

## MEMORANDUM

**To:** ES&A Clients and Friends  
**From:** Trisha Gibo, Esq.  
**Date:** 1/18/2019  
**Subject:** Dealing with the Aging Workforce

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The expected age of retirement continues to increase due to a combination of employee obligations to care for multiple dependents (adult children and aging parents), lack of personal support, high levels of debt, and extremely high healthcare costs. As a result, employers face an increase in the prevalence of disabilities in the workplace, which significantly affects employee performance and attendance and impacts the employer's operations. When dealing with an aging workforce, employers should be mindful of the potential legal risks and take appropriate precautions:

- **Monitor the workplace for age and disability discrimination.** Federal and state law prohibit employers from basing employment decisions on age or disability. Employers should be especially careful when evaluating employee performance, eliminating job duties, and disciplining older workers based on a perceived decline in performance. Adverse employment actions that disproportionately affect older employees (in comparison with their younger counterparts) may ultimately be deemed unlawful discrimination.
- **Prohibit discriminatory harassment in the workplace.** Harassment of employees because of age or disability is also prohibited. Employers must strictly forbid and intervene if employees engage in harassing behavior. For example, verbal comments which reference age and/or disability (e.g. suggesting older employees retire, and age- or disability-based name-calling) must not be tolerated.
- **Never assume that an employee is disabled.** Unless you have direct knowledge that an employee is disabled, assume that the employee can perform the essential functions of their position. If the employee is exhibiting an inability to perform their position, ask them directly about their performance. However, treat the individual as you would any other employee with a performance issue unless you become aware of a known disability. Document all communications with the employee.

- **Engage in the interactive reasonable accommodations process.** Employers have an obligation to engage in the *interactive process* when a disabled employee requests reasonable accommodation. An employee need not use the exact words “reasonable accommodation.” Rather, they need only identify the necessity for some type of employer assistance to perform their job. Requests for accommodation commonly come in the form of requests for extended unpaid leave. An employer must engage in a back and forth *dialogue* with the requesting employee in order to fulfill their obligation. Failure to have a dialogue with the requesting employee is unlawful disability discrimination.
- **Outline options for disabled employees who refuse to acknowledge the effect of their health on the performance of their job.** If an employee refuses to acknowledge any performance deficiency or potential disability, consider outlining their options for disability retirement. This will include a coordination of available benefits to assist the employee in transitioning to disability retirement.
- **Encourage employees to take advantage of available paid leave benefits.** Disabled employees who are unable to work should be encouraged to utilize paid leave benefits, if available. Employers are not required to provide paid leave for their employees, but if they do, they must have a written policy and ensure equal enforcement of that policy.
- **Encourage employees to take advantage of statutory benefits.** Hawaii employers are required to provide current employees with temporary disability insurance (TDI), which is a wage replacement benefit for non-work injuries or illness. Certain employers may also be required to provide statutory leave benefits pursuant to the federal Family and Medical Leave Act (FMLA) or Hawaii Family Leave Law (HFLL) – which mandate employers to offer unpaid leave for eligible employees in certain circumstances. Even if an employer is not covered by either FMLA or HFLL, it may be obligated to provide an unpaid leave of absence as a reasonable accommodation and should seek legal counsel to ensure compliance.
- **Consider offering employees supplemental insurance benefits.** While not required by law, supplemental insurance is often a low-cost benefit which is beneficial to both the employee and the employer. Supplemental insurance provides disabled employees with financial assistance, which may ease their transition to retirement. Examples of such benefits include: long-term disability insurance (LTDI), which acts as a partial wage replacement benefit; cancer insurance; accident insurance; hospitalization insurance; and a health savings account (or flexible spending plan).
- **Facilitate access to early retirement benefits when applicable.** Employees may be eligible for early distribution of retirement benefits if they have suffered a permanent disability or

may opt to take early retirement with reduced benefits in certain cases. Disabled employees should be provided with information as to how to inquire about their options. Again, this may be another source of financial support during the employee's transition out of the workplace.

- **Provide employees with information about social security disability benefits.** When disabled employees exhaust all available, employer-sponsored insurance benefits, they may be eligible for SSDI benefits. Providing disabled employees with a clear, financially supported path to retirement will allow employers to efficiently address concerns in the workplace by transitioning disabled employees to retirement.
- **Continue medical insurance coverage for disabled employees when appropriate.** Under Hawaii's Prepaid Healthcare Act, an employer must continue medical coverage for at least three months after the month in which the employee's disability began or until the last month in which the employee performed work, whichever is later. This applies even if an employee is not currently on schedule or working for the employer.
- **Consider non-employment solutions to assist your employee.** When dealing with disabled employees who are no longer able to work, consider reaching out to the employee's family as well as community groups to gain support in the employee's transition to retirement. The transition may be more efficient if the employee has continued emotional support from either family or community or retiree groups.

Taking these precautions will assist employers in ensuring compliance, avoiding litigation, and maintaining productivity and morale amongst an aging workforce.