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EMPLOYEE LOYALTY

Employees singing 'Volver, Volver' to former employers are getting rehired

by Jacob Monty, Monty & Ramirez, LLP

In 1972, Vicente Fernández released the iconic song "Volver, Volver," singing, "Tu tenías mucha razón, le hago caso al corazón y me muero por volver," a heartfelt expression of longing to return to a lost love. Today, this sentiment resonates with many employees who return to their former employers. The trend of "boomerang employees," those who leave a company only to later return, has surged, with rehires now accounting for up to 28% of all new hires, often accompanied by pay raises of up to 25%. Employers are increasingly embracing this phenomenon, as rehiring familiar faces offers predictable performance and can save companies up to $20,000 in recruitment costs.

Why should employers care?

Boomerang employees have become a significant part of modern hiring practices, making up 28% of new hires. Notably, more than 75% of rehired employees return within 16 months of their departure, underscoring the pull former employers have in the first two years after an employee leaves. Often, employees boomerang back to former employers because their new employers didn't meet their expectations.

Employers are increasingly becoming more open to rehiring former employees, recognizing their reliable performance and the substantial cost savings involved. Traditionally, labor and employment attorneys have advised against this practice because of concerns about past performance and its impact on current employee morale and perceptions of fairness.

However, as workplaces evolve, rehiring former employees is proving beneficial for both parties, challenging conventional notions of loyalty. This trend has surged, especially in the post-pandemic era, with 89% of small business owners expecting to rehire laid-off employees.

Allowing former employees to "sing their song" and return could be a strategic move that brings success. So, employers should weigh the benefits and risks.

Benefits and risks of boomerang employees

Rehiring former employees can significantly streamline the onboarding process. Boomerang employees are already familiar with team dynamics, company culture, and internal processes. They understand their former coworkers' personalities, strengths, and weaknesses and can integrate back into the team more seamlessly than a new hire.

Additionally, they're often more motivated and grateful for the second opportunity, leading to higher engagement

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and better performance. Employers can save between 33% and 66% in recruiting costs compared with hiring a new employee, amounting to savings of up to $20,000 per hire.

However, there are risks to rehiring boomerang employees. This practice could lower morale among current employees, who have remained loyal. On average, boomerang employees receive a 25% pay increase, while loyal employees typically see only a 4% raise. These employees may feel overlooked if they see returning colleagues receiving substantial pay increases or being promoted to managerial positions.

Another risk is potential litigation. Specifically, when an employer chooses to rehire one employee but not another with similar qualifications, there could be grounds for a lawsuit if the overlooked employee belongs to a protected class, such as race, age, or disability.

Also, the bond between employer and employee can take time to rekindle. Like in any relationship, once things are broken off the first time, it's impossible to repair it completely. So, many attorneys caution against rehiring because they've witnessed many of these relationships break again and, at times, cause more damage than the first breakup. It's important to realize, however, that with the right processes in place, these relationships may blossom into something better, even if they aren't what they were before.

So, before you bring former employees back, it's important to determine which songs to put on mute and which songs to keep listening for.

Opportunity and retention

To maximize the benefits of rehiring former employees, you should keep detailed performance reviews on file even after their absence. Such records can help identify which employees are worth inviting back and will help you avoid liability in a potential suit if you have a justifiable reason for bringing someone back.

It's also essential to maintain amicable relationships with departing employees. Letting high performers know the door is always open for their possible return can facilitate future rehiring. Many Fortune 500 companies have implemented alumni systems to stay connected with former employees, recognizing the value and potential they can bring as boomerang employees.

To mitigate the risks associated with boomerang employees, it's important to avoid offering extravagant compensation packages or promotions that could alienate employees who never left. It's crucial to maintain fair and equitable treatment in the workplace. For example, don't offer boomerang employees a 25% pay increase if your loyal employees only get a 10% increase, and don't offer a boomerang employee a promotion if that promotion could have been given to a loyal employee with the same credentials.

Because every situation is different, you must balance what you can offer to bring employees back and how that compares with what your loyal employees are getting.

A challenge you will always face, whether you decide to rehire former employees or not, is preventing your current employees from boomeranging back to their former employers. Building strong, personal connections with your employees can help keep them from leaving in the first place.

Additionally, fulfilling the commitments made during the interview process and meeting expectations is crucial for employee retention. Instead of merely offering new hires an office tour and lunch, engage them in meaningful interactions with colleagues in similar roles. Ensure the interviewer is also the future supervisor to prevent misalignment of expectations and unkept promises. By implementing these practices, you can better manage the boomerang trend and foster a more stable, committed workforce.

Overall, the trend of boomerang employees has only continued to rise. You can help facilitate these returns by parting with your employees amicably, using alumni systems, and improving the working environment. But you shouldn't rehire employees unless you've determined with confidence they'll reassimilate back into

the team and that whatever caused the first breakup has changed. Ultimately, the best solution is to retain employees in the first place by aligning expectations, proactively checking in, and reasonably compensating and promoting loyal employees.

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AGE DISCRIMINATION

Dallas court to employee in age discrimination case: 'Where's the evidence?'

by Michael P. Maslanka, UNT-Dallas College of Law

Remember the TV commercial for the fast-food chain in which a customer looks suspiciously at a burger from a rival chain and exclaims, "Where's the beef?" I thought of this when reading a Dallas court's dismissal of an age discrimination claim.

What is a 12(b)(6)?

In federal court, employers are given the chance—at the very start—to ask for dismissal of a lawsuit because it fails to allege facts supporting the claim. This is called a Rule 12(b)(6) motion.

It recently tanked an age discrimination/retaliation claim. Here's how it works.

State your facts

First, an employee alleges he was fired and replaced by a person younger than him.

This sounds good, does it not? After all, this is the essence of discrimination because of age, right?

Well, no. The law requires more. Here is the court's opinion:

> [Employee] only alleges that he was replaced by a young woman. [He] fails to allege his replacement's age, and he fails to provide any facts for the Court to conclude that she was substantially younger than him.

Why did the court say this? Although an age claim can be made without showing that a person under 40 was hired to take the employee's place, there must still be some differential between the ages of the fired employee and the replacement—say, 10 years—for there to be a claim (for instance, if a fired employee is 55 years of age, and the replacement is 45 years of age). But here, without the age of the replacement being alleged, the court couldn't find a plausible claim. Strike one!

Second, the employee alleges the company "freely transferred younger employees who had less experience and whose transfer would not fit as well as" the employee's transfer request.

Cutting-Edge HR

Survey finds many layoffs not necessary for cost cutting. ResumeBuilder.com surveyed 600 business leaders in July and found that 75% or more of the layoffs at their companies in the past year weren't necessary for cutting costs, and 80% said they chose to lay off employees instead of firing them. Also, the survey found that 31% of business leaders said performance was always a factor in layoff decisions. The top reason cited for hiding termination decisions was to maintain company morale. Other reasons were to avoid wrongful termination claims, to provide severance, and to avoid hurting the employees' feelings. The survey also found that more than half of managers were willing to give former low-performing employees good recommendations.

Many younger workers found willing to quit a job over politics. Job site Indeed reported in August that it commissioned a survey in partnership with Harris Poll that found Gen Z and millennial workers are more likely to seek employers that align with their own political values. The survey was conducted online from July 30 through August 1 among 1,141 U.S. employed adults aged at least 18. The survey also found employees would likely leave a job for that reason. The survey found 35% of respondents admitted to discussing politics at work, and 54% said they were uncomfortable with any conversation involving politics during work meetings. Indeed also reported that, according to its data, 60% of workers prefer jobs at companies with politically aligned CEOs. This number jumps to 66% among recent college grads and 71% of men between the ages of 18 and 34.

Research says half of U.S. workers want flexibility for remote work. A nationwide poll from Eagle Hill Consulting reported in August found that 50% of U.S. workers said they prefer working for an organization that provides flexibility when it comes to remote and hybrid work. Also, half of workers said they would consider looking for a new job should their employer reduce remote and hybrid work flexibility. That thinking is highest among Gen Z workers. Workers said their top concerns about more in-person work include work/life balance, commute time, increased costs, stress, and their happiness. The survey also found that employees see the value of in-person work. Fifty-six percent said those who work more in the office are more likely to be successful in their jobs, and 85% of workers said team building is managed better in person, as is integrating new team members (84%), training and managing teams (78%), onboarding (74%), and kicking off a new project (76%). The survey was conducted June 4 to 7 and included 1,453 respondents from a random sample of employees across the United States. ■

Federal Watch

NLRB decision ends consent orders. The National Labor Relations Board (NLRB) on August 22 issued a decision in *Metro Health, Inc. d/b/a Hospital Metropolitano Rio Piedras* overruling the 2017 *UPMC* decision and holding that the Board will no longer accept "consent orders," whereby an administrative law judge resolves an unfair labor practice case based on terms offered by the respondent but objected to by both the charging party and the general counsel. The Board majority concluded that consent orders fail to serve the goals of the National Labor Relations Act because the practice doesn't facilitate a truly mutual resolution of labor disputes. The Board, however, reaffirmed its practice of accepting true settlement agreements between a respondent and the general counsel and/or a charging party in lieu of finally adjudicating an unfair labor practice case on the merits, when accepting the settlement would effectuate the policies of the Act. Board members David M. Prouty and Gwynne A. Wilcox joined Chair Lauren McFerran in the decision, and Marvin E. Kaplan dissented.

EEOC finds ADR more effective early in complaint process. The Equal Employment Opportunity Commission (EEOC) issued a report in August finding that alternative dispute resolution (ADR) is more effective when it's offered early in the equal employment opportunity complaint process. ADR is a process in which a neutral third party helps parties reach an agreement without litigation. All federal agencies are required to have a fair ADR program, which generally means the process should be voluntary, confidential, enforceable, and led by a neutral person. Among the recommendations in the report: Provide training and education on the ADR process to employees, managers, supervisors, and settlement officials, and keep ADR participants informed of the procedural steps throughout the ADR process.

NLRB general counsel issues memo on academic institutions. National Labor Relations Board (NLRB) General Counsel Jennifer A. Abruzzo issued a memo in August clarifying academic institutions' responsibilities under the National Labor Relations Act and the Family Educational Rights and Privacy Act (FERPA) in cases involving the duty to furnish information when both statutes may be implicated. When student workers exercise their right to form a union, educational institutions are often required to disclose student-related information to a labor union that represents or seeks to represent those student-workers. FERPA protects the privacy of student education records and personally identifiable information. The memo provides a FERPA consent template that institutions may include in paperwork to be completed by a student-employee when onboarding to help facilitate the disclosure process. ■

The problem here? Apples to oranges. Here is the court:

> [Employee] has alleged no facts suggesting that these younger employees were similarly situated with him. For example, he pleads no facts about the qualifications of the specific employees outside of his conclusory statement that "transfers would not fit as well as [his] request."

Put differently, he alleged no facts other than "I didn't get a transfer, but younger employees did." This isn't sufficient to state a plausible claim—or as the woman in the commercial said, "Where's the beef!?!" Strike two.

Third, the employee alleges he internally protested unlawful age discrimination and then later lost his job.

The beef that is missing is the connection between the protest and the termination. The court relates that there were no allegations he was treated differently because of the protest or that he was reprimanded for the same. He also failed to allege a timeline of when he made the protest in relation to the termination, so he was unable to show the temporal proximity we talk about in another article. (See "Coach fouls out on retaliation claim" on page 5 of this issue.) Strike three.

By the way, one claim that wasn't dismissed was one for religious discrimination. *Farlow v. L3 Communications Integrated Systems*, Civil Action No. 3:23-CV-01661-B (N.D. Tex., August 6, 2024).

Bottom line

The court gave the employee a chance to replead and to set out facts stating a plausible claim. That's normal practice. But every employer needs to use all legal means to make the employee work for a victory.

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LITIGATION

To tell the truth: Falsehood dooms lawsuit

by Michael P. Maslanka, UNT-Dallas College of Law

The law requires that both sides to a lawsuit play fair. When that's not the case, the side playing fast and loose with the rules gets punished. For a recent prime example, read on.

Deposition falsehood!

After Daniel'la Deering was fired from her job as an in-house lawyer for Lockheed Martin, she sued for unlawful retaliation and claimed lost back wages. During her deposition, she testified that she was currently employed but that the pay wasn't very good. She testified that although she was looking for a better job, it was "exhausting and disheartening to keep applying for jobs and not get anything," so she had stopped her job search. Guess

what? At the time of her deposition, she had already accepted a job elsewhere that paid her a lot more money.

Deering later doubled down on the falsehood when she submitted documents to the court, including her resume, and failed to list this great new employer. The point: Her claimed backpay damages were higher than what she was entitled to because the law requires that compensation earned from new employment be used as an offset against claimed lost wages. In short, the less she earned, the greater the lost wages she could recover. Oops!

Falsehood revealed!

Shortly before trial, a litigant lists exhibits to be introduced at trial. One document Deering submitted listed her income in the previous year at $260,866, but her W-2 showed she made nearly twice as much: $452,214. She also submitted to the court the employment contract she signed with the great new—as yet unidentified—employer, with all of its compensation terms.

The lawyers for Lockheed were not asleep at the wheel. They asked the court to dismiss her lawsuit as punishment for her conduct. Request granted.

'My lawyers made me do it!'

Deering claimed her lawyers told her to lie. The appeals court cut to the quick: "Although the district court found that her attorneys also committed misconduct by signing [court documents] containing false employment and salary information, it was clear that the dismissal was for her bad-faith conduct, not theirs."

The appeals court then went on: Deering "was the one, after all, who took an oath to tell the truth during her deposition." Not to mention that a client is bound by the acts of their lawyers. Oh, and Lockheed was awarded $93,193 in attorneys' fees for the work needed to uncover the falsehood and seek dismissal. Likely she and the lawyers are jointly responsible for payment. *Daniel'la Deering v. Lockheed Martin* (8th Cir., September 17, 2024).

Bottom line

This case arose in the Upper Midwest. It made me think of the movie *Fargo*, in which a female police chief tracks down a kidnapper/murderer. In the last scene, he is locked up in the back of her patrol car, and she laments to him, "There is more to life than a little money, you know." Exactly.

You need to be vigilant in ensuring employees are playing by the rules. By way of example, be sure to write the employee's lawyer right after a lawsuit is filed and state that their client needs to preserve all social media posts, emails, and text messages because you intend to ask for them in discovery (pretrial exchange of evidence). The lawyer and the client have a duty (as do you) to preserve possible evidence. If they do not, then sanctions involving dismissal are a possibility. The point: More than one way to skin a cat, more than one way to win a lawsuit.

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RETALIATION

Coach fouls out on retaliation claim

by Michael P. Maslanka, UNT-Dallas College of Law

Retaliation claims are very dangerous for Texas employers. This is why any advantage is very welcome. So, a case that came out in September from the federal appeals court covering Texas is welcome news.

Coach complains; coach removed

Charles Julien worked as a teacher and basketball coach for a high school. Following a losing season in the rough and tumble world of high school sports, he was dismissed as coach on October 26, 2018. And on October 29, he filed a complaint with the school board alleging the principal who made the decision to dismiss him had also sexually harassed him. The complaint was investigated and found to be without merit.

Apparently high school basketball coaches are hard to come by. The school board superintendent reinstated Julien as the coach on November 26 so the team could compete in the upcoming season. Beginning in April 2019 and extending through September 2019, Julien claimed retaliation by the principal for filing the sexual harassment complaint consisting of:

- Locking the team out of gym facilities;
- Requiring Julien to obtain addition insurance for use of the facilities; and
- Ultimately removing him again as the coach in September 2019 after yet another losing season.

Julien filed a retaliation lawsuit under Title VII of the Civil Rights Act of 1964 in June 2021.

Slow play results in dismissal

"Revenge is a dish best served cold," or so goes conventional wisdom—and, candidly, human nature when you think about it.

But the courts don't see it that way. For a retaliation claim, they require an employee to show a connection between the complaint and the adverse actions. This can be done by establishing a short time frame between the two.

The $400-an-hour term for this $25 concept is "temporal proximity." Put differently, there is a short time span between the complaint and the bad stuff happening to the employee. If temporal proximity is absent, there is no retaliation claim. Here, the time span, at the earliest, is six months. That's too long, and so the coach fouled out. Case dismissed. *Julien v. St. John The Baptist Parish School System* (5th Cir., September 9, 2024).

Buzzer Beater

The best estimate for a time frame satisfying the temporal proximity element is a month or so. So, the best advice on a retaliation claim is creating a timeline, noting the dates of the complaint and the adverse employment action, and going from there.

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FITNESS FOR DUTY

Texas court draws roadmap for direct threat defense

by Michael P. Maslanka, UNT-Dallas College of Law

You likely have heard of the direct threat defense to an Americans with Disability (ADA) claim. But what is it? How does it work? A recent case from the U.S. 5th Circuit Court of Appeals (the federal appeals court covering Texas) answers these questions.

Tough job

Joseph Carrillo was a diesel electrician for Union Pacific Railroad Company (UP) at one of its facilities in Texas. His duties? Essentially, big locomotives are parked in a railyard, and he climbed in, over, and around them to fix problems with their electrical systems.

One morning in June 2017, Carrillo was at home getting ready for work when he suddenly went unconscious, bit his tongue, and hit the floor. Remembering nothing of the event, he saw a series of doctors:

- A cardiologist ordered a stress test that Carrillo failed.
- A neurologist diagnosed a possible seizure (among other possible causes) and ordered him not to drive or put himself in situations in which he or others could be injured.
- UP's doctor reviewed the notes of these doctors, administered other tests, and concluded that Carrillo likely had a seizure.

Was that it? No. UP went a step further. It sent Carrillo's records to a specialist at the University of Nebraska. The specialist concluded Carrillo likely experienced an isolated seizure and was at significant risk of sudden incapacitation for the next five years based on objective medical evidence.

Meanwhile, back at the railyard

So, a hard decision needed to be made: Would Carrillo be allowed to return to work? After reviewing the medical information, a UP manager who was familiar with Carrillo's job decided that Carrillo couldn't perform the essential job functions. Unfortunately, he wasn't allowed to return to work and sued for disability discrimination under the ADA.

UP raised the direct threat defense. Here's how the court summed up the defense, quoting the ADA:

> [The direct threat defense] protects the employer even if it does not reach the correct decision. The employer must simply make a "reasonable medical judgment" based on the "most current medical knowledge" or "the best available objective evidence," and upon an "individualized assessment of the individual's present ability to safely perform the essential functions of the job."

The court held this standard was met, and thus the lawsuit was dismissed.

Keys to the decision

Here we go.

First, UP didn't stop its inquiry with the opinion of its staff doctor. Rather, it solicited the opinion of a specialist from out of state. So, check the requirement of a reasonable medical judgment.

Second, the decision of whether Carrillo could perform the essential job functions was made by a manager who understood the reality of the job, not by a manager in a remote office who only understood it theoretically. So, check on the requirement of an individualized assessment. *Carrillo v. Union Pacific Railroad Company* (5th Cir., August 19, 2024).

Bottom line

On of the three judges dissented, arguing that UP could have done more—interview Carrillo's wife who found him on the floor, or require the UP doctor personally to meet with Carrillo. The line of argument of could have, would have, should have. But the ADA doesn't require an ideal determination.

A final thought. UP could have gone on the cheap and not paid the specialist at the University of Nebraska. But because a person's job was at stake—and because the law requires it—the employer went the extra mile. So should you.

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NATIONAL ORIGIN DISCRIMINATION

From the archives: Mistaken discrimination is still discrimination

by Michael P. Maslanka, UNT-Dallas College of Law

We live in a multicultural and multiracial America. The future is here. Numbers don't lie. In 2019, 44.7 million immigrants (foreign-born individuals) comprised 14% of the U.S. population. In 2018, 39.4 million native-born U.S. citizens had at least one immigrant parent. One in six U.S. workers is an immigrant, and 28.4 million immigrant workers comprise 17% of the U.S. labor force. These numbers are on an upward trajectory. So a case from 2015 takes on increasing import.

Cultural clash

Elie Arsham worked for the city of Baltimore. All was well until she got a new supervisor, Prakash Mistry. Mistry concluded incorrectly that Arsham was a member of an Indian ethnic group, the Parsee.

Mistry himself was of Indian descent and considered the Parsee to be of a lower caste. As a result, he apparently considered himself superior to Arsham and treated her very badly in her terms and conditions of employment.

But Arsham isn't Parsee, isn't even of Indian descent at all—she is ethnically Persian. So she filed a national origin discrimination claim with the Equal Employment Opportunity Commission (EEOC).

Claim or no claim?

The city argued: *Our supervisor was mistaken! He thought she was Parsee, but she was really Persian. There's no claim for "perceived discrimination" under Title VII of the Civil Rights Act of 1964! We win.*

Does it? No.

First, EEOC guidance states:

> The Commission defines national origin discrimination broadly as including, but not limited to, the denial of an individual's, or his or her ancestor's, place of origin, or because an individual has the physical, cultural, or linguistic characteristics of a national origin group.

The EEOC goes on to say that to state a Title VII violation, it is "enough to show that the [charging party] was treated differently because of his or her foreign accent, appearance or physical characteristics."

Second, the Civil Rights Act of 1991 states that all Title VII categories are still protected if one is a "motivating factor in any employment practice, even though other factors also motivated the practice." So, an "other factor" can be a mistaken view of the national origin of the employee.

HR Technology

Mainstream adoption of AI less than 2 years away, consulting firm says. Everyday artificial intelligence (AI) and digital employee experience (DEX) are projected to reach mainstream adoption in less than two years, according to management consulting firm Gartner Inc.'s Hype Cycle for Digital Workplace Applications, 2024. "Everyday AI promises to remove digital friction, by helping employees write, research, collaborate, and ideate," said Matt Cain, distinguished vice president analyst at Gartner. "It is a core part of DEX, which is a concentrated effort to remove digital friction and improve workforce digital dexterity, which itself is one of the key factors that will drive organizational prosperity through 2030." The Hype Cycle report says 2024 has been a critical year for digital workplace application leaders, as the focus on hybrid and remote work dwindles and the need for a strategic concentration on everyday AI rises.

Asia-Pacific survey finds engagement decline in hybrid work. Six in 10 firms in the Asia-Pacific (APAC) region reported a decline in employee engagement when using hybrid work models, according to a report from *Human Resources Director.* The survey of more than 600 IT and C-suite leaders and nearly 1,900 knowledge workers across the globe, including 604 in APAC, was conducted by Zoom. The survey found that 84% of organizations in the region have either a hybrid or a remote working model. "Workplace flexibility is not only becoming increasingly commonplace in the APAC region, but more diverse in itself – ranging from flextime to location, role, and even rotation-based models," Ricky Kapur, head of Zoom in APAC, said of the findings. "Leaders today are faced with a new challenge of finding the best-fit hybrid model while keeping up with the evolving expectations of a multigenerational workforce and the impact of rapidly advancing technologies like AI."

Employees ahead of organizations on AI, survey says. A report from McKinsey and Company says employees are far ahead of their organizations in using generative artificial intelligence (AI). The McKinsey Global Survey says companies have been slow to adopt in ways that could realize generative AI's trillion-dollar opportunity. Companies are urged to take a holistic approach to transforming how the whole organization works with generative AI. Technology alone won't create value, according to McKinsey. Instead, organizations must apply the technology in ways that enable the business strategy by reinventing operating models and entire domains, by reimagining talent and skilling, and by reinforcing changes through robust governance and infrastructure. ■

Third, and most importantly, Title VII prohibits unlawful discrimination "because of national origin." The very terms of the statute therefore prohibit treating Arsham differently than others because of her national origin.

Mistry's motivation was national origin. Period. So, the court concluded that Arsham stated a claim under Title VII. *Arsham v. Mayor & City Council of Baltimore*, 85 F. Supp. 3d 841 (D. Md., 2015).

Bottom line

Note this: Arsham could also have a claim under Section 1981 of the Civil Rights Act of 1866, which prohibits discrimination because of ethnicity or ancestry. Section 1981 is a potent statute, allowing imposition of punitive damages and eschewing the requirement of filing an EEOC charge.

Finally, ask yourself this: What would be the result if perceived discrimination claims were not allowed?

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WORKPLACE VIOLENCE

OSHA cites employer for unsafe workplace after employee shot during robbery

by Charlie Plumb, McAfee & Taft

There's no federal workplace violence prevention standard, and Occupational Safety and Health Administration (OSHA) regulations don't expressly address workplace violence. Yet, after a convenience store employee was shot during a robbery attempt, OSHA cited the employer for not doing enough to protect its workforce.

Background

According to the National Institute for Occupational Safety and Health, robberies are the leading cause of death for retail workers. The likelihood of violent acts occurring at convenience stores is often higher because of their late hours, reduced staffing, and other factors.

Aimed at improving employees' safety, OSHA's "Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments" publication suggests that such retailers can minimize their risks by taking steps like installing cash register barriers or enclosures, drop safe or cash management devices, and proper lighting and security cameras both inside and outside their stores, as well as posting signage indicating their checkout registers contain less than $50 in cash.

Shootings at Circle K

On January 19, 2024, two armed men entered a Circle K convenience store in Orlando, Florida, at 1:00 a.m. and demanded that the clerk open the cash register. When the employee backed away from the register, one of the robbers shot the clerk in the shoulder. Fortunately, the shot wasn't fatal.

However, this wasn't the first time OSHA has investigated shootings at Circle K stores. Since 2015, Circle K employees have been fatally shot in Alabama (December 2015), Florida (June 2016), Georgia (September 2019), and Texas (December 2018 and August 2021). Like the Orlando shooting, most of these occurred after dark.

The General Duty Clause in the Occupational Safety and Health Act (OSH Act) obligates employers to "furnish a workplace which is free from recognized hazards which may cause or are likely to cause death or serious physical harm." Despite Circle K's history of store shootings, OSHA found it hadn't taken adequate steps to prevent workplace violence.

On August 14, 2024, OSHA cited Circle K for violating the General Duty Clause and assessed the maximum penalty provided under the federal statute—$16,131. The employer has appealed the citation.

Takeaway

Unquestionably, violence in the workplace is on the rise. Even in the absence of a specific workplace violence prevention standard or regulation, OSHA intends to become more involved with violent workplace incidents and employers' obligations to take actions designed to prevent or reduce those events. ■

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