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Employment Law Outlook

Fall 2018

Is the Workplace the Next Frontier for Emotional Support Animals?

David A. Kushner

If you have flown recently, you may have been surprised to see a dog sitting on a neighbor's lap. Likewise, if you live in an apartment community with a no-pets policy, you have likely noticed that there are a surprising number of dogs at the property despite such a policy.

The law has long been clear under the Fair Housing Act that apartment communities must reasonably accommodate residents by allowing disability-related "assistance animals," including emotional support animals, even when the apartment does not normally allow dogs. Likewise, under Title III of the ADA, which applies to places of public accommodation, businesses must allow visitors to bring "service animals" (a more narrow term that does not include emotional support animals) onto their premises. Under the Air Carrier Access Act (ACAA), airlines are generally required to allow "service animals" onto the flight. Under the ACAA, service animal is defined more broadly to include emotional support animals.

Abuse of these laws has been rampant in recent years, with online retailers selling "disability letters" to patrons who fill out a form and make a payment.

Animal Accommodations under Title I of the ADA

It is therefore not surprising that employers are beginning to see an increased number of requests that they accommodate an employee's disability by allowing the employee to bring his/her dog to work.

Unlike the laws described above, Title I of the ADA (applicable to employers and their employees) does not contain any specific definition of the types of animals that are appropriate in the workplace. Instead, requests for animal accommodations must be analyzed on a case-by-case basis under the normal framework applicable to employee requests for accommodation under the ADA. However, unique issues arise with animal requests, such as whether the animal is safe in a particular workplace,

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Your 401(k) Plan May Help Employees Pay Their Student Loans

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The IRS recently released guidance in the form of a Private Letter Ruling (PLR 201833012) that approved an employer's program to provide a new type of student loan repayment benefit under its 401(k) plan. Although the PLR only applies to the employer who requested it, it serves as a helpful roadmap to employers looking for a tax-advantaged option to assist employees with their student loans while at the same time saving for retirement.

The 401(k) plan submitted to the IRS provided a matching formula of 5% of eligible compensation for each payroll period, provided employees made an elective contribution during the payroll period of at least 2% of eligible compensation. The employer's student loan repayment (SLR) nonelective contribution program has the following features:

- It is completely voluntary, employees must elect to enroll;
- Once enrolled, employees could opt-out of enrollment on a prospective basis;
- If an employee makes a student loan repayment during a payroll period that equals at least 2% of compensation, the employer will make an SLR nonelective contribution to the employee's 401(k) plan account equal to 5% of compensation for that payroll period (the same contribution as the matching contribution employees would have received if they made an elective contribution to the plan);
- The SLR nonelective contributions will be made as soon as practicable after the end of the plan year (given that employees can elect out of the loan repayment program at any time, the amount of SLR nonelective contributions is not known until the end of the plan year);
- The SLR nonelective contributions are subject to all applicable plan qualification requirements: eligibility, vesting, distribution rules, contribution limits, and coverage and nondiscrimination testing;
- The SLR nonelective contributions will not be treated as regular matching contributions for purposes of nondiscrimination testing;
- If the employee does not make a student loan repayment for a pay period equal to at least 2% of eligible compensation, but makes a regular elective deferral equal to at least 2% of compensation, the employer will make a "true-up matching contribution" equal to 5% of the eligible compensation for that payroll period;
- The true-up matching contributions will be made as soon as practicable after the end of the plan year and will be treated as regular matching contributions for nondiscrimination testing purposes;
- The SLR nonelective contributions and true-up matching contributions are subject to the same vesting schedule as regular matching contributions;
- Employees must be employed on the last day of the plan year (other than when employment terminates due to death or disability) in order to receive the SLR nonelective contributions or the true-up matching contributions; and
- The employer will not extend any student loans to employees who are eligible for the program and will not make any direct payments to reduce the student loan debt.

Advantages of implementing a student loan repayment program under a 401(k) plan:

- Enables employees to start building retirement savings even though their disposable income is used to pay student loans rather than contributing to their retirement plan.
- Employer contributions under the program would not be subject to FICA, FUTA, and federal income withholding.

Employers who are considering offering a loan repayment program should carefully consider the following issues:

- The contribution will have to be a nonelective contribution, as is the case in this PLR, and will be subject to the same qualification rules as any other plan contribution, including eligibility, vesting, and distribution requirements, as well as nondiscrimination testing.

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The H-1B Visa Program under the Trump Administration

James B. Wood

Throughout his presidential campaign, President Donald J. Trump stated that he would be the toughest president on immigration by strengthening the nation's immigration laws. In April 2017, President Trump issued the "Buy American, Hire American" Executive Order which has had reverberating effects on legal immigration, including on the H-1B visa program.

The H-1B visa program allows U.S. employers to employ foreign workers in specialty occupations. Specialty occupations are generally those positions requiring a bachelor's degree or higher (or a degree equivalent) in a specific specialty field. Congress controls the number of new H-1B visa cases accepted by U.S. Citizenship and Immigration Services (USCIS) each fiscal year (FY). Since 2004, the statutory cap has been set at 85,000 H-1B visas per year. Due to this cap, USCIS accepts new H-1B visa cases starting the first week of April each year. In the likely event USCIS receives more than 85,000 new cases in the first week of April, a lottery is conducted to randomly select cases for adjudication.

One of the first effects of the Executive Order has been visible through USCIS's H-1B adjudication trends. Since the Order was issued, USCIS significantly increased the number of Requests for Evidence (RFE) issued and denials of H-1B petitions. RFEs are issued when the government feels that additional information is needed to adjudicate a case. These RFEs require immediate attention and can result in an overall adjudication delay. In the 3rd quarter of FY17, USCIS issued RFEs on 22.5% of H-1B cases compared to a rate of 68.9% in the 4th quarter. Even more staggering than this jump is that in 4th quarter USCIS issued 63,184 RFEs which was nearly as many RFEs as USCIS issued in the first three quarters combined (63,599). The denial rate of H-1B petitions also rose from 15.9% in the 3rd quarter to 22.4% in the 4th quarter. These RFE and denial figures suggest that President Trump's Executive Order has led to increased scrutiny of H-1B visa cases.

In addition to these RFE and denial increases, the "Buy American, Hire American" Order led to major substantive changes in the USCIS "deference" policy. Under the prior policy, USCIS would only revisit its previous decisions in the case of material change in facts or prior government error. In its new policy the USCIS treats each case as a new case thus becoming "more consistent with the agency's current priorities and also advances policies that protect the interests of U.S. workers."

More recently, the USCIS issued a policy memorandum that took effect in mid-September providing adjudicators with the authority to deny cases on the basis that the initial evidence was not submitted or sufficient without first issuing RFEs. This new policy replaces another longstanding USCIS policy which required USCIS to issue an RFE in the event the petitioner could cure its deficiency by submitting additional information. However, the new policy does not address or clarify the initial evidence expectations or requirements. Ultimately, this could lead to employers seeing more cases denied, including cases being denied in error.

As USCIS continues to enhance and amend its adjudication policies, companies should begin planning for their new H-1B cases well in advance of the April 2019 H-1B filing deadline and consult an immigration attorney to ensure they are up-to-date on the latest USCIS policies and adjudication trends affecting the H-1B visa program.■

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how to balance the rights of the employee requesting the animal with those who might be allergic to the animal, and whether an employee's doctor (with no experience with the employer's workplace or expertise on animals) is the appropriate person to verify the need and appropriateness of the animal accommodation.

For example, in one recent case a special needs teacher requested the right to have her dog in the classroom, which she claimed helped her avoid panic attacks. Although she admitted that she only needed the dog in crowded situations in the hallway or in fire-drills, the Court held that these constituted essential functions and allowed her case to proceed to the jury.

On the other hand, a court recently ruled for an employer who denied an employee the right to have a PTSD-related assistance dog in a factory setting. The Court held that the employee had not established that he could perform the essential functions even with the dog. The Court also held that the employee's psychologist was not qualified to testify that the dog was safe or necessary, since he had not been to the factory and had no expertise with support animals.

Because this is an emerging area of the law with little consistent guidance from the courts, we strongly recommend that employers proceed carefully, and contact your employment counsel before rejecting or revoking an assistance animal accommodation request.■

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- While nondiscrimination testing may not be an issue for some employers, professional employers will have to pay attention as highly skilled college graduates may reach the highly compensated threshold ($120,000 in 2018) within the period of time that they maintain student debt. Should substantially all these SLR nonelective contributions benefit highly compensated employees, nondiscrimination testing will become an obstacle.

- Monitor the plan's compliance with elective deferral and matching contribution nondiscrimination tests. If a student loan program is offered, contributions under the program may result in lower elective deferrals and lower matching contributions being made for non-highly compensated employees which will negatively affect other aspects of nondiscrimination testing.

- Consider administrative costs associated with monitoring employee student loan payments and determining whether those payments qualify for student loan repayment contributions.

- Safe harbor plans may not be able to implement such a program.

In the absence of additional guidance from the IRS, any student loan repayment program design must be carefully assessed with legal counsel to prevent potential unfavorable consequences.■

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