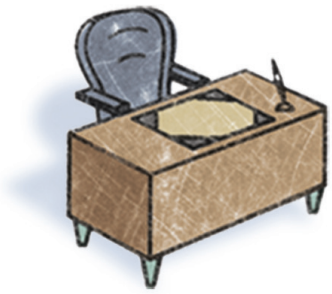
Phillips Lytle LLP

The Working Paper



JUNE 2013

A LABOR & EMPLOYMENT REPORT FROM PHILLIPS LYTLE

New York State Raises Minimum Wage

$8.00 PER HOUR
ON AND AFTER
DECEMBER 31, 2013

$8.75 PER HOUR
ON AND AFTER
DECEMBER 31, 2014

$9.00 PER HOUR
ON AND AFTER
DECEMBER 31, 2015

As the result of legislation signed by Governor Andrew M. Cuomo on March 29, 2013, the minimum wage in New York State will increase from $7.25 to $9.00 per hour over three years. The minimum wage will increase as follows:

- $8.00 per hour on and after December 31, 2013;
- $8.75 per hour on and after December 31, 2014; and
- $9.00 per hour on and after December 31, 2015.

The legislation increasing the minimum wage also contains a provision that provides a tax credit for employers that hire students between the ages of 16 and 19. The legislation does not increase the minimum wage for food service and/or other tipped employees. The current minimum wage for food service workers is $5.00 per hour and credit for tips must not exceed $2.75 per hour, provided that the total of tips received and wages equals or exceeds $7.25. The current minimum wage for other tipped service employees not working at a resort hotel is $5.65 per hour and credit for tips must not exceed $1.60 per hour, provided that the total of tips received and wages equals or exceeds $7.25 per hour. However, the legislation permits the Wage Board to start discussions on increases for tipped employees.

Employers may contact any Phillips Lytle Labor & Employment attorney for additional information on the minimum wage rate increase. ■

New York City Bans Discrimination Against the Unemployed

Effective June 11, 2013, it will be illegal for New York City employers, with at least four employees, to discriminate against persons because of having been unemployed. The new law, passed by the New York City Council over the mayor's veto, prohibits New York City employers from basing decisions regarding hiring, promotion, compensation, or the terms, conditions or privileges of employment, on a person's unemployment. Under the law, "unemployed" or "unemployment" is defined as "not having a job, being available for work and seeking employment." As a result, persons not seeking work between jobs are not protected. The law also makes it illegal to publish an advertisement for any job vacancy in New York City that states or implies that current employment is a requirement or qualification for the job, or that persons currently or previously unemployed will not be considered for employment. The law not only bans discrimination on the basis of unemployment, but also prohibits neutral policies that disproportionately disadvantage a group of unemployed persons. The effect of the law is to put an individual's unemployment status on equal footing with other protected categories, such as race, age, sex and disability.

Although covered New York City employers will not be able to discriminate based on unemployment, the law does not prohibit an employer from inquiring into the "circumstances surrounding an applicant's separation from prior employment" or from considering an individual's unemployment if there is a "substantial job related reason for doing so." It is also permissible under the law to consider the amount of a person's work experience in setting compensation or other terms of employment. Employers may also consider and include in advertisements "substantially job related qualifications," including, but not limited to, "a current and valid professional or occupational license; a certificate, registration permit or other credential; a minimum level of education or training; or a minimum level of professional, occupational or field experience." The law also permits employers to favor current employees when filling vacant positions or setting compensation.

Individuals who believe they have been discriminated against can file a complaint with the New York City Commission on Human Rights. The Commission is empowered to issue a "cease and desist" order, require the employer to hire the applicant, award back and front pay, and impose fines up to $250,000. Alternatively, individuals can directly file a lawsuit in court where they can recover compensatory and punitive damages, injunctive relief and attorneys' fees and costs.

To reduce the risk of being sued for unemployment discrimination, employers should at a minimum do the following:

(1) ensure that job advertisements in New York City do not require current employment;

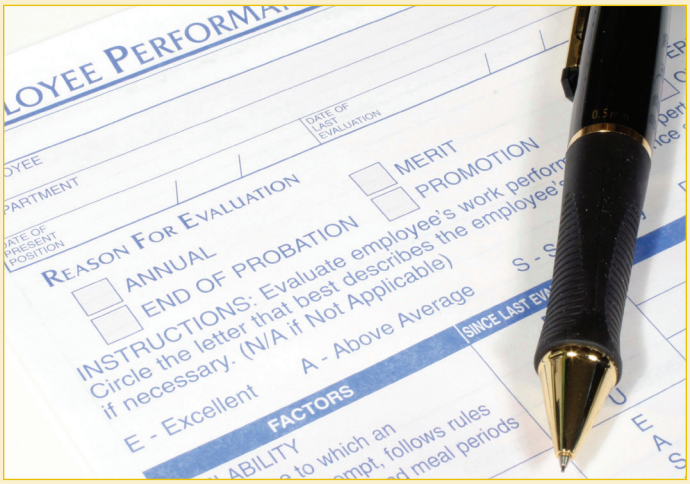
(2) review applications, handbooks, policies and hiring procedures to determine if they appear to take into account employment status and revise them as needed to comply with the law;

(3) avoid discussing unemployment during interviews unless there is a substantially job-related reason for doing so; and

(4) inform human resources professionals, and others involved in advertising job vacancies and making hiring and employment decisions in New York City, about the requirements of the new law.

Phillips Lytle Labor & Employment attorneys are available to assist in the review of employers' applications, job advertisements and hiring procedures, or any labor and employment law issue. ■

Employee Evaluations Play Crucial Role in Defending Against Discrimination Claims



Employers commonly compare and rely on the relative performance of employees in making many employment-related decisions, including promotion and termination decisions. Employee performance is a legitimate, non-discriminatory reason for making such decisions. When making performance-based employment decisions, it is important to review an employee's evaluations and that they accurately reflect any performance deficiencies. A recent federal court decision provides a reminder of the importance of considering evaluations when making performance-based decisions and the danger of ignoring an employee's positive evaluations and basing a performance-related decision on performance problems not reflected in them.

In the case of *Chlystek v. Donovan*, No. 11-11928, 2013 U.S. Dist. LEXIS 54444 (E.D. Mich. Apr. 16, 2013), the plaintiff was a 51-year-old employee of the Department of Housing and Urban Development (HUD) who was passed over for a promotion to the position of senior project manager in favor of a younger, less-experienced co-worker in his mid-20s. At the time he applied for the promotion, the plaintiff had worked for HUD for 16 years and had always received what the court described as "glowing" evaluations. He also had a college degree, an MBA, a certificate in housing and community development, and 13 years of experience as a project manager. The co-worker, who was selected for the senior project manager position, had worked for HUD for only two years immediately after graduating from college. When the plaintiff asked why he did not get the promotion, his supervisors gave him a variety of non-specific and changing explanations, of which included telling him that he was too "compassionate" while the selected co-worker was more "aggressive," he had a "history of being argumentative," and that he did not follow directives from supervisors. His supervisors also told him that the decision was based "on the basis of relative ability, knowledge and skills."

After discovery was completed, HUD moved for summary judgment dismissing the employee's case, which the court denied. In deciding to let the case go forward to a trial, the court found that the employee had presented sufficient evidence from which a jury could find that HUD's explanation, that it promoted the co-worker instead of him because the co-worker was better qualified, was a pretext for age discrimination. In support of its decision, the court relied on the fact that not only were the descriptions of the plaintiff's performance problems, that HUD relied in court, nowhere mentioned in his evaluations, but that in many cases, his evaluations rated him positive for the same attributes that HUD claimed in court were deficient. Because HUD's claims made in court about the plaintiff's performance were at odds with what HUD said about his performance in his evaluations, the court found that a jury could conclude that the reasons HUD proffered in court for its decision not to promote the plaintiff were merely after-the-fact justifications that were intended to mask age discrimination.

The court's decision highlights the importance of employee evaluations in discrimination cases. To increase the likelihood that employee evaluations will help rather than hurt when defending a discrimination claim, employers should ensure that employee evaluations are completed objectively and accurately, and that performance-based employment decisions are appropriately documented. Supervisors should avoid giving positive or "glowing" evaluations just to avoid the discomfort of having to confront an underperforming employee. Evaluations should also be reviewed and revised as necessary so that they actually evaluate those traits that are important in evaluating job performance. Lastly, when defending a discrimination claim, employers should avoid relying on explanations that could be perceived as simply being after-the-fact justifications.

Employers with questions or concerns about employee evaluations can contact any Phillips Lytle Labor & Employment attorney. ■

EEOC Says Wellness Plans Must Provide Reasonable Accommodations Under ADA

In a letter dated January 18, 2013, the Office of Legal Counsel for the Equal Employment Opportunity Commission (EEOC) stated that wellness programs covered by federal regulations are required to provide participants with reasonable accommodations under the Americans with Disabilities Act (ADA). A wellness program covered by federal regulations is generally any program that exists to promote health and prevent disease that is part of a group health plan. Examples include: a program that reduces an individual's cost-sharing for complying with a preventive care plan; a diagnostic testing program for health problems; and rewards for attending educational classes, following healthy lifestyle recommendations, or meeting certain biometric targets (such as weight, cholesterol, nicotine use, or blood pressure targets). In certain cases, an employee's health condition may prevent the employee from participating in the program and thereby prevent him/her from receiving any associated benefit or reward.

The EEOC's letter was issued in response to an employer's request for guidance about its obligation to provide reasonable accommodation for an employee to participate in a program it voluntarily offered to eligible employees that resulted in the

employer's health plan waiving its annual deductible, if the employee met certain requirements, such as enrollment in a disease management program or adherence to a doctor's exercise and medication recommendations. The employer had an employee who could not participate in the plan because of his/her health condition and was unsure if the program had to provide reasonable accommodations for the employee to participate. After reviewing the circumstances the employer presented, the EEOC determined that the program constituted a wellness program and that the program was required to provide reasonable accommodations for the employee under the ADA. The EEOC stated the following in its letter: "If a wellness program is voluntary and an employer requires participants to meet certain health outcomes or to engage in certain activities in order to remain in the program or to earn rewards, it must provide reasonable accommodations, absent undue hardship, to those individuals who are unable to meet the outcomes or engage in specific activities due to disability." Citing one of the requirements of the program that required employees to use medications at a rate of more than 80% of prescribed usage, the EEOC stated that if the employee were unable to meet that requirement, the program would have "to provide a reasonable accommodation to allow the individual to participate in the plan and to earn whatever reward is available." The EEOC did not elaborate on what would be reasonable accommodation in that situation.

The EEOC also stated that an employee with a disability could be lawfully removed from a voluntary wellness plan for failure to comply with plan requirements, but only if the employee were given reasonable accommodations and he/she remained eligible to participate in the employer's standard benefit plan.

The EEOC's determination that wellness programs must provide reasonable accommodations is not surprising given the ADA's broad application to an employee's terms and conditions of employment. Employers with wellness programs should take steps to ensure that their wellness programs inform employees of the availability of reasonable accommodations to participate and provide them where needed. Employers should also be prepared to engage in the interactive process with employees to identify possible reasonable accommodations that will allow employees to participate in their wellness programs.

Employers seeking guidance about reasonable accommodations in wellness programs, or any other labor and employment matter, can contact any Phillips Lytle Labor & Employment attorney. ■

E-Newsletter Sign-up

Different people have different preferences in communication styles. Therefore, Phillips Lytle is offering our newsletters in an electronic format as well as the printed version. We are dedicated to keeping our clients and friends apprised of matters of interest and are currently offering several other complimentary newsletters and client alerts in the following areas: Banking & Financial Services, Business & Commercial Litigation, Education, Environment and Energy, and Health Care law. To start receiving *The Working Paper*, or any of our other practice area communications, via e-mail, visit our website at www.phillipslytle.com and click on "E-Publication Sign-up" under the Publications menu.

Court Rules That On-Time Arrival at Work May Not Be an Essential Function of an Employee's Job

Most employers likely think that on-time arrival at work is an essential function of an employee's job. However, a federal appeals court recently ruled that may not always be the case. In *McMillan v. City of New York*, 711 F.3d 120 (2d Cir. 2013), the U.S. Court of Appeals for the Second Circuit, which has jurisdiction over New York State, ruled that under certain circumstances an employer might have to tolerate an employee's late arrival to work as a reasonable accommodation under the Americans with Disabilities Act (ADA).

In *McMillian*, the employee worked in the New York City Human Resources department for 10 years. The department operated under a flex-time policy that allowed employees to arrive any time between 9:00 a.m. and 10:00 a.m. The employee suffered from schizophrenia and took medications each morning that made him feel drowsy and sluggish, and as a result, he frequently did not arrive at work until after 11:00 a.m. For at least 10 years prior to 2008, the employee's late arrivals were either explicitly or tacitly approved. However, in 2008 the employee's supervisor refused to allow any more late arrivals, stating that she would not be doing her job if she continued to approve a lateness every day. After his supervisor stopped approving his late arrivals, the employee made repeated verbal requests for a later start time. He also later made a formal written request for a later flex start time that would allow him to arrive at work between 10:00 a.m. and 11:00 a.m. All of the requests were denied and the employee was subsequently disciplined, including being recommended for termination that was later reduced to a 30-day suspension. The employee then sued under the ADA and New York City Human Rights Law alleging that he had been denied a reasonable accommodation and discriminated against because of his disability.

The district court dismissed the employee's lawsuit finding that the employee could not perform an essential job function, arriving to work on time, and that the employee could not show that the City's explanation for suspending him, his habitual lateness, was a pretext for disability discrimination. However, the Court of Appeals reversed the district court and reinstated the lawsuit. The appeals court said that although on-time arrival might normally be an essential function for most jobs, in the employee's situation the evidence suggested that punctuality and attendance in the workplace at precise times were not absolutely required. In reaching its decision, the appeals court relied on the City's tolerance of the employee's late arrivals for at least 10 years and the existence of its flex-time policy that allowed employees to arrive at various times. Therefore, the appeals court remanded the case for a trial at which

a jury would be able to determine whether the employee's late arrivals substantially interfered with his ability to perform his essential job functions.

This case serves as a reminder that the consideration of what may be a reasonable accommodation must be made on a case-by-case basis and that an employer may have to modify as basic a requirement as an employee's work start time. In most jobs, arriving at a specific time is indeed an essential job function. However, in some work environments it may not be. Employers faced with a request for reasonable accommodation allowing an employee to vary the times the employee arrives at or leaves work should carefully review and consider such requests and not reject them out of hand. Any rejection of such a request should explain the legitimate business reasons why attendance at work between the established hours is necessary.

Phillips Lytle Labor & Employment attorneys are available to answer questions about the ADA or any disability issue with regards to labor and employment law. ■

Revised I-9 Employment Eligibility Verification Now Required

U.S. Citizenship and Immigration Services (USCIS) recently revised the Form I-9 that employers must use to verify the identity and employment authorization for individuals, both citizens and noncitizens, hired for employment in the United States. The form, which is completed by both the employer and employee, must be completed for each person on the payroll, with a few exceptions, and must be retained by the employer either for three years after the date of hire or one year after employment is terminated, whichever is later.

Form I-9 was revised on March 8, 2013 and can be found on the USCIS website. The revisions include the addition of data fields, including the employee's foreign passport information, if any, telephone and email addresses, improved instructions, and a revision to the form's layout. Older I-9 forms will be accepted until May 7, 2013 without penalty. After May 7, 2013, only the March 8, 2013 I-9 form will be accepted. After May 7, 2013, employers who fail to use the revised I-9 form may be subject to "all applicable penalties under section 274A of the INA, 8 U.S.C. 1324a, as enforced by U.S. Immigration and Customs Enforcement (ICE) and [the Department of Justice]." Introduction of the Revised Employment Eligibility Verification Form, 78 Fed. Reg. 15030 (Mar. 8, 2013).

Employers do not need to complete the revised Form I-9 for current employees if a properly completed Form I-9 is already on file, unless re-verification applies. Id. at 15031.

Failure to complete, retain and/or make available for inspection Form I-9, as required by law, may result in civil monetary penalties ranging from $110 to $1,100 per violation. In determining the amount of the penalty, consideration is given to:

(1) the size of the business;
(2) good faith on behalf of the employer;
(3) the seriousness of the violation;
(4) whether or not the individual was an unauthorized alien; and
(5) the history of previous violations by the employer.

We recommend that employers maintain the completed I-9 forms separate from the employees' personnel files, so that the forms are readily accessible in case of an audit.

If you have any questions about the revised I-9 form, please contact any of the attorneys on our Labor & Employment Practice Team. ■

Our Labor & Employment attorneys handle the full scope of labor relations, discrimination, and employment matters on behalf of management in the private and public sectors for employers of all sizes, from FORTUNE 500 companies to small businesses and not-for-profit organizations. We work with our clients to develop preventive strategies to reduce their risk of litigation, and represent them vigorously when confrontation occurs either at the negotiation table or in court.

Phillips Lytle LLP

For additional information or advice, please contact one of our Labor & Employment attorneys listed below.

BUFFALO OFFICE
3400 HSBC Center
Buffalo, NY 14203-2887
Phone 716 847 8400
Fax 716 852 6100

James D. Donathen, Partner

James R. Grasso, Partner

Michael R. Moravec, Partner

Amanda L. Lowe, Associate

Christopher L. Hayes, Associate

ALBANY OFFICE
Omni Plaza
30 South Pearl Street
Albany, NY 12207-3425
Phone 518 472 1224
Fax 518 472 1227

Marc H. Goldberg, Associate

CHAUTAUQUA OFFICE
201 West Third Street
Suite 205
Jamestown, NY 14701-4907
Phone 716 664 3906
Fax 716 664 4230

GARDEN CITY OFFICE
1305 Franklin Avenue
Suite 200
Garden City, NY 11530-1630
Phone 516 742 5201
Fax 516 742 3910

NEW YORK CITY OFFICE
The New York Times Building
620 Eighth Avenue
23rd Floor
New York, NY 10018-1405
Phone 212 759 4888
Fax 212 308 9079

Linda T. Prestegaard, Partner

ROCHESTER OFFICE
1400 First Federal Plaza
Rochester, NY 14614-1935
Phone 585 238 2000
Fax 585 232 3141

Kevin J. Mulvehill, Associate

Linda T. Prestegaard, Partner

CANADIAN OFFICE
The Communitech Hub
151 Charles Street West
Suite 152, The Tannery
Kitchener, Ontario N2G 1H6
Canada
Phone 519 570 4800
Fax 519 570 4858

James R. Grasso, Partner

WWW.PHILLIPSLYTLE.COM