Legal Matters®

winter 2021

Discrimination claims in Covid-19 era: a potential trap for employers?

The Covid-19 pandemic has created a lot of thorny issues for employers, such as navigating wage-and-hour laws with employees working from home, workplace safety regulations for those still at the office and the overall complexity of operating as normally as possible in an abnormal world.

Additionally, there's the reality that many businesses are struggling to stay afloat. While nobody likes to let employees go who haven't done anything wrong, staying in business in many cases may necessitate reductions in force. That doesn't change the fact that these layoffs are coming at the worst possible time for your workers, with job opportunities so scarce.

That means those who are laid off may be more motivated than ever to view their termination as discriminatory or otherwise unlawful and to take their employer to court. In some instances, their perceptions may be correct, as there are instances of employers who have used the pandemic as an excuse to get rid of workers for discriminatory or retaliatory reasons. But even if a worker doesn't have a valid claim, you don't want to deal with the headache of litigation. That's why it's critical to review your layoff plans with an attorney before carrying them out.

In the meantime, here are some tips that may help you stay out of hot water.

First, when considering layoffs, examine your own plans carefully

©ryanking999s

for red flags that could look like signs of discrimination. For example, the federal Age Discrimination in Employment Act makes it illegal to terminate a worker over 40 based on his or her age. If your layoff targets only workers in this category, you risk a lawsuit, even if where you think you have valid non-discriminatory reasons for your decision. Similarly, if your layoff disproportionately targets workers of a particular ethnic group (even if unintentionally), the affected workers are likely to see the

continued on page 2

Yankwitt Law Firm P.L.L.C.
2800 West State Road 84, Suite 118
Fort Lauderdale, FL 33312
Office: (954) 449-4368
Cell: (954) 600-2274
yankwittlawfirm@gmail.com | www.YankwittLawFirm.com

Court OK's prenup-turned-post-nup

Prenuptial agreements are a useful way for a soon-to-be-married couple to protect assets they are bringing into a marriage. Essentially, these are contracts that lay out exactly what each spouse is entitled to (and obligated to do) in the event of a divorce. If you and your soon-to-be-spouse are considering such an agreement, be sure to work with an attorney who can make sure it's properly executed. Otherwise it may not be enforced, as nearly happened in a recent Michigan case.

In that case, Carla Skaates and her husband Nathan Kayser lived together before getting married. Skaates had a dental practice purchased with her own assets. Kayser, who worked there as a business manager, also had a business of his own. The couple owned a third business together.

When they decided to get married, they spent 16 months negotiating a prenup. According to its terms, if they divorced the dental practice would go entirely to Skaates, Kayser's business would be solely his and the third business would be divided equally, with Skaates having an option to buy out Kayser's share. Everything else was separate property not subject to division.

The agreement also included a "cooling off" provision mandating that either party wait four months before filing for divorce while participating in at least three marital counseling sessions.

Even though the agreement was styled as a prenup, the couple executed it just over a month *after* they got married.

Less than four years later, Skaates filed for divorce with no cooling-off period.

When a local judge enforced the agreement, Kayser appealed. He argued that it did not qualify as a prenup and was unenforceable as a "post-nup" because it left Skaates better off financially. He also argued it was void because Skaates breached it and because, like many post-nups, it violated public policy by encouraging divorce.

The Michigan Court of Appeals agreed with Kayser's overall points about the enforceability of post-nups but disagreed that they applied in this case. The court also observed that the couple had attended marital counseling but it was unsuccessful. It then ruled the agreement was enforceable as a valid postnuptial agreement.

Some of the court's language indicated that this decision easily could have gone the other way, however. So if you are negotiating a prenup, your best bet is to execute it before the marriage.

Discrimination claims in the Covid-19 era

continued from page 1

reduction in force as discriminatory.

Employers also need to be very careful when their layoff plans include individuals requesting paid family leave under the Emergency Family and Medical Leave Expansion Act or on temporary disability, and be mindful that such employees may see the situation as retaliatory. Similarly, layoffs that include workers who have complained about a lack of PPE or sanitary measures in the workplace or who have recently filed sexual harassment or other internal discrimination complaints leave businesses vulnerable to retaliation claims as well.

A recent Ohio case illustrates how employers who think they're laying off workers with the best of intentions could find themselves at the business end of a discrimination suit. In that case, a physical therapy/rehab clinic laid off a 60-year-old human resources assistant who was the oldest employee at the company. The employer allegedly told her that a

©ryanking999s

woman of her age wasn't suited to be working for a company that large in light of the coronavirus.

The employee filed an age discrimination suit which the employer now will have to fight in court.

Assuming the allegations are true, it's possible that the employer thought it was trying to protect the employee from a potentially deadly infection. Nonetheless, its decision would still be based on age, which would be illegal under federal and most likely state law.

Colleges must protect intoxicated students from harm

A recent ruling from Massachusetts' highest court shows that at least in some states, colleges and universities can be held liable if they fail to protect students from alcohol-related emergencies.

The case stemmed from the alleged sexual assault of a freshman at Northeastern University in Boston.

The student claimed that a classmate sexually assaulted her in her dorm after he walked her back from a party at another residence hall. She alleged in her lawsuit that resident advisors knew she was seriously intoxicated at the time but failed to take appropriate steps to protect her from harm.

The university sought to have the case dismissed, arguing that because there is generally no duty to protect others from harm caused by third parties it had no duty to protect the student, who was voluntarily intoxicated, under the circumstances.

When a trial judge granted Northeastern's motion, the student appealed.

The Supreme Judicial Court affirmed the decision, finding that the mere presence of an intoxicated young woman accompanied by an intoxicated young man on their way back to their residence hall did not make a sexual assault reasonably foreseeable to university employees or staff. As a result, the student did not have an actionable claim.

But the court was unwilling to accept Northeastern's argument that colleges and universities have no duty to protect students from the consequences of voluntary alcohol use. It announced that institutions of higher education have a "special relationship" with their students that obligates them to take "reasonable measures" to protect students who are in "imminent danger."

©EyeMark

Although it didn't help the student in this case, the decision sends a signal that colleges can in certain circumstances be held accountable when it's clear a student is at risk and no action is taken.

While this is a Massachusetts case and other states may view the issue differently, if you or a member of your family has suffered alcohol-related harm on campus and you feel the school should have done more to prevent it, it's certainly worth discussing your case with an attorney.

Does working from home affect homeowners' insurance?

Businesses across the country have moved many of their professionals into work-from-home arrangements. That has led to some confusion as to who's liable and whose insurance will pay out in the case of injury or property damage.

Generally speaking, if your business has full-time employees who now work from home, your workplace coverage should extend to them at home. Your insurance would also cover any company property they use at home. It should include workers' compensation for injuries that happen to them while working, as well as liability coverage for injuries that happen to business-related guests on their property.

A business' insurance policy may also provide limited coverage if a worker's personal property is damaged while performing work-related tasks at home.

However, if you have workers whose status has changed during the pandemic, coverage needs might shift. For example, if you have a worker who is now categorized as an independent contractor, then they are functioning as a "business" and will need their own insurance to protect their home office, equipment and other "workplace" liabilities (e.g., if a customer has an injury while visiting their home). That would also be true for a worker who has added a sideline gig.

Even small sales jobs, such as representing a skin care line or selling candles, would likely be considered a home-based business. That means if customers come to an employee's house to pick up products, their homeowners' insurance would not pay for injuries that occur on their property.

Some insurance carriers may offer optional endorsements that can be added to a homeowners' policy to cover these risks.

We welcome your referrals.

We value all of our clients. While we are a busy firm, we welcome your referrals. We promise to provide first-class service to anyone that you refer to our firm. If you have already referred clients to our firm, thank you!

This newsletter is designed to keep you up-to-date with changes in the law. For help with these or any other legal issues, please call our firm today. The information in this newsletter is intended solely for your information. It does not constitute legal advice, and it should not be relied on without a discussion of your specific situation with an attorney.

Yankwitt Law Firm P.L.L.C.

2800 West State Road 84, Suite 118
Fort Lauderdale, FL 33312
Office: (954) 449-4368
Cell: (954) 600-2274
yankwittlawfirm@gmail.com | www.YankwittLawFirm.com

Landlord and tenant rights in bankruptcy

©Boyrcr420

As of press time, the CDC had barred residential landlords from evicting most tenants through December 31, 2020.

Other eviction bans may apply in your situation, and it's possible the federal ban could be extended. However, the rules will inevitably expire, and there are several important things tenants and landlords need to know about their rights.

Over the course of the pandemic, many landlords and tenants have had to address rental shortfalls. Some renters, unable to pay the rent in cases where an eviction ban was not in effect, have filed for bankruptcy in order to stop the eviction process. Meanwhile, landlords who are not receiving rent may not be able to make their mortgage payments and may also face foreclosure or bankruptcy.

When either a tenant or a landlord files for bankruptcy, the lease can either be "assumed," that is allowed to continue as normal, or it can be cancelled.

If the landlord has filed for bankruptcy and the tenant assumes the lease, the tenant is promising to pay rent and keep the property clean. If the tenant has filed for bankruptcy, then the landlord is obligated to keep the property safe and habitable.

If the landlord files for bankruptcy and the lease is cancelled by the tenant, the landlord can serve a "notice to vacate." If the tenant does not leave, the landlord can file for eviction.

If the lease is cancelled by the landlord, the tenant can file a claim in the landlord's bankruptcy case for damages from early termination. The tenant may be able to remain in the property for the duration of the lease and/or may have rental payments reduced if the landlord is no longer providing essentials such as heat, electricity or water.

Once a tenant has filed for bankruptcy, creditors cannot seek money and landlords are prevented from evicting a tenant, unless the landlord had already obtained an order of eviction before the tenant filed. If the tenant files for bankruptcy after an order of eviction, they may be able to stop the order by paying rent owed through 30 days after filing.