

THE CORPORATE COUNSELLOR

LOMURRO, DAVISON, EASTMAN & MUÑOZ, P.A.

EMPLOYMENT LAW EDITION:

New Jersey's Civil Union Act

New Jersey's Civil Union Act promises equality in areas controlled by New Jersey Law. The New Jersey Civil Union Act is just that - it's a civil union act approved for the State of New Jersey. New Jersey is powerless to provide the promise to equality in areas controlled by the Federal Law.

Medical insurance and retirement plans will present the most difficult problems for employers. The Employment Retirement Income Security Act (ERISA) preempts all state laws which relate to employee benefit plans within the Federal law's scope. However, ERISA does not affect state laws regulating insurance, banking or securities. On the other hand, ERISA has been held to preempt the Continuation of Benefits provision under the New Jersey Family Leave Act. New Jersey's **Mini-COBRA** Law has not been subject to such a challenge because it regulates the insurance product itself. Self insured programs are not regulated by the State Insurance Law and are regulated by ERISA.

Some employers have indicated an intent to request proof of an employee's civil union. However, if the employer does not request a marriage certificate to cover spouses, a demand for proof of a civil union is likely to be viewed as discriminatory.

Taxation: The Defense of Marriage Act enacted in 1996 prevents a civil union partner from being considered a spouse for purposes of the Internal Revenue Code. Therefore, health benefits provided on a **pretax** basis to employees and their spouses cannot be provided on a pretax basis to civil union partners unless one partner meets the definition of a **dependent**. If an employer has an employee seeking coverage as a dependent, the partner would need to complete a form **Affidavit of Dependency** which lists all the requirements for dependency. For civil union partners who do not meet the definition of a dependent, the employer must report and record

the cost of the insurance as an after tax benefit and income to the employee subject to Federal taxation. Civil partners cannot be included in health flex spending accounts provided under Section 125 of the Internal Revenue Code.

Insurance: Smaller employers with 2 to 19 employees are covered by New Jersey's Mini COBRA Law. They will be required to offer the option of purchasing continued health care coverage to civil union partners when the employee's partner is terminated or other qualifying event occurs. COBRA (the consolidated on the Budget Reconciliation Act) covers larger employers and does not require continuation coverage to be offered to civil union partners because it is prohibited by the Defense of Marriage Act. As a side note, it is interesting to note that employers must offer health insurance coverage to those partners in civil unions, but do not need to offer the same coverage to domestic partners that have not formalized their relationship by a civil union.

Retirement plans such as traditional pension plans and 401K's are regulated by ERISA and are not required to comply with the Civil Union Act.

Family and Medical Leave Laws: Partners in a civil union cannot take Federal Family Medical Leave to care for a seriously ill partner. However, under the New Jersey Family Leave Act, a partner in a civil union will be able to take 12 weeks in any 24 month period to care for their partner in a civil union. However, that leave comes without the FMLA health benefit protection.

Worker's Compensation: Civil union partners are now entitled to worker's compensation benefits including, but not limited to, survivor benefits and payment of back wages.

PROTECT YOUR COMPANY FROM DISCRIMINATION/ HARRASSMENT LAWSUITS

It has been ten years since the United States Supreme Court issued its landmark decision laying out the path for an employer to assert an affirmative defense for harassment.

Since the decision in 1998, to assert a defense, Courts have required that employers have a written policy. Courts have also looked favorably on policies that provide a second avenue of review of the Complaint if an employee is not satisfied with the resolution, and have upheld the use of the defense when an employee fails to utilize the follow up procedure.

Some of the deficiencies noted by courts have been the failure to investigate a complaint, the timeliness of the investigation, and the thoroughness of the investigation. For example, the District Court of New Jersey, in Mancuso v. City of Atlantic City, felt that an employee's failure to complain of the specific conduct at issue could be excused by a jury because she had previously observed on several occasions her employer's failure to take seriously previous harassment complaints.

As a result, employers must insure that they have a well designed, well publicized anti-harassment policy, conduct regular harassment training, and promptly and thoroughly investigate or remediate any incidents of harassment.

The following is an excerpt from an article appearing in the April 7, 2008 New Jersey Law Journal in an article entitled "Illegal Worker's Sexual Assault of Child Sparks Call for Strict Employer Liability." by Harry Gottlieb.

Sexual assault of a six year old girl at a New Jersey store by an employee in the country illegally has promoted an effort to enact a law making businesses strictly liable for intentional acts by workers who shouldn't have been hired. The girl's parents are suing the store for negligent hiring and supervision. They are also sponsoring a bill that would impose sanctions to deter all businesses from hiring undocumented workers.

WHEN DOES EMPLOYMENT START FOR PURPOSES OF WORKER'S COMPENSATION?

Generally, accidents occurring while an employee is traveling to and from work are not considered within the course of employment unless "the employee is engaged in the direct performance, duties assigned, or directed by the employer." N.J.S.A. 34:15-36. There is, however, an exception to this Rule. "The travel-time" exception provides workers compensation coverage to employees who are paid for their travel time to and from distant work sites, even though they may not be in direct performance of their duties. Brown v. Am. Red Cross. Notwithstanding, if an employee is only made whole for their expenses for traveling, and not compensated for their time, the traveling employee is not in the course of his employment and any accident will not be considered as rising out of employment. An accident will only be considered in the course of employment of worker's compensation if the employee is receiving employment wages for the time spent traveling. Nebesne v. Crocetti.

18 U.S.C.A. SECTION 1513(e)

"Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense, shall be fined under this title or imprisoned not more than ten years, or both.

Minimum Wage Workers Get First Federal Raise in a Decade

REMINDER - On July 24, 2007 the new Federal Minimum Wage Rate was changed to \$5.85. Thereafter, on each anniversary for two years the rate will be increased by \$.70, therefore, the minimum wage on **July 24, 2008** will be **\$6.55** and on **January 24th, 2009** it will be **\$7.25**. For many employers the increase is a nonevent because in about half the states the minimum wage rate already exceeds the current Federal Minimum Wage. Specifically, New Jersey's current minimum wage is currently set at \$7.15. In 2009 the minimum wage will be increased, to match the Federal plan rate increase, to \$7.25.

Managing Personal Relationships in the Workplace

By: Loryn M. Lawson, Esq.

With people spending an increased amount of time in the workplace, the number of workplace romances are on the rise and it is inevitable they will continue to increase. For example, in 2003, a VaultReports.com internet survey revealed that 59% of the participants surveyed said they had been involved in a workplace romance at some point in their careers. Braun Consulting News, Vol. 5. No. 3, Winter 1999. Another 27% of the participants said they had never dated a co-worker, but were not opposed to having a relationship with someone they worked with. Id.

As more employees become involved in personal relationships with co-workers, employers are confronted with a myriad of complicated and potentially embarrassing issues. Indeed, workplace romances have a significant impact on employers, including an increase in employee cynicism, a reduction in productivity, loss of valued employees, as well as vexatious litigation spawned by a relationship turned sour. A decline in employee morale amongst co-workers who perceive that a supervisor is favoring his or her paramour is one of the many problems associated with workplace romances. In fact, Courts have begun to extend liability to employers on this issue. In Miller v. Department of Corrections, 115 P.3d 77 (2005), the California Supreme Court held that a female plaintiff had stated a viable cause of action for sexual harassment against the Department of Corrections, where the prison warden had repeatedly demonstrated favoritism towards three other female employees with whom he had sexual affairs. In analyzing whether to expand the scope of sexual harassment claims to include claims based upon favoritism of other employees, the Court reviewed the Equal Employment Opportunity Commission's Policy Guidance on Employer Liability, which states that "if favoritism based upon the granting of sexual favors is widespread in a workplace . . . a message is implicitly conveyed that the managers view the woman as 'sexual playthings', thereby creating an atmosphere that is demeaning to women." Id. at 812. Faced with substantial evidence that the warden's sexual affairs resulted in promotions and other perquisites for his paramours, the Court reversed the grant of summary judgment and reinstated the plaintiff's complaint.

Significantly, the Miller Court held that an employee can state a claim for sexual harassment by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment. Id. at 814.

This case highlights the significant liability issues posed by favoritism arising from workplace relationships. The stakes, however, are even higher for employers when a workplace relationship involving employees with unequal powers fails. One innovative solution employers are utilizing is the consensual relationship agreement, otherwise known as "love contracts," which emerged relatively recently to help protect companies against costly sexual harassment lawsuits. A consensual relationship agreement or "love contract" is simply an acknowledgment by both employees that: 1) the relationship is consensual and that there are no promises regarding the terms and conditions of employment, 2) they have reviewed the employer's sexual harassment policy and agree to abide by its terms, and 3) if the nature of the relationship changes, either employee has the right to lodge a complaint in accordance with the employer's sexual harassment policy.

Although no court has considered the validity of a personal relationship contract and a "love contract" may not ultimately serve as a complete bar against a lawsuit, the personal relationship agreement will nonetheless serve as persuasive evidence that the employer complied with its legal obligations to maintain a workplace free of harassment. The sheer existence of the "love contract" demonstrates that the employer maintained a policy on harassment, took appropriate steps upon discovery of the relationship to ensure that it was a consensual relationship, and communicated to its employees the availability of a grievance procedure if the employees perceive the relationship has evolved into some form of harassment. The "love contract" is a potentially creative mechanism to protect your company from liability for sex harassment and we recommend that employers considering the use of a "love contract," take care to ensure that it is carefully crafted to protect the company against liability for workplace romances.

Is Your Handbook Really Protecting You?

Employee handbooks can be great tools to help you lay down policies and comply with the law. But a poorly written, outdated or inconsistent book can hurt your company.

The biggest problem: Companies often include handbook language that eliminates their right to fire employees at will.

Here are the 10 most common handbooks mistakes to avoid:

1. Adopting a “form” handbook, which includes promises you’ll probably never keep.
2. Including lots of detail on procedures, which confuses employees and provides fodder for lawyers. Stick to company *policies* in the book. Keep a separate *procedures* manual for managers.
3. Mentioning an employee probationary period. That can erase at-will status by implying that, once the period is over, the employee can stay forever. Use the words “introductory period.”
4. Being too specific in your discipline policy. That gives the impression that the list covers every possible infraction.
5. Not being consistent with other company documents.
6. Overlooking an at-will disclaimer. Have employees sign a disclaimer acknowledging that the company can terminate their employment at any time and bypass discipline policies if the situation warrants.
7. Sabotaging disclaimers by what you say, especially reassuring employees that their jobs are secure.
8. Not adapting the handbook to accommodate each state’s laws.
9. Failing to update the manual frequently for changing laws.
10. Setting unrealistic policies. If you know your supervisors won’t enforce it, don’t put it in your handbook.

Lomurro, Davison, Eastman and Muñoz is a New Jersey law firm committed to its mission statement which guides us at every level.

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