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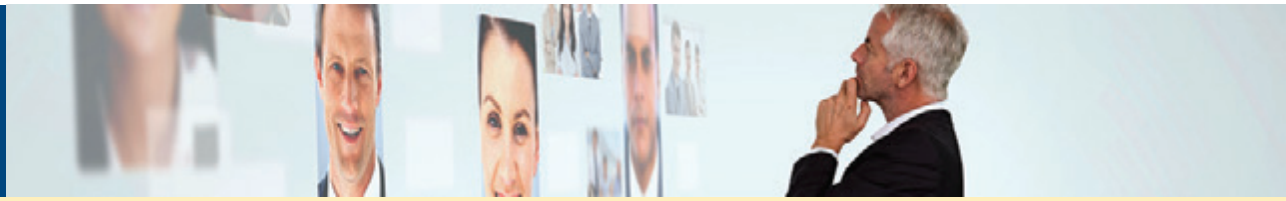

The Job Description

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In This Issue

Leadership Note

Letter from the Chair

By Stanley E. Graham

As the great twentieth century philosopher, "McDonald's," once said, "You deserve a break today!" I heard that jingle about a million times growing up and, though it was written to sell Big Macs and chicken nuggets, it's one of those slogans that can be applied to life.

So, with that jingle still ringing in my head, I write to you today from the pristine beaches of Orange Beach, Alabama, where I've spent the week enjoying the sound of crashing waves interspersed with the giggles of my teenage sons as they watch Cartoon Network before running down to ride wave after wave on their boogie boards. We all know it's just a temporary respite from school, work, fighting traffic, and mowing the lawn, but it doesn't stop us from enjoying this special time away from the everyday.

Tomorrow we head home. And when we return to the myriad work and school obligations that await us, we will try, little by little, one day at a time to take a break from the everyday and enjoy all that life has to offer. For my boys, that means "screens off" by 8pm to do something (anything!) that doesn't involve electronics. For me, it means taking 15 minutes on the way to the office to stop at my local coffee shop to read something for me, and to forget, even temporarily, about the emails and deadlines that await my arrival. There are lots of other ways to take a break, of course, but the key is to remember to actually do something for you every day, lest we get swept away with the demands of a busy law practice.

So today, consider the simple act of printing this issue of the *Job Description*, or saving it to a device that is not connected to your work email. Take it somewhere quiet, get comfortable, put your phone and your watch on "Do Not Disturb" mode, and spend 10 minutes soaking up its great content.

All of us on the DRI Employment and Labor Committee are grateful to the authors and editors that make this great publication possible. I am also personally grateful to my phenomenal Vice Chair, Dessi Day, and our cadre of wonderful subcommittee chairs who make this such a fantastic committee. Hoping to see you in October at the DRI Annual Meeting and in May 2020 for our annual Employment and Labor Law Seminar. Talk about some great breaks!

Until then, I hope that you will put this issue of the *Job Description* to the best use of all: taking a break. You deserve it not just today, but every day!

Stanley E. (Stan) Graham is a partner with the Nashville office of Waller, and the current chair of the DRI Employment and Labor Law Committee. His extensive jury trial experience includes first-chair verdicts for Ford Motor Company, Dollar General, Logan's Roadhouse, and Federal-Mogul Corporation. He also has extensive experience defending multi-plaintiff and class litigation, including 5 EEOC enforcement actions in the past two years and numerous FLSA collective actions. He is recognized in Chambers USA and has been twice named Nashville Lawyer of the Year by Best Lawyers in the field of Labor Law-Management. He has defended litigation and arbitration proceedings in 23 states and counting.

Feature Articles

Paid Leave Ordinances: Enforcement Against Employers Outside a City—Minnesota Case Study

By Randi Winter

The "Twin Cities" of Minneapolis and Saint Paul, Minnesota have nearly identical paid sick and safe leave ordinances that went into effect in July 2017. Under both ordinances, all employees—including part-time, seasonal, and temporary workers—are entitled to earn one hour of paid sick/safe leave for every 30 hours worked, up to a maximum of 48 hours of paid leave per year. Employees must also be allowed to carry over up to 80 hours of accrued sick/safe leave from year to year. Additionally, the ordinances impose certain recordkeeping, notice posting, and handbook publication requirements, which can be burdensome for employers.

When first enacted, both cities' ordinances were only enforceable against employers with an actual physical presence within city limits, such as an office or warehouse. This limitation resulted from an early temporary injunction issued by a Minnesota trial court in a lawsuit brought by the Minnesota Chamber of Commerce. In granting the injunction, the trial court held that Minnesota law prohibited the City of Minneapolis from impermissibly operating outside the geographic borders of the City by enforcing its ordinance against non-resident employers.

Recently, however, the Minnesota Court of Appeals reversed the trial court's decision and terminated the injunction. The Court of Appeals reasoned that the Minneapolis ordinance did not have an unlawful extraterritorial effect because, as amended, it only allowed for the accrual of paid sick/safe leave for work that an employee performed within city limits, and it likewise only allowed an employee to use available paid sick/safe leave on days that the employee was scheduled to work in Minneapolis.

Additionally, the appellate court rejected the Chamber's argument that a Minnesota statute regulating sick leave preempted the Minneapolis paid leave ordinance. On this issue, the Court of Appeals reasoned that "[b]ecause the [Minneapolis] ordinance does not permit conduct that the [Minnesota] sick-leave statute forbids, there is no conflict." In other words, the ordinance withstands preemption scrutiny because employers are able to simultaneously comply with both the state statute and the city ordinance.

Unsurprisingly, the Chamber of Commerce has appealed the adverse appellate decision, and the Minnesota Supreme Court granted review on June 26, 2019. In its order granting review, the state's highest court indicated that it would consolidate oral argument on the Chamber's appeal relating to the paid sick/safe leave ordinance with another case pending before it challenging a separate Minneapolis ordinance that imposes a minimum wage that is significantly higher than the state minimum wage. Notably, the State of Minnesota and the League of Minnesota Cities have already filed amicus briefs in support of the City's higher minimum wage efforts, and it is expected that both entities will support the Minneapolis paid sick/safe leave ordinance, as well.

It remains to be seen whether the Minnesota Supreme Court will uphold enforcement of the Minneapolis paid sick/safe leave ordinance against non-resident employers. In the meantime, however, because the temporary injunction is no longer in place, the City of Minneapolis can move forward with enforcing the ordinance against all employers that have employees who perform any work in Minneapolis, regardless of whether such employers have a physical presence within city limits. The City of Minneapolis has indicated that it intends to start enforcing its ordinance against extraterritorial employers after a rulemaking comment period that ended on June 7, 2019. Furthermore, the City appears to be taking the position that non-resident employers owe paid sick/safe leave to employees working in Minneapolis retroactive to the ordinance's original effective date of July 1, 2017.

In contrast, the City of Saint Paul has not yet indicated whether it intends to follow suit by enforcing its ordinance against employers that do not have a physical location within city limits, although the plain language of the Saint Paul ordinance would appear to allow the city to do so.

Compliance with the Minneapolis ordinance could be a logistical nightmare for those employers with employees that only perform a limited amount of work in Minneapolis on a temporary or infrequent basis. Minneapolis has set a threshold for eligibility at 80 hours, meaning that an employee must work a minimum of 80 hours per year

within the city to be eligible to start using paid sick/safe leave. This means that companies must be careful to track the hours their mobile workforces spend in city limits, such as performing deliveries or working at construction jobsites.

If you have clients with employees performing work in Minneapolis, or Saint Paul, on even a limited basis, this recent development in Minnesota law presents a good opportunity to reach out to those clients to ensure they are up to speed with respect to their compliance obligations. Such clients should also be made aware of upcoming paid leave requirements for employees working in Duluth, Minnesota, which has its own paid sick/safe leave ordinance going into effect on January 1, 2020.

Randi Winter is a partner in the recently opened Minneapolis office of Spencer Fane LLP. She maintains a management-side employment and commercial litigation practice with an emphasis on the defense of non-compete and whistleblower claims. Randi may be atypical in that she enjoys nearly every aspect of litigation, especially trial. She is new to DRI and appreciates the active and collaborative nature of the DRI Employment and Labor Law Committee.

"Ban the Box" Continues to Gain Momentum

By Anne Yuengert and Bridget Warren


For years employers have been asking about an applicant's criminal history and not hiring someone who has one. Some employers used these questions because of the nature of their industry. For example, financial service institutions must comply with heightened background check regulations and schools and daycares cannot hire anyone convicted of certain crimes. Some employers used these questions because they would rather not take a chance on an applicant with a history of problematic behavior like violence, theft, or drug convictions. Finally, other employers used these questions to screen applications, concluding that they had a lot of qualified applicants and could afford to be choosy.

Given the recent tide of state and local laws banning such questions on applications, employers need to ask themselves "Can we ask a job applicant about criminal history?" As with so many legal questions, the answer is "it depends" on where you or your employees work. You need to determine whether you operate in a jurisdiction that precludes criminal history questions until you have reached certain points in the hiring process.

This movement—commonly referred to as "Ban the Box"—has a growing membership, with the following states currently banning the box in some form:

> Arizona, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin.

If you operate in any of these states, check the law to determine: (1) whether the law applies for both public and private employers; (2) whether it only applies to employers who meet a threshold number of employees; and (3) at what point in the hiring process you can ask about criminal history.

States, Cities, and Counties Have Passed Variations of "Ban the Box" Making It Difficult for Employers to Adopt Consistent Hiring Practices

Knowing what an employer can and cannot do in each jurisdiction has proved difficult because the restrictions lack consistency. What started out as an initiative to literally ban a box on employment applications asking whether an applicant had ever been convicted of a crime has morphed. Laws now place a variety of restrictions on employers, the two major ones being (1) an employer's ability to consider and use criminal history information when making hiring decisions, and (2) when an employer can inquire about an applicant's criminal history. To boot, the restrictions may be different for public and private employers.

First, regarding an employer's consideration and use of criminal history information, some Ban the Box laws do not mention an employer's restriction on how to use an applicant's criminal history, while others require the

employer to examine certain factors. New York City, for example, requires employers to consider eight specific factors when evaluating criminal history information during the application process. Even still, some jurisdictions, like San Francisco, ban the consideration of certain convictions completely for crimes that have been decriminalized since the original conviction.

Second, jurisdictions also restrict when employers can take certain actions, including (1) asking about an applicant's criminal history, (2) providing disclosures and requiring an applicant to fill out a background check authorization form, and (3) conducting the actual background check. Although jurisdictions restrict these actions until different steps in the hiring process, they typically adopt one of four approaches, permitting the inquiry:

- after a candidate is deemed qualified,
- after a candidate is selected for an interview,
- during or after an interview, or
- after a conditional employment offer is made.

The variations between laws and ordinances make it difficult for employers to have consistent practices across jurisdictions. To deal with this issue, employers can adopt the most conservative approach in all states in which they do business. Depending on the employer's footprint, that could require employers to wait until after a conditional offer of employment to ask about criminal convictions, require an applicant to authorize a background check, and actually run that check, which could slow down the hiring process. Alternatively, employers can review the state laws and any city and county ordinances to determine what it cannot do and when. This latter approach is much more time and labor intensive but will allow the employer to learn of any prior convictions earlier in the application process (which could save time).

The Most Recent State to Ban the Box: Colorado

Colorado is the most recent state to ban the box for private and public employers. Beginning as early as September 1, 2019, Colorado employers will be prohibited from asking prospective workers about their criminal history on job applications. The Colorado law specifically forbids public and private employers from:

- Advertising that a person with a criminal history may not apply for a position;
- Placing a statement in an employment application that a person with a criminal history may not apply for a position; and
- Inquiring about an applicant's criminal history on an initial job application.

Fortunately, these restrictions do not apply when: (1) the law prohibits an individual with a certain criminal history from holding a particular job; (2) the employer is participating in a program to encourage employment of people with criminal histories; or (3) the employer is legally required to conduct a criminal history record check for the specific job.

The law takes effect on September 1, 2019 for employers with eleven or more employees and on September 1, 2021 for all other employers. The Colorado Department of Labor and Employment (CDLE) will enforce the law and can issue warnings and orders of compliance for violations. If violations continue after warnings or orders, the CDLE may impose civil penalties. There is no private cause of action under the law, so job applicants cannot bring their own lawsuits.

Of importance, the law does not take away an employer's ability to uncover whether a job applicant has a criminal history. Colorado employers are still allowed to run background checks on prospective workers at any time and can still ask about the applicant's criminal history during the interview. The law instead focuses on giving a job applicant the opportunity to sit face to face with a prospective employer and explain his or her criminal history in person. With the law's effective date quickly approaching, employers who operate in Colorado should check their job postings and applications to ensure they do not run afoul of this new law.

Takeaways

It does not appear that the movement is slowing down given the number of states, cities and counties that have passed Ban the Box laws in the past twenty years. To ensure they are in compliance, employers should periodically check to see if their jurisdiction has adopted a Ban the Box law. For employers in numerous jurisdictions with these laws, they should decide whether to take a jurisdiction-by-jurisdiction approach or a lowest common denominator approach. Either way, employers need to stay vigilant to make sure they are not running afoul of any state laws or local ordinances. A couple of resources to check your state or locality are the Society for Human Resource Management (https://www.shrm.

org/resourcesandtools/legal-and-compliance/state-and-local-updates/xperthr/pages/ban-the-box-laws-by-state-and-municipality-.aspx) and the National Employment Law Project (https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/).

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A Post-#MeToo Holistic Primer for Building Respectful Workplaces

By Jill Pedigo Hall

Workplace culture is under the proverbial microscope, brought into sharp focus by the #MeToo movement and the almost daily media revelations of celebrity harassment and sexual misconduct. Even if one gives only scant attention to these multiplying reports of sexual wrongdoing, including assault and even sex trafficking, it becomes apparent that those workplaces and cultures in which the conduct has occurred have permitted, or even encouraged, the behavior. Concurrently, sexual harassment charges are on the increase. More than 7,600 sexual harassment charges were filed with the Equal Employment Opportunity Commission (EEOC) in 2018, a 13.6 percent jump from the previous year. It seems that this is a moment of change, in which there is a clear and present need for employers to address their workplace cultures. That need, in addition to developing a methodology for creating effective, respectful workplaces, was the focus of former EEOC Commissioner Chai Feldblum in her presentation at the 2019 DRI Employment and Labor Law Seminar in Phoenix. The goal of the presentation was to provide employment practitioners with a practical methodology for assisting employers in implementing change.

Ms. Feldblum co-authored the EEOC's June 2016 groundbreaking report, *Select Task Force on the Study of Harassment in the Workplace, Executive Summary and Recommendations*. This report targeted culture as the key contributor to workplace harassment, concluding: "Workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment."

In addition to reminding employers of the need to craft and implement effective harassment policies and trainings, the report provided employers with checklists, charts of cultural risk factors, and tangible steps to take to prevent harassment from occurring within their workplaces.[1] Ms. Feldblum expanded upon this theme, providing the audience with a next-step primer for creating respectful and inclusive cultures. She supplemented the report's guidance by providing a pragmatic action plan based in part upon post-#MeToo findings.

Basic Steps of the Action Plan for Cultural Change

Ms. Feldblum described an employer action plan consisting of four basic steps:

- Perform a cultural assessment;
- Analyze data from assessments to develop a strategic plan for change;
- Assess current policies, procedures, accountability mechanisms, and training; and
- Implement and maintain the plan.

She characterized the cultural assessment as a best practice and preventive measure that is a starting point for employers seeking to make cultural change. A cultural

[1] For those practitioners unfamiliar with the report and its valuable appendices, it can be found at https://www.eeoc.gov/eeoc/task_force/harassment/task_force_report.cfm.

assessment enables leadership to get a sense of the existing values, perceptions, and behaviors in its workforce. Ms. Feldblum observed that cultural assessments provide employers with important data and a roadmap from which to customize policies, procedures, accountability measures, and training that will work in creating a respectful culture. She identified some themes found in recent post-#MeToo cultural assessments that employers have used as guides to shape their strategic change plans:

- Lack of knowledge of the procedures for complaining about sexual harassment or other workplace issues.
- Fear of retaliation, including isolation, as a result of reporting.
- Significant imbalances in power can lead to risky situations.
- Men question whether companies are "pulling the trigger too quickly."
- Concern over the unintended consequence of #MeToo, like undermining mentorship opportunities between men and women.
- The "corporate philosophy" on anti-harassment does not align with what happens "on the ground."

The findings exemplify underpinnings for underreporting, concern over #MeToo impact in the workplace, and related communication failures. However, identifying the issues allows an employer to fashion solutions. Ms. Feldblum explained how employers created policies and procedures to eliminate those circumstances that underlie the themes. For example, an easy "fix" for the problem of lack of knowledge of reporting avenues is to ensure that: (1) reporting procedures are clearly and simply stated in employment handbooks, policies, and postings, and (2) employees receiving training on these issues. For the more complex issue of the unintended impact of #MeToo on workplace development, an employer might need to use various internal resources such as focus groups to restructure mentorship communications to ensure the relationships are preserved. Simply identifying the issues that exist within the workplace allows an employer to develop a strategic plan to address those previously unrecognized roadblocks to an effectively respectful workplace.

In discussing the second step, Ms. Feldblum described the components of a "multi-faceted campaign" that begins with the mainstays of prevention, leadership and accountability. She focused on the necessity of leadership modeling and articulating the belief that a safe, respectful, and inclusive workplace is important. Without such a message coming from the top, a prevention program will not be effective. She emphasized the critical nature of leadership holding accountable those who engage in misconduct, those responsible for responding to misconduct, and those who retaliate. Ms. Feldblum acknowledged the possible difficulties in persuading client leaders that they should institutionalize accountability in policies and practices. However, she stressed that it is necessary for leadership to be the drivers in creating the respectful culture.

Another aspect of the multi-faceted second step in the plan includes assessing current policies and procedures. Ms. Feldblum reiterated the need, set out in greater detail in the report, for harassment policies to use simple and clear language to explain prohibited conduct and the complaint process, and provide multiple avenues for reporting. In terms of procedures, she encouraged a mindset of taking complainants seriously, another embodiment of a respectful workplace where employees believe they will be heard. Finally, she talked about how creating a diverse culture through use of broad-based recruiting efforts and deployment of effective inclusion practices reduces risk and likelihood of harassment occurring.

Training to Change Behavior, Not Beliefs

As a final point, Ms. Feldblum set out a pragmatic training model that included three components: compliance training, respectful workplace training, and bystander intervention training. Instead of focusing training on legal definitions and generic descriptions, Ms. Feldblum posited a model focused on real-world situations, skills development, and employee and supervisor education. She identified the following as necessary components of "good compliance training":

- Using a live, interactive trainer;
- Providing examples that fit the workplace;
- Explaining unacceptable conduct, not illegal conduct;
- Explaining steps to report harassment;
- Explaining what will happen in an investigation; and
- For supervisors, explaining expectations for responding to complaints.

Her model for respectful workplace training focuses on behaviors that build inclusion instead of "status-based characteristics." Employees are taught to increase their awareness of respectful behavior and also how to give and respond to feedback about uncivil behavior. Supervisors

are trained in how to coach on problematic behaviors and employees.

The effectiveness of the final training component that Ms. Feldblum proposed would depend upon how effective an employer had been in implementing its strategic plan toward creating a more respectful workplace culture. Bystander intervention training is based upon a building a sense of collective responsibility among workers for having a safe, respectful, and inclusive workplace. Without confidence in leadership's commitment toward the same, it is unlikely that employees will take the "risk." The training consists of educating the workers on knowing what is unacceptable, giving workers options for intervention that are realistic within their specific workplace, and helping them develop skills for the intervention.

A Model for Holistic Legal Assistance

In the marketplace where legal work is often compartmentalized into discrete tasks (*i.e.*, redraft a policy, conduct a training, etc.), proposing to assist employers through the holistic model that Ms. Feldblum proposed may be seen as "theoretical" or "soft" without any clear result. However, the model is grounded in findings of what has worked in building civil workplace cultures. Described most simply, the model requires engaged leadership, a willingness to take a hard and detailed look at the culture of a workplace, problem solving to alleviate risks that can cause incivility and exclusion, and taking steps to foster inclusion. As practitioners, we can provide valuable input into the process, including assisting in formulating a strategic plan, drafting concrete policies procedures, formulating and addressing the results of cultural assessments, training, and advising on effective leadership.

Jill Pedigo Hall practices with von Briesen & Roper, s.c., in Madison, Wisconsin. She advises organizations and businesses of all sizes, assisting in strengthening workplace structures and compliance strategies. Widely regarded for building collaboration, she is also a resourceful litigator. Ms. Hall leverages her personal business experience to solve employment law and people management issues, and reduce risks through efficient, practical solutions. Medical leave and workplace disability accommodation management is a focal area of Ms. Hall's practice and she has litigated, written, and trained on the topic. Ms. Hall is rated AV Preeminent by Martindale-Hubbell. Jill is the 2019 Program Vice Chair for DRI Employment and Labor Law Seminar.