EMPLOYMENT LAW
TODAY

News & trends that matter to you

Employers must monitor 401(k) fees, says Supreme Court

The Employee Retirement Income Security Act (ERISA) requires employers that sponsor 401(k) plans to act in the best interest of their employees. In a recent court case, employees claimed that their employer neglected to do exactly that — by failing to consider whether the fees being charged in conjunction with its fund options were reasonable.

The statute of limitations

In this case, the employees indicated that, for several different funds in the employer's 401(k) plan, almost identical fund offerings were available with considerably lower fees. The employees argued that the employer did not act in the employees' best interest by retaining the higher-fee options.

The company, on the other hand, alleged that it was not liable for three of the six funds in question because of the law's six-year statute of limitations. That is, the funds had not been added to the plan within the six years prior to the filing of the lawsuit.

Both the district court and the Ninth Circuit Court of Appeals agreed with the employer that those funds fell outside the reach of the law because of the timing. On appeal, however, the Supreme Court of the United States unanimously disagreed with the lower courts.

While the High Court acknowledged the requirement that employers sponsoring 401(k) plans have a duty to "exercise prudence in selecting investments at the outset," it noted that they also have a "continuing duty … to monitor and remove imprudent trust investments." Essentially, the Court ruled that the employer's duty to monitor plan performance and fees is ongoing. *Tibble v. Edison International* (May 18, 2015)

What now?

High management fees — though they may seem small in comparison to an employee's overall investment portfolio, can eat into individual retirement savings over time. Employers will likely want to keep an even closer eye on these types of investments, not only to safeguard their employees' accounts, but to safeguard against the increased scrutiny that such plans may now face in light of this ruling.

Plan administrators should not only be aware of how the fees associated with their plans stack up, but where higher-fee funds are retained, should also keep a record of why the decision to retain them was made.

Key to remember: Employers that sponsor 401(k) plans have an ongoing duty to monitor both overall plan performance and the reasonableness of associated fees.

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Conversations about job security protected under the NLRA

Recent activity by the National Labor Relations Board (NLRB) confirms once again that the list of employee activities protected as "concerted activity" under the National Labor Relations Act (NLRA) is robust. Next up on the list of NLRA-protected activities: conversations among employees about job security.

'Are our jobs safe?'

In a case that originally came before the NLRB in 2010, an employer fired an employee for being untrustworthy and gossiping. Noting a "help wanted" posting she had seen online, the employee had shared her concerns with fellow employees about the possibility of a termination or layoff. After this employee's concerns caused another employee to ask company owners if his job was in danger, the "gossiping" employee was terminated.

In 2012, the NLRB ruled that this employee was terminated for engaging in protected concerted activity under the NLRA. In this decision, the NLRB noted that while most actions must be intended to initiate, induce, or prepare employees for a group action to qualify as protected concerted activity, some activities are "inherently concerted." Activities meet this definition if they are:

- A vital term and condition of employment,
- The matter of interest on which concerted activity feeds, or
- Preliminary to organizing or other action for mutual aid or protection.

In this case, the Board ruled that ultimately, the employee was terminated for discussing job security, an activity which, like discussing wages, meets this standard of being "inherently concerted."

Everything old is new again

So why is this 2012 ruling making headlines again? The decision was made by a Board consisting of five members, three of which were invalidly appointed by President Barack Obama, according to *NLRB v. Noel Canning*. Since the Board didn't have the three-member quorum necessary to issue valid decisions, the decision in this case was set aside. Now that the Board has the required quorum, it has affirmed its 2012 decision.

Be careful about discipline for 'gossip'

Over the past several years, employers' lists of what employee activities should not result in discipline because of the NLRA have grown considerably. In this case, the employer's frustration likely resulted from what it saw as unnecessary hubbub and stress in the workplace. However, an employer must take care when tempted to discipline or even terminate an employee for what it might perceive to be mere rumormongering. In many cases, what may seem like simple gossip is actually a conversation about terms and conditions of employment, which is protected activity under the NLRA.

Key to remember: Like conversations about wages, discussions between employees about job security will typically be protected activity under the NLRA.

July begins VETS-4212 and EEO-1 reporting

July marks the beginning of the reporting periods for both the EEO-1 and the VETS-4212 Report, the latter of which has gone through some revisions for 2015. Most overt is the change to the report's name (it was previously known as the VETS-100A Report).

Both the VETS-4212 and the EEO-1 Report require employers to collect certain demographic information about employees and both must be filed annually by September 30th. Also for both reports, employers may use employment data beginning in July.

Employers that want to get a jump on their reporting responsibilities may want to get started by making sure the necessary data is in order. While an early start is always a good idea, those filing the new VETS-4212 may particularly benefit from giving themselves a little extra time to acclimate to a new reporting format.

The **EEO-1 Report** is required for employers with 100 or more employees OR 50 or more employees and a federal contract of $50,000 or more.

The **VETS-4212 Report** is required for employers with a federal contract of $100,000 or more.

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New digital communication between employers and the EEOC

In May, the Equal Employment Opportunity Commission (EEOC) began a pilot program to digitally transmit documents regarding discrimination charges from the agency to employers and also to allow employers to interact with the agency electronically . This program is in response to Executive Order 13571, "Streaming Service Delivery and Improving Customer Service," which requires federal agencies to improve customer experience, in part by expanding online services.

The EEOC's new system, called ACT Digital, is currently being tested in 11 EEOC offices in Arizona, California, Colorado, Indiana, Michigan, North Carolina, South Carolina, and Virginia. Experts speculate that it could be implemented nationwide as early as October or November of this year.

How does it work?

At this stage, ACT Digital allows employers against whom a charge has been filed to communicate with the EEOC through a secure portal. The employer can download the charge, review and respond to an invitation to mediate, submit a position statement, and provide and verify its contact information. The system also provides information about the EEOC's mediation program and information on drafting effective position statements.

While the pilot program's utility essentially ends with the submission of the employer's position statement, the portal is intended to eventually include the charge process in its entirety.

Notifications

According to the EEOC, in situations where the agency has an email address for a designated contact, the employer will receive a notice of a charge to that address. If the EEOC does not have an email address for the specific employer, a paper notice will be mailed instructing the employer to log into the system.

The agency also has a plan for cases in which an employer may not receive the digital notice. If, after 10 days of an electronic notice being sent, the employer has not taken any action, EEOC staff will attempt to re-serve the notice.

Employers may choose not to use the digital system, opting to continue to use the paper system and receive and submit all communications and documents via mail. However, the EEOC notes that the digital system does have advantages, including faster access to and submission of documents.

The EEOC's user guide for this portal can be found at: http://www.eeoc.gov/employers/respondent_portal_users_guide.cfm.

Key to remember: The EEOC is beginning to roll out ACT Digital, a secure online portal shared between the agency and employers that allows communication about discrimination charges filed against employers.

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IRS issues adjusted HSA limits and more for 2016

The Internal Revenue Service recently issued Revenue Procedure 2015-30, which details the inflation-adjusted amounts for Health Savings Accounts (HSAs) and the required deductibles and out-of-pocket maximums for high deductible health plans (HDHPs).

In this table, which compares 2016 with 2015 figures, the HSA contribution limits under a high deductible health plan are comprised of the both employer and employee contributions together.

HSA contribution limit	2016	2015
Individual	$3,350	$3,350
Family	$6,750	$6,650
HDHP minimum deductible		
Individual	$1,300	$1,300
Family	$2,600	$2,600
HDHP maximum out-of-pocket		
Individual	$6,550	$6,450
Family	$13,100	$12,900

STATE UPDATE

ARIZONA

Veterans preference
Effective July 3, 2015, private employers in Arizona may voluntarily give hiring preference to veterans without violating any state or local equal employment opportunity law or regulation. The employer's policy must be in writing and must be applied uniformly to employment decisions regarding hiring, promotion, or retention during a reduction in force. HB2094

GEORGIA

Payroll cards
An amendment to Georgia's law regarding payment of wages now expressly allows employers to use payroll cards. Employers choosing to use payroll cards to distribute wages must explain associated fees to employees in writing, and must allow employees to opt out of payment via payroll cards. SB88

MARYLAND

Discrimination
Effective October 1, 2015, interns in Maryland will be protected from employment discrimination. Employers may not discriminate on the basis of race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, or disability. For the purposes of this law, an "intern" is someone who has not been promised employment at the conclusion of the training period, who performs work to supplement training given in an educational environment, who does not displace regular employees, and who understands that he or she will not be paid. SB 604

MONTANA

Social media
Employers in Montana may not request or require an employee or applicant to disclose a username or password to allow the employer to access the individual's personal social media account. Employers also may not ask employees or applicants to access a personal social media account in the presence of the employer or divulge any information contained on personal social media. HB343

NEW HAMPSHIRE

Minimum wage
Effective June 14, 2015, an employer may no longer employ an individual with a disability at an hourly rate lower than the minimum wage. The law also removes the options for an employer to obtain special authorization to pay a subminimum wage for those in sheltered workshops. SB 47

NEW YORK

Discrimination
Effective September 31, 2015, employers in New York City may not discriminate against an applicant or employee with regard to hiring, compensation, or the terms and conditions of employment based on the individual's consumer credit history. There are exceptions to the law for employees in certain positions, including police officers, employees required to possess security clearance under any state or federal law, employees with access to trade secrets, intelligence information, or national security information, employees with signatory authority over third party assets of $10,000 or more, and employees whose duties include modifying digital security systems established to prevent unauthorized use of the employer's networks or databases. Int. No. 261-A

NORTH DAKOTA

PTO forfeiture
Employers in North Dakota are not required to pay out an employee's paid time off (PTO) if it was awarded by the employer but not yet earned by the employee and the employee had been given written notice of the limitation on payment of awarded PTO before the time off was awarded. These provisions are effective August 1, 2015. HB1202

OKLAHOMA

Veterans preference
Effective November 1, 2015, private employers in Oklahoma may voluntarily give hiring preference to veterans without violating any state or local equal employment opportunity law or regulation. The employer's policy must be in writing and must be applied uniformly to employment decisions regarding hiring, promotion, or retention during a reduction in force. SB195

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HR INBOX

Designating FMLA leave

Q. When leave is requested by an employee, is it the employer's responsibility to designate the leave as FMLA or is it the employee's responsibility to request it?

A. In short, it is always the employer's responsibility to designate an absence as FMLA leave; this is not an employee's responsibility. An employee must put his or her employer on notice of the need for leave, but this notice may be accomplished in a variety of ways. Employees need not expressly assert rights under the FMLA or even mention the FMLA. For instance, in one case, a court held that an employee's odd behavior was seen as providing notice.

Once an employer has been put on notice, it has five business days to provide an eligibility/rights and responsibilities notice to the employee. Along with this, under most circumstances, the employer may request a certification. When enough information has been received to determine whether the leave is protected by the FMLA, the employer has five business days to provide the employee with a designation notice.

Temporary workers and unemployment

Q. We are looking to hire several workers for about 10 weeks. Could these employees be eligible for unemployment at the end of this period even though they knew employment would be temporary?

A. While unemployment eligibility varies by state, typically, it's not whether an employee knew that his or her assignment would be temporary, but the extent to which he or she had established an attachment to the workforce. Most states require employees to earn a certain amount of money in a specific period of time. In many states, that time period is called a "base period," and it consists of the first four of the last five completed calendar quarters.

While each unemployment case is usually considered independently by the respective state agency, in many cases, employees who work for your organization for a very short duration will not have sufficient (if they have any) earnings in their base period. Where this is the case, the employees won't typically be eligible for benefits from your company.

Generational conflict

Q. One of our older employees has been making a lot of rather judgmental comments to a younger employee (a Millennial), calling her lazy, entitled, and unfocused, and basing those comments on her age. The younger employee has come to us indicating that she feels she is being harassed. Should we be concerned?

A. The answer to whether you should be concerned is yes, as you should be concerned in any situation in which an employee relations issue arises. These two employees must understand your expectation that they respect one another and get along enough to do their jobs effectively.

It may take sitting down with them (either individually or together) to discuss how that level of respect should be demonstrated. Remind the older employee that he or she is not responsible for monitoring the younger employee's performance, and review your expectations for civility in the workplace. You should also review the consequences if the unacceptable behavior continues.

As far as a legal claim of harassment goes, employees over the age of 40 are protected from discrimination or harassment based on age. Since a Millennial employee would not yet have reached 40, she wouldn't have a legal claim in this situation unless the offending comments were somehow related to her membership in another protected class.

YOU WEIGH IN

Liability with casual chats?

An employer was faced with letting go of a few part-time employees. A supervisor with a hand in the decision frequented a local store (not affiliated with the employer) and was friendly with one of the clerks there. During one visit, the supervisor and the clerk were discussing the upcoming cuts. When the clerk offered her opinion that a specific employee should be kept on, the supervisor replied that that individual would not be retained because his church attendance interfered with his work obligations. The clerk informed that particular employee of the supervisor's comments. After the employee was chosen for termination, he sued for religious discrimination. **Who won?**

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'X' marks the spot, but perhaps it shouldn't for FCRA

Most employers that conduct background checks using a third party are aware of the Fair Credit Reporting Act (FCRA) requirement to provide applicants with a disclosure and authorization document before obtaining a consumer report. The FCRA requires that this notice be in writing and that it be clear and conspicuous. The FCRA also requires that the disclosure be part of a standalone document — it may not be combined with any other paperwork.

Online disclosures

Despite this instruction, some employers (likely in an attempt to streamline their processes) have embedded a box at the end of their online applications for applicants to indicate that they understand the employer may conduct a background check and that they agree to such a check.

However, these practices may lead to legal liability, and recently, many retailers have had electronic FCRA disclosures called into question by class action lawsuits. The plaintiffs in one recent case before the U.S. District Court of the Northern District of Texas (Castro v. Michaels Stores, Inc.), indicate that the employer incorporated the required FCRA disclosure and authorization into other content as part of the application

Because the retailer's "I agree" check box is part of a continuous web page containing the company's employment application, the plaintiffs allege that the disclosure is not "standalone" as required by the law. The plaintiffs also indicated that the check box was confusing because of additional and irrelevant information that surrounded it.

Essentially, the argument in this case is that the employer failed to make the FCRA disclosure and authorization as conspicuous as it is intended to be under the law.

Navigating the uncertainty

At this point in time, employers may not have exceedingly clear guidance regarding where the FCRA meets technology, and the fact that several retailers that faced similar legal challenges settled out of court also fails to provide clarification. Unfortunately, this isn't the first time an employment law hasn't clearly addressed the role of technology, and it likely won't be the last.

Though employers may need to wait for more definite guidance about the FCRA's application, they can refresh their understanding of the law's requirements. At least that way, any risk that an employer takes (particularly regarding the FCRA disclosure and authorization) will be a calculated one.

Key to remember: Employers that choose to provide the FCRA disclosure and authorization notice electronically should be especially aware of the legal requirements surrounding notification.

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More reasons to take care with confidentiality agreements

Recently, the National Labor Relations Board (NLRB) has taken issue with employers' confidentiality policies and agreements. Most commonly, the Board has indicated that such problematic policies would likely chill employees from exercising their rights under the National Labor Relations Act (NLRA) by creating the impression that certain terms and conditions of employment might be included in the employer's definition of "confidential information."

However, the NLRB isn't the only agency concerned about employers' confidentiality agreements. The Equal Employment Opportunity Commission (EEOC) has also challenged policies and agreements

THE COURT WEIGHS IN

Casual comments count

The employee alleged that he was chosen for termination because of his religious beliefs. Aside from the comments made by the supervisor directly to the store clerk, the employee cited another situation in which fellow employees were overheard (again by the store clerk) speaking negatively about the employee's religious convictions and expressions. While the employer argued that the clerk's testimony should not be allowed, the court disagreed. Ultimately, the employee won, and a jury awarded him $100,000 in compensatory damages. *Risk v. Burgettstown Borough*, Third Circuit, No. 08-4746 February 12, 2010

in which a confidentiality provision would keep employees from communicating with federal agencies.

Most recently, the Securities and Exchange Commission (SEC) has gotten in on the action, holding an administrative proceeding to consider an employer's confidentiality provisions surrounding internal investigations. The targeted employer required employees who were part of internal investigations surrounding unethical and illegal conduct to agree to refrain from discussing the investigation without authorization from the employer.

The SEC concluded that the employer's confidentiality requirement kept employees from communicating directly with the agency about a possible securities law violation. The agency indicated that this was in violation of The Dodd-Frank Act's whistleblower protection rule, which prohibits companies from taking any action to impede whistleblowers from reporting possible securities violations to the SEC.

Key to remember: Confidentiality policies and other agreements containing confidentiality provisions are increasingly under scrutiny from federal agencies. Employers may want to draft such policies and agreements with the aid of legal counsel.

ICE takes falsifying I-9s personally, and so could your employees

The Form I-9 is used at the beginning of the employment relationship to show that employees are who they say they are and that they are authorized to work in the United States. Many employers are aware of the importance of completing the Form I-9 properly and within the required timeframes. In fact, employers have become increasingly aware of the seriousness of this responsibility in recent years, as the United States Citizenship and Immigration Services has upped its game in terms of both audits conducted and fines imposed on employers.

While employers may try to communicate this importance to employees whose job it is to complete I-9s with other employees, however, some don't quite understand how serious the seemingly simple form can be. These same employees may be interested to know — and may be more motivated with an understanding that — they could be held personally responsible for errors and omissions surrounding the Form I-9.

A cautionary tale

The personal liability that can come with Form I-9 responsibilities is no joke. In May, a woman in New York was convicted of submitting a false written statement on the I-9. The woman signed (under penalty of perjury) in the preparer/translator area of Section 1 of the form, attesting that she had assisted the employee in completing Section 1 and that "to the best of [her] knowledge, the information is true and correct."

While individuals who make such attestations in good faith won't typically face legal liability, this employee knew that the employee with whom she was completing the form was not authorized to work. Further, she knew the employee wasn't even in the country legally. Yet, she indicated in Section 1 of the I-9 that the employee was a lawful permanent resident.

Because of the falsification, the employee was criminally prosecuted after her company's hiring practices were investigated by Immigration and Customs Enforcement (ICE). The law (18 USC Section 1001) prohibits individuals from making false statements to government agencies, and a violation of that statute carries a maximum sentence of five years in prison and a fine of up to $250,000. With the help of her attorney, this particular employee made a plea agreement and was sentenced to one year of probation.

While personal liability is not an extremely common situation, it is a risk built in to the I-9 process. Employers must help employees with I-9 responsibilities understand the seriousness of completing the form, not only on the employer's behalf, but also from a personal perspective.

Employers (especially those with I-9s that could be in better shape) may also want to review the purpose of the Form I-9 with those whose responsibility it is to manage the process. Relaying the possibility of personal liability and the details of stories like the one outlined here might just provide the extra motivation employees need to make sure they're completing the forms correctly, completely, and in good faith.

Key to remember: Employees must understand that the Form I-9 process is a serious undertaking — one that could come with liability for both the company and for individual employees completing the forms on behalf of the employer.

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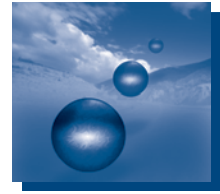
PERSPECTIVES



Workplace lessons from the boy who cried wolf

By Katie Loehrke

The views expressed in this article are those of the editor, and do not necessarily reflect the views of J. J. Keller & Associates, Inc.

As with most fables, there are several iterations of the story Aesop calls "The Shepherd Boy and the Wolf," but the tale generally goes like this: A boy, whose job it was to tend sheep, cried "Wolf!" signaling to the nearby villagers that his flock was being attacked. The villagers fell for the boy's ploy twice before losing confidence in his sincerity. In the third instance, when a wolf actually did attack, no one came to help.

We all know the conventional moral of this story: lies damage credibility. However, if we think of the boy who cried wolf as someone's employee, at least two other takeaways come to mind.

Lesson 1: Clearly this kid did not have enough to do

Different versions of this story describe the boy as either lonely or bored. While plenty of employees are mature and self-disciplined, some who don't have enough to do at work will find not-so-appropriate ways to entertain themselves.

Underutilized employees may not disrupt a whole town full of villagers, but they may disrupt their coworkers with an excessive amount of idle chitchat. Or, they may use their spare time to fuel the company rumor mill, complain, or undermine company values.

If the boy who cried wolf was bored, there must have been something that could have kept him busy, which may have eliminated his craving for entertainment. While it's not always immediately obvious which employees need extra guidance, an employee who engages in undesirable behaviors when faced with free time may be self-identifying as someone who requires closer supervision.

Lesson 2: Where's the discipline?

Again, there are different adaptations of this tale, but in many versions, the boy is never chastised for his trickery. With no initial repercussions for his misbehavior, it's no wonder he attempted to summon the villagers a second time simply for his own entertainment.

Discipline is not meant to punish employees, but to encourage them to change their behavior(s) and avoid more serious consequences

In sexual harassment cases (bear with me, it's related), to determine the extent of an employer's liability, courts will consider whether the employer's response to harassment was both proportional to the offense and effective in preventing a recurrence. These are excellent considerations any time discipline becomes necessary.

Whether discipline is proportional considers the severity of the infraction, the number of times it was committed, and the harm caused. Whether discipline is effective at preventing a recurrence of the behavior may include an additional consideration of the specific individual involved, his or her history, and his or her personality.

Why the moral's not enough

In Aesop's tale, the boy's lost credibility is meant to be understood as the ultimate punishment. But along with that repercussion came the loss of a great many sheep, which — if we're talking an employee-employer relationship here — were no doubt the property of the boy's employer.

While not all employees need constant supervision or direction, employers must be willing to back up their clearly communicated expectations with discipline when a situation merits it. With the proper correction, the boy who cried wolf may have changed his behavior after his first transgression, leaving the villagers to their work and ultimately keeping his employer's sheep intact.

We get it, though, Aesop. That would have made for a much duller tale.

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DIRECTOR OF EDITORIAL RESOURCES: Paul V. Arnold

EDITOR: Katie Loehrke, PHR

CONTRIBUTING EDITORS: Dolly Clabault, PHR; Michael Henckel; Ed Zalewski, PHR;

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