

Ask the Attorney: Dress codes, mental health issues and file retention

In this edition of Ask the Attorney, our expert employment lawyer tackles readers questions about dress codes, file retention and mental health issues.

Are we creating a problem by giving a temp a pass on our dress code?

Q: “We have an employee hired through a temporary agency who wore a shirt to work that said “Caliente.” I know this means hot. I think it’s inappropriate for her to wear this shirt in a business setting and if she were an employee, I would probably tell her that. However, since she’s a temp, and not likely to become a permanent employee, what should I do? - Lee, Texas

A: The best approach is to have a dress code that you can consistently apply—perhaps, no T-shirts with mottos?—and then ensure that the staffing agency with which you work is aware that you have a dress code. If one of the temporary workers comes to work inappropriately dressed, the best approach is to contact her manager at the staffing agency and ask them to speak with her about her choice of dress. This approach works equally well regardless of the type of dress code violation, and does so in a manner that appropriately recognizes that the staffing agency is in fact her direct employer.

How long should we retain documents in an employee’s file?

Q: “Should I apply a retention schedule to individual documents in an employee’s file, or should I keep everything until 7-10 years after they are no longer an employee?” - Maren, Virginia

A: I can’t speak to the particular software system you use to track and store information, but in general, a seven to ten-year hold after an employee departs would be more than enough. Even in jurisdictions with lengthy statutes of limitation on contract and wage claims, this period would nearly always suffice. At the same time, there are a few exceptions—for example, certain occupational safety and health records must be kept for 30 years after the employee has moved on. And some records really should be tossed sooner.

Without knowing anything about the nature of your operations, I would suggest gathering information on how long you must save certain records and whether you should destroy them after that period, and once you are sure that seven to ten years will work for most, set that as your default and set up documents that need to be retained for different periods in another “folder” with different rules.

What action can we take when an employee is hospitalized for mental health issues?

Q: “We were informed that an employee in good standing was hospitalized for mental health issues. We have placed her on suspension until we can gather additional information about what is occurring and her ability to safely complete her job duties. She had previously disclosed a history of mental health issues, but had provided a clearance from a medical doctor stating that she was stable and able to work. Is this a qualifying event for FMLA? Are we able to terminate her employee because of the assumed risk to safety to herself and those

around her in the event of another episode?” - Anonymous, Pennsylvania

A: An employee who has worked a sufficient number of hours to be eligible for Family and Medical Leave is entitled to job-protected time away from work whenever he or she experiences a “serious health condition.” Regulations implementing the FMLA make it clear that overnight hospital stays will always qualify as serious, as will chronic conditions requiring on-going monitoring.

It sounds like this employee meets both those standards. Not only is FMLA leave job-protected, the Americans with Disabilities Act prohibits employers from discharging disabled workers because of that disability, unless the individual poses a “direct threat” to herself or others.

You don’t say whether the employee has done anything (at work or elsewhere) that suggests that she is a threat to herself or anyone else, but even so, it sounds like it is too early to decide whether she can safely return to work. Mental health conditions, like other health conditions, can be episodic, and treatment may need to be adjusted now and again. Once she is ready to return to work, you can engage in the interactive process to determine if she is able to perform the essential functions of her role safely, without posing a threat to herself or others, with or without first taking additional leave or requiring other accommodations.