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The Employment Law AUTHORITY

Today's Hot Topics in Labor & Employment Law | January/February 2015

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High Tech, High Risk: Protecting Health Plan Data

Recent Cyber Attack Reminds Employers to Take Swift Action

On February 5, 2015, Anthem Blue Cross and Blue Shield, one of the largest health insurers in the country, notified its policyholders, members, and business partners that it was recently the target of an external cyber attack that appears to have comprised the confidentiality of medical and other personal information maintained on its information technology (IT) system. The information at issue included names, birth dates, medical identification numbers, Social Security numbers, addresses, employment information, and other similar information of more than 80 million current and former members. The notices that Anthem delivered to those potentially affected by the attack indicate that this attack did not compromise medical or credit card information.

An employer facing news that its insurer or third-party administrator (TPA) has experienced a data breach may find such news alarming and, at times, confusing. Even if no medical information was compromised, identifying information associated with a means of paying for medical services—such as information concerning current or former members' enrollment in health insurance or information about members' health claims from a TPA—generally qualifies as protected health information (PHI) under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). This is true even if neither diagnostic codes nor other sensitive information is included among the identifying information. Accordingly, if a plan participant's name, Social Security number, address, or other identifying information were compromised while held by an insurer or TPA,

Please see "DATA BREACH" on page 6

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Ogletree Deakins Earns Practice Group of the Year

Three Firm Attorneys Also Named to BTI All-Star List

Ogletree Deakins' Employment Law Practice Group has been named a 2014 Practice Group of the Year by the prominent legal news publication *Law360*. The publication selected firms that "came through for their clients in 2014, sealing the big deals and winning the high-stakes suits." This is the second consecutive year that the firm's Employment Law Practice Group has been named a Practice Group of the Year.

"We are proud to be recognized by *Law360* for a second year," said Kim Ebert, managing shareholder of Ogletree Deakins. "We are very thankful that our clients continue to entrust us with their employment law matters throughout the United States and internationally, and we will continue our focus on providing excellent, value-based service to our clients in 2015."

Law360's Practice Groups of the Year highlights up to five practice groups that notched the biggest litigation victories or deals of the year. According to the publication, winners are recognized for the size, complexity, and significance of the deals or litigation they worked on.

Ogletree Deakins is also pleased to announce that Charles T. Speth II, L. Gray Geddie, Jr., and Michael H. Cramer have been named to the *BTI Client Service All-Stars 2015* list. The *BTI Client Service All-Stars* is a listing—identified solely through client feedback—of lawyers delivering the highest levels of client service. Those named to the list have earned recognition from leading general counsel and legal decision makers for their client service. ■

EEOC FY 2014 Statistics Are Here: What Do They Mean for Employers?

by Evan J. Shenkman, Ogletree Deakins (Morristown)

The U.S. Equal Employment Opportunity Commission (EEOC) just released its fiscal year (FY) 2014 enforcement and litigation statistical report for the private sector. Presented annually, the report always contains some nuggets for employers and employment attorneys, and this year is no exception.

Key Statistics

Among the FY 2014 highlights are the following statistics:

- The EEOC received 88,778 charges in FY 2014—about a 5 percent reduction from FY 2013. The EEOC attributes this decrease, in part, to a government shutdown during a portion of the fiscal year.
- For the sixth year in a row, retaliation-based charges were the most common. At 42.8 percent of all charges filed, retaliation claims are at their highest percentage in history. Race discrimination, sex discrimination, and disability discrimination charges rounded out the top four in terms of prevalence, as they did in FY 2013, while charges based on genetic information brought under the Genetic Information Nondiscrimination Act (GINA) remained the rarest, at only 0.4 percent of all charges.
- The number of discharge- and discipline-related charges dropped slightly—roughly 3 percent from FY 2013, though discharge remained the most common issue among all EEOC charges. Harassment-related charges were the second most common, increasing by 3 percent from FY 2013. Some increases and decreases were far more eye-opening:

(1) Charges alleging discriminatory advertisements more than doubled, from 49 to 121. Most were age-related claims.

(2) Charges based upon allegedly unlawful waivers rose from 31 to 85.

(3) Charges based on employment testing increased from 157 to 231.

(4) Charges based on early retirement incentives climbed from 28 to 52.

- The overall percentage of "reasonable cause" findings (an initial finding in favor of the employee) dipped from 3.6 percent to 3.1 percent in FY 2013, representing the lowest percentage of cause findings in the 18-year period tracked by the EEOC. Compare this to the nearly 10 percent of charges that led to probable cause findings in 2001.
- On a state-by-state basis, Texas employers continued to face more EEOC charges than all others with 8,035 charges, reflecting 9.1 percent of all charges filed in the nation. Employers in Florida, with 7,528 charges, and California, with 6,363 charges, rounded out the top three for the third year in a row.
- Claimants recovered $296.1 million in FY 2014 via the EEOC's administrative process—a decrease of $75.9 million from FY 2013.
- The EEOC filed 133 merits lawsuits (two more than the prior fiscal year), with the vast majority—76 suits asserting claims under Title VII of the Civil Rights Act, 49 suits under the Americans with Disabilities Act, and 12 suits under the Age Discrimination in Employment Act. GINA suits remain sparse: the EEOC filed its first three suits asserting GINA claims in FY 2013, but only filed two suits asserting GINA claims in FY 2014.
- The EEOC resolved only 144 lawsuits—compared to 222 suits resolved in FY 2013—and received $22.5 million in monetary benefits from settlements and awards, as compared to $38.6 million in FY 2013.

Key Takeaways

Prudent employers should reflect upon the EEOC's FY 2014 data and incorporate some lessons learned. At a minimum, employers should provide sufficient training on retaliation, as the prevalence of those charges remains at a historic level. The training should drive home the point that even if an employee's complaint is without merit, retaliation is unacceptable and unlawful.

Further, periodic, comprehensive harassment training remains critical, particularly as those charges remain among the most prevalent and most difficult to dismiss for lack of probable cause. Employers in states with greater EEOC activity, such as Texas, California, and Florida, should proceed with even greater caution.

With an increasing number of claims based on allegedly unlawful advertisements (most, age-based), HR departments should consider reviewing all advertisements in advance of publication to ensure that unlawful preferences (age-based, gender-based, etc.) are excluded. Employers should ensure that their HR or legal departments review any employee waivers, early retirement programs, and employee testing systems, as claims related to these initiatives are on the rise.

Finally, employers should compare their own statistics to the EEOC's data, both on a regional and national basis. If the results are dramatically different in one or more locales, or for one or more charge types, a problem might exist that calls for enhanced training or targeted personnel actions. ■

Ogletree Deakins

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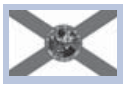
Ogletree Deakins State Round-Up

California*

On January 8, the California Supreme Court issued a decision holding that the on-call hours for security guards who work 24-hour shifts constitute compensable hours worked. The justices agreed with the Court of Appeal's finding that the guards were entitled to compensation because the employer "substantially restricted" their ability to engage in personal activities. *Mendiola v. CPS Security Solutions, Inc.*, No. S212704 (January 8, 2015).

Florida*



On January 13, the Florida Department of Revenue's General Tax Administration and the U.S. Department of Labor's Wage and Hour Division entered into a memorandum of understanding in which they agreed to share information on independent contractor misclassification and coordinate law enforcement efforts in this area. Over one-third of the United States has entered into similar agreements in efforts to stave off misclassification.

Georgia

The Eleventh Circuit Court of Appeals rejected a suit brought by a Georgia trucker who alleged that he was fired in violation of the ADA. The court held that the trucker was no longer qualified for his job based on his week-old diagnosis of chronic alcohol dependence. *Jarvela v. Crete Carrier Corp.,* No. 13-11601 (January 28, 2015).

Illinois*

A recent amendment to the Illinois Human Rights Act expands the Act's protection against sexual harassment to unpaid interns. The amendment, which applies only in the sexual harassment context, defines "unpaid intern" and lists criteria to determine whether a position qualifies as an unpaid internship. This amendment went into effect on January 1.

Indiana

The Seventh Circuit Court of Appeals rejected a lawsuit brought by a 59-year-old substance abuse counselor who was previously employed by the Indiana Department of Corrections. The court found that the worker failed to show that the private contractor that took over prison counseling services did not hire her based on her age or sex. *Ripberger v. Corizon, Inc.*, No. 13-2070 (December 10, 2014).

Massachusetts*

In one of his last acts as governor, former Governor Deval Patrick signed into law on January 7, an amendment to the previous Massachusetts Maternity Leave Law that extends eight weeks of unpaid leave to both male and female employees to care for a newborn, newly placed, or newly adopted child.

Missouri*

The Missouri Court of Appeals recently issued an opinion that continues the trend in the state of restricting the enforceability of arbitration clauses. In the January 13 decision, the court held that at-will employment—even "new" or "future" employment—does not constitute valid consideration necessary to form a contract. *Jimenez v. Cintas Corporation*, Nos. ED101015, ED101241 (January 13, 2015).

New Jersey*

The New Jersey Supreme Court recently issued a landmark ruling that will reshape hostile work environment sexual harassment cases brought under the New Jersey Law Against Discrimination. The justices expanded the definition of a "supervisor" for purposes of hostile work environment claims under state law and adopted the *Faragher/Ellerth* affirmative defense. *Aguas v. State of New Jersey*, A-35-13 (February 11, 2015).

Oregon*

The city of Eugene, Oregon recently released the proposed rules to the mandatory paid sick leave ordinance that it passed last year, which will take effect in July 2015, or on October 1 if the state legislature passes a statewide sick leave law. Under the proposed rules, any employee who works within Eugene will accrue paid sick leave at a rate of at least 1 hour for every 30 hours worked. This accrual will begin on the employee's first day of work.

Pennsylvania*

On February 12, Philadelphia Mayor Michael Nutter signed legislation requiring certain employers to provide up to five days of paid sick leave each calendar year to their employees. The ordinance, titled "Promoting Healthy Families and Workplaces," goes into effect on May 13, 2015.

Tennessee*

The Tennessee Department of Labor and Workforce Development's Division of Occupational Safety and Health has adopted the new federal rules on injury reporting. While the federal OSHA revised rule took effect on January 1, 2015, the rule will not become effective in Tennessee until February 24, 2015. The state also has plans to allow employers to report workplace injuries electronically.

Virgin Islands*

The Supreme Court of the Virgin Islands recently held that the Wrongful Discharge Act provides a remedy not only when an individual is discharged or resigns under circumstances that are alleged to constitute a constructive discharge, but also when the individual is demoted from a previously held position. *Rennie v. Hess Oil Virgin Islands Corp.*, No. 2014-0028 (February 6, 2015).

**For more information on these state-specific rulings or developments, visit www.ogletreedeakins.com.*

Promulgating Employee Conduct at Work: Avoiding Common Policy Land Mines

*by Thomas M. Stanek and Sasha H. Meschkow**

With ever-changing developments in social media, employers are often concerned with ways in which they can monitor off-duty employee conduct. However, employers often lose sight of how policies that seek to control employee conduct on the job or in the workplace may run afoul of National Labor Relations Board (NLRB) precedent. This article highlights a common policy land mine—as recently applied to a Fortune 500 company—and how to revise that policy to minimize future risk of unfair labor practice charges.

Finding the Land Mine: Defining Section 7 Activity

Section 7 of the National Labor Relations Act (NLRA) permits employees, including non-union employees, to engage in certain protected concerted activity. This activity generally includes employee expression of workplace concerns, such as wages, hours, and other terms and conditions of employment. This expression can take many forms, including verbal communication between employees that is of a soliciting nature (often referred to as "solicitation") or the distribution or dissemination of written materials from one employee to another.

As demonstrated below, the NLRB remains increasingly critical of policies that seek to limit employee expression in the workplace and thus function to limit the expression of workplace concerns.

Mercedes-Benz: Narrowly-Tailored Policies

In its recent ruling in *Mercedes-Benz U.S. Int'l Inc.*, 361 NLRB No. 120 (2014), the NLRB reaffirmed its nuanced approach to solicitation and distribution rules and affirmed the administrative law judge's (ALJ) finding that Mercedes-Benz's policy violated the NLRA where the policy was not discretely-tailored to prohibiting employee solicitation in working areas only during working time.

Mercedes-Benz's handbook policy stated in relevant part: "[The Company] prohibits solicitation and/or distribution of non-work related materials by Team Members during work time or in working areas."

The ALJ found, and the Board affirmed, that the policy violated the NLRA because it could be construed by employees as prohibiting solicitation in work areas even if the employees at issue were not on working time. The ALJ also rejected Mercedes-Benz's argument that the policy could not be construed as impeding Section 7 rights because its employees routinely solicited on non-working time without interference. Despite his conclusion that Mercedes-Benz routinely allowed solicitation during non-working time, the ALJ concluded that the policy was unlawful because maintenance of the rule, even without enforcement, violated the NLRA.

Finally, the ALJ concluded Mercedes-Benz did not intend its rule to be construed in any way which discouraged Section 7 activity; however, because under relevant NLRB precedent the employer's intent is not relevant in determining whether a policy is unlawful, such intent was insufficient to preclude a finding that the policy violated the NLRA.

The ALJ also found, and the NLRB affirmed, that Mercedes-Benz had violated the NLRA when it prohibited employees from distribution in particular areas of the facility. As a general rule, employers may lawfully prohibit employees from distributing literature in work areas to prevent hazard to production. However, this principle does not apply to "mixed use areas"—areas that include both work matters and non-work matters.

The areas at issue for Mercedes-Benz were:

- The team center—an area that encompassed the employees' break and eating area, and housed the team leaders' offices, filing cabinets, and various equipment; and
- The facility's atrium—the primary means of egress and ingress into the facility, which also included a security kiosk, a storefront that sold merchandise to employees and visitors, the facility's medical office, and a vehicle leasing desk.

The ALJ concluded that the company's team center and atrium were mixed use areas for which it had not presented any special circumstances justifying the prohibition of distribution.

Key Takeaways

In light of the NLRB's nuanced approach, employers should review and revise internal solicitation and distribution policies to ensure they are narrowly-tailored in accordance with this decision.

Employers also should avoid getting caught in the "mixed use area" trap by:

- Identifying areas in which work and non-work activities take place, such as hallways, common meeting spaces, and shared break rooms; and
- Revising policies to exempt such areas from any distribution prohibition or identify special circumstances, such as the hindrance of production or certain equipment or machinery, that may result from distribution in that specific area.

The NLRB's regulation of basic work policies is just one of many topics that will be covered at this year's *Not Your Father's NLRB—The Era of Ambush Elections* on March 26-27, 2015, at the Fairmont Chicago. Attendees will receive information from experienced practitioners about the latest developments and practical tips to help protect their organizations. For more information or to register for this program, call (866) 964-6303 or visit our website at www.ogletreedeakins.com. ■

"The NLRB remains increasingly critical of policies that seek to limit employee expression in the workplace."

* Thomas Stanek is a shareholder and Sasha Meschkow is an associate in the Phoenix office of Ogletree Deakins. Both attorneys represent employers in labor and employment related matters.

Supervisor's Knowledge of Unreported Overtime May Lead to FLSA Liability

Court Finds Employer May Not Assert Equitable Defense in Such Cases

A federal appellate court recently held that if an employer knew—or had reason to know—that an employee has underreported his or her work hours, the employer cannot escape liability under the Fair Labor Standards Act (FLSA) by asserting that the employee purposely reported his or her work hours incorrectly and therefore has "unclean hands." According to the Eleventh Circuit Court of Appeals, "[b]arring FLSA actions for wage and overtime violations where the employer is aware that an employee is underreporting hours would undermine the Act's deterrent purpose." ***Bailey v. TitleMax of Georgia., Inc.,*** *No. 14-11747, Eleventh Circuit Court of Appeals (January 15, 2015).*

Factual Background

Santonias Bailey worked at a TitleMax store in Jonesboro, Georgia, for under a year. Bailey alleges that during that time, he worked overtime hours that he did not report and for which he was not paid.

Bailey claimed that he worked "off the clock" because his supervisor told him that TitleMax "does not allow overtime pay" and that he was encouraged not to report overtime hours when recording his work time. Bailey further alleges that his supervisor changed his hours, at one point adding an unpaid lunch hour when, in fact, Bailey claims to have worked through his lunch break.

After he resigned from TitleMax, Bailey filed a lawsuit under the FLSA for unpaid overtime. A trial judge granted TitleMax's request to dismiss the case, after finding that the company had asserted a valid equitable defense—that Bailey had violated company policies requiring accurate time entries by employees—which barred his FLSA claim. Bailey appealed this decision to the Eleventh Circuit Court of Appeals.

Legal Analysis

The FLSA requires employers to pay nonexempt employees at least one-and-one-half times the employees' regular hourly wage for every hour worked in excess of 40 hours in one week. Courts regularly have noted that the goal of the FLSA is to counteract the inequality of bargaining power between employees and employers.

On appeal, the Eleventh Circuit reversed the trial judge's decision, holding that once an employee has established that he or she has worked overtime without pay and that the employer knew—or should have known—that overtime was worked no "equitable" defenses can be asserted to defend against the FLSA claim.

An equitable defense shifts most or all of the responsibility to the employee. In this case, TitleMax claimed that Bailey had not followed the company's policy requiring the accurate reporting of time records, and/or should have complained about his supervisor's directives about working unpaid overtime.

The Eleventh Circuit rejected those equitable defenses, finding that the evidence that Bailey's supervisor knew of the underreporting precluded the company's assertion of the equitable defenses. To do otherwise, the court found, would contravene the purpose of the FLSA and would allow an employer to rely on written policies regarding accurate reporting, while allowing supervisors to undermine those policies by encouraging—or even requiring—underreporting.

Practical Impact

According to Maria Danaher, a shareholder in the Pittsburgh office of Ogletree Deakins, "While the Eleventh Circuit's ruling does not ensure the worker's success at trial, it seems to create another level of diligence for employers. This holding goes beyond the FLSA's requirement that employers have policies and procedures for ensuring the accurate reporting of work hours, and imposes an affirmative duty on employers to make certain that supervisors and managers do not make statements that contradict those policies." ■

It's Time to Post the OSHA 300A Annual Summary

The Occupational Safety and Health Administration's (OSHA) Form 300A, which lists a summary of the total number of job-related injuries and illnesses that occurred during 2014 at each workplace, must be posted between February 1 and April 30, 2015. The summary must be placed in a conspicuous location where notices to employees are usually posted, and the posting cannot be altered, defaced, or covered by other material.

The summary must include the total number of job-related injuries and illnesses that occurred in 2014 and were logged on OSHA Form 300, Log of Work-Related Injuries and Illnesses. To assist in calculating incidence rates, the form requires information about the annual average number of employees and total hours worked during the calendar year. If there were no recordable injuries or illnesses in 2014, employers may enter "zero" on the total line.

A company executive must sign and certify the form. This can include: (1) any officer of the corporation; (2) the highest-ranking company official working at the establishment; (3) the immediate supervisor of the highest-ranking company official working at the establishment; or (4) an owner of the company (permitted only if the company is a sole proprietorship or partnership).

Employers with 10 or fewer employees and employers in certain industries are normally exempt from federal OSHA injury and illness recordkeeping and posting requirements, including the annual Form 300A posting. A list of exempt industries can be found on OSHA's website. The Bureau of Labor Statistics, however, may still select exempted employers to participate in an annual statistical survey.

More importantly, all employers covered by OSHA must report work-related employee fatalities to OSHA within eight hours. Effective January 1, 2015, all work-related in-patient hospitalizations, amputations, or losses of an eye must be reported within 24 hours. Employers who contact an OSHA Area Office and are not able to speak directly to a person should call OSHA's national hotline at 800-321-6742. OSHA is preparing to implement an online reporting form, but it is not currently available.

Ogletree Deakins News

New to the firm. Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. They include: Dr. Ulrike Conradi (Berlin); Phillip Pemberton (Denver); Patricia Beaty (Indianapolis); Pia Padfield (London); Christopher Wong (Los Angeles); Lorne Dauenhauer (Portland); Patti Perez (San Diego); and Lauren Marino (Washington, D.C.).

New shareholders. Ten of the firm's attorneys have been elected to the position of shareholder. The attorneys in the newly-elected shareholder class include: Donelle Buratto, Catherine Coble, Christopher Decker, John Merrell, Diana Nehro, Sarah Nichols, David Rosner, Natalie Stevens, Clark Whitney, and Erin Williams.

"DATA BREACH"

continued from page 1

that would constitute a breach for purposes of the Health Information Technology for Economic and Clinical Health (HITECH) Act and HIPAA. In such a situation, state-level breach notification laws also are likely to be implicated.

Employers' Obligations

As employers consider how to respond on behalf of their health plans, it is important to note that employers' obligations will depend on the nature of the relationship between the employer and its health plan, and the insurer or TPA.

- Insured Plan—If the plan is insured, the insurer is the covered entity responsible for investigating the situation, undertaking appropriate mitigating measures, and providing all required notices to plan participants, regulators and, in some instances, the media.
- Self-Funded Plan—If the plan is self-insured, the responsibility for investigating a breach and providing any required notice, by default, falls on the plan and the employer as its sponsor. If, as is typically the case, however, the employer has outsourced the claims administration role, the TPA may have the contractual obligation for assessing and responding to the breach. At a minimum, the TPA will have a notice obligation to the plan/employer and a responsibility to provide details surrounding the breach. Employers should review the relevant contract documents and determine where responsibility for response, remedial, and notification measures rests.

For life insurance and other non-health coverage and benefit services that Anthem offers, HIPAA and HITECH may not apply. However, when crafting a response, employers should consider their role as a fiduciary of the benefit plan as well as employee relations. It may be prudent for an employer to reach out to employees, sharing information sent by Anthem regarding the breach, as well as follow up with Anthem representatives to get a better understanding of how the breach is being addressed.

In all cases, under state breach notification laws, generally the party that held the data when the breach occurred is responsible for issuing the notice. State laws govern who must provide notice and define the contents and recipients of such notices. Accordingly, employers should identify the implicated states and comply with their obligations in the relevant jurisdictions.

Action Items for Employers

Initial action items for employers in this situation include the following:

- Define the relationship between the employer's health plan and Anthem. Is Anthem acting as an insurer or as a TPA for the plan?
- If the plan is insured, the notification obligation resides primarily with Anthem, and based on Anthem's public communications thus far, it appears that Anthem is proceeding with the mitigation and notice process already. In addition to notifying the affected individuals, employers should review their insurance contract documents and evaluate their provisions regarding data privacy and security. Ultimately, if the plan is fully insured, Anthem should be responsible for HIPAA and HITECH compliance and the proper issuer of notices under state data breach laws.
- If the plan is self-insured and Anthem serves as TPA, the employer should closely examine its service contract and "business associate agreement." In particular, the employer should focus on the breach assessment and notice provisions and determine who is responsible for evaluating possible breaches and issuing required notifications to the affected individuals. The employer should examine the information that Anthem has provided regarding its handling of the breach and make sure that those actions coincide with the contractual provisions, HIPAA, HITECH, and applicable state breach notification laws.
- If the employer retains responsibility to provide the required notice, determine whose data was compromised, identify the actions required to protect the data and mitigate harm, and prepare the notices necessary to comply with the plan's obligations under HIPAA and state law. The employer will likely need to work with Anthem to collect the detailed information necessary to prepare the required notices, and Anthem has an obligation to provide the employer with that information.
- Consider additional steps the employer should take to mitigate any harm caused by the breach. Review the service agreement and business associate agreement for any provisions governing mitigation obligations and indemnification clauses for the employer's ability to recover for costs related to the breach.

Although Anthem was the victim of this particular cyber attack, recent large-scale data breaches with major retailers and financial institutions demonstrate that all forms of sensitive personal information can be vulnerable to exploitation, and the employee benefits world is certainly not immune from these challenges. Other major health insurers and benefits consultants, insurance brokers, and third-party administrators are likely vulnerable to similar attacks in the future, and employers should be prepared to respond quickly in the event their plans or business partners are affected.

Data breaches and employer obligations will be covered in detail at the 2015 National Workplace Strategies Seminar in San Antonio on May 13-16. To register for this program, visit www.ogletreedeakins.com/events. ■

Delegation: Ask Permission, Beg Forgiveness, or Practice "Per-Giveness"?

by Jathan Janove, Ogletree Deakins Learning Solutions

As a boss, have you ever been frustrated by employees who either (a) kept you in the dark or (b) sought your approval for everything?

As an employee, have you ever been frustrated by bosses who either (a) kept you in the dark or (b) insisted on their approval for everything?

If you're a boss, you know that being left in the dark can erode trust and produce micromanagement or avoidance. Yet continually being interrupted to help others make decisions can be frustrating and also lead to a loss of trust and confidence.

If you're an employee asking the boss's permission to do something, you might be told "yes" or "no." Or you might be told . . . nothing. Being told nothing, you might go ahead and act—and risk doing the "wrong" thing and having to beg forgiveness later. Or, you might just do . . . nothing—remain in limbo.

The permission/forgiveness dichotomy causes another problem. Have you ever been asked a yes-or-no question when you weren't comfortable with either answer? Of course! Perhaps you weren't sure or perhaps you thought "no," but were hesitant to say so.

I've experienced these delegation challenges both as a boss and as an employee reporting to a boss. As a result, I recommend incorporating an approach I call "per-giveness" as part of your boss-employee communications. When a decision needs to be made, it falls into one of three categories:

(1) Permission: advance authorization from the boss;

(2) Forgiveness: Just do it; if it goes wrong, offer a mea culpa; or

(3) Per-giveness: Give the boss notice of a pending issue for decision and an opportunity to weigh in, but don't require a response in order to act.

For decisions that fall into the "per-giveness" category, let your boss know the following three pieces of information and a closing statement:

(1) What you're planning to do;

(2) When you're planning to do it;

(3) Why your intended course of action is optimal; and

(4) This closing statement: "Let me know if you have questions or would like to discuss this."

Per-giveness in Action

When I was managing shareholder of Ogletree Deakins' Portland office, I relied heavily on my office administrator (OA). Per-giveness became part of our delegation dialogue. Certain decisions fell in the permission category: "Don't proceed without my express approval." For example: "Jathan, I think the office needs to be remodeled and I have a bid of $47,000. May I go forward with this?" Other decisions fell under forgiveness: "Go ahead and do it." Here is an example: "I've authorized two hours of secretarial overtime this evening." And others fell in between (per-giveness): "Jathan, at my staff meeting on Monday at 10:00 a.m., I plan to announce a new protocol related to scheduling vacations that is based on the following . . . Let me know if you have questions or wish to discuss this."

My OA and I periodically assessed the types of decisions that belonged in each category and made adjustments. How did this help us? From my perspective as the boss, it promoted trust, confidence, and efficiency. I never had to worry, "What's she up to now?!" Yet I wasn't bogged down by having to make lots of decisions to keep things running. Also, I had a new option for decisions that fell in the gray area. When my OA gave notice of an impending action, I wasn't required to endorse or reject her recommended action. If I was on the fence, I could read her per-giveness message and . . . do nothing—let her act as she thinks appropriate.

From my OA's standpoint, this three-category decision-making approach created a nice balance—management without micromanagement. Moreover, it eliminated the frustrating and often enervating experience of sending requests to a boss who doesn't respond.

In summary, relieve yourself of the either-or dilemma of permission or forgiveness. Instead, ask which box the decision falls into:

- Ask permission?
- (Potentially) beg forgiveness?
- Apply per-giveness?

As we must be the change we wish to see in the world, here I go: "Hi, boss. I'm planning to post the enclosed column in the newsletter, which goes to press next Tuesday. Let me know if you have questions or wish to discuss it. Cheers, Jathan."

Jathan Janove is the firm's Director of Employee Engagement Solutions and a member of Ogletree Deakins Learning Solutions (ODLS). In that capacity, he provides clients customized training, coaching, and consulting solutions to meet their challenges and achieve their goals. ■

"Say Cheese": Ogletree Deakins Opens Milwaukee Office

Ogletree Deakins kicked off the new year by opening an office in Milwaukee with a group of nine experienced and highly regarded attorneys. Tim Costello serves as the managing shareholder of the Milwaukee office. He is joined by shareholders Robert Bartel, Timothy Kamin, Kevin Kinney, and Brian Radloff, special counsel David Loeffler, of counsel Keith Kopplin, and associates Mark Johnson and Dean Kelley. By opening in Milwaukee, Ogletree Deakins now has 47 offices and extends a growth trajectory that includes 13 new offices since 2010 and international expansion into Europe and Mexico.

"Milwaukee has been an attractive market for the firm for years and has a number of synergies with our Chicago and Minneapolis offices," said Kim Ebert, managing shareholder of Ogletree Deakins. "We are excited to expand into Milwaukee and have found a great group of talented professionals who fit our culture and share our values."

"Ogletree Deakins is a first-class organization, and we are excited to be a part of the firm," said Costello. "Our clients will immediately benefit from the firm's depth of knowledge, boundless resources, and culture of unparalleled client service."

"15-Month Lapse" Until Adverse Action Does Not Bar Retaliation Suit

Court Finds Employer's Reason for Refusing to Rehire Worker Was Pretextual

A federal appellate court recently reinstated a retaliation lawsuit brought by a worker under the Age Discrimination in Employment Act (ADEA) and state law. According to the Sixth Circuit Court of Appeals, a reasonable jury could find a causal connection between the company's decision not to rehire the worker and his then-pending age discrimination lawsuit challenging his discharge during a reduction in force. ***Sharp v. Aker Plant Services Group, Inc.,*** *No. 14-5415, Sixth Circuit Court of Appeals (January 13, 2015).*

Factual Background

Aker Plant Services Group, Inc. provides engineering, procurement, and construction services to clients in the manufacturing industry, including E.I. du Pont de Nemours and Company. In 2003, Tommy Sharp began working on a contract basis for Aker and was assigned to a Dupont plant in Louisville, Kentucky. Two years later, Aker hired Sharp as a full-time electrical and instrumentation engineer.

In January 2009, Sharp was laid off as part of a reduction in force. Sharp asked his supervisor, Mike Hudson, why he—rather than his less experienced, less senior coworkers—was selected to be laid off. Hudson responded that after Sharp's team leader retired, the company wanted to ensure continuity in team operations by retaining a younger worker on the team who they planned to groom to become the next team leader.

Two weeks before his effective termination date, Sharp returned to work with two digital MP3 players, which he used to secretly record a conversation with Hudson. During this conversation, Hudson reiterated his reasons for choosing Sharp for layoff.

Sharp subsequently filed an age discrimination lawsuit and, following a jury trial, a verdict was rendered in Aker's favor. While this suit was pending, a staffing agency sought to place Sharp with Aker in a temporary position as an electrical designer at DuPont's Louisville plant. Aker's Senior HR Manager Scott Atkins received the inquiry and rejected the application by email.

His explanation was as follows: "Yes, we do know Tom. He does acceptable work as a designer, but he violated a DuPont mandate on the use of electronic recording devices on company property when last employed here. There are combustible materials in the plant that can potentially be ignited by the use of cell phones, recorders, cameras, etc… DuPont maintains a zero-tolerance approach to safety violations on its property so, unfortunately, we will not be able to consider Mr. Sharp for this role."

DuPont's Site Policies Brochure prohibits cameras and recording devices on plant premises. According to the company's Safety Manual, "knowingly violating safety rules and procedures" constitutes a terminable offense and employees are prohibited from bringing electrical or battery operated devices on the premises without management permission.

After receiving a right-to-sue letter from the Equal Employment Opportunity Commission, Sharp filed a second lawsuit against Aker alleging retaliation in violation of the ADEA and state law. The trial judge granted Aker's motion to dismiss both claims, and Sharp appealed.

The trial judge rejected both the federal and state retaliation claims, finding that Sharp failed to establish the necessary causal connection between his previous age discrimination suit and Aker's rejection of his application. According to the court, Sharp did not introduce evidence of temporal proximity or that the company treated similarly-situated workers more favorably than Sharp. "[A]s a matter of law," the court wrote, "the fifteen-month lapse between Sharp's demand letter—when Aker first learned of Sharp's intent to pursue redress for age discrimination—and Aker's decision to reject his application for rehire precluded a finding of temporal proximity."

Legal Analysis

The Sixth Circuit Court of Appeals disagreed with the trial judge, noting that "[t]he court needed instead to consider those two factors in light of one another—together with Sharp's other circumstantial evidence—to determine whether 'an inference could be drawn that the adverse action would not have been taken had [Sharp] not filed a discrimination action.'" Considering the evidence in the light most favorable to Sharp, the Sixth Circuit held that a reasonable jury could infer that Aker declined to rehire Sharp in retaliation for his earlier discrimination action against the company.

The Sixth Circuit acknowledged the 15-month lapse between the two actions. However, the court found that such a lapse could be consistent with a retaliatory motive, reasoning: "because Aker terminated Sharp months before he disclosed his intent to sue, no opportunity for retaliation manifested until the staffing agency tried placing Sharp back at DuPont's Louisville plant. Aker rejected Sharp on the same day it received his application. And Atkins, the Aker employee who fielded the proposal that Sharp fill Aker's vacancy at the DuPont plant, became personally involved in the underlying lawsuit just two months before rejecting him."

> *"This decision illustrates the importance of maintaining an effective anti-retaliation policy."*

The court also held that Aker's stated reason for rejecting Sharp's application ("the use of electronic recording devices on company property") was pretextual. According to Sharp, his coworker brought a smartphone to the plant daily, used the phone to take pictures, and was not disciplined by Aker. Based on this evidence, the Sixth Circuit reinstated Sharp's retaliation claims.

Practical Impact

According to Wade Fricke, a shareholder in the Cleveland office of Ogletree Deakins: "First, this decision illustrates the importance of maintaining an effective anti-retaliation policy and regularly training supervisors. Second, when possible, it is important to take the alleged discriminator/harasser out of the decisional loop for any action that could be deemed an adverse employment action. Finally, employers must apply workplace policies consistently to all employees." ■