



A DIVISION OF LEAVITT PACIFIC INSURANCE BROKERS

Newsletter March 2011

Can I fire a bankrupt employee?

Not exactly. Although you may be concerned, particularly if your employee is handling money, many people have very legitimate reasons for seeking bankruptcy protection, and you can't fire your employee simply because he/she filed for bankruptcy. A primary purpose of the bankruptcy law is to allow debtors to obtain a fresh start, and Congress has determined that a fresh start would be impeded if an employer can adversely affect, end, or modify a debtor's employment on account of bankruptcy.

The U.S. Bankruptcy Code contains a nondiscrimination provision that bars employers from firing or discriminating against an employee who is or has been a debtor or bankrupt "solely because" he (1) is or has been a debtor, (2) has been insolvent before the commencement of the bankruptcy proceedings, or (3) hasn't paid a debt that can be erased in bankruptcy.

Discrimination prohibition construed narrowly

The bankruptcy discrimination statute applies to all private employers. It protects all individuals who are or have been in bankruptcy. Because many people are filing for bankruptcy these days, one would expect to see a flood of bankruptcy discrimination cases, but that hasn't happened. There are several reasons.

Scope of statutory protection very limited. Courts have interpreted the statute to require proof that the employee was discriminated against "solely"

because of the bankruptcy or insolvency. An employer can prevail if it can offer a legitimate nondiscriminatory reason for the adverse employment action, even if bankruptcy also was a consideration.

Statutory protection may not extend to all aspects of the employee-employment relationship. For example, some courts have found that the provision doesn't cover discrimination in hiring since applicants for employment aren't "employees."

Statutory protection isn't available if adverse employment decision occurs before bankruptcy filing. If an employer fires an employee before he files for bankruptcy, even if it's because of his poor financial status, he can't later file for bankruptcy and then sue the employer for discrimination.

The fact that the statute has been interpreted rather restrictively isn't a reason for you to ignore it. You should remain on guard for situations that would lead to a lawsuit under the bankruptcy discrimination law. Bear in mind that while some courts have ruled to the contrary, other courts have ruled that it's illegal to refuse to hire an otherwise qualified applicant because of a bankruptcy.

Employer risks

The law doesn't specify what remedies are available for a violation. For the most part, the bankruptcy courts have relied on remedies applied in other employment discrimination contexts, e.g., an award of reinstatement and back pay for illegally

terminated employees. Keep in mind that a current or former employee who is in the middle of the bankruptcy proceedings already has an attorney and is in difficult financial straits. Launching a lawsuit against an employer is relatively easy under those circumstances, so an employer's risk is heightened because a bankrupt employee might be more likely to sue than other disgruntled employees.

Bottom line

Exercise common sense, and you should be able to avoid bankruptcy discrimination liability. The key is to remember that the law prohibits discrimination "solely"

because of bankruptcy or insolvency. So long as you can identify some other reasonable factor that played a role in your decision, you should be able to successfully defend against that type of claim. Proper documentation of your reasons will bolster your defense.

These articles should not be construed as legal advice or as pertaining to specific situations. Consult with your legal counsel for further information.

Stay "In The Know" in 2011 –

Educational Seminars

We have a variety of educational seminars planned for 2011. Some will be live from the office of our partner in Campbell. Others will be conducted using "Go To Meeting" web conferencing.

Leavitt Pacific Insurance Brokers
695 Campbell Technology Parkway, Ste 250
Campbell, CA 95008

March Educational Session

OHR's Quarterly Harassment Prevention Training for Managers

As a service to your business we have a quarterly Harassment Prevention Training. Those sessions occur each quarter on the last Thursday of the month at 1:00 PM. Mark your calendars for March, June, September and December. We also do individual sessions for your offices, including Managers and Supervisors and non supervisory employees.

The next OHR Harassment Prevention Training for Managers session is scheduled for **Thursday, March 31st at 1:00 pm** in Campbell, CA. To register please RSVP for the live session at [Harassment Prevention Training](#)

MyOHR provides key Human Resources consulting and support for small, emerging and mid-size companies. Focusing on Human Resource Legal Compliance, MyOHR assists business in achieving operational efficiency by providing the infrastructure necessary to manage the workforce in compliance with State and Federal requirements. MyOHR is cost effective for companies that

have not budgeted for a full-time HR position. Contact Jaime Orendac, SPHR-CA at Jaimeo@MyOHR.com.