Workplace Notes

Volume VII / Issue 2
Fall 2008

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Name, Rank and Serial Number: Responding to Requests for References

The most obvious reference for a person seeking a new job is the job seeker's former employer. However, many employers are inclined to give only the civilian employment equivalent of "name, rank and serial number," which is usually dates of employment, job title and salary or salary range, for fear of incurring litigation from the former employee. Sometimes limitations on references are formally incorporated into separation agreements, or agreements to settle employment litigation, in which the former employer agrees to give only "neutral" references in response to inquiries from prospective employers. It has been observed that this reticence, whether formal or informal, is not helpful to either applicants or prospective employers in the job market, but most former employers feel that it is necessary to protect themselves from potential retaliation claims by former employees.

Moreover, this general reference practice has been incorporated into the Connecticut general statute on disclosure of information from personnel files, Section 31-128f, which provides that former employers should have written authorization from an ex-employee before releasing any information contained in the personnel file except where the information is limited to the verification of dates of employment and the employee's title or position and wage or salary. Of course, a reference commenting on an ex-employee's performance is not necessarily information contained in the personnel file, even though the personnel file may contain similar information in the form of performance reviews or disciplinary notices.

In the case of *Miron v. University of New Haven Police Department*, decided last year by the Connecticut Supreme Court, the Court created protections for former employers willing to comment, even unfavorably, on the job performance of ex-employees. The Court held that such references were protected by a qualified privilege, which is a privilege against defamation or other claims that protects the former employer unless the former employer acted with malice in providing a negative reference. The Court hoped to combat the "culture of silence" in responding to reference requests, which seemed especially contrary to public policy in references for applicants as police officers.

Employers who undertake to limit references in separation agreements must take special care to prevent human resources personnel or other managers from violating the terms of the agreement. In a recent case in another state, a company agreed to the "name, rank and serial number" reference limitation in an agreement settling a lawsuit, and promised not to disclose that the ex-employee had been fired. However, a human resources staff member receiving a telephone request for a reference from a job placement consultant (head hunter) said that he had better be careful in responding to the reference request because the employee had twice sued his company for wrongful discharge and he wanted to be careful.

In a lawsuit contesting that the settlement agreement had been violated, the company claimed that a "reference" had not been given because the inquiry came from a head hunter rather than a prospective employer, and alternatively that the settlement agreement only promised that the company would give confirmation of dates of employment, position and salary, not that the company would not comment on anything else. But the court held that the obvious sense of the agreement to limit references included both to prospective employers or their agents, such as head hunters, and that moreover the obvious sense of the agreement was to limit any comment that would be detrimental to future employment.

Requests for references concerning former employees should not be left to ad hoc responses. Businesses should have a uniform policy, which should probably be limited to the simple confirmation of dates of employment, position and salary unless senior management decides to release more detailed commentary, which should be carefully presented to remain within the qualified privilege. In addition, all managers and human resources staff should know when a separation agreement or settlement agreement contains a limitation on giving references.

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Amendments to Disabilities Act Expand Protections for Employees

Recent amendments to the Americans With Disabilities Act ("ADA"), effective January 1, 2009, expand the ADA's coverage to include more employees, principally by broadening the definition of "disability." The amendments make a number of significant changes to the ADA, including the following:

- The courts will no longer take into account treatments, such as medication, or other corrective measures, such as prosthetics, in determining whether a person is disabled. Thus, for example, a person with a hearing impairment has a disability under the ADA even if she uses a hearing aid that renders her hearing normal. A diabetic has a disability despite the fact that with insulin therapy his daily activities are unrestricted. Previously, the Supreme Court ruled that such corrective measures should be taken into account in determining whether a person is disabled or not under the statute. There is an exception to the new rule for eyeglasses and contact lenses.

- Under the ADA, a "disability" is a physical or mental condition that "substantially limits one or more major life activities." Courts have read this phrase fairly narrowly, holding that major life activities are those that are of central importance to most people's daily lives. But the amendments provide an expansive list of "major life activities," including caring for oneself, performing manual tasks, seeing, hearing, breathing, learning, reading, concentrating, thinking, communicating and working, as well as "the operation of a major bodily function" such as "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions." The amendments thus insure that a broad range of health conditions will be considered to be "disabilities." Moreover, courts will now be specifically required to construe the term "disability" as broadly as possible.

- The amendments also expand protection for employees who are "regarded as" disabled. Previously, such plaintiffs were required to show that the employer perceived them as substantially limited in a major life activity. Under the new statutory language, a "regarded as" claimant need only show that the employer perceived him/her as impaired, whether or not the perceived impairment limits or is perceived to limit a major life activity.

What does all this mean for Connecticut employers? For those with 15 or more employees (including part-time and, often, temporary employees), who are therefore covered by the ADA, these amendments certainly mean that more care must be taken to comply with the Act, to avoid making employment-related decisions based on an employee's actual or perceived disability, and to engage any employee who is disabled in dialogue about reasonable accommodations that will enable the employee to perform his or her job. There are likely to be more claims brought under the amended ADA, as employees' lawyers seek to test the limits of the new provisions. It is likely that Connecticut employers with at least three but fewer than 15 employees, who are subject to the Connecticut Fair Employment Practices Act but not to the ADA, will face similar claims, since Connecticut courts generally look to federal law for guidance in interpreting the state statute.

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With Layoffs Mounting, What Employers Should Know About WARN

Lately, the headlines about layoffs and plant closings seem to be increasing in frequency; and in these tough times, there is a tendency to either dig in or throw your hands up in disgust and despair.

There is no good reason for making bad situations worse. Compliance with the WARN (short for: Worker Adjustment and Retraining Notification) Act is fairly straightforward and can prevent mass lawsuits from following.

What is WARN? Overall, WARN requires that the employer give notice to employees who may be affected by a plant closing or mass layoff. In addition to notifying employees, the employer must also advise the Connecticut Department of Labor and municipal officials of its proposed actions. The state then posts this information in monthly reports available online. WARN is not a mandatory severance law; in other words, it does not require employers to give employees severance when they are affected by a mass layoff or plant closing.

What exactly does the WARN Act require and who is covered? Here are some basic answers to some basic questions. As always, those who need more information should seek legal counsel and review the applicable laws. In addition, some states have additional requirements that must be followed; this article only discusses the WARN Act as applied to employers in Connecticut.

Who Is Covered?

Not all employers are covered. Employers who have 100 or more full-time employees are covered. But employers who have 100 or more full-time AND "part-time" employees who, in total, work more than 4000 hours per week are also covered. Most governments are not covered, but some quasi-public and public entities may be covered.

When Does WARN Apply?

Two types of events are covered by WARN — plant closings and mass layoffs. "Employment Loss" within each of them triggers some notice requirements. Each of these terms has its own WARN definition, as do some others.

A "plant closing" is a permanent or temporary shutdown of a "single site of employment" (or one or more facilities or operating units within a single site of employment), so long as the shutdown results in an employment loss at that site for 50 or more full-time employees during any 30-day period.

A "mass layoff" is a reduction in force (that is not a "plant closing") that results in employment loss at a single site of employment during any 30-day period for at least 50 employees. These 50 or more employees must also make up at least 33 percent of the total employees (excluding any "part-time" employees). WARN's "mass layoff" definition is also satisfied if the force reduction causes employment loss to 500 non-"part-time" employees.

What Is An "Employment Loss"?

Despite its apparent plain meaning, the term "employment loss" is fairly broad under WARN. It means either:

- a termination of employment for reasons other than a discharge for cause, voluntary departure, or retirement;
- a layoff longer than six months (which indicates that the employee may return after the "layoff"); or
- a reduction in hours of more than 50 percent during each month of any six-month period.

What Notice Is Required?

A WARN notice must be given to each employee at least 60 days before a plant closing or mass layoff; however, if there is a union, the notice must be given to the union representative of the affected employees.

In Connecticut, notice must also be provided to the Connecticut dislocated worker unit (see below) and the chief elected official of the local government where the closing or layoff is occurring.

The Website for the Connecticut Department of Labor has some more specifics on the notice required:

Written notification should be printed on company letterhead, signed by the authorized employer representative, and addressed to:

Rapid Response Unit
Connecticut Department of Labor
200 Folly Brook Boulevard
Wethersfield, CT 06109-1114

This notification should include: the name and address of the employment site where the plant closing or mass layoff will occur; the date(s) of proposed closing or mass layoff; the number of affected workers; the address of the collective bargaining representative and its chief elected officer, if applicable; and, the name, address, and telephone number of the employer representative to contact regarding the closing or mass layoff.

Interestingly, the DOL site also encourages employers to seek legal counsel regarding the notices.

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