Missouri Alliance for HOME CARE

SESCO management consultants

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Developing Policy to Address Employees' Personal Devices During and After Working Hours

Many SESCO clients allow and/or request employees to use their personal devices for work. Also, many clients allow employees to bring to the workplace their personal devices for personal use. The reality in today's world that we live in is that we are all very closely tied to our cell phones, tablets, watches, and laptops. For many, it's a preferred and primary way of communicating with staff, clients and personal friends and family. Personal devices and electronics will only increase in terms of the way we work and live our lives.

Employers, as well as individuals alike, rely on personal devices in the workplace because allowing use, especially for work, provides significant convenience, cost benefits, flexibility, improves overall productivity and responsiveness, and increases worker satisfaction.

However, with these benefits there also are significant risks to consider as well such as the loss or theft of devices, Wage and Hour (working time) issues, employee privacy, discrimination and harassment and separation of employment.

The following provides SESCO's recommendation to address the employment-specific legal issues as well as the benefits of personal device policies and addresses SESCO's staff recommendations that clients and employees should incorporate when implementing personal device practices at work.

Wage and Hour – Paid Time

SESCO clients should carefully consider the Wage and Hour risks of personal devices in the workplace. Under the Fair Labor Standards Act (FLSA), employers must pay at least minimum wage to nonexempt employees for all hours the employee is suffered or permitted to work by the employer. In addition, nonexempt employees must receive overtime pay when they work in excess of 40 hours during a workweek (federal – some states are more restrictive). When employees have remote access, hours of work can include time spent on or off the clock drafting and responding to emails, taking conference calls, video conferencing and completing projects or discussing work with other employees. Many employers even require employees to check emails around the clock while others may not; but if such compensable time is not paid, it can expose the organization to potential liability -- back wages for time worked not paid.

Staff Recommendation: Employers can protect themselves from such Wage and Hour risks by incorporating into policies that address:

- Require employees to record and report all time worked – this would include after hours worked when using personal devices.
- Set clear policies on working outside of normal scheduled hours – many SESCO policies clearly state that employees should not perform work after hours unless specifically requested to do so or approved by their manager.
- Policy should address minimum wage compliance by reimbursing employees for device fees or paying an hourly rate that ensures employees receive at or above minimum wage after device expenses and fees.

Discrimination and Harassment

If an employee uses his or her own personal device to bully co-workers, send harassing emails or text messages, or transmit racially insensitive pictures or videos, whether during working hours or not, it can create liability for the employer. This includes inappropriate language and communications on social media as well.

Staff Recommendation: SESCO recommends that employers should train employees on using good judgment when communicating with colleagues on personal devices. This should be included in new hire orientation as well as annually in reviewing policy as well as harassment training. The company's policy should include instructions on acceptable use, prohibit inappropriate use and remind employees that the company's policy prohibiting harassment, discrimination and retaliation apply to the use of all devices under the company's policy.

Employee Negligence

Employee negligence can also put employers at risk. When employees receive a new mobile device, they often store their old one or give it away thus increasing the risk of data compromise. Employees may also inadvertently download malware or become the victim of a phishing scam by clicking on a malicious link. Company data can also be compromised if the employee loses the device, fails to password protect their device, or the device is stolen. Employees may also accidently expose sensitive company information when communicating through unsecured or public Wi-Fi networks.

Staff Recommendation: To reduce the risk associated with data loss and security breaches, clients should educate employees on the importance of maintaining strong passwords, changing passwords and encrypting data stored on the device. Employers may also want to consider adopting a policy that clearly states that the organization owns the company data on the device and requires employees to back up company data and notify the employer in the event their personal device is lost, stolen or damaged. If data compromise is an ongoing concern, employers can establish protocols which permit retrieval and review of company

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data as well as the ability to remotely locate the device and automatically wipe the device of all data in certain instances.

Privacy Issues

SESCO clients should balance its duty to safeguard sensitive and proprietary information with employee privacy. For example, certain states have enacted laws that protect an employee's right to social media privacy. These laws prohibit employers from trying to gain unauthorized access to an employee's private social networking site – including prohibiting against requesting or requiring access to employees' social media accounts. Privacy protections may also apply to the healthcare information stored on the device as well as the employee's privileged communications with his or her doctor, attorney or spouse.

Staff Recommendation: SESCO recommends that both the employer and employees' rights be established, including what exactly can be accessed on a personal device, and exactly what will happen if the device is lost or compromised, or if the employee leaves the business. Companies can also mitigate damages by making employees aware of the privacy trade-offs and the reasonable expectations of privacy related to their use of a personal device for work. Employers can, at a minimum, train employees on what their policy says, inform employees of privacy-related issues and if monitoring or an investigation becomes necessary, minimize the potential exposure of employees' personal and private information.

Termination of Employment Challenges

When an employee separates from the organization, segregating and retrieving company data can be challenging from personal devices. Accordingly, policy should include a section detailing what actions must be taken, both by the company and employee, upon separation of employment.

Staff Recommendation: Policy might include deleting data, revoking access to a network, deleting certain apps and/or working with the employer's IT staff or vendor to complete the exit requirements and ensure proper removal of company trade secrets, proprietary and confidential information and other company data. Employers may also want to consider adopting a policy advising employees that not complying with the exit policies will result in a full remote factory reset of their devices which can be achieved by the mobile device management toolsets commercially available. Moreover, they should sign a waiver consenting to such activities and holding the organization harmless for any such damage, loss or use of data loss.

In summary, although there is no one-size-fits-all policy, all employers should develop and disseminate a comprehensive policy that takes into account the company's existing infrastructure and risk. As with all information security risk, how the organization defines and treats risk plays a role in choosing the security roles that the employer may implement. It is also essential that employers and employees engage in active communication to include training, discussing policy on a regular basis and making revisions and updates as needed.

SESCO Management Consultants specializes in reviewing and preparing policy for employers across all 50 states. Contact SESCO to discuss this critical policy issue as we're always as close as your telephone.

Q&A on Pregnancy Discrimination and Related Issues

The EEOC enforcement guidance on pregnancy discrimination and related issues (guidance) was originally released on July 14, 2014 and recently updated in light of the Supreme Court's decision in *Young v. United Parcel Service, Inc.* (2015).

As SESCO discusses pregnancy related questions from clients on a regular basis, we are providing the following background and Q&A as the Pregnancy and Discrimination Act along with the Americans with Disabilities Act prohibits discrimination based on pregnancy, childbirth or other related medical conditions.

In general, the following Q&A addresses:

- When employer actions may constitute unlawful discrimination on the basis of pregnancy.
- The obligation of employers under the Pregnancy Discrimination Act to provide pregnant workers equal access to the benefits of employment such as leave, light duty, health benefits and others.
- How the ADA (Americans with Disabilities Act) as Amended to broaden the definition of disability, applying to individuals with pregnancy-related impairments affect employer policy and practice.

1. **Does the PDA protect individuals who are not currently pregnant based on their ability or intention to become pregnant?**

   Yes. The PDA's protection extends to differential treatment based on an employee's fertility or childbearing capacity. Thus sex-specific policies restricting women from certain jobs based on childbearing capacity, such as those banning fertile women from jobs with exposure to harmful chemicals, are generally prohibited. An employer's concern about risks to a pregnant employee or her fetus will rarely, if ever, justify such restrictions. Sex-specific job restrictions can only be justified if the employer can show that lack of childbearing capacity is a bona fide occupational qualification (BFOQ), that is, reasonably necessary to the normal operation of the business.

2. **What are examples of medical conditions related to pregnancy or childbirth?**

   Medical conditions related to pregnancy may include symptoms such as back pain; disorders such as preeclampsia (pregnancy-induced high blood pressure) and gestational diabetes; complications requiring bed rest; and the after-effects of a delivery.

   Lactation is also a pregnancy-related medical condition. An employee who is lactating must be able to address lactation-related needs to the same extent as she and her coworkers are able to address other similarly limiting medical conditions. For example, if an employer allows employees to change their schedules or use sick leave for routine doctor appointments and to address non-incapacitating medical conditions, then it must allow female employees to change their schedules or use sick leave for lactation-related needs.

3. **Will an employer violate the PDA if it takes an adverse action against a pregnant worker based on concerns about her health and safety?**

   Yes. Although an employer may, of course, require that a pregnant worker be able to perform the duties of her job, adverse employment actions, including those related to hiring, assignments, or promotion, that are based on an employer's assumptions

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PREGNANCY DISCRIMINATION

or stereotypes about pregnant workers' attendance, schedules, physical ability to work, or commitment to their jobs, are unlawful. Even when an employer believes it is acting in an employee's best interest, adverse actions based on assumptions or stereotypes are prohibited. For instance, it is unlawful for an employer to involuntarily reassign a pregnant employee to a lower paying job involving fewer deadlines based on an assumption that the stress and fast-paced work required in her current job would increase risks associated with her pregnancy.

4. **Does the PDA protect employees from harassment based on pregnancy, childbirth, or related medical conditions?**

   Yes. Unwelcome and offensive jokes or name-calling, physical assaults or threats, intimidation, ridicule, insults, offensive objects or pictures, and interference with work performance that is motivated by pregnancy, childbirth, or related medical conditions may constitute unlawful harassment. Whether the conduct is sufficiently hostile to constitute unlawful harassment depends on factors such as the frequency of the conduct or its severity. Employer liability can result from the conduct of supervisors, coworkers, or non-employees such as customers or business partners over whom the employer has some control.

5. **May an employer impose greater restrictions on pregnancy-related medical leave than on other medical leave?**

   No. Under the PDA, an employer must allow women with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work. Thus, an employer:

   - may not impose a shorter maximum period for pregnancy-related leave than for other types of medical or short-term disability leave; and
   - must allow an employee who is temporarily disabled due to pregnancy to take leave without pay to the same extent that other employees who are similar in their ability or inability to work are allowed to do so.

   An employer must also hold open a job for a pregnancy-related absence for the same length of time that jobs are held open for employees on sick or temporary disability leave. If the pregnant employee used leave under the Family and Medical Leave Act (FMLA), the employer must restore the employee to her original job or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.

   Note that under the ADA, an employer may have to provide leave in addition to that provided under its normal leave policy as a reasonable accommodation for someone with a pregnancy-related impairment that is a disability.

6. **Must an employer provide a reasonable accommodation to a worker with a pregnancy-related impairment who requests one?**

   Yes, if the accommodation is necessary because of a pregnancy-related impairment that substantially limits a major life activity. An employer may only deny a needed reasonable accommodation to an employee with a disability who has asked for one if it would result in an undue hardship. An undue hardship is defined as an action requiring significant difficulty or expense.

7. **What are some accommodations a pregnant worker may need?**

   Examples of reasonable accommodations that may be necessary for someone whose pregnancy-related impairment is a disability include:

   - Redistributing marginal or nonessential functions (for example, occasional lifting) that a pregnant worker cannot perform, or altering how an essential or marginal function is performed;
   - Modifying workplace policies, such as allowing a pregnant worker more frequent breaks or allowing her to keep a water bottle at a workstation even though keeping drinks at workstations is generally prohibited;
   - Modifying a work schedule so that someone who experiences severe morning sickness can arrive later than her usual start time and leave later to make up the time;
   - Allowing a pregnant worker placed on bed rest to telework where feasible;
   - Granting leave in addition to what an employer would normally provide under a sick leave policy;
   - Purchasing or modifying equipment, such as a stool for a pregnant employee who needs to sit while performing job tasks typically performed while standing; and
   - Temporarily reassigning an employee to a light duty position.

In summary, SESCO strongly recommends a thorough review of current policy and practices to include interviewing questions, EEOC and ADA policy, light duty and general leave policies and other related policies and practices to ensure compliance. With the Americans with Disabilities Act as Amended, there are significant pitfalls and liabilities associated with pregnancy.

SESCO Client Feedback

"Adam and Bill, thank you for continuing to teach me the true meaning of 'exceptional service'." ~ Mike Albano - Albano & Associates P.L.C.

"Bill, I just wanted to let you know how much we've appreciated Adam's assistance in his employment law research and policy development for one of our multi-state clients. He's been a pleasure to work with and we appreciate our relationship with SESCO." ~ Bob Crumley - Independent Hardee's Franchise Association

Special Thanks to New SESCO Clients!

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RETURN SERVICE REQUESTED

Train Your Management Team

Employers' liability associated with non-compliance to employment regulations typically stems from the inappropriate actions and communications of frontline supervisors and managers. In a majority of these cases, there is no intent to break a rule or law but it's normally due to managers simply not understanding and appreciating the complexity of employment regulations to include screening and hiring, day-to-day management and separation of employment. SESCO has been training managers for over 50 years and we can bring in this awareness training and provide practical hands-on recommendations to your team to avoid significant liability.

SESCO Client Inquiry - Staff Response

Question: ***When can an employer deduct from the pay of a salaried, exempt employee?***

Answer: Deductions from pay are permissible when an exempt employee: is absent from work for one or more full days for personal reasons other than sickness or disability; for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness; to offset amounts employees receive as jury or witness fees, or for military pay; for penalties imposed in good faith for infractions of safety rules of major significance; or for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions. In the case of Family and Medical Leave Act (FMLA) absences, either partial day or full day deductions may be made.

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