Ask *the* Experts...

BY STAN SCHAIR, ESQ.

Q *We have a number of Spanish-speaking employees. Can we force them to speak only English while on the job?*

— J. Lewis, NYC

A It depends. The general rule of thumb is that you may require employees to speak only English--only for job related and business necessity. The EEOC cites examples of such situations, including: when communicating with customers or co-workers who speak only English; when important for job safety, cooperation, or efficiency; when English-only-speaking supervisors must monitor employee interaction and performance. It is important that any English-only rule is justified by business necessity and narrowly tailored to meet that necessity. For example, extending the rule to non-work times (meal periods, breaks) would be highly suspect and probably unlawful. As there are many court decisions declaring English-only policies illegal, it is important that you consult with counsel before fashioning and implementing such a rule.

Q *We have an employee returning from duty in Iraq. Frankly, we have long since hired a replacement for his position. Do we have to take the returning vet back? If so, can we legally fire the current incumbent, as we have no other position?*

— A. Miller, Albany

A The answer is probably yes to both questions. The Uniformed Services Employment and Reemployment Rights Act (USERRA) is the federal law that applies to the first question. Under USERRA, a pre-service employer must reemploy service members returning from a period of service if those service members meet five criteria: (1) the individual must have held a civilian job; (2) he/she must have given notice to the employer when leaving the job for service in the uniformed services, unless giving notice was precluded by military necessity or otherwise impossible or unreasonable; (3) the cumulative period of service must not have exceeded five years; (4) the individual must not have been released from service under dishonorable or other punitive conditions; and (5) the person must have reported back to the civilian job in a timely manner or have submitted a timely application for reemployment.

As to the second question, the normal rules of employment-at-will apply. If the sole reason for termination is that the company does not have any other position available for which the incumbent is qualified, it would be lawful to terminate the incumbent. However, as with all terminations, you should conduct an analysis of whether the reason can be objectively supported, and consider other possible claims of discrimination that may arise from the termination.

Q *We received an authorization form from a law firm, that appears to be signed by one of our employees, requesting certain information about that same employee. Are we obligated to comply with it?*

— S. Dolan, Rochester

A No. In New York, personnel files are the property of the employer. An employer must, of course, comply with a valid subpoena, but a

mere "authorization" to release information does not, standing alone, require an employer to provide the requested information. Often the type of authorization form used by insurance defense law firms will be a "HIPAA Authorization Form," and the law firm may be requesting non-medical related information outside the scope of such an authorization. Before releasing any information about your employee, it would be prudent to speak with the employee to confirm whether it is his/her signature on the authorization form.

Q *We have a policy that states if an employee is fired for misconduct, he/she will lose any accrued and unused vacation leave. Is this legal?*

— R. Huff, NYC

A Yes, assuming your business is located in New York. The answer may change depending on the applicable state. In New York, the terms of the vacation policy govern eligibility for vacation leave and pay. Just make sure the language regarding the "misconduct" ineligibility provision is explicitly and clearly written into the vacation policy, and the term "misconduct" is defined and provides that any final determination is to be made by the employer. The key is to provide adequate notice about the rules governing eligibility to use or be paid for vacation leave. It would also be helpful to have the ineligibility clause printed in a bold and larger font to avoid any claims that the employer was seeking to "bury" it. ◗

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