

Question & Answer Summary July and August 2009 Webinar

The Workforce of the Future, Parts 1 & 2

On July 16 and August 20, 2009, Miller Law Group presented a two-part webinar on the Workforce of the Future. In Part 1, we examined how workforce demographics - race, age, religion, language and more - are quickly changing, and how existing California and federal laws are being interpreted to apply to the new profile. In Part 2, we explored the legal and practical issues of the growing contingent workforce, including independent contractors, part-time, seasonal, leased or temporary employees, as well as those who job share or telecommute. The following are answers to frequently asked questions by webinar attendees.

For over a decade, Miller Law Group has devoted its practice exclusively to representing business in all aspects of California employment law and related litigation. If you have questions about your workplace obligations, please contact Michele Ballard Miller (mbm@millerlawgroup.com) or Carolyn Rashby (cr@millerlawgroup.com), or call 415-464-4300.

111 SUTTER STREET
SUITE 700
SAN FRANCISCO
CA 94104
415 464 4300 T
415 464 4336 F

Q. CAN EMPLOYEES DEALING WITH THE PUBLIC BE PROHIBITED FROM HAVING FACIAL PIERCINGS, OR WOULD THE PROHIBITION AMOUNT TO RELIGIOUS DISCRIMINATION?

A. It depends. A policy prohibiting employees from wearing facial piercings when dealing with the public or customers can raise religious issues. Courts will generally uphold reasonable dress and grooming standards that are related to the job in question and grounded in safety, efficiency or other business concerns. However, when those standards conflict with employees' religious beliefs or practices, employers should proceed carefully. If an employee claims her piercings are related to her religion, an employer should take the time to work with the employee to determine whether there is a reasonable accommodation for the employee's religious beliefs/practices. An employer may be liable unless it can demonstrate that making an accommodation/exception from the policy would pose an undue hardship for the employer. Employers should keep in mind that the undue hardship standard is high and difficult to demonstrate.

Q. IF WE GRANT AN EMPLOYEE A DAY OFF FOR RELIGIOUS REASONS AND, AS A RESULT, ANOTHER EMPLOYEE WHO HAS MORE SENIORITY MUST WORK THAT DAY, DOES THAT AMOUNT TO AN UNDUE HARDSHIP SUCH THAT WE COULD REFUSE THE TIME OFF REQUEST?

A. It depends. A proposed religious accommodation will pose an undue hardship if it would deprive another employee of a job preference or other benefit that is guaranteed by a bona fide seniority system or collective bargaining agreement. The fact that there is a seniority system in place does not relieve the employer of the duty to explore a reasonable accommodation of the employee's religious beliefs/practices. But the issue, ultimately, is whether an accommodation can be provided without violating the seniority system. The U.S. Equal Employment Opportunity Commission (EEOC) advises that often an employer can allow co-workers to volunteer to substitute or swap shifts as an accommodation to address a scheduling need without violating a seniority system or collective bargaining agreement.

Q. WOULD IT BE PROBLEMATIC TO BAN EMPLOYEES FROM USING RELIGIOUS TAGLINES ON EMAILS, SUCH AS "HAVE A BLESSED DAY"?

A. Employers do have some ability to restrict religious speech in the workplace. However, before issuing a prohibition, it is important to consider whether the speech poses an undue hardship for the employer – for example, by evaluating the potential disruption, if any, that will be posed by permitting the expression. In one case, a federal appeals court found that an employer did not violate Title VII by prohibiting an employee from using the greeting "Have a blessed day" in written correspondence to customers, where the employer generally prohibited employees from using religious, personal or political statements in closing written or oral communications with customers or fellow employees and accommodated the employee by permitting her to continue using "Have a blessed day" in conversation with co-workers.

Q. ARE CALIFORNIA EMPLOYERS REQUIRED TO HAVE UNISEX RESTROOMS TO AVOID DISCRIMINATION ON THE BASIS OF GENDER IDENTITY?

A. No. While the California Fair Employment and Housing Act (FEHA) bars discrimination on the basis of gender identity, this provision does not mandate that employers designate a "unisex" restroom that can be used by employees of either gender. However, an employer is required to permit an employee to use the restroom of the gender with which the employee identifies. Note that even if an employer has a unisex restroom, a transgender employee would still be entitled to use the single sex restroom associated with his or her gender identity.

Q. MAY AN EMPLOYER REQUEST A CREDIT REPORT ON AN APPLICANT PRIOR TO THE JOB INTERVIEW?

A. Before an employer may obtain a credit or consumer report, the employer must disclose to the applicant that a report may be requested and obtain the applicant's written consent. Provided advance consent is obtained in connection with the job application process, neither California nor federal law place restrictions on obtaining the report prior to the job interview. If the report will be part of any decision not to hire the applicant, the employer is required to provide the individual with a copy of the report and information about their rights. The rules on credit and consumer reports in the employment context are complex, and employers should be certain to follow them scrupulously.

Q. WITH RESPECT TO WORKPLACE POSTINGS IN DIFFERENT LANGUAGES, ARE WE REQUIRED TO POST IN A CERTAIN LANGUAGE EVEN IF EMPLOYEES WHO SPEAK THAT NATIVE LANGUAGE ARE ALSO PROFICIENT IN ENGLISH?

A. Under many of the different laws requiring workplace postings in languages other than English, the trigger is whether a certain percentage of employees speak another language as their primary language. Thus, for example, even if some of your employees are native Chinese speakers but also speak some English – and may even be proficient at it – the letter of the law may require posting in Chinese (or another language, as required).

Q. WE HIRE TEMPS TO COVER FOR EMPLOYEES WHO ARE ON LEAVES. DO WE HAVE TO OFFER THESE TEMPS THE SAME BONUSES WE GIVE TO OUR REGULAR EMPLOYEES?

A. There is no legal requirement to include temporary employees among employees entitled to receive a bonus. However, if the bonus provisions are drafted in a way that appears to promise temps bonus rights, temps could argue that they are contractually entitled to bonuses. Therefore, bonus plan terms should be reviewed to determine whether temps are covered by the provisions or not. And, when drafting bonus plans, employers should be careful to specify the types of employees that are and are not entitled to a bonus.

Q. IS IT PREFERABLE FOR AN INDEPENDENT CONTRACTOR TO HAVE AN EMPLOYER IDENTIFICATION NUMBER (EIN) RATHER THAN JUST A SOCIAL SECURITY NUMBER?

A. Preferable, yes, but not required. The reason is that an EIN signifies that the contractor has his or her own separate business and is providing services to your company through that business. However, having an EIN does not, by itself, demonstrate independent contractor status. Similarly, the lack of an EIN does not automatically mean the individual is an employee.

Rather, whether the person has an EIN is just one factor, of many, that should be considered in determining an individual's status as an employee or independent contractor.

Q. I UNDERSTAND THAT IT IS IMPORTANT TO SELECT EMPLOYEES CAREFULLY FOR TELECOMMUTING ASSIGNMENTS, TO MAKE SURE THEY ARE THE TYPE OF PERSON WHO CAN WORK INDEPENDENTLY. BUT WON'T THAT LEAD TO TREATING EMPLOYEES DIFFERENTLY, I.E. DISCRIMINATION?

A. Employers are entitled to select employees for job assignments (including telecommuting assignments) based on their various strengths, and the practice in and of itself does not run afoul of state and federal anti-bias laws. Where employers can run into trouble, however, is when a selection decision is based in whole or in part on an impermissible factor, such as race, gender or disability. To avoid potential claims of unlawful discrimination in doling out telecommuting privileges, employers should make sure they can identify and articulate legitimate, non-discriminatory criteria supporting their reasons for entrusting certain employees with those privileges.

Q. IS IT PERMISSIBLE TO ALLOW NON-EXEMPT EMPLOYEES TO TELECOMMUTE?

A. Employers can permit both exempt and non-exempt employees to telecommute, although there are special wage and hour risks that may arise when the telecommuter is non-exempt. For example, it can be difficult to ensure that an employee is taking required meal and rest breaks and to verify that all hours worked are being properly recorded. Thus, when telecommuters are non-exempt, employers are advised to pay close attention to wage and hour issues and make sure the employees understand they are required to take meal and rest breaks and provide the company with a record of all time worked. To help keep track of hours worked by telecommuting employees, many employers use computer or telephone systems that automatically generate an hours report, which can be compared to daily timesheets. Employers can also keep an eye on hours by requiring non-exempt telecommuters to report in by phone at the beginning and end of each work day and at breaks.

This webinar and Question and Answer Summary are presented by Miller Law Group to review recent developments in employment law. This material is designed to provide informative and current information as of the date of the webinar, and should not be considered legal advice.