

employment law update

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EMPLOYEES' "HIRED GUN" ADVISES EMPLOYERS AT K&C SEMINAR

Kevin Martingayle makes his living suing employers. The K&C Employment Team is dedicated to protecting employers. Accordingly, some of the employer representatives who attended the K&C 28th Annual Employment Law Update on November 10, 2011, may have been surprised to see Mr. Martingayle highlighted as a luncheon speaker. But Mr. Martingayle provided attendees with a valuable perspective and guidance on how to avoid being sued by lawyers like him.

Mr. Martingayle described what he looks for when deciding whether or not to take a case against an employer. He pointed out that most former employees who come to him are angry and feel mistreated by their former employers. While Mr. Martingayle said that only a small percentage of the complaints he hears end up in lawsuits, he gave examples of cases he has filed against employers where facts and circumstances caused his clients to be particularly sympathetic in front of a jury.

To avoid ending up being sued, Mr. Martingayle advised employers to follow the "Golden Rule" and use common sense in the process. For example, he cautioned against insulting or embarrassing employees who are disciplined or terminated. According to Mr. Martingayle, doing so simply drives employees into the welcoming arms of an attorney. To avoid such a result, he suggested treating employees humanely when they are terminated and consider providing employees who are leaving an opportunity to resign in almost every case.

Mr. Martingayle also advised the employers in attendance to consistently apply their own written policies. He stated that written policies and handbooks can be helpful to employers, but only if they are consistently followed. Mr. Martingayle also told the employer representatives present that if they use evaluations, the evaluators need to be trained to be accurate and candid. From Mr. Martingayle's perspective, documentation that isn't accurate can be more damaging than no documentation at all.

After his presentation, Mr. Martingayle answered a number of questions from the audience and, immediately thereafter, spent some time in the K&C Answer Booth addressing questions that attendees may have been a little reluctant to ask in an open setting. All in all, the attendees appreciated the opportunity to hear the perspective of a lawyer who sues employers and how he chooses his targets.

PRACTICAL POINTER

The K&C Employment Team, which only represents employers, firmly believes that providing different perspectives like Kevin Martingayle's helps employers avoid workplace liability. That is why a number of current and former representatives of government agencies that enforce employee rights will be on hand at the March 22 showing of the 28th Annual Employment Law Update at the Greater Richmond Convention Center along with another top lawyer, Harris Butler, who, like Mr. Martingayle, specializes in suing employers.

NO-FAULT ABSENCE POLICIES MAY VIOLATE THE ADA

A No-Fault Absence Policy terminates an employee who accumulates a designated number of absences, regardless of the reason. This sounds like a non-discriminatory tool which, when applied consistently, could safely help manage employee attendance. The Equal Employment Opportunity Commission (EEOC), however, has taken the position that such policies can violate the Americans with Disabilities Act (ADA). The EEOC has concluded that the reasonable accommodation requirement under the ADA mandates that employers treat disabled individuals requiring accommodations differently than non-disabled employees in the application of a No-Fault Absence Policy.

Three large employers that applied such policies to disabled employees were recently sued by the EEOC for ADA violations. Sears, Roebuck & Co. settled a suit in an Illinois federal court for \$6.2 million, Supervalu, Inc., paid \$3.2 million in a suit filed in the same court, and Verizon recently settled a nationwide class action in a Maryland federal court for \$20 million.

According to the EEOC, rigid application of No-Fault Absence Policies can prevent employers from engaging in the interactive process with disabled employees required by the ADA. Employers need to be flexible and work with disabled employees to determine the availability of a reasonable accommodation that would allow a disabled employee to perform the essential functions of his or her job.

Given the potential ADA risks, employers should modify their attendance policies as necessary to maintain flexibility in enforcement. Employers are also well advised to be careful to engage in accommodation discussions with disabled individuals to determine whether they may be able to perform the essential functions of their jobs with a variation from a No-Fault Absence Policy.

NO WAY TO SAY GOOD-BYE

According to the recent decision in *Overly v. KeyBank Nat'l Ass'n*, when a female financial advisor for KeyBank National Association in Indiana submitted her resignation letter, a male supervisor allegedly applauded, grabbed her arm to push her out a door, and yelled "Good riddance, b _ _ _ h!" Not surprisingly, this led to a lawsuit that included claims of constructive discharge, sex discrimination and workplace harassment. Because other evidence was lacking, KeyBank ultimately prevailed in this litigation, but it was an expensive headache that perhaps could have been avoided with documented humane treatment of the departing financial advisor.

Inappropriate communications alleged in this case are exactly what lawyers who sue employers look for when deciding to take a case. They know that this sort of behavior causes juries to sympathize with terminated employees. So, if employers allow supervisors to engage in such inappropriate behavior, it may come back to haunt them in court. Common sense and supervisory training on appropriate separation procedures could well have kept KeyBank from becoming embroiled in costly and unnecessary litigation.

FYI

At the November 10th showing of the 28th Annual Employment Law Update, EEOC Investigator Michael Johnson told the audience that many times, just treating a departing employee with respect and patiently listening to any concerns will keep the employee from lodging a claim with a government agency or court. What the supervisor allegedly did in this case was a far cry from what Investigator Johnson suggested to attendees. At the March 22nd Employment Law Update, the Acting Director for the Richmond EEOC Office, Thomas Colclough, will be on hand to provide similar candid observations.

EEOC CHARGES HIT RECORD HIGH

Economic conditions and statutory changes have spurred several noteworthy trends reflected in Charges of Discrimination filed with the Equal Employment Opportunity Commission (EEOC). Significantly, the EEOC received a record number of charges filed in fiscal year 2011 (which ended on September 30, 2011). During fiscal year 2011, the EEOC received 99,947 discrimination charges against private sector employers and recovered a record \$364 million through administrative enforcement efforts.

With the passage of the ADA Amendments Act, which took effect January 1, 2009, and the publication of the EEOC's implementing regulations, employees have an easier burden to establish the existence of a covered disability. Against this backdrop, it is not surprising that charges filed with the EEOC reflect an increase in ADA charges based on psychiatric disabilities, including depression, anxiety disorder, and manic depression.

The continued upward trend of retaliation claims has also been a significant development. In fact, the number of retaliation charges filed annually has nearly doubled since 1997. Coupled with the ADA changes, a recent study conducted by the Employment and Disability Institute confirmed that the number of ADA charges alleging unlawful retaliation has also increased, something the EEOC (and the K&C Employment Team) will be closely monitoring.

28TH ANNUAL EMPLOYMENT LAW UPDATE PUTTING THE PIECES TOGETHER

Knowing that companies are dealing with many pieces of the employment law puzzle, K&C is pleased to announce a program designed to help employers solve the employment law puzzle. The second showing of the 28th Annual Employment Law Update "Putting the Pieces Together" will be held at the Greater Richmond Convention Center on Thursday, March 22nd.

The K&C Employment Law Team will present a variety of educational workshops and will feature several representatives from a number of government agencies, as well as an intriguing lunchtime presentation by Harris Butler, a lawyer who specializes in suing employers. Attendees will also have a chance to view an educational and entertaining mock filing of an EEOC charge by a "problem" employee against his former employer, as well as attend a number of timely topics including: What Employers Should Know About Social Media; Avoiding Discrimination Claims; Handling Unemployment Claims; Current Wage-Hour Issues; Safe Interviewing/Hiring Practices; and more.

The 28th Annual Employment Law Update will provide employers with valuable tips to piece together their employment law puzzles and reduce potential liability. For more information, visit our website at www.kaufCAN.com or contact Kerry Martinolich at (804) 771.5722 or (757) 624.3232.

This program has been approved for 6 credit hours toward PHR and SPHR recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI homepage at www.hrci.org. The use of this seal is not an endorsement by HR Certification Institute of the quality of the program. It means that this program has met HR Certification Institute's criteria to be pre-approved for recertification credit.



DEADLINE FOR POSTING NLRB NOTICE EXTENDED

Late this past Summer, the National Labor Relations Board (NLRB) issued a rule requiring employers to post notices informing their employees of their rights to unionize under the National Labor Relations Act (NLRA). On December 23, 2011, the NLRB issued a rule extending the deadline for posting such notices from January 31, 2012, to April 30, 2012. This poster, which is required to be a little larger than most other postings, will be provided to all attendees at the March 22 showing of the 28th Annual Employment Law Update at the Greater Richmond Convention Center. Anyone else interested in receiving a copy of this poster may contact Kerry Martinolich at (757) 624.3158 to receive a free copy.

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Visit our website at www.kaufCAN.com
for timely updates or to register for our seminars.

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