WHAT IF YOU MADE THE WRONG HIRE?

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With today's ever-changing workforce, human resources executives and management are faced with making hiring decisions every day. The work force hiring pool consists of baby boomers, near retirees, Gen X., Gen Y., and multi-cultural applicants. Given the diverse nature of each of these employment applicants (a topic for another day) human resource managers often find that the wrong hire has been made. The purpose of this paper is to discuss the various labor and employment laws which impact Georgia employers workforce. Of course, this is an overview of the various laws which effect the hiring and firing of an employee. No single paper or one hour discussion can adequately cover all of the legal consequences which should be considered by a particular employer when hiring and terminating an employee. This paper is simply a reference source and is absolutely no substitute for your legal counsel. If you encounter any problems with the termination of an existing employee you are strongly encouraged to seek legal counsel.

If you have any questions about this or other issues surrounding the hiring and firing of today's employee, please feel free to contact me at LClarke@mcdr-law.com

Recruitment

In today's Internet world, there are more options available to the employer in recruiting future employees. Traditionally, employers have posted notices with the Department of Labor and advertised through the local newspaper. The use of such local advertising has now been replaced with monster.com or AJC.com or other internet-based employment programs. In fact, a job applicant can simply hit "job search" and find a wealth of opportunities.

By the same token, a future employer or is faced with a wealth of applicants for a job that the applicants may or may not be suited for. Human resource managers must eliminate and narrow the applicant field and limit the

applications to those individuals who are appropriately qualified. That is to say properly identify those individuals who are best qualified -WITHOUT VIOLATING ANY FEDERAL OR STATE EMPLOYMENT LAW!

First and foremost, the Employer must advertise the position with an eye toward eliminating the non-qualified applicant. Dangerous potential claims exist when the job requirements advertised are vague or ambiguous. A clear concise job description goes a long way as documentary evidence in opposition to a discrimination action – if it is just that: clear and concise and a true representation of the job duties and qualifications.

INTERVIEWS.

An interview is an opportunity to meet and personally evaluate the applicant for his or her suitability for the job. Employers can avoid potential pitfalls and increase the value of the personal interview if the interviewee is familiar with the open position. It is best for the interviewer to observe the requirements of the job (personally or by video), review the job description for accuracy, and be familiar with the licensing or educational requirements of the open position. Such background work assures the employer that the interviewer can identify the best candidates.

Interviewers must know what can and cannot be legally asked in an interview. As we will discuss later ADA (Americans with Disabilities Act), ADEA (Age Discrimination Act and Title VII (race, color, national origin, religion and pregnancy), among other Acts, are all at play in the interview process. Interviewers must avoid any question that would violate the rights of an individual in a protected class.

Interviewers often take notes – this practice is acceptable IF the note themselves are not indicative of discriminatory actions or practices of the Interviewer.

ADA

The Americans with Disabilities Act ADA was a monumental event for employers and employees as it was the first time the employers were given an affirmative duty to do something versus all the discrimination Acts telling the employer what they are not allowed to do. Prior law requiring

employers not to discriminate was common, but the ADA required the employer identify non-essential job functions and implement accommodations for those non-essential functions. The employer must determine if a qualified individual has a disability; is qualified for the job; and can perform the essential functions of the job with or without a reasonable accommodation. ADA comes into play even with the job applicants. ADA applies to those who are applying for a job as well as to the employers' current employees.

It is significant to note that the ADA does not apply unless a person is in a protected class. The ADA discusses major life activities, and Courts define major life activities as:e talking, walking, singing, hearing, breathing, learning, working, sitting, standing, lifting, and reaching. The EEOC has added additional major life activities such as thinking, concentrating, interacting, and sleeping. The US Supreme Court has added reproduction as a protected major life activity.

A disability under the ADA is a physical or mental impairment that substantially limits one or more major life activities or has a record of doing so, or the individual is regarded as impaired by the employer.

As mentioned above, an applicant must first be subject to the Act and must first have the necessary non-medical qualifications in order to be considered for the job. For example, early on an interviewer should inquire as to education, work history, and required certifications and/or licenses. For example, if interviewing a person for a nurse' assistant job, it must first be determined if the individual has an active certification. These questions can eliminate those applicants who are not qualified for the position without ever going into any medical qualification.

In the interview process, or pre-offer stage of employment, an interviewer is limited as to the questions that can be asked about physical or mental limitations. The best practice is to ask if the individual can perform the job with or without accommodations. It is proper to note the specific job functions, (the reason for the proper job description) and ask whether the applicant can satisfy those particular job requirements.

The interviewer can also ask about the essential functions of the job. It is important that any job description produced by the employer has a specific reference to those functions which are essential and non-essential. It is

suggested that you have legal counsel review your job description so as to determine what is and is not essential. This is key in later defending against an ADA action.

Once an individual has been hired, the ADA still applies if the employer has 15 or more employers and if the individual meets the definition of a qualified individual under the Act. Remember, the test is a physical or mental health condition that substantially limits a major life activity, a record or of impairment, or being regarded as impairment. There is no statutory notice required, but the employer should accommodate an employee if it knows of a covered disability, observes the need and the employee is protected by the Act, or the employee is covered by the Act and asks for accommodation.

The employer may require a medical exam if there is a reasonable belief that the ability to do it an essential function is impaired; to determine a reasonable accommodation; if there is a direct threat; if required by law; or if the job related testing is consistent with the business necessity. See EEOC Guidance on Employment Inquiries and Medical Exams.

An employer must hold a job open for an ADA protected employee unless undue hardship or direct threat exists. The 11th circuit held in Wood vs. Green that an indefinite leave of absence is not a reasonable accommodation as the ability to work is an essential function of a job. Remember an employee can be terminated for failure to perform the essential job functions only after all reasonable accommodations have been exhausted per statute and the employee still cannot perform the essential functions of the job.

What do you do if an employee comes to you and says “I have a disability. I can do the essential functions of my job, but I do need accommodations.” What should your response be? First, listen appropriately and promise to get back within a reasonable time, but do not acknowledge that the employee is ADA qualified. You must to ban investigation into the qualifications under ADA. Do not automatically assume that because the person claims to have a disability that this disability qualifies this person for ADA accommodations. You must make an individualized determination if the major life activity is involved. For example, does medication control this particular condition? If so, generally speaking, this condition would not be ADA protected.

In looking at the essential functions of a job, the employer must use its judgment when reviewing such factors as the written job description, the time spent performing the alleged essential function, the consequences of not requiring the employer to perform the function, the terms of collective-bargaining, if any, work experience of the past employees doing this job, and the work experience of the current employee doing the job. This analysis must be made before you acknowledge to the individual that they all are ADA qualified. If you are unclear on the qualifications of this individual's disability then it is essential that you contact your legal counsel to assist you in this determination.

Many employers are not aware that the ADA specifically holds that an employer may not deny employment or take unsuitable action against an individual because that individual has a relationship or association with an individual who has an ADA protected disability. For example, if an employee is discriminated against because a family member is covered under an employee's health policy, the individual may not be denied employment because his child or spouse would affect the company health plan. Another example, if an employee is distracted, because a family member has an ADA protected disability which requires considerable attention from your employee, the employer may not discriminate against this individual because it feels this employee is not being attentive to his work duties. Finally, if an employee's is known to have a friend or family member who is HIV positive and protected by ADA, the employer may not discriminate against its employee based on his or her association with an HIV-positive person.

Family and Medical Leave Act.

While the ADA was designed to bring physically and mentally disabled individuals into the workforce with reasonable accommodations, FMLA was designed so that employees could take up to 12 weeks of unpaid leave to recover from illness or pregnancy or to care for the designated family members with out the threat of loss of his or her employment.

An employer is covered by FMLA if it employs 50 or more employees each working day for 20 or more full calendar weeks in the current or preceding calendar year. Please note that these workweeks are not necessarily

consecutive. All public employers and educational agencies are covered under FMLA and once a private employer satisfies the aforementioned threshold, then the employer remains covered until it no longer employs at least 50 employees during 29 consecutive work weeks in both the current and preceding calendar year. It is important for employers to remember that the employee eligibility requirement is calculated from the date of commencement and not from the date the employee actually requests a leave of absence. Employers must also recalled that an employer may invoke the FMLA leave as well aas the employee. The employee can simply provide notice and a qualified reason for the FMLA leave. If the employee is qualified then at that point, the employer must provide the eligible employee with up to 12 weeks of unpaid leave during any 12 month period.

The employer must only provide FMLA leave for qualified reasons: the birth of a child or to care for a newborn within one year of birth; the placement of a child with that employee for adoption or foster care or to care for the newly placed child within one year of placement; to care for a child, parent or spouse who suffers from a serious health condition, as defined by FMLA which may include either physical or psychological care; OR a serious health condition that affects the employee and the employee is unable to perform one or more of the essential functions of the job. Again, an appropriate job description is very helpful in determining whether this employee is unable to perform one or more of the essential functions of the job. Employers must also note that the FMLA does not cover an employee who must care for in-law or ex spouse or partner of the employee.

The Act allows the employer options for calculating the 12 month period. The employer must designate which method it wishes to use and apply that method uniformly and consistently. This is important when the employer is trying to "help" an employee who does not qualify under the Act. The employer must be uniform and consistent in the method that the 12 month leave is applied.

Under FMLA the employee is entitled to intermittent leave or leave taken in small or large blocks of time. For example, an employee might have to be absent for therapy or other treatments. This would be considered intermittent leave.

FMLA also defines a serious health condition. Serious health condition with either inpatient care or a period of incapacity for more than three

consecutive days involving medical treatment. The FMLA requires the employee to provide notice if it is foreseeable. If the request is inexpected then the Act states as soon as practicable. It should be noted that if a significant amount of the employees of an employer cannot speaking English, certain information must be provided in that other predominant language.

An employer may ask for a certification of a healthcare provider and can terminate if an employee fails to return to work. However this is a very detailed oriented and fact specific process. If an employer is considering terminating an employee for failure to return to work following an FMLA leave of absence then the employer is advised to contact their legal counsel to determine if the facts support the termination..

An employee or employer can substitute paid vacation and sick time, or medical leave for the FMLA leave. An employer can also designate short-term disability or workers' compensation has FMLA leave as well.

An employee's job is protected during a leave of absence under FMLA. Such protection is guaranteed by the act unless the employee cannot perform the essential functions and is not protected under ADA; if so, the employee can be terminated. Again that this is very fact specific so consult your legal counsel.

When an employee is able to return to work following an FMLA leave of absence, the employer must restore the employee to his or her former job or to an equivalent position. Employers must be aware that equivalent means one that is virtually identical to the employees, i.e. former job terms, working conditions, duties, privileges, pay scale, benefits, privileges and even status.

In some instances employers go through lay offs, plant shutdowns or closures of divisions during the time of aprotected FMLA leave.. An employer must be able to show that the employee would have been terminated as part of this layoffs, etc. This evidence shows proper termination and allows the employee to deny reinstatement. Of course, the employee may notify the employer that he or she does not intend to return to work and then the employee does not have to be reinstated. All employers must be aware that FMLA requires the employer maintain the records for at least three years and make them available for inspection and copying and

transcription by the Department of Labor, if requested. It is also important that the employer maintain medical certifications or medical documentation of the employees or their family members in a confidential medical file separate from the usual personal file.

Military leave (USERRA).

The Uniformed Services Employment and Reemployment Act protects those employees who serve in the armed services. USERRA has become more of an issue for the employer in the last few years as employers must protect the rights of the employees who are called by their country to serve in a military capacity. Georgia also has a military leave statute which offers protection to any private employee who serves in the state militia, the reserve component of the Armed Forces, the Georgia National Guard or who attends military schools for a limited period of time.

Military service or uniformed service includes all branches of the United States armed forces, both active and reserve, the Army National Guard and the Air National Guard, and the Commission Court's of Public Health Service as designated by the President in time of war or national emergency.

It is not necessary that the employee be actively serving his or her country. Service also applies to active duty training, in active-duty training, full-time National Guard duty, absence for an examination to determine fitness for duty, absence for the purposes of performing funeral duties performed by the National Guard or reserve members.

Individuals who feel compelled to leave their employment to pursue or pursue a full-time career in the military are not protected as this is an individual who is making a career change as opposed to being called to serve.

Employers large and small are subject to the USERRA. This applies to private companies, federal, state or local governments and agencies. In short, the law requires employers to allow an employee to take a military leave of absence. Once an employee notifies the employer of his or her military obligation, the employer must allow the individual to perform his military obligation then reemploy eligible employees, subject to certain conditions. The employee must be able to show he was absent from civilian

employment due to uniformed service; the employee must give timely advance verbal or written notice of his obligation unless notification is outside of the employees control. The employees absence from the employer due to duty military service must not exceed a total of five years, unless service is required beyond five years to complete an initial period of obligated service; service during which the employee is unable to obtain discharge orders through no fault of the employee; service required by the military for drills annual training or completion of skills training; service performed where the individual has been ordered to active duty are critical commission; federal service in the National Guard when called upon by the president; or involuntary active duty due to emergency service.

Employers not required to pay the employee during military leave; however, the employer cannot dock an exempt employee's pay for absences due to military leave.

Generally speaking, the employee shall return to a position at the same level of compensation, wages, commissions, bonus, shift, etc.; however, the employee was paid, he must return to that level of pay. E

We have been asked if an employee incurs an illness or injury during his or her military service, is that illness or condition subject to an exclusion or a pre-existing condition limitation of an employer's health plan A health plan can include a provision excluding for coverage any injury or illness occurred as a result of military services. If the plan does not include such an exclusion the plan's pre-existing condition limitations, if any, would apply.