 years. It wasn't until confronted with a newspaper article showing potential leave abuse that it questioned the employee's claims.

Light-duty assignment effectively admits employee has FMLA-qualifying condition

When an employee returns from FMLA leave and his employer assigns him to light-duty work, that is basically an acknowledgment that the employee has a serious health condition that is incapacitating enough to interfere with performing an essential function of the job.

The employer can't later challenge that part of FMLA eligibility.

Recent case: Arnold had worked for Dietz & Watson for three years before injuring his shoulder on the job. The next day, he asked for light-duty work. Ultimately, his doctors told him to take a week off to heal. During that time, Arnold saw his doctor twice and received continuing treatment.

When he returned to work, Dietz & Watson put him on light-duty work.

A few weeks later, Arnold was fired for alleged performance issues.

He sued, alleging retaliation for taking FMLA leave. The company argued that his injury had not been serious enough to be covered by the FMLA.

But the court disagreed after noting that Dietz & Watson had agreed to place Arnold in a light-duty position. It said that amounted to an admission that Arnold had not been able to perform an essential function of his job while recuperating from his injury. (*Mercer v. Dietz & Watson,* No. 15-3928, ED PA, 2015)

Final note: If in doubt about whether an employee has a serious health condition, get a second assessment and a third, tie-breaking one if the assessments still don't agree. But remember, you pay for those exams.

Local anti-bias laws may help employees—or help *you* get cases dismissed

You may have heard that employees have new opportunities to sue their employers based on local laws that expand employment protections and prohibit forms of discrimination that state or federal laws don't include. Sometimes, that's true.

Fortunately, though, these new laws and their regulations may trip up employees and give you an opportunity to push for the case to be dismissed, as this recent case shows.

Recent case: Deborah had a romantic relationship with a female co-worker at her job in State College. After her employer terminated her, Deborah sued, alleging that she had been fired because of her sexual orientation.

Before going to federal court, she had filed a complaint with the State College Human Rights Commission, a local anti-discrimination agency that enforces a State College ordinance prohibiting employment discrimination based on sexual orientation.

The commission tried to engage in mediation between Deborah and her former employer, which wasn't particularly cooperative.

But before the commission was finished with the investigation, Deborah asked it to dismiss the case as she was going to instead file an EEOC complaint. She assumed that the investigation was pointless since the employer wasn't cooperating and that she could still bring her lawsuit.

The court said she was wrong and that she should have waited for the commission to dismiss the case or rule in her favor. Her federal lawsuit was dismissed. (*Stewart v. Keystone,* No. 4:14-CV-1050, MD PA, 2015)

Legal Briefs

Unemployment: Workplace threats are grounds to quit

Employees who report being threatened at work can quit and collect unemployment benefits if their employer doesn't act fast to provide a safe workplace. Such a "compelling and necessitous" reason to quit makes the employee eligible.

Recent case: Kayla was a nursing assistant assigned to private homes. When a man showed up at a company party and threatened to "break her face" for not taking good care of his grandfather, Kayla had to call the police and have him escorted away.

Her employer promised to remove the patient from her care roster, but it did not. When the grandson again accosted Kayla, she quit and filed for unemployment compensation.

She got the benefits because she had complained about the threats and her employer didn't resolve the problem. (*Life Pittsburgh v. Unemployment Compensation Board of Review,* No. 230 CD 2015, Commonwealth Court of Pennsylvania, 2015)

'Racist' not a protected class under Title VII

Here's a common sense conclusion: Firing someone you suspect may be a racist is a legitimate decision.

Recent case: Martine, who is white, claims that a white supervisor fired her because she wanted to balance the racial makeup of the workplace. Martine also wanted to show that she was allegedly fired because the supervisor perceived Martine to have "low expectations" for her black students and that this somehow amounted to reverse discrimination against her because she is white.

The court rejected that argument, stating that, "An employer may discharge an employee believed to be racist without running afoul of Title VII."

The court did, however, let go forward Martine's claim she had been fired to change the racial makeup of the workplace. (*Devine v. Pittsburgh Board of Public Education, et al.*, No. 2:13-CV-220, WD PA, 2015)

Asking employees medical questions: What's legal, what's not?

The ADA states that employers "shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature and severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." *(See box at right.)*

Only disability-related inquiries and medical examinations are subject to the ADA's restrictions. So the key issue that must be addressed first is whether the employer's question is a "disability-related inquiry."

EEOC guidance says a disability-related inquiry is one "that is likely to elicit information about a disability."

Unlawful inquiries

The EEOC says such unlawful inquiries include:

- Asking employees whether they have (or ever had) a disability or inquiring about the nature or severity of an employee's disability
- Asking employees to provide medical documentation regarding the disability
- Asking co-workers, family members, doctors or others about an employee's disability
- Asking about employees' genetic information
- Asking about employees' prior workers' comp history
- Asking employees whether they take prescription drugs
- Asking employees broad questions about their impairments that are likely to elicit disability info.

Lawful inquiries

On the flip side, questions that aren't likely to elicit info about a disability are legal under the ADA. *Examples:*

- Asking generally about employees' wellbeing (e.g., How are you?)
- Asking employees who look ill if they are feeling OK
- Asking how employees are doing following the death of a loved one
- Asking employees about nondisability-related impairments (e.g., How did you break your leg?)
- Asking whether employees can perform job functions
- Asking employees whether they have been drinking or about their current use of illegal drugs
- Asking a pregnant employee how she is feeling or when her baby is due

Note: These restrictions on inquiries apply to all employees, not just those with disabilities.

The EEOC's view

What's considered 'job-related and consistent with business necessity'?

The EEOC says a disability-related inquiry of an employee may be "job-related and consistent with business necessity" when:

"An employer "has a reasonable belief, based on objective evidence, that:

"(1) an employee's ability to perform essential job functions will be impaired by a medical condition; or

"(2) an employee will pose a direct threat due to a medical condition.

"Disability-related inquiries that follow up on a request for reasonable accommodation when the disability or need for accommodation is not known or obvious also may be job-related and consistent with business necessity. Also, periodic medical examinations and other monitoring under specific circumstances may be job-related."

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Former Highmark exec sues insurer for $32M

Kenneth Milani, former chief executive officer of Pennsylvania's largest health insurer Highmark, is suing the company in the wake of his 2012 firing for lying about his relationship with a married Highmark employee.

His lawsuit seeks back pay worth $32 million.

After officials at Highmark, based in Pittsburgh, learned Milani had been charged with simple assault and defiant trespass after showing up at the married woman's home in March 2012, they terminated him. The woman told police she and Milani had been having an affair since October 2011.

Highmark stated Milani was terminated for "cause," but released no details to the public. Milani's contract allowed the company to withhold part of Milani's compensation if he was discharged for "gross or willful misconduct."

Milani claims the company owes him $26 million in severance and pension benefits and $6 million in wages and other costs. Milani claims the altercation did not affect his business activities because it did not take place at Highmark's place of business.

Half million dollars for Satanic hand scanner

A mining company's refusal to accommodate an employee's religious belief has cost it $586,860. A federal jury in Pittsburgh decided that Consol Energy violated Title VII of the Civil Rights Act when it refused an employee's request to use an alternative method for tracking his hours.

The man, an evangelical Christian, believed a biometric scanner that Consol employees use to clock in and out was associated with the Satanic "mark of the beast" mentioned in the Bible's Book of Revelations.

He asked the company to create an alternative system that would allow it to track his hours without submitting to the machine's scan of his hand. When the company refused, he took an early retirement rather than compromise his religious beliefs.

He filed a complaint with the EEOC, which sued Consol on his behalf.

The federal jury awarded him $150,000 in compensatory damages and an additional $436,860 in back and front pay.

Health care safety

(Cont. from page 1)

(OSHA) has launched a new website to help health care providers curtail violence at work.

Visit it at **www.osha.gov/dsg/hospitals/workplace_violence.html**.

The site offers links to resources on:

- Establishing a prevention program
- Workplace analysis and hazard identification
- Hazard prevention and control
- Safety and health training
- Record-keeping and program evaluation.

The site page also includes information about legal requirements in various states and other valuable information for healthcare providers.

Note: Health care employers should review OSHA publications and other resources to determine if their workplace safety programs are sufficient to protect employees and the public.

USCIS proposes a new 'smart' I-9 form to cut errors, confusion

With the current version of the Form I-9 set to expire on March 31, the U.S. Citizenship and Immigration Services (USCIS) last month announced it is seeking public comment on a newly revised "smart" version of the I-9 form. *The goal:* reduce technical errors and avoid confusion that arises among employers and employees.

The form will ease on-screen data entry and completion of the I-9, but it is not an electronic form. After completion, employers not using an electronic I-9 system will have to print it out for signature. The form features new drop-down lists of acceptable documents. Some fields are validated to ensure data is entered correctly.

For a list of changes and link to the comment page, see the LawLogix blog at **www.tinyurl.com/i-9dhs**.

EEOC sues staffing firm for harassment and retaliation

The EEOC has filed suit against staffing company Labor Ready Mid-Atlantic for actions occurring at its office in Washington, Pa.

According to the suit, the firm sent two female workers to a client's construction site where workers harassed them. In one case, a male worker grabbed the breast of one of the women.

One worker also allegedly threw roofing tiles at the women in an attempt to injure them. Music played at the work site frequently contained racial epithets. One of the women, who is biracial, complained about the music. One construction worker allegedly said to her, "It's a shame you're black, what a waste."

The women complained to the staffing agency's branch manager and the corporate hotline.

The EEOC now contends the company took no action to address the harassment—other than moving the two to another job and then firing them. The EEOC filed suit after efforts to resolve the dispute through the commission's conciliation process failed.

Note: The temp agency's failure to address the harassment will now mean they face an expensive legal battle.

Prepare now for the data breach that will inevitably hit you

Most companies maintain large amounts of data about their employees, some of which may be considered personally identifiable information. It must be carefully guarded to ensure employee privacy and prevent identity theft.

That may be more difficult if employers adopt cloud-based information systems, in which data is stored in off-site servers.

You must understand the relevant laws and your obligations to protect employee data.

A growing problem

Data breaches have become all too common, so much so that employers should anticipate that they will eventually have to deal with one. One report identified 855 separate incidents in one recent year alone, resulting in the loss of 174 million data records. In another security study, 90% of organizations surveyed had experienced at least one data breach.

The advent of "big data" and cloud computing can mean enormous losses of data from a single breach, resulting in very large classes of potential plaintiffs. Plaintiffs' attorneys are watching data breaches very closely. When Zappos.com reported a data breach, it took less than 24 hours for the first lawsuit to be filed.

State, federal laws

Generally, data privacy laws only give special protections to data that can be used to uniquely identify a person, such as a Social Security number, name, driver's license number or bank account number. However, other information must be safeguarded, too, if it could be used in conjunction with other data to identify someone—such as a date of birth, address or gender.

Pennsylvania's Breach of Personal Information Notification Act defines personally identifiable information to include an individual's first name or first initial and last name in combination with and linked to any one or more of the following data elements:

- Social Security number
- Driver's license number (or a state identification card number issued in lieu of a driver's license)
- Financial account number, credit- or debit-card number, in combination with any required security code, access code or password that would permit access to an individual's financial account.

Employers that collect and maintain personally identifiable information face an increasing risk of class-action lawsuits.

In addition to Pennsylvania laws, a number of federal data privacy laws also apply to PII. These include the Health Insurance Portability and Accountability Act (HIPAA), the Health Information Technology for Economic and Clinical Health Act (HITECH) and the Fair and Accurate Credit Transactions Act (FACTA).

The class-action threat

Employers that collect and maintain personally identifiable information face an increasing risk of class-action lawsuits if that information is stolen or misused following a data breach.

In many states, class-action suits are on the rise because of liberal data-breach laws that allow private rights-of-action for security breaches—regardless of any likelihood of injury. A recent survey of data-breach litigation found that the average settlement award in these cases was approximately $2,500 per plaintiff. The mean attorneys' fee was $1.2 million.

Different courts, standards

Despite the daunting statistics, it may be possible to have class-action suits dismissed if no injury-in-fact results from the data breach.

Various federal courts disagree about the need for plaintiffs to demonstrate actual harm in order to have standing in federal courts.

The 3rd Circuit Court of Appeals, which covers Pennsylvania, has held that "allegations of hypothetical, future injury" are not sufficient to establish standing.

More recently, the U.S. Supreme Court, in *Clapper v. Amnesty International USA*, held that, in order to establish standing, plaintiff's injuries must be "concrete, particularized, and actual or imminent."

They may not be based solely on a "speculative chain of possibilities." While *Clapper* was not a data-breach case, the Court's reinforcement of standing requirements will likely result in a higher bar to establish federal standing for data-breach plaintiffs.

Steps you can take

It's virtually certain that every employer will eventually have to deal with privacy issues resulting from a data breach.

To mitigate your risk, beef up administrative, technical and physical security measures you take to prevent data breaches. More than one-third of breaches are caused by third parties. That makes it critical to strengthen indemnification provisions with third parties who have access to your data.

Couple that with more training for employees who handle personal information.

Taking those steps may convince a court that no actual injury-in-fact exists upon which to base a class-action lawsuit.

You should also evaluate your insurance coverage, and confirm that you have a liability policy that specifically covers the costs associated with data breaches and related incidents.

EEOC proposed rule clarifies wellness rules under GINA

Employer-sponsored wellness programs often collect medical data about employees and their families to identify risk factors and customize health and exercise programs. The Affordable Care Act (ACA) health care reform law favors wellness programs as a way to manage chronic diseases and educate employees about their health.

THE LAW Many wellness programs offer employees incentives for providing family health histories and meeting certain health-related goals. Both the ADA and the Genetic Information Nondiscrimination Act (GINA) bar employers from discriminating against employees based on their family medical histories or any predisposition to disease that genetic testing may reveal.

The ADA also bars many medical inquiries, but makes an exception for wellness programs as long as the information acquired is not used to discriminate against the employee.

WHAT'S NEW Wellness programs often collect information about an employee's current health status when conducting a health risk assessment (HRA). This information often includes information about the employee's current health condition, medications and habits such as whether the employee smokes. Often, a blood pressure or cholesterol screening is included.

If the plan covers an employee's spouse, the employer often collects the same information her or him as well.

Wellness programs frequently offer incentives in exchange for employee participation under the theory that managing employee health will lower future health costs.

GINA explicitly bars employers from offering incentives to employees to provide genetic information with the narrow exception of information used for wellness programs.

The EEOC enforces both the ADA and GINA. The commission recently announced a Notice of Proposed Rulemaking (NPRM) that would explain what incentives employers could offer employees for providing genetic information.

Under the new rule, employers could offer employees up to 30% of the cost of their family or individual health coverage in exchange for participating in a wellness program. The incentives may be in cash or in-kind, such as reductions or reimbursement for health premiums or contributions to health savings accounts. In cases where the spouse participates as well, the cap on the incentive for the spouse would be 30% of the family premium less 30% of the employee's individual premium.

Announcing the NPRM, the EEOC noted that because of GINA's prohibition on using genetic information, it was drawing a narrow exception. The EEOC believes that the less genetic information revealed, the less the likelihood of discrimination.

It noted that all genetic information revelations must be voluntary and that minor children lack the legal capacity to voluntarily agree to any release or use of their genetic information.

HOW TO COMPLY GINA regulations offer employers a safe harbor for genetic information collected in wellness programs as long as the information is necessary to meet the program's legitimate goals and is not used to discriminate against the employee.

Wellness programs must be voluntary. They must not be designed as a way to circumvent GINA, the ADA or any other employment law. Program participation may not be overly burdensome to employees in terms of the time, expense or effort needed to meet program goals. Wellness programs must be reasonably designed to promote health and prevent disease.

Authorizations and waivers

Employers must obtain authorization from employees to collect current health information or any genetic information the employee may wish to voluntarily share. The new rule only permits employers to collect current health status on employee spouses, not genetic information. Employers should have spouses sign an authorization to obtain current health status information.

GINA specifically bars employers from offering any incentive in exchange for selling and employee's genetic information. Employers may not condition participation in a wellness program upon receiving the right to sell employee health information of any kind.

Have your attorney draft all wellness programs authorizations and waivers.

How the law defines 'genetic information?'

GINA defines genetic information as "information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about the manifestation of a disease or disorder in an individual's family members (i.e. family medical history)." The law states:

Family medical history is included in the definition of genetic information because it is often used to determine whether someone has an increased risk of getting a disease, disorder, or condition in the future. Genetic information also includes an individual's request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or a family member of the individual, and the genetic information of a fetus carried by and individual or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology.

by Susan K. Lessack, Esq., Pepper Hamilton LLP, Philadelphia

How should we manage transition from workers' comp to part-time work?

Q We have an employee who was out on workers' comp and has recently returned to work part time. She is still collecting partial workers' comp. Can we adjust her vacation/personal time to reflect the limited hours she's working or is she entitled to the full amount of days?

A It depends whether your other part-time employees (if you have them) receive fewer vacation/personal days than full-time employees. If they do, you should treat this employee in the same manner.

Be aware that decreasing the amount of vacation/personal time to which the employee is entitled could spur a workers' compensation retaliation claim. The employee could allege the decrease is in retaliation for pursuing a workers' compensation claim. If the reduction in vacation/personal time is consistent with your policy or practices for other part-time employees, you should have a strong defense to a retaliation claim.

It is not advisable to reduce this employee's vacation/personal time if that is not consistent with how you treat other part-time employees.

Another issue to be mindful of is the risk of a disability discrimination claim under the ADA. If the employee's injury constitutes a disability under the ADA, reducing the employee's vacation/personal time could give rise to a disability discrimination claim if other, nondisabled part-time employees are treated differently.

How should we start a workplace investigation?

Q An employee lodged a complaint about a supervisor's misconduct. I know we'll need to perform an investigation, but I'm not sure where to start. What's the best way to proceed?

A Start by meeting with the employee and getting his or her full account of what occurred. Two people should meet with the employee, and one should take detailed notes.

After meeting with the employee, you should meet with the supervisor and then with others who may have witnessed the conduct or whom the employee or the supervisor identifies as having relevant knowledge.

Begin the investigation promptly. Ask each person to keep the investigation confidential, and keep an open mind until you have spoken with all of the witnesses.

Based on what you hear and the credibility of the witnesses, determine if the supervisor did engage in misconduct. If you conclude that he or she did, take remedial action designed to prevent the conduct from happening again. That action can take a variety of forms, including a warning, coaching or training, or termination.

What's the risk of giving a lousy job reference?

Q One of our former employees was fired because she was chronically late, frequently called out of work, and had a poor working relationship with her colleagues. If we provide negative job references to prospective employers could we be sued for libel?

A An employee can sue a former employer for defamation and libel based on a negative job reference provided to prospective employers.

Pennsylvania law does provide immunity to an employer that provides information about the job performance of a current or former employee to a prospective employer based on the presumption that the employer was acting in good faith. The former or current employee can rebut this presumption of good faith with clear and convincing evidence that the employer:

- Knew, or should have known, that the disclosed information was false
- Knew the information was "materially misleading"
- Knew the information was false and was disclosed with reckless disregard for the truth or falsity of the information
- Disclosed information and the disclosure of that information was prohibited by contract or law.

Even though Pennsylvania law protects employers that provide truthful negative references, employers should tread carefully in providing reference information.

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To submit your question to Pennsylvania Employment Law, *email it to HRPAeditor@BusinessManagementDaily.com.*