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on the discrimination risks AI tools present, and several state legislatures have passed laws regulating the use of AI in hiring.

Legal response to the use of AI in the workplace

2023 saw a wave of legislation aimed at regulating the use of AI in hiring and recruiting. New York City implemented a comprehensive law requiring employers to notify applicants if they use AI and to perform annual "bias audits" to identify any biases in an AI tool's design or operation that could lead to discrimination. California, Washington, D.C., Massachusetts, New Jersey, and Pennsylvania have all proposed legislation with similar components.

The EEOC announced a new focus on AI in the workplace, issuing guidance about the risk that AI used in employment selection procedures may have an adverse impact on members of protected classes. In September 2023, the EEOC settled a discrimination lawsuit against iTutorGroup, Inc., which allegedly programmed its recruiting software to automatically reject older candidates. iTutorGroup agreed to pay $365,000 to resolve the lawsuit.

Additionally, employees' attorneys have begun testing the waters of AI-based discrimination claims. In *Mobley v. Workday, Inc.*, filed last year, Derek Mobley (who is African American, over 40, and disabled) allegedly applied for nearly 100 jobs at various companies that all used Workday software to screen applicants. He was denied every job and claimed the Workday software unlawfully screened him out due to his protected classes. Employers that use automated employment decision tools such as Workday could also become targets of litigation.

Strategies for managing risk

As the use of AI in the workplace becomes more commonplace, it's critical to have a strategy for managing risk. First, you should consider implementing a comprehensive AI policy that identifies permissible (and prohibited) uses of AI and any disclosure requirements. The policy may also prohibit the use or disclosure of protected information, require employees to report any misuse of AI in the workplace, and include protocols for ensuring AI output is vetted for accuracy.

Second, you should consider researching your AI tools thoroughly to understand how they protect against learned bias or the disclosure of protected information. It may also be advisable to read the terms of service carefully to understand your rights and obligations if a claim is filed (i.e., does the AI vendor expect to be indemnified by the employer?).

Third, you should monitor proposed legislation and court decisions to ensure you are adjusting your practices to comply with any new requirements. Finally, you may wish to consult legal counsel about your specific uses of AI and how to best minimize legal risks.

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RETALIATION

Deviation from policy on Arizona paid sick time revives retaliation claim

AK	**AZ**	HI	NV	OR	WA

by Jodi R. Bohr, Tiffany & Bosco, P.A.

The Arizona Fair Wages and Healthy Families Act—aka Arizona Paid Sick Time Law—requires all employers to provide all employees a certain amount of paid sick time. An employer with at least 15 employees must provide them with at least 40 hours of paid sick time each year. To comply with the Act, employers are also required to follow certain notice requirements, including posting the Earned Paid Sick Time Poster and providing employees with pays stubs that include the amount of paid sick time available, the amount taken to date in the year, and the amount of pay received as sick time.

Even if the employee exhausts paid sick time, employers must be cautious taking any adverse employment action within 90 days of the employee's last use of paid sick time. How can an employer that pays an employee more paid sick time than required find itself in hot water for retaliation under the Act?

What you need to know

Joshua Papias worked as a headerman for Parker Fasteners beginning on May 29, 2019. Although Parker implemented various policies on paid sick time (PST), paid time off (PTO), and attendance, its actual employment practices deviated from the policies in various instances.

For example, although the policy states that Papias could use PST for limited reasons, his first year of employment saw him using PST for reasons unrelated to illness, such as family gatherings and personal appointments and more than his allotted amount.

Additionally, Parker advanced 48 hours of PTO to Papias during his first year, contrary to the policy that accrual begins after one year of full-time employment. In his second year, he continued to request time off without explicitly indicating it was for sick time, yet Parker classified the hours as PST on paystubs.

According to Parker, Papias had more than exhausted his PST when he sought time off for illness and to seek medical attention. After missing a week of work following his illness, he returned with a doctor's note. He had a meeting with his supervisor and human resources, at which time the supervisor expressed skepticism that he had been ill, informed him that his absences had placed "a lot of stress" on the supervisor, and fired him.

Litigation ensued

Papias sued for retaliation under the Act. The Maricopa County Superior Court entered judgment in Parker's favor, "largely due to the fact that [Papias] did not have any [PST] at the time of his termination." He appealed.

The Arizona Court of Appeals disagreed and returned the case to the lower court. It found that Papias's termination occurred within 90 days of his last use of time off designated by Parker as PST, which triggered a presumption of retaliation. It did so, despite Parker's argument that he had already exhausted his sick time.

The court acknowledged that the final use of PST was above the protected amount (40 hours) and emphasized that discrepancies in Parker's employment practices—such as front-loading vacation and sick time—created a plausible argument for Papias. So, it concluded that since Parker designated his time off as PST, which was taken within 90 days of the termination, that time was protected under the Act. He was permitted to proceed with his retaliation claim.

How does this decision affect employers?

This decision demonstrates the importance of following policies within an employee handbook. Those policies, if effectively implemented, should manage an employee's expectations of how they should act in each situation and/or the benefits or consequences that will occur based on their conduct. If implemented correctly, managing those expectations should help avoid claims altogether, or at the very least provide you with certain safeguards when a retaliation claim arises.

Come back next month for another article on this case and a discussion on best practices to avoid liability on a retaliation claim under the Act.

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SICK LEAVE

Sick leave payout rule for WA construction workers takes effect

AK	AZ	HI	NV	OR	**WA**

by Emily A. Bushaw and Mackenzie Olson, Perkins Coie LLP

Certain construction workers and other employees in the construction industry must be paid the entire balance of accrued and unused paid sick leave if those workers separate from employment before they reach their 90th day of employment. This requirement, effective January 1, 2024, and prompted by Senate Bill 5111 (SB 5111), applies regardless of whether a worker's separation is voluntary or involuntary.

Background

This change covers workers who fall under the North American Industry Classification System Code 23 (NAICS 23)—construction—even if they aren't directly involved in actual construction work, such as nonexempt administrative staff. The requirement doesn't apply to workers who work only in residential building construction (NAICS Code 236100).

However, if a nonexempt worker covered under NAICS 23 performs both residential and nonresidential work as defined by the NAICS, the separation payout requirements apply. Additionally, this requirement also applies to workers covered by a collective bargaining agreement.

If a worker is rehired within 12 months of separation, whether at the worker's same or a different business location, sick leave previously paid out after separation doesn't need to be reinstated. But, if rehired, this worker's previous period of employment must be counted for the purpose of determining the date on which the employee is entitled to use sick leave.