AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

GALLATIN VALLEY HUMAN RESOURCES ASSOCIATION
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Legislative Information Update: February 2012

Here is a recent NLRB ruling regarding protected activities

In a settlement with the National Labor Relations Board, a Texas scaffolding company has agreed to pay $323,116 in back pay, per diem and interest to 73 former employees who were discharged in violation of federal labor law.

The agreement, signed February 3, also requires Atlantic Scaffolding Company to expunge its records of the discharges and send written notification of the action to the employees.

The settlement follows a Board decision in March 2011 that found the company unlawfully terminated the 73 employees for engaging in protected concerted activity. The Board later denied the employer's motion for reconsideration.

The employer then provided records to the Board's Regional Office so that back pay could be calculated. After extensive review of the payroll records, assessment of the interim earnings of the terminated employees, and consultation with the employer and the United Brotherhood of Carpenters, Local 502, the Region concluded that $274,916 in back pay and per diem were due, with daily compound interest through January 31, 2012 adding $48,200.

The records also established that the job for which the employees were hired had concluded in May 2008 and the affected employees were therefore not entitled to reinstatement.

The settlement was made possible by the hard work of Region 16 trial attorney Jamal Allen, Compliance Officer Charlene Donovan and Compliance Assistant Tracy Williams-Fisher.

For more information on this topic, please visit: http://www.nlrb.gov/news/settlement-distributes-more-300000-unlawfully-discharged-workers-texas

Employee Rights Trivia

Do you know the minimum number of employees required before certain laws/protections take effect? You might be surprised..

Federal Laws Where Applicability is Based on Number of Employees				
Popular Name of Law	**15 or more**	**20 or more**	**50 or more**	**100 or more**
Age Discrimination in Employment Act*		X		
Americans with Disabilities Act*	X			
Civil Rights Act*	X			
Family Medical Leave Act			X	
Veterans' Reemployment Rights	X			
Worker Adjustment and Retraining Act Plant Closure Act				X

*ALL EMPLOYERS, REGARDLESS OF NUMBER OF EMPLOYEES, ARE COVERED UNDER THE MONTANA STATE LAWS.

Information on this topic was obtained at: http://dli.mt.gov/resources/laws.asp#stlaws

What You Should Know:
Questions and Answers about the EEOC and High School Diploma Requirements

(I found the letter to be interesting reading. There is a link to it located below.)

Background: On November 17, 2011, the EEOC issued an informal discussion letter about how the Americans with Disabilities Act (ADA) applies to qualification standards for jobs. The letter can be found at http://www.eeoc.gov/eeoc/foia/letters/2011/ada_qualification_standards.html. There has been significant commentary and conjecture about the meaning and scope of the letter. The following questions and answers are meant to clarify these issues.

Question: Have you just made it illegal for businesses to require a high school diploma?

> **Answer**: No. Nothing in the letter prohibits employers from adopting a requirement that a job applicant have a high school diploma. However, an employer may have to allow someone who says that a disability has prevented him from obtaining a high school diploma to demonstrate qualification for the job in some other way.

Question: Are you telling people that they are protected by the ADA if they decide not to graduate from high school? Wouldn't this create a disincentive to finish high school?

> **Answer**: No. The ADA only protects someone whose disability makes it impossible for him or her to get a diploma. It would not protect someone who simply decided not to get a high school diploma.
>
> Employers may continue to have high school diploma requirements and, in the vast majority of cases, they will not have to make exceptions to them. However, if an applicant tells an employer she cannot meet the requirement because of a disability; an employer may have to allow her to demonstrate the ability to do the job in some other way. This may include considering work experience in the same or similar jobs, or allowing her to demonstrate performance of the job's essential functions. The employer can require the applicant to demonstrate, perhaps through appropriate documentation, that she has a disability and that the disability actually prevents her from meeting the high school diploma requirement.

Question: So, does that mean the employer must hire the person with a disability?

> **Answer**: No. Even if the applicant with a disability can demonstrate the ability to do the job through some means other than possession of a high school diploma, the employer may still choose the best

qualified person for the job. The employer does not have to prefer the applicant with a disability over someone who can perform the job better.

Question: Is the informal discussion letter a new interpretation of the law?

Answer: No. Like all of EEOC's informal discussion letters, the letter simply applies the existing standards under the ADA and the EEOC's regulations. The EEOC's informal discussion letters are meant to provide assistance for employers in complying with the laws. In this case the letter was intended to explain how the ADA applies when any job requirement (although a high school diploma was the specific example that we were asked about) excludes someone with a disability from a job.

Question: Is this the first time that a high school diploma requirement has been questioned as a possible violation of employment discrimination law?

Answer: No. The U.S. Supreme Court decided in 1971 that a high school diploma requirement was discriminatory because it had a disparate impact on African Americans who had high school diploma rates far lower than whites in the relevant geographical area, and because the requirement was not job related for the position in question and consistent with business necessity. Griggs v. Duke Power Co., 401 U.S. 424 (1971). The courts and the EEOC have consistently applied the Supreme Court's interpretation of the law ever since, and Congress confirmed it in the Civil Rights Act of 1991.

Additionally, in 2003, EEOC brought a lawsuit on behalf of an employee with an intellectual disability who was fired from her job as a nursing assistant in a residential care facility when the employer adopted a requirement that nursing assistants have high school diplomas. She had worked successfully in the job for four years and had several times tried to obtain her GED, but could not do so because of her disability. Her GED instructors offered to work with the employer to find an alternative way to assess the employee's ability to do the job, but the employer refused. The employer settled the case with EEOC.

More information on this topic can be obtained by visiting:
http://www.eeoc.gov/eeoc/newsroom/wysk_high_school_ada.cfm