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OSHA Return to Work

Pursuant to OSHA regulations, an employee may refuse to work if they meet the following strict criteria after notifying the employer of the dangerous condition:

- The employee must reasonably believe they are in imminent danger.
- A reasonable person would agree that there is a real danger of death or serious injury

And

- Due to the urgency of the situation, there is insufficient time to eliminate the danger.

This "danger" cannot be a generalized fear and must be a real and identifiable condition. If employers are following the guidelines published by the CDC, it will be difficult for an employee to successfully argue they are in imminent danger.

Metrics to Consider

Voluntary Turnover Definition: Voluntary turnover is initiated by the employee, and it is the employee's choice to terminate employment. (Examples include: accepting other employment, relocating to a new area, retirement and leaving for personal reasons).

Annual Voluntary Turnover Calculation / Metric: Divide the number of voluntary separations during the calendar year by the average number of employees during the calendar year and multiply by 100 (i.e. 5/200=.025=2.5%).

Involuntary Turnover Definition: Involuntary turnover is initiated by the company and it is not the employee's choice to terminate employment (Examples include: being fired for violation of policy or unsatisfactory work performance and being laid off).

Involuntary Turnover Calculation / Metric: Divide the number of involuntary separations during the calendar year by the average number of employees during the calendar year and multiply by 100 (i.e. 5/200=.025=2.5%).

Desirable Turnover (Also known as "good turnover") Definition: Desirable turnover is when a sub-par employee leaves the company, either voluntarily or involuntarily, and you consider it to be a good thing, overall. (Sub-par includes job performance, attendance issues, tardiness and overall attitude).

Desirable Turnover Calculation / Metric: Divide the number of desirable separations during the calendar year by the average number of employees during the calendar year and multiply by 100 (i.e. 5/200=.025=2.5%).

Undesirable Turnover (Also known as "bad turnover") Definition: Undesirable turnover is when a good employee that you would like to retain leaves the company. (Examples include: top performers, innovators, and highly knowledgeable employees with strong work ethics).

Undesirable Turnover Calculation / Metric: Divide the number of undesirable separations during the calendar year by the average number of employees during the calendar year and multiply by 100 (i.e. 5/200=.025=2.5%).

Stand Against Racism

We should stand against racism in all its forms. We should unequivocally condemn any form of bigotry, intolerance, and discrimination. We should stand in solidarity with those who protest who seek to give voice to those who are unheard. We should stand with those who support fundamental change to live up to our society's promise of equal opportunity and justice for all. We should commit to continuing to listen to ignored voices and educate ourselves on these persistent issues. Each of our organizations needs to understand this is a sensitive subject, and we can respond with a deep empathy for all perspectives. Here are some thoughts on how we can address this and quickly take progressive steps toward real trust.

- Right or wrong, there are many people who are angry, sad, and scared. When you are experiencing any of those emotions, you can easily overreact. We are all guilty of it.
- When we feel emotions like that, we often don't feel listened to and we feel like our power has been taken away. Be proactive about your commitment to not only listening but asking others what's on their minds so you can understand. If you do this from a genuine place, then everyone wins. It may not be easy or comfortable, but it will be authentic.

- Create a message that articulates your company's commitment to preventing discrimination and remind everyone about your anti-discrimination policy. The more public you are about this (putting these up on the website), the more trust you will build with your employees and your customers/clients.
- Commit to regularly investing in Inclusion and Diversity training. This will ultimately make everyone more productive and your company more profitable.
- Let your people know that you don't support racism and BE LOUD about your commitment to not supporting it, along with your policies on preventing it. Provide mental health support for people who need it and encourage them to take advantage of it.
- Remember the saying, "It was great to be invited to the dance. It was even better to be asked to dance." To get there requires top-down support and a series of activities beyond just the training. In addition to the unfortunate reality that there still is racism is implicit bias. That can and should be a focal point of attention in training and other exercises.
- Now is a time for people to talk and get to know others. Learn about what we have in common and embrace our differences. The goal is NOT to for things to get back to normal. The goal should be for things to be much better than they were.

Together, we can and will get through this difficult time in our world.

Pandemic Q & A

How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic? During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

If a job may only be performed at the workplace, are there reasonable accommodations for individuals with disabilities, absent undue hardship, that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19? There may be reasonable accommodations that could offer protection to an individual whose disability puts him at greater risk from COVID-19 and who therefore requests such actions to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer.

Low-cost solutions achieved with materials already on hand or easily obtained may be effective. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per CDC guidance or other accommodations that reduce chances of exposure.

Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.

If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, may he now be entitled to a reasonable accommodation (absent undue hardship)? Although many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.

As with any accommodation request, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist him and enable him to keep working; explore alternative accommodations that may effectively meet his needs; and request medical documentation if needed.

What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant expense" during the COVID-19 pandemic? Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components). But, the sudden loss of some or all of an employer's income stream because of this pandemic is a relevant

consideration. Also relevant is the amount of discretionary funds available at this time - when considering other expenses - and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted). These considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic. For example, even under current circumstances, there may be many no-cost or very low-cost accommodations.

3 Checklists for Avoiding LGBTQ Discrimination in Your Benefits Programs ***by Stephen Miller***

The U.S. Supreme Court ruled June 15 in Bostock v. Clayton County, Ga. that the prohibition against sex discrimination in the workplace under Title VII of the Civil Rights Act covers sexual orientation and gender identity. Title VII applies to employers with 15 or more employees, including part-time and temporary workers.

Following the decision, benefits experts advise that employers review their benefits programs to ensure that lesbian, gay, bisexual, transgender and queer (LGBTQ) employees are treated equally. Below are three checklists that employers can use to find and correct discriminatory language and practices, and thereby reduce the likelihood of being sued under Title VII or other statutes that provide employees with sexual-orientation and gender-identity protections.

CHECKLIST #1

REVIEW BENEFITS PLANS

"Because of Bostock, employers who sponsor group health plans [and other benefits programs] should consider taking the following steps, in addition to a general review of their benefit plans," attorneys at McDermott Will & Emery recommended. In a post on the firm's website, Jacob M. Mattinson and Judith Wethall, partners at the firm's Chicago office, and Emily Rickard and Philip Shecter, associates based in Washington, D.C., and San Francisco, respectively, advised these actions:

✓ Review coverage terms for gender-affirmation surgery, gender dysphoria, and pharmacy and mental health benefits to determine whether changes may be appropriate.

✓ Review eligibility for same-sex spouses and same-sex domestic partners to determine whether any changes may be appropriate.

✓ Review employee assistance programs (EAPs) and related services to ensure adequate coverage for the specific needs of LGBTQ employees.

✓ Review benefit plan administration and benefits claim forms for potential sex-discrimination concerns, including issues related to sexual-orientation and gender-identity discrimination.

✓ Review your health plan's provider network to ensure reasonable access to providers experienced with and supportive of LGBTQ health care.

✓ Determine whether disability plan coverage includes temporary disability due to gender-affirmation surgery.

✓ Consider expanding family planning benefits (both within and outside group health plans) to include LGBTQ employees (e.g., adoption assistance, foster care, reproductive technology assistance).

✓ Consult with legal counsel, if you are an employer with strongly held religious beliefs, to ensure that any desired religious exclusions are met.

"Plan sponsors and administrators should consult with their third-party administrators, insurance providers and legal advisors to confirm Bostock's implications on their existing plan policies, procedures, participant notices and applicable plan documents," the McDermott Will & Emery attorneys advised.

CHECKLIST #2

REVISE DISCRIMINATORY POLICIES

Nancy K. Campbell, a partner at law firm Snell & Wilmer in Phoenix, and Matthew P. Chiarello, an associate at the firm, gave several examples showing how health and welfare plans might inadvertently discriminate against LGBTQ employees. Although a legal requirement to provide some benefits may depend on future court rulings—for instance, if an employer/owner contends that deeply held religious beliefs prevent the business from providing coverage for sex-realignment treatment and surgery—it's prudent to check if your benefits programs present the following red flags:

⚑ Provides coverage to opposite-sex spouses but not same-sex spouses, or vice versa.

⚑ Provides coverage to same-sex domestic partners but not opposite-sex domestic partners, or vice versa.

🚩 Denies coverage to transgender employees.

🚩 Charges transgender employees a higher premium for coverage.

🚩 Does not provide medically necessary mental health benefits, hormone therapy and some level of gender-affirmation surgical benefits for transgender employees.

🚩 Limits sex-specific care based on an individual's sex assigned at birth, gender identity or recorded gender (e.g., not covering a hysterectomy for a transgender man or a prostate exam for a transgender woman).

🚩 Does not cover family planning benefits for LGBTQ employees if family planning benefits are covered for opposite-sex couples.

🚩 Does not provide disability benefits for short-term or long-term disability due to gender dysphoria or gender-affirmation surgeries.

"The Bostock ruling takes effect immediately, so employers might need to move fast to implement appropriate changes to provide equal benefits," Campbell and Chiarello advised.

CHECKLIST #3

LOOK BROADLY FOR BIAS

"Employers evaluating existing limits on health coverage for same-sex spouses or gender-transition services in light of [the Bostock] decision need to keep in mind not just Title VII but also other federal and state laws protecting the LGBTQ community," noted Katharine Marshall and Kaye Pestaina, principals in the law and policy group and HR consultancy Mercer. They recommended these steps to ensure fair treatment for all employees:

✓ Review anti-harassment and other workplace policies and training programs on LGBTQ issues, taking applicable federal and state laws into consideration.

✓ Ensure compliance with the ongoing contracting requirements prohibiting LGBTQ discrimination if you're a federal contractor or subcontractor.

✓ Consider Mental Health Parity and Addiction Equity Act (MHPAEA) compliance challenges. While the MHPAEA does not require employers to provide a particular set of benefits, putting limits on behavioral health treatments for gender dysphoria could violate the law if they are not on par with the limits on medical and surgical benefits.

✓ Review the group health plan's provider network for adequate access to providers supportive of and knowledgeable about LGBTQ health care. Consider a provider directory identifying practitioners welcoming LGBTQ patients or with expertise in LGBTQ health-related expertise.

✓ Review benefit administration gender-assignment requirements and consider options for more inclusive descriptors.

✓ Review disability plan coverage for temporary disability due to gender-affirmation surgeries.

✓ Review EAPs or other support-service vendors (e.g., digital behavioral health care providers) for offerings specific to the needs of LGBTQ members.

✓ Consider family planning benefits within the group health plan and elsewhere that include the needs of LGBTQ employees. (The 2018 LGBTQ Family Building Survey from the Family Equality Council indicated that up to 3.8 million LGBTQ Millennials were considering expanding their families, and many expected to use assisted reproductive technology, foster care or adoption.)

When designing benefits, "employers can always maintain nondiscrimination policies and practices broader than what federal or state law requires," Marshall and Pestaina pointed out.

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