EMPLOYMENT LAWSCENE ALERT: DOCUMENTATION MATTERS!

If you call your employment lawyer and tell her that you want to terminate an employee for performance issues, one of the first questions will be “What documentation do you have?” Recently, the Seventh Circuit confirmed just how crucial documentation can be when defending an employment lawsuit.

In *Rozumalski v. W.F. Baird and Associates*, decided August 22, 2019, the employee had been sexually harassed by her supervisor, who was investigated by the employer and terminated once the investigation confirmed the allegations. However, after her supervisor’s termination, the employee was eventually terminated from her job and filed a federal complaint alleging that she had been retaliated against for her original sexual harassment claim and for other complaints stating that her previous supervisor who had been terminated had negatively influenced her new boss in retaliation. The company testified that the employee was terminated for legitimate, non-discriminatory reasons, namely, performance issues. The company stated that the employee struggled with her business development responsibilities, submitted a report that was grossly below company standards and required significant reworking, and was consistently late to work. These performance issues were documented in her written performance evaluation and listed as “needs improvement.” The employee then continued to receive negative performance evaluations, which provided specific examples to support the company’s concerns about her work, and was eventually placed on an Employee Improvement Plan. When she violated a term of her Employee Improvement Plan, she was terminated.

The Seventh Circuit acknowledged that a prior complaint of harassment could impact a victim long after the incident. However, it found that the employee’s new supervisor was not aware of her original harassment complaints until at least five months after the first negative performance review and, therefore, could not have been motivated by a retaliatory animus. Additionally, the individual who made the ultimate decision to terminate the employee’s employment did not know about the original complaints and was motivated solely by the employee’s violation of the Employee Improvement Plan. Finally, the Seventh Circuit observed that the employee’s complaints that her new supervisor was negatively impacted by her previous supervisor could not have been a basis for retaliation because her documented performance issues predated her complaints.

This case stresses the importance of employers properly documenting employee performance issues and creating honest performance evaluations that accurately describe and document employee performance issues. Performance evaluations should be focused on critical performance issues measured against the employer’s legitimate business

expectations. When an employee fails to meet a legitimate business expectation, the performance evaluation should reflect that deficiency. Too often, employers want to terminate underperforming employees without supporting documentation. For example, when an employee's most recent performance evaluations are reviewed prior to termination and there is absolutely no indication or evidence of poor or underachieving performance, the company's business records do not match the reality of the employee's performance, and the termination decision becomes more problematic.

The Seventh Circuit's decision could have been much different for this employer if the employee's performance issues had not been documented or had not been documented accurately. As demonstrated, good and accurate documentation is vitally important—it may be the difference for your company in winning or losing a lawsuit.

EMPLOYMENT LAWSCENE ALERT: THE EEOC HAS STARTED COLLECTING REQUIRED PAY DATA: DO YOU NEED TO REPORT AND ARE YOU READY?

On July 15, 2019, after a protracted legal battle, the EEOC began collecting employers' EEO-1 2017 and 2018 payroll data, which may be referred to as Component 2 data. The reporting requirement was originally announced by the Obama administration in 2016, but in 2017, the Trump administration stayed the collection of Component 2 data, citing the burden it imposed on employers. However, in March 2019, the U.S. District Court for the District of Columbia issued an order reinstating the requirement.

Therefore, between now and the deadline of September 30, 2019, all employers with 100 or more employees (both full-time and part-time) must submit the requisite information from calendar years 2017 and 2018 for all employees employed during the relevant "workforce snapshot period," which is an employer-selected payroll period between October 1 and December 31 of the reporting year. Employers, including federal contractors, that have less than 100 employees are not subject to these reporting requirements. Subject employers must provide the EEOC with the following data for employees in the workforce snapshot period: the employees' race/ethnicity and sex; the employee's EEO-1 job classification; the actual hours worked by non-exempt employees; actual hours worked by or proxy hours worked (e.g., 40 hours per week for full-time employees) for exempt employees; and Form W-2 payroll information. Such information does not have to be submitted for each individual employee but can be submitted by identifying, based on race/ethnicity and sex, the number

of employees in each EEO-1 job category that fall into each of 12 EEO-1 compensation bands and the aggregate number of hours worked by all employees in each EEO-1 compensation band. The EEOC's stated purpose for collecting such information is to identify and remediate unlawful pay disparities in pay that are based on race/ethnicity and/or sex. Therefore, providing complete and accurate information in all categories is essential.

Employers subject to this requirement should have received correspondence via the U.S. mail and an email from NORC, the research group that is conducting the survey on behalf of the EEOC, notifying them of this obligation. Reminders are also scheduled to be sent in August and September. The EEOC has provided resources for filers at https://eeoccomp2.norc.org.

EMPLOYMENT LAWSCENE ALERT: EMPLOYERS SHOULD CONFIRM THAT THEIR I-9S ARE IN ORDER

Recently, President Trump announced that a new round of workplace immigration raids would be postponed until after July 4. Regardless of when or if these raids happen, all employers should take this time to ensure that they are in compliance with federal law by having proper work authorizations for all of their employees. Workplace authorization is governed by the Immigration and Reform Control Act, which allows U.S. companies to hire and employ only U.S. citizens, non-citizen nationals, lawful permanent residents, and aliens authorized to work in the U.S. Employers must have a Form I-9 on file for every current employee hired on or after November 6, 1986. I-9 forms for former employees must be kept until the later of three years from the employee's hire date or one year after their final date of employment. Such forms can be retained on paper or electronically.

To determine compliance with federal immigration laws for lawful work authorization, employers should conduct an audit of their I-9s to confirm, among other things, that each individual who should have an I-9 on file in fact has one on file; that any and all employment authorization documents are current; that all sections of the I-9 form have been fully filled out; and that any changes, such as a name change, have been properly documented. Corrections to I-9 forms must be handled carefully and in compliance with federal law. We have attorneys experienced in assisting employers with I-9 audits. Failure to properly follow the law regarding the maintenance of I-9 forms, including making corrections, can subject an employer to civil and criminal penalties.

EMPLOYMENT LAWSCENE ALERT: IT'S TOO COLD TO WORK – HOW EMPLOYERS SHOULD HANDLE WAGE DEDUCTIONS IN INCLEMENT WEATHER

Employers in Wisconsin may be closed this week due to the extremely cold temperatures that are predicted on Wednesday and Thursday. If an employer makes that decision, they may be wondering whether or not they need to pay their employees for the days they choose to be closed. For non-exempt employees, the answer is simple: employees must be paid only for time worked. Therefore, if the employer closes and the employee does not perform any work, the employee does not need to be paid. However, the answer is a bit more complicated for exempt employees.

Under the Fair Labor Standards Act ("FLSA"), an employee is considered exempt if they meet certain duties tests and receive compensation on a "salary basis." The FLSA regulations provide that, for an exempt employee to be paid on a "salary basis," the employee must receive his or her full salary for any week in which the employee performs any work without regard to the number of days or hours worked. An employee will not be considered to be paid on a "salary basis" for any week if deductions are made from an employee's salary for any absence occasioned by the employer or by the operating requirements of the business. However, a deduction may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability.

So, can an employer deduct the day's wage from an exempt employee's salary when the employer closes its business due to inclement weather (e.g., extreme cold)? The short answer is no. It is the U.S. Department of Labor's ("DOL") position that an employer must pay an exempt employee his or her full salary for any week in which work was performed if the employer closes its operations due to a weather-related emergency or other emergency, such as a power outage. The DOL's position is based, in part, on the FLSA's regulation that provides that deductions may not be made for time when work is not available. When it is the employer's decision to close its business because of an emergency, including severe weather, the DOL presumes that employees remain ready, willing, and able to work. Under such circumstances, deductions may not be made from an exempt employee's salary when work is not available. If deductions are made under such circumstances, the employer risks losing the exemption, thus subjecting it to potential overtime liability. If the employer's operation are closed for a full workweek, no salary must be paid.

Employers are permitted to require that employees utilize their available paid time off during

an employer-mandated office closure, whether for a full day or a partial day. However, if the employer does not provide paid time off or if the employee does not have available paid time off, the employer may not deduct from the employee's salary for the closure. The employer may not require that the employee have a negative leave balance or make an already negative leave balance more negative as the result of requiring the employee to take paid time off for an office closure.

On the other hand, when an emergency causes an employee to choose not to report to work for the day, even though the employer remains open for business, the DOL treats such an absence as an absence for personal reasons. Consequently, an employer that remains open for business during inclement weather may lawfully deduct one full day's wages from an exempt employee's salary if that person does not report for work for the day due to adverse weather conditions or otherwise require the employee to utilize paid time off. Such a deduction will not violate the "salary basis" rule or otherwise affect the employee's exempt status. If, however, the employee works only a partial day because of weather-related issues, the employer may not make deductions from the employee's salary for the lost time because an exempt employee must receive a full day's pay for the partial day worked in order for the employer to meet the "salary basis" rule.

EMPLOYMENT LAWSCENE ALERT: COMPANY HOLIDAY PARTIES AND TIPS FOR AVOIDING LIABILITY

The holidays are upon us, and that means holiday parties. While holiday parties are a good time to reflect on the year and gather employees to boost morale and camaraderie, they also have potential employment law pitfalls that employers should plan to avoid. If throwing a company-sponsored holiday party, employers should keep the following in mind:

1. Prevent Sexual Harassment. Although the #MeToo movement has not changed the legal requirements related to sexual harassment, it has certainly brought such issues to the top of employer's minds, and it should stay there during the holiday season and any holiday parties. Ensure that your employees are aware of your anti-harassment policy and that they understand that harassment involving any employee at any time, including at a holiday party, will not be tolerated. Remind your employees that, while they are encouraged to have a good time at the holiday party, it is a company-sponsored event where all of the policies and rules of the company apply. If you become aware of inappropriate conduct that occurs at the holiday party, you should deal with it appropriately. Additionally, if you receive complaints about activities related to the holiday party, you must document the incident and do a proper investigation to

deal with those issues.

2. Reduce the Risk of Alcohol-Related Incidents. Employers may be subject to liability for injuries caused by employees who consume alcohol at employer-sponsored events. To avoid potential liability, employers should promote responsible drinking and monitor alcohol consumption appropriately. Employers may want to consider hosting their holiday parties at a restaurant or other off-site location where alcohol is served by professional bartenders who know how to recognize and respond to guests who are visibly intoxicated.
3. Minimize the Risk of Workers' Compensation Liability. Workers' compensation benefits may be available to employees who suffer a work-related injury or illness. To avoid this liability at a company-sponsored holiday party, the employer should make it clear that there is no business purpose to the event, that attendance is completely voluntary, and that they are not being compensated for their attendance at the event. Illnesses caused by contaminants found in food or beverages may create legal exposure if the providers are not properly licensed, so companies should use licensed third-parties who have their own insurance coverage to provide food and beverages.
4. Prevent Wage and Hour Claims. Non-exempt employees must be paid for all work-related events that they are required to attend. Therefore, to ensure that the time spent at a holiday party is not considered compensable under state or federal wage and hour law, employers should make it clear that attendance is completely voluntary, hold the party outside of normal working hours, and ensure that no work is performed during the party and that employees are not under the impression that they are performing work.

EMPLOYMENT LAWSCENE ALERT: VOTING LEAVE IN WISCONSIN – WHAT YOU NEED TO KNOW

With the Wisconsin general election coming up next week on November 6, 2018, now is the time for employers to brush up on their obligations surrounding voting.

All Wisconsin employers are required to provide employees who are eligible to vote up to three consecutive hours of unpaid leave to vote while the polls are open (from 7 AM until 8 PM), and employees must request the time off prior to the election. Voting leave cannot be denied on the basis that employees would have time outside of their scheduled work hours to vote while the polls are open, but employers can specify which three hours an employee is permitted to utilize. Other than the time being unpaid, employers may not penalize employees for using voting leave. However, employers should remember that, under the FLSA, they may not deduct from an exempt employee's salary for partial day absences.

Additionally, all Wisconsin employers are also required to grant an employee who is

appointed to serve as an election official 24 hours of unpaid leave for the election day in which the employee serves in his or her official capacity. Employees must provide their employers with at least seven days' notice of their need for this leave. Other than the time being unpaid, employers may not penalize employees for using election official leave.

Finally, Wisconsin employers are not permitted to make threats that are intended to influence the political opinions or actions of their employees. Specifically, employers cannot distribute printed materials to employees that threaten business shut down, in whole or in part, or reduction in salaries or wages of employees if a certain party or candidate is elected or if any referendum is adopted or rejected.

EMPLOYMENT LAWSCENE ALERT: EMPLOYERS MUST REVIEW THEIR BACKGROUND CHECK PROCESSES TO ENSURE COMPLIANCE WITH NEW RULES

The Fair Credit Reporting Act ("FCRA") requires that employers who request "consumer reports," which include background checks, criminal histories, driving records, and credit reports, from a third-party service about employees and applicants follow certain rules. These rules contain specific requirements for notice, disclosure, and consent both in conjunction with obtaining a report and taking adverse employment action because of information in the report.

One requirement is that an employer must make certain disclosures **before** the employer takes an adverse action based on information discovered in the consumer report. This includes providing the employee or applicant with a written summary of consumer rights under the FCRA. Recently, the Bureau of Consumer Financial Protection updated its model disclosure to reflect recent legislative changes to the FCRA, such as the consumer's right to place a security freeze or fraud alert on their credit report. The new model form can be found here.

Employers must ensure that their authorizations and disclosures meet all FCRA requirements and that they are providing the correct notifications, including the updated summary of rights.

#METOO: SEXUAL HARASSMENT CLAIMS AND MISCONDUCT

Wisconsin attorneys Sara Geenen and Erica Reib discuss the duties and risks for both employers and employees seeking to protect themselves.

EMPLOYMENT LAWSCENE ALERT: RULING ON MARQUETTE PROFESSOR CONTAINS LESSONS FOR PRIVATE EMPLOYERS

On Friday, July 6, 2018, the Wisconsin Supreme Court determined that Marquette University had breached its contract with tenured professor John McAdams when it suspended him for discretionary cause after he authored a controversial blog post. McAdams claimed that the blog post fell within his rights to protected speech and academic freedom, whereas the University claimed that it was an unprofessional attack that was outside of those protections. Because the Court determined that the blog post was protected by the doctrine of academic freedom, which was guaranteed under the professor's contract and could not be used as a basis for discretionary cause, the Court held that the University had breached the contract because the blog post was a "contractually-disqualified basis for discipline."

The University argued that the Court had to defer to its internal procedures for suspending and dismissing faculty members and could not second-guess its choices unless the University had abused its discretion, infringed on the faculty member's constitutional rights, acted in bad faith, or engaged in fraud. However, the Court found that "the University's internal dispute resolution process is not a substitute for Dr. McAdams' right to sue in our courts" and that it did not have to defer to the disciplinary procedure because 1) it was fundamentally flawed due to the unacceptable bias on the Faculty Hearing Committee (the "Committee"); 2) the Committee had no authority to bind parties to its decision, because the parties had not agreed that the internal dispute process would replace or limit the adjudication of a contract dispute in court, as can be done with an arbitration agreement; and 3) there was no required procedural process to defer to because, although the Committee makes a recommendation, it is the University president that ultimately makes the disciplinary decision, and there were no rules, procedures, or standards that describe how the president was to make his ultimate

decision.

This case should serve as a reminder to all private employers that, while courts generally defer to the decisions of an employer, they will not do so if those decisions or the processes underlying the decisions violate a contractual or statutory right of the employee. For example, if your disciplinary process is tainted by improper and illegal bias on the basis of protected class, the court will not disregard that simply because a disciplinary procedure was followed. Employers should make sure not only that they are following their internal disciplinary procedures but that procedures are fair and impartial and that the decisions stemming from those procedures do not violate the contractual or statutory rights of employees.

EMPLOYMENT LAWSCENE ALERT: SUPREME COURT DECIDES CLASS-ACTION WAIVERS ARE ENFORCEABLE FOR EMPLOYEES

For the last several years, employers have been operating under a cloud of confusion regarding whether provisions in employment agreements that require employees to engage in individual arbitration proceedings, as opposed to class proceedings, are enforceable. Finally, the Supreme Court, in a 5-4 decision, has given us an answer, and the answer is yes, such provisions are enforceable!

In 2012, the National Labor Relations Board (NLRB) took the stance that class waivers violated workers' rights to engage in concerted activity under Section 7 of the National Labor Relations Act (NLRA). Although the Fifth Circuit rejected that stance in *D.R. Horton and Murphy Oil* and held that such provisions were valid and enforceable, the NLRB continued to litigate the issue, claiming that such provisions were not legal. In the intervening years, the Second and Eighth Circuits have agreed with the Fifth Circuit, while the Sixth, Seventh, and Ninth Circuits have agreed with the NLRB.

On Monday, in *Epic Systems Corp. v. Lewis*, the Supreme Court finally settled the dispute. In examining the issue, the Court considered two issues: (1) whether the "savings clause" of the Federal Arbitration Act (FAA) required enforcement of the arbitration agreements as written if the agreement violated another federal law, and (2) whether the arbitration agreements that waived collective rights violated the NLRA.

In looking at the first issue, the majority found that the FAA required courts to enforce arbitration agreements and, therefore, favored arbitration agreements. Although it

acknowledged the general FAA "savings clause," such clause only applies when certain *contract* defenses apply. In examining the case at hand, the majority found that no such contract defenses were applicable and that it could not override the established policy of enforcing arbitration agreements.

The Court also considered whether the NLRA's protection of employees' collective rights displaced the FAA's favored enforcement of arbitration agreement. The majority held that, although the NLRA guarantees employees the right to *bargain* collectively, it neither guarantees the right to *collective action* nor manifests intent to displace the FAA. Because the NLRA was enacted after the FAA, if Congress had intended the NLRA to override the FAA's protections for arbitration agreements, such intent would have needed to be clear. Because it was not clear, the Court found that there was no such intent and that the NLRA's protection of collective rights could not override the FAA's policy of enforcing arbitration agreements as written.

Based on the Supreme Court's ruling in *Epic*, employers are now free to include arbitration agreements that include a waiver of class and collective actions in their employment contracts. Although Congress could amend the law to clearly state that the NLRA, or some other federal law, does not allow for waiver of class or collective actions by employees, such legislative action is unlikely at this point in time. Employers may find arbitration agreements useful as arbitration may be less expensive, faster, and more flexible than traditional litigation.