

## It Depends: The Top 3 Inherently Gray Areas Of Employment Law

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*Fact-specific. Case by case.* These are just two of the terms that stand for one of the frustrating (for employers) truths of many areas of employment law: there are few black and white answers. There are endless shades of gray, and in honor of this week's letter of the law (G), we recognize three common gray areas and some specific questions that must be asked when addressing situations under each. The fact that there are so many questions that need to be answered under each explains why they are gray areas!

### 1. Is a noncompete agreement enforceable?

- What duties did the employee perform for the previous employer?
- What duties is the employee performing for the new employer?
- Did the employee engage in any underhanded behavior while still employed by the previous employer (such as copying confidential documents)?
- What have been the previous employer's practices and track record in enforcing noncompetes in the past?
- What state's law does the agreement say will apply?
- What state is the employee located in now?
- Does the contract specify where any disputes must be litigated?

### 2. Does an employer have to provide a particular reasonable accommodation under the disability discrimination laws?

- What efforts have been made to communicate with the employee about the situation?
- Has the employee been cooperative in responding to inquiries?
- Do you have a medical assessment of the employee's ability to perform his/her job?
- Do you trust that assessment (or do we think the physician's assistant

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filled it out the way the employer wanted him/her to)?

- How unique are the employee's job duties?
- What are the job duties?
- Which job duties do you think are not being adequately performed?
- Do you question the employee's efforts in attempting to work, or do you think the employee is to any degree malingering?

### **3. Is a worker an independent contractor or an employee?**

- Is there any written agreement with the worker?
- Are there are other workers performing the same or similar tasks, and are they considered employees or contractors?
- How much direction is the worker receiving from the company on the details of performing tasks?
- Does the worker provide services for other companies?
- Is the worker full time or close to it for your company?
- Does the worker provide any or all of the tools need to perform his/her work?
- How long has the worker been working for your company?

These issues are like snowflakes. With so many questions (and these are not intended to be exhaustive lists), no two sets of answers will be exactly alike. That can be frustrating, because it is easier to administer rules with clearer thresholds: *Two weeks of vacation. No flip flops at work. The work day is 8:30 to 5:00 with a half hour lunch break at noon.* Those rules are usually pretty easy. Like it or not, though, what employment lawyers and employers spend most of their time on are the snowflakes, and carefully working through the situations to manage them as cost-effectively as possible. What gray areas are you spending your time on this week?