THOMSON REUTERS

Westlaw®

Brave (and risky) new world: Employment law considerations for the modern workplace

By Elise M. Bloom Esq., and Samantha R. Manelin, Esq., *Proskauer Rose LLP*

OCTOBER 8, 2019

It is business as usual on a Thursday afternoon, and the office is buzzing with its usual good-natured activity. Off to one side are the CEO and chief financial officer, engaged in their daily ping-pong tournament, their beers resting precariously on the edge of the table as they talk shop (a conversation intermittently interrupted by the CEO's "creative" swears as she, yet again, loses to the CFO).

Meanwhile, in the nearby bullpen style open floor office, employees are scattered at various workstations. Some are getting work done, but more can be seen sending messages to each other (and to their remote colleagues) using the company's messenger system. Still others are busy trying to teach Bo, the office Labradoodle, to roll over.

The head of IT seems undisturbed by the hubbub as he takes a power nap in the office hammock, unaware of the basketballs whizzing by mere inches from his head, as the marketing team brainstorms their next social media blitz while shooting hoops.

This illustration of the modern workplace might seem hyperbolic to some. To many hiring managers, however, it spells out the new essential recipe for recruiting highly sought after millennial (and soon, Generation Z, or "zoomer") talent.

Perhaps needless to say, this new vision of the office comes with obvious advantages (e.g., fostering creativity, encouraging teamwork, promoting self-care) alongside practical impediments (e.g., costs, distractions and limits to productivity).

But less obviously, it also comes with additional increased risk — or at least legal considerations — from an employment law perspective. As discussed below, companies providing new innovations in employee benefits — such as recreational activities in the office, pet-friendly policies, and remote work opportunities — should initiate conversations with outside counsel about risk management and best practices.

MIXING PLAY WITH WORK

It is no secret that the modern workplace demands a lot of its employees. After all, when emails can be read with a flick of the wrist, it is hard to keep work from bleeding into life. In exchange for those inevitably blurred lines, however, the new workforce is seeking employment opportunities where a little more life can be brought into work.

For instance, it is not uncommon for modern workplaces to entice talent by featuring recreational activities like ping-pong, cornhole or an indoor basketball hoop; to supply alcohol in the office (or to arrange for regular happy hours nearby); or even to provide "nap pods" for a midday reprieve.

In theory, these amenities are meant to foster creativity, teamwork and productivity.[1] In reality, however, they can create a significantly heightened risk of employment-related harassment allegations — especially in a culture still reeling from the consequences of the recent (and ongoing) #MeToo and #TimesUp movements.

> Workplace amenities are meant to foster creativity, teamwork and productivity, but can create a significantly heightened risk of employment-related harassment allegations — especially in the #MeToo culture.

A recent Proskauer Rose study notes that workplace misconduct is now being seriously scrutinized as a result of the heightened attention paid to allegations of harassment and discrimination. For instance, in the first year since the movements were catalyzed in October 2017, at least one notable figure was accused (publicly) of inappropriate conduct each day, and the Equal Employment Opportunity Commission filed 50% more sexual harassment claims compared with its historical filings.[2]

Against this backdrop, employers should pay particular attention to the increased risk stemming from recreational office amenities, especially with respect to potential allegations of harassment or discrimination.

For instance, while nap pods might seem appealing for a post-lunch reprieve, they are less enticing when the human resources team is faced with a complaint regarding two employees who have chosen to share (perhaps romantically) the same nap pod.

By the same token, while offering drinks at 5 p.m. may seem like the ideal morale booster in the abstract, easily accessible alcohol in the workplace only exacerbates risk further. Some employees'

judgment about appropriate behavior is not always ideal even when they are sober, and alcohol almost inevitably further compromises that judgment.

Relatedly, the presence of certain recreational activities, be it a basketball hoop in the office, or even a fantasy football league administered from the office, could lead employees to feel left out, a sentiment that may breed allegations of a boys' club environment (and thus of gender discrimination).[3]

There is no need to strip the workplace of all recreational amenities, however. Rather, as is the solution for many workplace issues, employers can help mitigate the risk by establishing clear rules — and, just as importantly, by enforcing them.

For instance, remind employees that rules of professionalism and anti-harassment apply at all times, be it during the workday, at a happy hour event with colleagues, or during office-sponsored recreational activities or outings.

Set rules about what can or cannot be consumed in the office, and consider restricting or prohibiting the access to or consumption of alcohol on office premises. As an alternative, provide free healthy snacks or refreshments to employees in lieu of alcohol.

There is no need to strip the workplace of all recreational amenities; rather, employers can help mitigate risk by establishing clear rules — and, just as importantly, by enforcing them.

Consider updating handbooks to reflect a policy that any activities that take place at work, or that are coordinated in the workplace, are equal opportunity, meaning that those organizing the activities must invite any and all employees to participate.

Finally, although employers should always provide regular harassment and discrimination training, refresher courses — reflecting updates that take into consideration new workplace benefits and policies, and that are specific to particular audiences — are always a useful way to remind employees of the company's anti-discrimination and anti-harassment policies, and to reestablish norms about appropriate conduct in the workplace (and beyond).

REMOTE WORK OR TELECOMMUTING

For many employees, the ideal modern workplace may be one's own home. Now that most office-based work can be performed over the internet, many industries offer employees the opportunity to work remotely on occasion (or even full time). While remote work policies may liberate employees from the hassles of commuting, they may also burden employers with potential legal headaches.

Take, for instance, the dilemma surrounding the application of state laws to remote employees who work from their homes outside the state of their company or home office. Every state, and at times, every distinct legal doctrine or statute, may prescribe a different formula for determining whether laws or regulations govern "out of state" employees who perform services for in-state companies.

For instance, Massachusetts recently passed legislation providing for paid family and medical leave, with an expansive (and vague) definition of coverage. This has led a number of employers located outside the state to question whether they need to provide the paid family and medical leave benefits (and satisfy the related requirements pertaining to tax contributions) for their few employees who work remotely from their home offices in Massachusetts.[4]

Similarly, states establish different rules pertaining to the application of wage-and-hour laws — including laws pertaining to minimum wage rates, overtime requirements, exemptions, record-keeping requirements and wage statement requirements — to remote workers. Accordingly, a company with remote employees will likely face a rather complex maze of state laws and regulations in determining which laws govern those employees.

Remote work also may be particularly challenging for employees who work with sensitive or confidential information regarding the company or its clients. For obvious reasons, allowing employees to perform work at home (or while traveling, at a coffee shop, etc.) significantly increases the risk that sensitive information may be exposed or misappropriated.

The recent viral video of an ABC interviewee's family photobombing his on-air teleconference recorded from his home office may have had the nation laughing, but the potential consequences of exposure of confidential information to family members (or to other members of the public) are far more sobering.[5]

Whether advertent or inadvertent, an employee's disclosure of sensitive data may result in significant liability to clients, and may also create an issue regarding that employee's confidentiality and nondisclosure obligations with the company.

These issues are not insurmountable, of course. With respect to the issues pertaining to the application of state law, employers can minimize complications by keeping careful records of the locations in which employees perform work (including remote work, business travel and even during vacations).

This type of record-keeping will assist a company in evaluating the various state laws at issue, although employers should

consider consulting with outside counsel to help navigate the maze of competing choice-of-law doctrines.

Employers can also set guidelines with remote employees with respect to confidential data. For instance, a company might permit an employee to perform services from a home office but not from a nearby coffee shop. Relatedly, a company might set a firm rule that phone/video calls involving confidential issues must take place in a fully private workspace.

Employers can also reduce the risk of outside hackers or data breaches by providing remote employees with secure methods of connecting to the company's system, such as a secure virtual private network, or VPN.

Finally, from a purely practical perspective, consider adopting policies that take into account the benefits of employees appearing in-person in the workplace. As convenient as remote work may be, there are innumerable benefits to live interactions in the workplace, including exposure to valuable learning experiences and increased collaboration between team members.

> A company with remote employees will likely face a rather complex maze of state laws and regulations in determining which laws govern those employees.

Accordingly, policies that limit remote work to occasional use — or at least require in-person appearance at the office on a regular basis — may be advantageous for both the company and the employee.

PET-FRIENDLY POLICIES

To some, the ultimate workplace amenity is the ability to bring a pet to the office — it obviates the need for an expensive sitter or walker at home, and who can resist the opportunity to pet Bo the Labradoodle to relieve some stress during the workday?

In fact, a number of high-profile companies have begun introducing pet-friendly work policies, and recent studies report that as many as 8% of workplaces are formally pet friendly, citing the therapeutic effects that dogs can have for individuals experiencing stress or trauma.[6]

However, pet-friendly policies can also lead to some potentially "hairy" workplace issues. In particular, employees with allergies may complain that they cannot tolerate working in the same space as certain pets — and this is all the more problematic in modern offices with open floor plans.

Similarly, some employees may complain that they have a phobia of certain animals. In such situations, it may be incumbent upon the employer to engage in proper protocols pursuant to the Americans with Disabilities Act and related state laws, and to participate in an interactive conversation with the employee regarding possible reasonable accommodations (though it would certainly depend on the facts at issue to determine whether a phobia or allergy constitutes a disability in the first instance).[7]

Ultimately, pet-friendly policies leave open the possibility that an animal could physically injure an employee at work, leading to a dilemma as to whether such an injury constitutes a work-related injury for purposes of a workers' compensation claim.

The most conservative approach to dealing with these risks is to eliminate or avoid a pet-friendly policy in the first instance (though employers should be sure to consider accommodations for employees requiring service animals for disabilities). Employers can also choose to celebrate their employees' love for animals in ways other than pet-friendly policies.

Consider, for instance, organizing monthly pet-friendly meetups after work at a nearby park, offering a subsidy for pet insurance, or providing paid leave for the adoption of a new pet. There are also ways to make pet-friendly policies less risky without eliminating them altogether.

Most importantly, take every employee complaint seriously, and be sure to evaluate if and when responsibilities under the ADA or state law to discuss reasonable accommodations are triggered.

Moreover, ensure that the policy anticipates future complaints or concerns by instating "no-pet" work zones where people who prefer not to be around pets (for health reasons, phobias or otherwise) may choose to work, and by implementing other rules and guidelines to help manage various issues.

For instance, consider implementing restrictions as to breed (or as to species), in case certain employees interpret a pet-friendly policy too liberally (as arguably did certain airplane travelers who attempted to bring an "emotional support peacock" on a flight).[8]

Similarly, consider a protocol for when an animal is aggressive, misbehaves or otherwise causes distractions, and establish rules for when animals need to stay in crates or on leashes. Ultimately, a pet-friendly workplace should be considered a privilege that employers are free to revoke at any time.

CONCLUSION

Despite the potential risks, the ideal modern workplace is not out of reach. In general, by setting firm rules (and enforcing them), and by establishing that the benefits are earned privileges rather than rights, a company can mitigate the risk of complications and legal exposure.

Ultimately, so long as companies carefully evaluate the consequences of their policies and amenities, potentially with

the aid of outside counsel, they can continue to entice new talent with exceptional and innovative benefits.

NOTES

[1] According to some, naps are actually considered a productivity booster. *See* "It's Time to Start Taking Naps at Work," Katie Zimmerman for Forbes.com (available at https://bit.ly/2mXfV7Z).

[2] *See* Proskauer Value Insights: Workplace Complaints in the #MeToo Era (available at http://bit.ly/2knNWga).

[3] *See, e.g. Fahrenkrug v. Verizon Servs. Corp.*, No. 11-cv-1014, 2015 WL 13021890, at *8 (N.D.N.Y. May 14, 2015), *aff'd*, 652 F. App'x 54 (2d Cir. 2016). Although the defendants prevailed on summary judgment in this case, the plaintiff alleged gender discrimination, in part citing the fact that she was "not part of the good old boy network. I did not participate in fantasy hockey, fantasy basketball, fantasy anything."

[4] Massachusetts General Law Ch. 175M is referred to as the Paid Family and Medical Leave law or PFML.

[5] Video is available at https://abcn.ws/2mo4UfA.

[6] *See* "Why Bringing Your Dog to Work Can Be Great for (Almost) Everyone" June 22, 2018, http://bit.ly/2mlqCKM.

[7] *Compare, e.g., Gallagher v. Sunrise Assisted Living of Haverford*, 268 F. Supp. 2d 436, 442 (E.D. Pa. 2003) (analyzing whether an employee with severe animal allergy had a disability, where she worked in a nursing home that allowed pets, and ultimately finding that the allergy was not a disability because it did not significantly restrict her ability to breathe or restrict her major life activities), w ith *Schmidt v. Mercy Hosp. of Pittsburgh*, No. 05-cv-1446, 2007 WL 2683826, at *2 (W.D. Pa. Sept. 7, 2007) (finding that asthma could constitute a disability under ADA where it significantly restricted her ability to breathe compared to an average person).

[8] *See* https://nbcnews.to/2E48Mt0.

This article first appeared in the October 8, 2019, edition of Westlaw Journal Employment.

ABOUT THE AUTHORS

Elise M. Bloom (L) is a partner in **Proskauer Rose LLP**'s Labor & Employment department and a member of the firm's Executive Committee in New York. **Samantha R. Manelin** (R) is an associate in the firm's Labor & Employment department in Boston.

Thomson Reuters develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world's most trusted news organization.