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North Dakota
EMPLOYMENT LAW LETTER

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DISABILITY DISCRIMINATION

8th Circuit rejects discrimination, retaliation claims under ADA

The U.S. 8th Circuit Court of Appeals (whose rulings apply to all North Dakota employers) recently held that it would be inappropriate for it to address whether disability discrimination claims should be analyzed under a "but-for" causation standard rather than a "mixed-motive" standard because the issue would not change the outcome of the case. The 8th Circuit affirmed the district court's grant of summary judgment (dismissal without a trial) in favor of an employer on an employee's claims of disability discrimination and retaliation under the Americans with Disabilities Act (ADA).

Background

Norah Oehmke was diagnosed with Hodgkin's lymphoma in 1997. She received chemotherapy, radiation, and a bone-marrow transplant for the condition. Her cancer has been in remission since 1999, but the treatments resulted in adverse long-term health effects, including a suppressed immune system and cardiomyopathy (a heart disease).

In 2003, Medtronic, a medical device manufacturer, hired Oehmke as a credit representative. She excelled at the position, and in 2005, Medtronic promoted her to senior patient services specialist. In that position, she answered patients' telephone calls and e-mails concerning implantable devices, warranty claims, and unreimbursed medical claims.

Oehmke's supervisors initially gave her positive performance evaluations. They permitted her to work from home on days she was ill and allowed her to take medical leave for her frequent medical appointments. At first, Oehmke had a favorable relationship with her primary supervisor, Mavis Klemmensen, but their relationship deteriorated over time.

In the summer of 2008, Medtronic received three customer complaints about calls handled by Oehmke and complaints from employees regarding Oehmke's blunt communication style. Klemmensen informed Oehmke that she would begin enforcing the two-days-per-week limit on telecommuting that applied to other employees until Oehmke demonstrated consistent empathy on patient phone calls. Oehmke asked to continue to be allowed to telecommute as needed, and Klemmensen later granted the request on the condition that her calls from home be recorded. During a subsequent meeting that turned contentious, Oehmke leaned toward Klemmensen in a physically intimidating manner.

In October and November 2008, Oehmke missed a considerable amount of work for an illness and an injury from a car accident. Thereafter, during

AGENCY ACTION

EEOC announces $4.25 million settlement of sex discrimination suits. Two lawsuits against a group of affiliated coal mining companies accused of hiring practices that effectively excluded women from working in the underground mines and in other coal production positions have been settled. The settlement calls for the companies to pay $4.25 million to a group of female applicants who it was determined were denied jobs because of sex discrimination. The Equal Employment Opportunity Commission (EEOC) filed suit against Marion, Illinois-based Mach Mining, LLC, in 2011. In 2016, the agency filed a second lawsuit naming certain affiliates of Mach that, along with Mach, are part of St. Louis-based Foresight Energy. The cases were resolved by a single consent decree. In addition to the monetary settlement, the companies have agreed to hiring goals that are expected to result in at least 34 women being hired into coal production jobs in their mines that operate in Illinois.

OSHA issues recommended practices on anti-retaliation programs. The Occupational Safety and Health Administration (OSHA) has issued "Recommended Practices for Anti-Retaliation Programs." The recommendations are intended to apply to all public- and private-sector employers covered by the 22 whistleblower protection laws that OSHA enforces.

Veteran EEOC member takes top post. EEOC member Victoria A. Lipnic was announced as President Donald Trump's pick for acting chair of the agency in January. Lipnic has served as an EEOC commissioner since 2010, having been nominated to serve by President Barack Obama and confirmed by the Senate initially for a term ending on July 1, 2015. Obama nominated her to serve a second term ending July 1, 2020, and she was confirmed by the Senate on November 19, 2015. "I believe equal employment opportunity is critical to all Americans and to how we define ourselves as a nation," she said after the announcement.

Miscimarra takes helm of NLRB. President Trump announced in January that he had named National Labor Relations Board (NLRB) member Philip A. Miscimarra as acting chair of the NLRB. "I remain committed to the task that Congress has assigned to the Board, which is to foster stability and to apply the National Labor Relations Act [NLRA] in an even-handed manner that serves the interests of employees, employers, and unions throughout the country," Miscimarra said after the announcement. He also recognized former Chairman Mark Gaston Pearce for his service. Pearce will continue as a member of the Board in a term expiring August 27, 2018. The NLRB also currently includes Lauren McFerran, whose term expires on December 16, 2019. Two Board seats are vacant. ✤

a meeting, Klemmensen presented her with an inflated absenteeism rate. The rate counted days Oehmke missed for medical leave under the Family and Medical Leave Act (FMLA), which did not count under Medtronic's absenteeism policy.

Oehmke took leave from late February 2009 to mid-June 2009. While she was on leave, Klemmensen retired and was replaced by Patti Peltier. Upon Oehmke's return, Peltier required her to make formal requests for accommodations rather than make informal requests as she had in the past. In addition, Peltier changed her schedule from 7:00 a.m. to 4:00 p.m. to 8:00 a.m. to 5:00 p.m.

In August 2009, Oehmke received a negative performance evaluation that included an inflated absenteeism rate. The next month, Oehmke gave incorrect—and potentially life-threatening—advice to a patient's wife concerning the minimum safe distance between a forklift and a pacemaker. Oehmke took leave for an unidentified lung disease from late September to November 2009, exhausting her FMLA leave entitlement. Therefore, her position was no longer held open for her.

On October 28, 2009, Oehmke informed Medtronic that she would return on November 2. On October 30, Medtronic hired a new employee for her position. Oehmke did not return to work until November 18, and Peltier and another supervisor created a new position for her. An assistant overheard Peltier and the other supervisor state their intention to make the new position difficult and miserable in hopes that Oehmke would quit or fall behind, creating a reason to fire her.

In November 2009, Oehmke assumed the new CareLink specialist position at the same salary as her previous job. Her tasks included handling incoming and outgoing patient telephone calls about a system that remotely monitored and transmitted information about patients' heart devices. She was also tasked with answering all e-mails that went to Medtronic's website. She was not permitted to leave until she completed all her tasks each day.

Soon after beginning the new position, Oehmke fell behind. She submitted a letter from her physician requesting accommodations, all of which Medtronic granted, with the exception of her request to work from 7:00 a.m. to 4:00 p.m. so she would have time to attend medical appointments during the week. Instead, Medtronic put her on a 9:00 a.m. to 6:00 p.m. schedule that afforded her time to attend her appointments, with time to attend appointments in the afternoon if no morning appointments were available. When Oehmke complained about the schedule, the company stated it needed her to work the later schedule because call volume was higher in the afternoon and it was difficult to find coverage for the earlier shift given her need for frequent absences.

On January 8, 2010, Peltier placed Oehmke on a performance improvement plan (PIP). The PIP referenced numerous violations of Medtronic's patient call policies dating back to August 2009, including providing incorrect information, giving medical advice, making unnecessary comments to patients,

and failing to be empathetic. The plan also noted that Oehmke failed to meet the obligations of the CareLink specialist position. Oehmke refused to sign the PIP. Around the same time, Peltier criticized her for taking medical leave too often, again based on an inflated absenteeism rate.

On January 22, 2010, Peltier and Oehmke discussed her continuing performance issues. At that time, Peltier informed Oehmke that she would be given the 7:00 a.m. to 4:00 p.m. schedule she had requested, but she would no longer be allowed to telecommute. According to Peltier, Oehmke taunted her during the meeting and laughed at everything she said. Later that day, Medtronic suspended Oehmke.

On February 24, 2010, Oehmke and her attorney met with Medtronic's in-house counsel. During the meeting, Oehmke expressed her desire to work in a different department because of her toxic relationship with Peltier. She left the meeting with the understanding that her request would be granted. However, Medtronic's counsel followed up with a proposed settlement agreement and release. Oehmke rejected the settlement agreement, and Medtronic terminated her employment.

Oehmke filed a lawsuit for disability discrimination and retaliation under the ADA and state discrimination statutes. The district court concluded that her claims were time-barred with respect to all of Medtronic's allegedly discriminatory acts except her termination.

The district court concluded that Oehmke had not established a *prima facie* (basic) case of discrimination. To establish a *prima facie* case of disability discrimination under the ADA, an employee who does not have direct evidence of discrimination must show that she (1) has a disability within the meaning of the ADA, (2) is a qualified individual under the ADA, and (3) suffered an adverse employment action as a result of her disability. If she meets that burden, the burden shifts to the employer to show it had a legitimate nondiscriminatory reason for the adverse action. Finally, the burden shifts back to the employee to show that the proffered reason was really a pretext (excuse) for discrimination.

The district court found that Oehmke's disability discrimination claim failed because she did not raise a dispute regarding causation between her disability and her termination. The court concluded that even if she had shown causation, she failed to raise a dispute regarding pretext. On Oehmke's retaliation claim, the district court concluded that she failed to raise a dispute regarding causation between her termination and her protected activity (i.e., asserting her rights under the ADA during her meeting with Medtronic's in-house counsel and rejecting Medtronic's settlement offer). Thus, the court granted summary judgment in favor of Medtronic. Oehmke appealed.

8th Circuit's decision

Oehmke argued that her bout with cancer left her with lingering long-term health effects, including a suppressed immune system and cardiomyopathy. She claimed those conditions caused her to be absent from work to attend medical appointments and left her needing certain accommodations, including telecommuting and a schedule that allowed her to attend medical appointments without missing work. She argued that Medtronic terminated her because it did not want to accommodate her scheduling needs and discriminated against her based on her disability.

The 8th Circuit affirmed the award of summary judgment in favor of Medtronic. Although the court found that Oehmke's cancer was a covered disability under the ADA (even while in remission), it held that she did not suffer an adverse employment action based on her disability. The 8th Circuit analyzed Oehmke's claim under a mixed-motive causation standard, meaning it would allow her claim to proceed if it found evidence that the adverse employment action was motivated by both permissible and impermissible factors. In other words, under a mixed-motive analysis, if a discriminatory intent contributed to the adverse employment action *in any way*, Oehmke could establish the causation element of her claim.

Medtronic advocated for the application of the more stringent "but-for" causation standard, which was articulated by the U.S. Supreme Court in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). Although *Gross* involved age discrimination claims filed under the Age Discrimination in Employment Act of 1967 (ADEA), which prohibits discrimination "because of age," courts in several circuits have extended the Supreme Court's analysis to disability discrimination claims under the ADA, which prohibits discrimination "on the basis of" disability. However, the 8th Circuit declined to address Medtronic's argument because (1) the potential effect of *Gross* on the court's interpretation of the ADA was only superficially addressed in Medtronic's brief and (2) the court agreed with the district court's decision that Medtronic was entitled to summary judgment under the less stringent mixed-motive causation standard.

In support of its conclusion, the 8th Circuit found that Medtronic decided to terminate Oehmke because of her rejection of its settlement offer, which arose from her suspension for failing to meet the requirements of her position. In doing so, the 8th Circuit gave Oehmke the benefit of all reasonable inferences, including her claims that her CareLink specialist position carried impossibly difficult responsibilities and that she was assigned to the position in hopes that its difficulty would give Medtronic reason to suspend or terminate her. Therefore, the court did not consider her inability to keep up with her duties the true reason for her termination.

The 8th Circuit concluded that Medtronic had enough concerns about Oehmke's performance to justify her termination. For example, she:

- Gave incorrect and potentially life-threatening advice concerning a patient's pacemaker;
- Was perceived by her managers as insolent and threatening;
- Admitted that she attempted to undermine her managers' authority;
- Failed to follow Medtronic's procedures; and
- Repeatedly engaged in interactions that led to customer complaints.

Those problems certainly provided Medtronic a permissible basis for concern.

The court rejected Oehmke's argument that evidence in the record supported an inference that Medtronic had impermissible motives. While there was evidence that her supervisors were motivated in part by her absenteeism, she failed to submit evidence connecting the overwhelming majority of her absences to her disability. Further, Medtronic granted almost all of her accommodation requests, undercutting her argument that her supervisor discriminated against her because she did not believe she had cancer. The 8th Circuit concluded that there was not a sufficient causal connection for Oehmke to establish a *prima facie* case of disability discrimination.

The 8th Circuit also rejected Oehmke's argument that Medtronic terminated her in retaliation for asserting her rights under the ADA during a meeting or for rejecting its settlement offer. The court held that unlike a disparate treatment claim under the ADA, there is no question that a *prima facie* retaliation case under the ADA requires a but-for causal connection between the employee's assertion of ADA rights and an adverse action by the employer. Because Medtronic had cause to terminate Oehmke (performance issues), she could not establish a retaliation claim. *Oehmke v. Medtronic, Inc.*, 844 F.3d 748 (8th Cir., 2016).

Takeaway for employers

While the 8th Circuit hinted that it may consider altering the standard it uses to determine causation in disability discrimination claims under the ADA, the mixed-motive standard remains in effect. Therefore, if a discriminatory intent contributes to an adverse employment action *in any way,* the employee will be able to establish a discrimination claim and force the employer to provide a legitimate nondiscriminatory reason for the adverse action. To counter the potential implication of discriminatory intent, strictly adhere to your antidiscrimination policies, and maintain written records of discipline and performance issues. ✤

MENTAL HEALTH

EEOC releases guidance on mental health conditions

The Equal Employment Opportunity Commission (EEOC) has released informal guidance to advise employees of their legal rights in the workplace with regard to depression, posttraumatic stress disorder (PTSD), and other mental health conditions. Although the guidance is geared toward employees, it provides insight for employers on the EEOC's position on employee protections under the Americans with Disabilities Act (ADA).

Guidance covers broad range of topics

The guidance is provided in a question-and-answer format and covers the following areas.

Discrimination. The EEOC advises that it's illegal for employers to discriminate against an individual because he has a mental health condition. The guidance explains the exceptions for individuals who pose a safety risk and for those who are unable to perform their job duties. The EEOC says you can't rely on myths or stereotypes about a mental health condition when making an employment decision but instead must base your decision on objective evidence.

Privacy/confidentiality. The guidance explains that employees and applicants are entitled to keep their condition private and that employers are permitted to ask medical questions in four situations only:

(1) When an individual asks for a reasonable accommodation;

(2) After a conditional job offer has been extended but before employment begins (as long as all applicants in the same job category are asked the same questions);

(3) For affirmative action purposes—and a response must be voluntary; or

(4) When there is objective evidence that an employee may be unable to do his job (or may pose a safety risk) because of a medical condition.

When medical information is disclosed, you must keep the information confidential—even from coworkers.

Job performance. Reasonable accommodation is the focus of the EEOC's guidance in this area. It describes a reasonable accommodation as a change in the way things are normally done at work and gives the following examples:

- Altered break and work schedules (e.g., scheduling work around therapy appointments);
- A quiet office space or devices that create a quiet work environment;

- Changes in supervisory methods (e.g., written instructions from a supervisor who doesn't usually provide them);
- Specific shift assignments; and
- Telecommuting.

"Substantially limiting" condition. The guidance points out that a condition doesn't need to be permanent or severe to be substantially limiting under the ADA. A condition that makes activities more difficult, uncomfortable, or time-consuming to perform (when compared to the general population) may be substantially limiting.

And even if symptoms come and go, the guidance notes that "what matters is how limiting they would be when the symptoms are present." It also notes that mental health conditions like major depression, PTSD, bipolar disorder, and obsessive compulsive disorder "should *easily* qualify." According to this section, you shouldn't conduct an extensive analysis of whether a condition qualifies as a disability. Instead you should focus on complying with the ADA's antidiscrimination and reasonable accommodation requirements.

Reasonable accommodation. The guidance advises employees that they may ask for a reasonable accommodation at any time but that it's generally better to ask before any workplace problems occur because employers aren't required to excuse poor job performance—even if it's caused by a medical condition or the side effects of medication.

The guidance notes you may ask an employee to put an accommodation request in writing and may ask her healthcare provider for documentation about the condition and the need for an accommodation. The EEOC suggests that employees bring to their medical appointment a copy of the EEOC publication "The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation" (available at www.eeoc.gov).

The guidance adds that an unpaid leave may be a reasonable accommodation if the leave will help the employee get to a point where she can perform a job's essential functions. And if the employee is permanently unable to do her regular job, the guidance explains that she can request reassignment to another job if one is available.

Harassment. The EEOC advises employees to tell their employer about any harassment if they want the employer to stop the problem. The guidance recommends that employees follow your reporting procedures and explains your legal obligation to take action to prevent future harassment.

Bottom line

Although the EEOC's guidance is directed specifically at employees and their healthcare providers, you may also benefit from it for several reasons. First, the document makes clear that you must rely on objective evidence in making employment decisions and requesting medical information from employees—myths, stereotypes, and rumors are insufficient. In addition, given the document's focus on confidentiality, you should ensure you have in place a process guaranteeing the appropriate treatment of information regarding employees' mental health conditions.

WORKPLACE TRENDS

Survey brands performance reviews cumbersome, demotivating. Software giant Adobe, which abolished its formal annual performance reviews in 2012 in favor of a new kind of employee-management communication, has released a survey showing that a majority of U.S. office workers consider their review systems outdated, time-consuming, and stressful. Many of the 1,500 workers surveyed said reviews drive competition among coworkers, increase personal stress, and result in dramatic reactions such as crying and quitting. The research found that on average, managers spend 17 hours per employee preparing for a performance review, and more than half of office workers feel that performance reviews have no impact on how they do their job and are a needless HR requirement.

Study shows IRA contributions inconsistent. An analysis by the Employee Benefit Research Institute (EBRI) shows that most owners of individual retirement accounts (IRAs) don't contribute to them every year, but more than half of those who contribute put in the maximum amount allowed by law. The analysis found that among traditional IRA owners, nearly 88% didn't contribute in any of the five years studied, while barely 2% contributed all five years. By contrast, almost 62% of Roth IRA owners didn't contribute in any year, but more than 10% contributed in all five years. While the percentage of IRA owners who contribute to their accounts remained relatively consistent across the five years of the EBRI's study, those who contributed the maximum rose from 43.5% in 2010 to 53.5% in 2012. Increases during that time occurred for each IRA type, with owners of traditional IRAs having higher likelihoods of contributing the maximum in each year.

Toys, pizza among odd items brought to job interviews. CareerBuilder has released results of a nationwide online survey revealing a list of the strangest things people have done in job interviews. More than 2,600 hiring and HR managers were surveyed. The responses include: A candidate asked where the nearest bar was located, a candidate brought his childhood toys to the interview, and another ate a pizza he brought with him. The survey also asked respondents to identify the biggest body language mistakes jobseekers make. Sixty-seven percent said failing to make eye contact, 89% said not smiling, 34% said playing with something on the table, 32% said fidgeting too much, and 32% said crossing their arms over their chests. Among the surest ways to ruin a job interview, survey respondents said getting caught lying, answering a cellphone or text, appearing arrogant or entitled, dressing inappropriately, and appearing to have a lack of accountability. ✤

UNION ACTIVITY

Union membership down in 2016. The U.S. Bureau of Labor Statistics (BLS) has reported that the union membership rate—the percent of wage and salary workers who were members of unions—was 10.7% percent in 2016, down four-tenths of a percentage point from 2015. The number of wage and salary workers belonging to unions—at 14.6 million in 2016—declined by 240,000 from 2015. In 1983, the first year for which comparable union data are available, the union membership rate was 20.1%, and there were 17.7 million union workers. Highlights from the 2016 data show that public-sector workers had a union membership rate (34.4%) more than five times higher than that of private-sector workers (6.4%). Workers in education, training, and library occupations and in protective service occupations had the highest unionization rates (34.6% and 34.5%, respectively). New York continued to have the highest union membership rate (23.6%), while South Carolina continued to have the lowest (1.6%).

Unions applaud withdrawal from TPP. President Donald Trump's announcement in January that the United States would withdraw from the Trans-Pacific Partnership (TPP) has drawn praise from union leaders. AFL-CIO President Richard Trumka called the TPP decision and the reopening of the North American Free Trade Agreement (NAFTA) "an important first step toward a trade policy that works for working people." Bob Martinez, president of the International Association of Machinists and Aerospace Workers said the TPP decision "signals the beginning of changing a culture that has for years encouraged companies to ship American jobs overseas." United Auto Workers President Dennis Williams called it "a victory for American workers and families." United Steelworkers International President Leo W. Gerard said the decision "should be just the beginning of a new approach on trade." Marc Perrone, international president of the United Food and Commercial Workers International Union, called the decision a positive step but just "a small piece of what must be a larger effort to protect Americans who face exploitative, unfair, discriminatory, and unjust workplaces."

SEIU speaks out against immigration executive orders. The Service Employees International Union (SEIU) has called President Trump's Executive Orders related to immigration "contrary to our identity as a nation and our core values as Americans." In a statement in January, Rocio Saenz, SEIU international executive vice president and iAmerica Action president, advocated "commonsense immigration reform that keeps families together and on a path to citizenship." ✤

Also, the guidance highlights the significance of healthcare provider documentation in accommodation requests. Indeed, documentation from a healthcare provider often serves as a catalyst for the interactive dialogue between you and the employee that is required by the ADA.

Finally, the guidance underscores the importance of training supervisors. Supervisors must be able to identify an accommodation request and understand your obligations once a request is received. They also must manage performance and conduct issues that may be caused by employees' mental health conditions—a difficult task that can be accomplished with proper education and guidance.

The EEOC guidance is available online at www.eeoc.gov/laws/types/disability.cfm. ✤

TRADE SECRETS

The spy who came in from the kitchen

Offering workers the opportunity to work from home has many benefits for both the employee and the employer, but it can bring challenges as well. One challenge is handling trade secrets, which are defined as any information that gives some competitive advantage to a company, isn't generally known, and can't be obtained legitimately from an independent source.

To keep a trade secret, you must safeguard it from release. Traditionally, the corporate jewels were protected by locked doors, filing cabinets, and security systems. Now that an employee is just as likely to be working from a kitchen table as an office cubicle, it's harder to lock up information. Here are a few suggestions for securing sensitive information when employees work at home.

Guarding the secrets

Secure access. Require employees who work remotely to use virtual private network (VPN) or other secure access procedures that work smoothly to access your secure server. Reconsider overly cumbersome or dysfunctional access procedures, which can encourage employees to develop workarounds that defeat the purpose of the secure system. If you have a BYOD (bring your own device) policy, be sure employees understand that using their own devices doesn't mean the information on the devices becomes theirs.

Set permissions. Classify digital data (e.g., public, confidential, eyes only), and keep track of employee clearance levels so you know who can access each type. This will help you narrow the pool of suspects if a theft occurs.

Use software tools. Programs such as LOCKlizard or Vitrium allow you to lock document files, stop screenshots, watermark documents, and log document views.

Employee training. Be clear about your expectations of employees in your employment agreements and written policies. Teach employees to recognize warning signs of information

theft, and set up a way to report potential problems anonymously.

Lock and key. Review the environment in which the employee is working. Is the level of physical security in that environment appropriate for the information the employee has access to? Do others in the household have access to devices where work is stored? Is there a security system? Working remotely may not be appropriate for employees who work extensively with sensitive information.

Act before it's too late

There are penalties, both civil and criminal, for trade secret theft. However, once that valuable information is gone, no law can make it secret again. It's better to prevent the theft from occurring in the first place. ✤

HIRING

Consistent job descriptions are key to avoiding discrimination claims

If you are involved in your company's hiring process, you know how challenging it is to sift through a giant pile of résumés in order to find the best candidate. By the time you read one résumé, chances are, five more have been added to your pile. Many employers use job requirements as a way to quickly eliminate unqualified candidates. For example, if a job requires a college degree, any applicant without a degree can be quickly moved to the back of the pile. As long as the criteria used to eliminate applicants are necessary for the position in question, there is nothing wrong with that approach.

However, a recent study by economists Daniel Shoag and Robert Clifford III suggests that many employers alter the job requirements they use to "filter" applicants based on the state of the economy and other factors they think will affect the number of applications they receive. That makes sense from a practical perspective—you have to get through that pile of résumés somehow. However, it also raises legal red flags.

The study

One of the study's key findings was that the exact same job may have different requirements from one year to the next. When applications are few, an employer may relax certain requirements to incentivize more candidates to apply for the job. The next year, if the employer thinks it will be overwhelmed by applicants, it may add job requirements.

The study focused on the use of credit scores in hiring. A growing number of states have banned the use of credit scores in the hiring process. According to the study, many people who were commonly thought to benefit from such legislation, including black applicants and applicants with low credit scores, actually fared *worse* after the laws were passed. The reason? Many employers began adding requirements for positions, including education and experience requirements, so they could continue to filter out candidates who were perceived as risky. In an economist's words, that was "evidence of substitution across signals by employers." In other words, employers that could no longer use applicants' credit scores as an indicator of their fitness for a position turned to other characteristics that may be correlated with successful applicants.

Discriminatory hiring practices

As you know, it is illegal for an employer to discriminate against members of a protected class (e.g., on the basis of race) during the hiring process. The study suggests black applicants tended to fare worse in the hiring process when employers added education and experience requirements. Often, such requirements are perfectly legitimate. However, there is concern that employers added requirements after new laws made it more difficult to automatically dismiss applicants with low credit scores.

If a certain level of education is necessary for a position, you would expect it to be a requirement all along. The study found evidence that some employers shifted job requirements in a way that disproportionately affected a protected class, which could open the door for disparate impact discrimination claims.

Reasonable accommodations

Job descriptions can also take on added significance during a dispute over whether an employer offered an employee with a disability a reasonable accommodation. Employers cannot discriminate against applicants or employees who can perform the essential functions of a job with or without a reasonable accommodation. Often, the employer and employee disagree on whether a certain requirement is an essential function of a position.

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3-30 FMLA Certifications: How to Get the Medical Information You Need to Designate Leave and Decrease Abuse

4-5 Pay Disparities and Sex Discrimination: How to Review Compensation Practices to Address Gender Pay Gap Issues and Minimize Legal Liabilities

4-6 HR Department of One: Practical Ways to Manage Your Workload, Stay Compliant, and Achieve Personal and Organizational Success

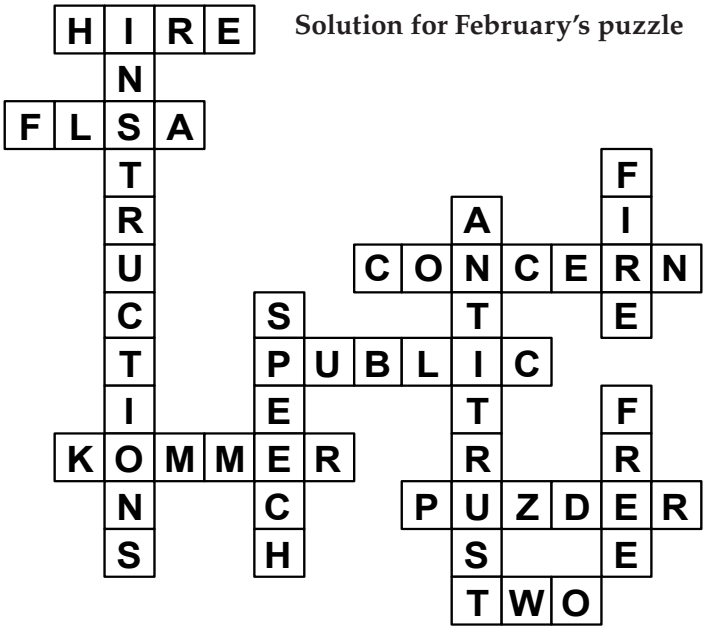
4-6 FMLA Intermittent and Reduced-Schedule Leave: Best Practices for Managing Leave and Mitigating Abuse ✤

For example, a 60-pound lifting requirement might be absolutely essential for a warehouse worker, but it could be optional for an employee who spends his entire day in a cubicle. An employer may be able to point to the job description or posting as evidence that the requirement in question has been an important facet of the position all along. The only issue is when an employer regularly changes the requirements of a job based on the number of applications it receives. Such changes undermine the argument that the requirement is in fact "essential."

Takeaway

It makes perfect sense to be very selective when you have many applications for a position, and there is nothing illegal about choosing an applicant with superior skills, training, and experience. The problem is filtering—automatically moving an application to the back of the pile or dismissing it outright because of the applicant's credit score. If your requirements are not consistent from year to year, you may be vulnerable to claims that they are not job-related and that your hiring practices discriminate against certain groups. It may be a lot of work to sift through a large pile of résumés, but that pales in comparison to the headaches that result from a discrimination lawsuit. ✤

Solution for February's puzzle



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