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September 2010 Newsletter

In This Issue

Dear Lisa,

Welcome to the September 2010 edition of the Mitchell & Sheahan Newsletter!

This month's newsletter features an article written by Attorney Bob Mitchell titled "A Few Pointers on the Employment Application"as well as an article written by Attorney Peg Sheahan titled "Part-Time Employees."

We hope you find the articles helpful and informative. As always, feel free to contact us if you have any questions.

A FEW POINTERS ON THE EMPLOYMENT APPLICATION

By Robert Mitchell

An employment application is found at the heart of almost every employer's hiring process. It seems like a simple enough way to obtain those bits of information needed by an employer to make the first cut amongst job applicants. Almost everyone is aware of the basics of what can and cannot be asked on job applications, but it is always good to review them and consider what the application can and cannot do for you as we progress through our series on the hiring process.

No one today would ask an applicant to identify race or ethnic background in an employment application. No one would ask for an

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applicant's age. Did you know, however, that asking for a social security number can expose you to an obligation to protect the applicant's personal information? It is impermissible to ask about an applicant's religion or need for taking religious holidays, taking certain days off for religious observance or about religious customs and practices. Nor should you ever ask if the candidate is a U.S. citizen, although an employer can inquire into whether the candidate is authorized to work in the United States.

Were you aware that in Connecticut a job seeker is not required to reveal any arrests, criminal charges or even convictions if the records have been erased, and that the denial cannot be considered as a falsehood on the application? (The applicant can even swear under oath that he or she has never been arrested at all.) So while you can ask if the applicant has been convicted of a crime, you cannot really depend on the answer. Furthermore, under Connecticut law, the information an employer might obtain about convictions must be maintained separately from the rest of the application and access to it must be restricted.

Despite the limitations imposed on employment applications, they are still invaluable tools in the recruiting process. Below are a few very basic hints on making your application a useful employment tool.

Initially, think of your application as having three distinct sections. The first is an instructional section, the second asks for applicant-specific information and the third sets out certifications, disclaimers and notices to the applicant about the terms and conditions of employment.

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The instructional section should make at least three points. First, it should clearly state that any applicant who provides unrequested information will automatically be rejected. This is to counter the practice of some people to provide information that they believe will cause the employer to identify them as members of particular protected classes and thus create an awkward dilemma for the employer if it wants to reject the applicant. Second, you should include instructions on how disabled applicants can request any accommodation needed to allow them to complete the selection process. Finally, the hiring company should include an equal opportunity employment statement.

The second portion of the application is the section where the applicant provides information to the employer about himself. The United States Equal Opportunity Commission (EEOC) views job applications as just one of the many selection tools that employers use to fill their workforces. Applications are categorized just like psychological or aptitude tests. Selection procedures must be related to the duties and requirements of the job to be acceptable to the EEOC. In addition to outright forbidden questions, EEOC's employee selection rules are also intended to avoid employer inquiries that have an indirect adverse impact on identifiable protected groups. **The central point to remember is that the more directly the application's questions can be tied to the legitimate requirements of the job at issue; the less likely the employer is to get into trouble for asking them**.

In line with the EEOC's selection rules for example, not only should the employer refrain from asking if an applicant is a U.S. citizen or where the applicant himself was born, it should also not ask where the applicant's parents came from or what his native tongue is, because the questions might be read to have an adverse impact on the foreign born. Instead the employer might ask the applicant if he is eligible to work in the United States and, if performing the job requires speaking and writing English, whether the applicant has any difficulty with the English language. Examples of questions that can have an adverse impact on minority applicants are inquiries about financial status, garnishments, arrests or even if they have been honorably discharged from the military services. There are a myriad of impermissible or inadvisable questions that touch on gender, disability, union status and other similar issues. If you have any doubts about your application form, it should be reviewed with an eye toward preventing inquiries that are: (1) not directly job related; or (2) touch upon issues that might tend to impact any protected applicant group more than the general population.

The final section of your application should set out several certifications or notices to the applicants. First, it should note that your company is an at-will employer (assuming such is the case), that the application is not itself a contract of any kind and that no oral or other promises made to the applicant during the selection process are binding on the company unless put into writing and signed by the appropriate company official. Second, there should be a statement that failing to fill the application out completely, omitting information from any of the applicant's responses or falsifying any information provided on the application (or during any other part of the selection process) can lead to rejection of the application or to a termination employment (if the omission or falsification is discovered after hire).

It is also advisable to state how long the employer will consider the application when filling available positions. This period will largely depend on the rate of applications that an employer receives weighed

against its anticipated rate of new hiring. Six months is a likely maximum active period in any case. (Note: the time that the application remains active may be different from the time that it is maintained in the employer's files- often for a year or longer- as a result of legal recordkeeping requirements.)

Finally, over the years one of the most common errors we have seen in the course of reviewing thousands of applications is the failure to make sure that the form is completely filled out. It is remarkable how often an applicant is allowed to hide a serious employment related, disqualifying event by simply failing to answer a question. This should never happen. One preventative is to allow applicants to answer questions that they feel are not relevant to them with a "not applicable" or "N/A". The availability of such answers should be made clear in the instructional section. If an incomplete application makes it to the desk of the responsible HR official, it should be noted and the applicant asked to answer the omitted questions if and when an interview takes place.

The application form is most often the first step in an employer's employment selection process. Its importance should not be minimized and its utility should be maximized.

PART-TIME EMPLOYEES

By Margaret M. Sheahan

Employers often ask what employment laws apply to their part-time workforce and what legal standard determines whether an employee is a part-timer. "How many hours does an employee have to work to require us to provide him benefits?" "Do part-timers qualify for FMLA leave?" "Do I have to give part-timers breaks?" "Can discharged part-time employees collect Unemployment Compensation benefits?"

Although the term is widely used and commonly understood, "part-timer" has no fixed legal meaning applicable to all employment law issues. In fact, for most employment law purposes, the distinction between part-time and full-time employees makes no difference whatsoever. Typically, "part-time" status only indirectly affects compliance issues by contributing to an employee's reaching or not reaching an eligibility threshold expressed in terms of hours worked.

The idea that a 40 hour week is "full-time" can be traced to part of the Depression Era's New Deal, the 1938 Fair Labor Standards Act. The FLSA does not ban longer workweeks; it just imposes a half-time pay premium on all time worked over 40 hours in a workweek. The statute says nothing at all about "full-time" or "part-time." Any "non-exempt" worker who puts in more than 40 hours in any workweek* is entitled to overtime pay, regardless of what his or her regular schedule is.

As a practical matter, there is great deviation in the concept of "full-time." Some employers call 40 hours full-time; others, 37.5 or 35 hours; and, no doubt, there are other practices. These are conventions, rather than rules. "Full-time" and "part-time" are flexible concepts.

So when does "part-time" status make a difference in compliance?

The Worker Adjustment and Retraining Notification ("WARN") Act ***does*** define "part-timers," but in a way foreign to common usage and relevant only to that statute. WARN is the federal statute that requires employees to be given 60 days' advance notice of a "plant closing" or "mass layoff." It imposes this requirement only on employers with at least 100 employees, whose actions will result in "employment loss" for qualifying numbers of employees. "Part-timers," that is, those who have worked for the employer less than 6 months in the last 12 months or who work less than 20 hours per week, are not counted in calculating whether the employer or the employment loss meet the statutory thresholds. ("Part-timers" are, however, entitled to notice of a qualifying event if the statute otherwise applies.)

Connecticut's Unemployment Compensation system generally disqualifies employees discharged from part-time jobs from collecting benefits unless they are limited to working part-time by a physical or mental impairment that is chronic or expected to be long-term. Not very helpfully, the Unemployment Compensation regulations define "full-time" generally as "employment for the number of hours which prevails for the industry or employment sector in which the work is performed;" but in another section addressing a particular issue, "full-time" is defined as "any job normally requiring thirty-five hours or more of services each week." The term, "part-time employment," is not defined generally, but in sections addressing particular issues it is said to be "employment of less than thirty-five hours per calendar week."

As far as whether part time employees are entitled to benefits, for all but retirement benefits, this is generally a question of the terms of the employer's plan and the choices the employer makes when establishing the plan. The law does not require the provision of any benefits whatsoever (at least until the new federal statute on health care reform takes effect). Tradition and competitive market forces are the real impetus for employers to provide benefits. The federal law governing employee benefits for most private employers, the Employee Retirement Income Security Act ("ERISA"), generally requires that employers provide benefits to employees in accordance with the terms of the plan without dictating what those terms must be. The question, then, of whether part-time employees are eligible to receive medical plan coverage, severance pay, disability income benefits and the like, is really a matter of employer preference as expressed in the design of the plan. For retirement income benefits, however, ERISA has a different impact. For a retirement plan to qualify for favorable tax treatment for the sponsoring employer and the participating employees, the plan must meet statutory standards, including permitting participation by all employees who works at least 1,000 hours per year. This threshold is low enough to include many "part-time" workers.

Determining whether an employer is subject to the federal or Connecticut FMLA requires counting employees. Unlike WARN, however, both these statutes deem that all employees, regardless of their length of employment or regular work schedules be counted to determine if the employer's workforce size meets the eligibility standard (50 employees in 20 or more weeks in the current or preceding calendar

year for the federal; 75 employees as of October 1 for the State).** Part-time status ***can***, however, affect whether an individual employee qualifies to take FMLA leave, and if so, how much. To be eligible, an employee must have worked at least a minimum number of hours for the employer in the 12 months immediately preceding the leave's commencement (1,250 for the federal; 1,000 for the State). FMLA leave is stated in terms of workweeks (12 in 12 months for the federal; 16 in 24 months for the State).*** Workweeks can vary from one employee to another. When leave is taken on a reduced schedule basis, this can be significant. For example, an employee who works 20 hours a week has a total federal entitlement of 240 hours in 12 months, not the 480 hours a 40-hour per week full-timer has.

Connecticut's "meal period" statute judges whether employees are entitled to time off during a work day by how many hours are worked in the workday, not by how many hours the employee is scheduled to work in a workweek. "Part-time" workers who work full days are just as likely to be entitled to breaks as full-timers. The statute requires anyone working 7 ½ consecutive hours or more to get a 30 minute break between the first 2 and the last 2 hours of the shift (if none of the statute's interesting exceptions applies).

CONCLUSION

"Part -time" status, in and of itself, rarely determines an employer's compliance obligations.

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*80 hours in any two week pay period for qualifying health care employees

**Similarly, all employees, regardless of regularly scheduled work hours, "count" in determining workforce size coverage standards under Title VII (15 employees), ADEA (20 employees), ADA (15 employees) and Connecticut's Fair Employment Practices Act (3 employees).

***The newest federal FMLA provisions provides that 26 weeks of leave may be taken in "a single 12 month period" for an eligible employee to care for an injured service member relative.

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