FOLEY & FOLEY P C
ATTORNEYS AT LAW

CCHRA
Cape Cod Human Resources Association

General Counsel Employment Law Report

Prepared By:
Michael E. Foley, Esq.

August 13, 2019

Harassment Training By Text? SMH*

There is a new start up, targeting other start ups, offering employee harassment training via text message. The company promises compliance with federal and state (CA in this case) laws in 30 days for 5 minutes a day. Wow! Is this the future?

If it is, the Equal Employment Opportunity Commission is not there yet. Its task force on harassment in the workplace addressed the need for a change in training. The change the EEOC envisioned is not likely a quick text course. Specifically, the EEOC has stated:

…(O)ne size does not fit all: Training is most effective when tailored to the specific workforce and workplace and to different cohorts of employees.

On the one hand, text training participation rates for such a small time commitment would most likely rise. On the other hand, that generic, general training time–as small as it is–would probably be wasted. The EEOC has made it clear that effective training must be tailored to the workforce and *within* the workforce. The goal is to prevent harassment, not to check off the done training box.

Before you commit to any training, make sure it will fully educate your employees, especially first line supervisors. Well trained managers are a valuable resource in the fight against workplace harassment. We can help. Contact us for an up to date training program that best utilizes your time and resources. IMHO, our training is time well spent.

*Shaking My Head

Oops they did it again: Google and Age Discrimination

Google recently entered into an $11 million dollar settlement with a few hundred unsuccessful job applicants, all over 40. Google denies age was a factor–maybe they just weren't Googley enough? The tech industry has a long history with ageism. Culture is an often used term to determine fit. The average age at Facebook is 29 and Amazon is 30. A common refrain in this industry is that many applicants do not possess the required "technical prowess." Oh and yeah, they happen to be over 40.

Federal law prohibiting age discrimination, the Age Discrimination in Employment Act (ADEA), has been on the books since 1967. The federal law requires 20 or more employees to bring a claim but many states have a lower threshold. According to the AARP, workers over 55 years old represent the fastest-growing labor group in the U.S. as a result of increased lifespans and financial constraints. But older job seekers are up to three times less likely to be selected for interviews than younger applicants with less relevant experience. At the same time of record lows in unemployment, 3 million job applicants over 55 cannot find work.

The upshot? As always, applicants must be reviewed on their merits, regardless of age. Age bias in the workplace can be costly. Inter-generational teams can be productive and creative. Consider training on this issue if you find your workplace lacking in employees over 40 or even (gulp) 50.

Hairstyle and Workplace Discrimination

On July 3, 2019, California passed the Crown Act, a first in the nation ban on discrimination based on Natural Hair. Specifically, it is unlawful to discriminate based on the kinky or curly hair texture of an applicant or employee. The Act, which is an acronym for "Create a Respectful and Open Workplace for Natural Hair" falls under California's Fair Employment and Housing Act. The Crown Act seeks to redress race neutral grooming polices that impact persons of color. Common hairstyles for people with kinky or curly hair like braids, locs, or twists have often been deemed unprofessional and unacceptable. The law seeks to eradicate that notion. And yesterday, New York's Governor signed its version of the law, which amends the Human Rights Law and Dignity for All Students Act to make clear that discrimination based on race includes hairstyles or traits associated with race. The NY law is effective immediately and CA on 1/1/20.

The Crown Act states: "In a society in which hair has historically been one of many determining factors of a person's race, and whether they were a second-class citizen, hair today remains a proxy for race… . Therefore, hair discrimination targeting hairstyles associated with race is racial discrimination."

As California and New York go, so goes the nation? Well, maybe not the nation (I'm looking at you middle America), but several states will most likely adopt this trend. We will keep you posted. In the meantime, reviewing grooming policies soon might be a good idea.

Your 5 Star Rating Could Cause Trouble

Recently, my vet's office sent a promotion asking me to rate them on Yelp. If I gave a 5 star review, I could get $5.00 off my next visit. Other businesses urge rankings and reviews in exchange for discounts or merchandise. The Kardashians of the world make real money this way. Why not? Everybody wins!

Problem is, this practice runs afoul of the Federal Trade Commission (FTC) and for now, the onus is on your business. And the FTC is starting to crack down on businesses that do not disclose the "material connection" between the poster or endorser and the brand or business. Fines and settlements are piling up but it does not have to be that way. With social media outpacing all other types of advertising, it is crucial for businesses to know how to stay within the FTC guidelines and adequately disclose the use of promotions:

- A clear and conspicuous disclosure between the business and the endorser—no matter the nature or size—must be easy to see. No clicking or tiny print to hide the disclosure. From sweepstakes entry to a free dress, consumers must know the relationship to the poster.
- The endorser must have actual knowledge of the product. "Detox tea" used social media influencers who had not tried their tea and was a recent target.
- Using the word "sponsored" or "promoted" or #ad where it is not lost in lots of other #hashtags is a good practice
- Where images are used, the disclosure should be superimposed on the image and, in the case of videos, up long enough to actually be read.

So far, the complaints by the FTC have been against the brand or businesses. Lord & Taylor agreed, among other conditions, to a social media compliance program to monitor their activity after failing to disclose a free dress promotion.

While you may not have the Kardashians or major influencers endorsing your business, the FTC wants you to disclose any ties to any promotions or discounts–even if it is posted without your consent. Which means someone needs to keep an eye on your posts and feeds. It is a fast social media world and the Wild West is getting a few sheriffs.

Questions? We can help.

Family Responsibilities Discrimination Claims Are Off the Charts

Many articles come across my screen each day, and this one really caught my eye: Family Responsibilities Discrimination (FRD) cases rose 269% between 2006 and 2015. Higher than any other type of employment case. Even crazier, employees win a whopping 67% of FRD cases that go to trial and 52% of all cases. What are we talking about here and how can your workplace avoid this?

Family Responsibilities Discrimination (FRD) encompasses any adverse action taken against an employee seeking accommodation based on caregiving needs or bias shown against the employee. While FRD cases have been filed in every state, workers are more likely to prevail in the Northeast and the West. Here are the major trends:

1. Eldercare cases showed the largest increase at 650% and are expected to grow as the population ages;
2. Pregnancy accommodation cases are the most common in spite of (or because of) an increase in state laws in this area;
3. Lactation claims increased 800%, although the actual numbers were not large; and
4. Men as caregivers increased, which meant an increase in men as claimants.

The financial burden of these cases is staggering and the impact on morale, recruitment and reputation is just as costly. Steps can be taken to reduce claims and create a harmonious workplace:

1. Train supervisors–interaction with supervisors is cited as the key source of FRD claims
2. Adopt or update policies that clearly instruct on the law and how your workplace complies
3. Institute or use an effective complaint procedure to resolve issues in house quickly and efficiently
4. HR must be active in oversight of decisions and instruction to managers

The strain of caregiving affects most people at some point of their working life. The laws and cases in this area are changing all the time. Best practices and clear guidance can keep your workplace productive and discrimination free: We can help.

Immigration Inquiry: Can I Hire Someone Who Says They Have an H-4 EAD?

The short answer: yes, for now. H-4 spouses of certain H-1B employees are eligible to receive employment authorization and work for any employer in the US. Earlier this year, USCIS began the process to officially eliminate the H-4 EAD option. With the opposition H-4 EADs received from the moment the rule was finalized in May 2015, and more broadly the intense scrutiny H-1B workers have received under this administration, the elimination was expected to be swift. But almost three years into this administration, the rule is nowhere near finalized and there doesn't seem to be any movement towards a final proposal. Experts like me see the delays as an issue of the substance of the rule rather than the normal bureaucratic incompetence. Even if USCIS eliminates the H-4 EAD, it is unlikely that the current ones will be revoked so there's no need for panic quite yet.

Employers should continue to complete an I-9 for an employee who presents an EAD card, so long as the card seems valid on its face. You may not know whether it is based on an H-4 or another status, and our office can help you figure that out. We can strategize on other employment authorization options now in the event that the H-4 is eliminated in the future.

Attorney Cassie Ramos leads our work authorization and immigration practice.

Call us. We're here to help.

Can You Avoid an I-9 Audit? No, But You Can Be Prepared

Worksite enforcement investigations are nothing new, but ICE (Immigration and Customs Enforcement) has stepped up their efforts in the last couple of years, doubling the number of investigations in fiscal year 2018. In the last month, ICE sent over 3,000 audits, called Notices of Inspection (NOIs), to businesses across the country, with more expected to come as the agency has received additional funds to hire more investigators. Although ICE must equally enforce its policies, it has targeted specific industries in the recent surge of I-9 audits, including construction, hospitality, and technology companies. Even if your company is outside of these industries, no one is immune to an I-9 audit.

If your company receives an I-9 audit, you have three days to pull together all your I-9s for both active and terminated employees within the retention time frame, and ensure that they have been properly completed. Three days is not much time, and ICE rarely grants extensions. Employers should create a Form I-9 compliance policy that ensures administrative consistency. Policies should note civil and criminal penalties, which could range from $220 to $2,292 *per violation*, including potential personal liability, if violations are found. Once an employer creates a policy, all employees should be informed and all employees responsible for Form I-9 completion (such as HR professionals or people managers that complete Section 2) should receive adequate training. ICE is less likely to find that even paperwork errors are merely procedural or technical, if the errors implicate fundamental Form I-9 requirements. For example, retailer Abercrombie & Fitch was fined more than $1 million in 2010 following an ICE audit that evaluated the company's Form I-9 compliance and found it deficient, despite the company's diligent efforts. These numbers will continue to rise as ICE continues with its enforcement actions.

The best way to protect against penalties or violations is to conduct yearly internal audits to correct existing or ongoing errors in Form I-9 policies and procedures. This also enables employers to show good faith efforts for Form I-9 compliance if questions arise and can be used to mitigate possible penalties. The best defense is a good offense.

Don't wait until you receive an audit from ICE to reach out. We can help with internal audits and to create consistent corporate policies and procedures to proactively ensure immigration compliance.

The Life-Changing Magic of Free Mandatory Workplace Posters

With people on vacation at your workplace, it might be a good time to tidy up. We are not talking a Marie Kondo style purge here. No, why not update your mandatory posters? New laws have come into play in many states, bringing new posting requirements.

As always, state and federal posters are free. You can buy them laminated and colorful if you want that look. Or you can click and print below and comply easily.

Here are links to the federal and Massachusetts mandatory posters. Please reach out if you have questions on posting obligations or are looking for a specific poster.

- Federal: United States Department of Labor – Wage and Hour Division
- Massachusetts: Labor and Workforce Development – Massachusetts Workplace Poster Requirements

Replacing out of date workplace posters with new ones may not spark joy. But you can check off a to do task from your lengthy compliance list. That's something.

Questions? We can help.

General Counsel's Office Hours

Special Member Benefit

All CCHRA members in good standing will have the special benefit of being able to call Attorney Michael E. Foley, in his role as the CCHRA General Counsel, to obtain his guidance on employment law compliance issues and corresponding HR-related risk management during his CCHRA GC Office Hours – **at no cost**.

Click here for the description of the role of the CCHRA General Counsel. As General Counsel, Mike will be available within his virtual and gratis office hours for all CCHRA members from 2 pm to 3 pm on the first and third Tuesday of each month. The guidance Mike provides during his office hours will cover all issues that arise within the broad spectrum of the employment relationship to help CCHRA members achieve compliance with the extensive regulations that govern their workplace and to better understand best employment practices.

Issues related to the Internal Revenue Code/the Internal Revenue Service or ERISA-related issues will not be covered under this arrangement, nor will the interpretation, editing or drafting of documents. The office hours will be limited to providing guidance on employment law questions and corresponding HR-related risk management that can be answered in one telephone conversation. Mike can be reached during his CCHRA General Counsel Office Hours at 508-548-4888.

Mike Foley has been representing employers, small and large, for-profit and not-for-profit within all industry sectors and in all matters of labor and employment law for over 30 years. He draws on the breadth of his experience to offer employers an uncommon approach and practical solutions. Click here for Mike's bio.