HR SPECIALIST

Minnesota Employment Law

April 2015
Vol. 8, No. 4

Trusted compliance advice for Minnesota employers **Editors:** Susan K. Fitzke and Sarah J. Gorajski, Esqs., Littler Mendelson, Minneapolis

In the News . . .

Look, Ma, my first paycheck! Heed new check-fraud risk

Another sign of the social-media apocalypse: In Minnesota, police are tracking down a massive check fraud operation that began when a young woman posted a picture of her first paycheck on Instagram. The fraudsters were able to create phony checks from the picture. Use the lesson to encourage check privacy—and direct deposit.

Use updated FMLA forms—at least for the rest of March

With almost no advance notice, the federal government has revised recently expired FMLA forms to reflect a new effective date: March 31, 2015. The core suite of FMLA forms—doctors' certifications of serious health conditions, notices of rights and responsibilities and designation notices—was set to expire Feb. 28.

On Feb. 25, notice of a one-month extension appeared in the *Federal Register,* and on March 1, the Department of Labor's FMLA Web page added links to updated forms carrying the March 31 expiration date.

Practical impact: Right now, probably none. If past practice holds true, old FMLA forms you may have printed out will still suffice. Or scroll down to the forms section of the **www.dol.gov/whd/fmla/** and print fresh ones.

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Minnesota Employment Law is published by **HR Specialist**. Susan K. Fitzke and Sarah J.Gorajski, shareholders in the Minneapolis office of the Littler Mendelson employment law firm. Contact Susan at sfitzke@littler.com and Sarah at sgorajski@littler.com, or call (612) 630-1000.

Discipline if employee ignores overtime rules

Employers must pay hourly employees for all overtime worked, whether it was authorized or not.

So what's the best way to discourage employees from working unauthorized OT? Clarify up front that employees may not work overtime and require them to provide accurate time reports. Then, discipline anyone who ignores these common sense rules. Just make sure that you do pay them for any unauthorized time they do work.

As the following case shows, this approach works.

Recent case: Deborah worked as an hourly billing analyst for United Healthcare. During her last five years with the company, she worked from home. Her routine hours were 8:00 a.m. to 4:30 p.m.

Before allowing Deborah to work from home, she received a copy of United Healthcare's overtime policy. It said that the company paid for all hours worked, but stipulated, "you MUST accurately record all the time that you work. Record all time worked, including overtime hours, as actual hours worked."

The policy went on to state, "Before working overtime, you must get approval from your manager. Failure to obtain pre-approval for overtime will not void your entitlement to be paid for the time you worked, but

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Never threaten deductions from exempts' pay

Exempt employees aren't entitled to overtime; hourly workers are. But one of the requirements for being classified as exempt under the manager or executive categories (and others) is that employees are paid on a salary basis. They must receive their full pay regardless of the quality or quantity of the work performed in any given week.

If a supervisor tells an exempt employee that his pay will be cut for poor performance and the employer follows through on the threat, the exemption may disappear—creating nonexempt, hourly classification for an entire group of similarly situated employees. That means they would all be due overtime for all hours over 40 they work in a week.

Lesson: A supervisor's single threat leading to a salary deduction could cost your company millions.

Recent case: David and several other store managers for a tile retailer were classified as exempt. Each managed one store. They were paid a set salary, plus bonuses. They received no overtime pay when they worked more than 40 hours per week, which happened frequently.

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Discipline for OT violations

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it may subject you to disciplinary action, up to and including termination of employment."

Even so, when a supervisor pulled old time records, it was discovered that Deborah had worked past 4:30 almost every workday for three years. The company paid her for the time, to the tune of almost $10,000. Then it fired her for violating the pre-approved overtime only rule.

United Healthcare successfully contested Deborah's application for unemployment benefits. She appealed, but was turned down because she had committed misconduct by ignoring the overtime rule. (*Weckert v. United Healthcare,* No. A14-1247, Court of Appeals of Minnesota, 2015)

Exempt? No deductions

(Cont. from page 1)

Trouble began when a senior manager sent an email criticizing sales performance. The email threatened bonus and salary deductions. Later, an internal audit revealed that 14 store managers had salary deductions taken. These totaled just $5,000 and were repaid following the audit.

However, that was enough to certify a class action and let a misclassification lawsuit continue. If the managers can tie the email to the deductions, they could collect overtime for all managers at the employer's stores nationwide. *(Rebischke v. The Tile Shop,* No. 14-624, DC MN, 2015)

Final note: It bears repeating: Never make a performance deduction from an exempt employee's salary. Also, be sure you understand exactly when and how you can make salary deductions. The rules are complicated and a mistake can be expensive.

Tell bosses: Many subtle—and not so subtle—comments can add up to evidence of age bias

Remind supervisors that when it comes to age discrimination, what they say matters. They should never comment directly on age, and should avoid references to "generational differences" or anything else that might be construed as code for age discrimination.

Recent case: Pat was 61 years old and worked as a general manager at Auntie Ruth's Furry Friends, an upscale dog and cat boarding kennel in Minnetonka. When the business was sold to two young people under age 30, the new owners told everyone that they had to reapply for their jobs—using an application that requested the applicant's age and high school graduation date.

When Pat interviewed, she told the two new owners she believed the questions were illegal age discrimination. They agreed to remove the questions.

During the interview, the owners asked her to take a $5-per-hour pay cut and said they wanted to relieve her of some of her duties and give them to one of the new owners. They told Pat that they believed one of them could "relate better" to the kennel's younger workers. Pat declined the pay cut. Then one owner directly asked her how old she was and when she planned on retiring. Pat told them her age and said that she had no plans to retire at all. Pat was rehired without a pay cut. But the comments didn't stop.

Part of Pat's job was to advise the new owners because they were inexperienced, and she interacted with both regularly. When one owner wrote the check for employee health insurance, she complained out loud that Pat "cost a lot" and that the business couldn't "afford you" since premiums were set by age. The owner also ridiculed Pat's wardrobe, allegedly saying it was "from the '70s." The owner also said she related better to the rest of the staff since she was closer in age to them than Pat.

Then, after Pat told the owner that the employee handbook forbade employees from wearing shorts or showing their tattoos, the owner who herself sported tattoos told Pat that it was "a generational thing."

Train supervisors to avoid all ageist talk. Their comments can come back to haunt you.

The new owners fired Pat after just 45 days, telling her that the reason was she was clearly unhappy in her job.

Pat sued, alleging age discrimination under the Minnesota Human Rights Act (MHRA).

The trial court felt the owners' comments weren't enough evidence of age discrimination, but the Court of Appeals of Minnesota reversed that decision and called the comments direct evidence of age discrimination. Noting that Pat had been replaced first by a 45-year-old and then by a 25-year-old, it sent the case back to trial. (*Ritter v. Auntie Ruth's Furry Friends,* No. A-14-1044, Court of Appeals of Minnesota, 2015)

Final note: Train all supervisors and managers to avoid any ageist remarks. Provide examples of comments that can come back to haunt them. And of course, make sure that your applications don't ask for employees' age or graduation dates. Employees can provide their age after hire so it can be used for legitimate purposes like insurance coverage.

Consider extended leave as accommodation if disabled employee is likely to return to work

Before rejecting a disabled employee's request for additional time off as a reasonable accommodation, consider whether the time would allow the employee to return. If not, you probably won't have to provide the additional leave.

Recent case: Wayne was a firefighter in Coon Rapids. He developed a heart infection and had to undergo extensive diagnostic work. An exam revealed he had muscular dystrophy, and Wayne's doctors said he would not be able to keep working as a firefighter. But the same doctors also recommended a second opinion.

Wayne asked the city to allow him to use up all his available time off, including FMLA, sick, vacation and other leave. That way, he would hit retirement age. He claimed allowing this would be a reasonable accommodation.

The city disagreed, reasoning that if Wayne could never return to work, he wasn't entitled to more time off. Extra time off would not allow him to eventually perform the essential functions of his job—fighting fires. He was terminated.

Wayne then got a second opinion and found out that he did not have muscular dystrophy after all, and could return to work.

He sued, claiming he should have been accommodated with extended leave.

The court disagreed. Since no one, including Wayne, had known his condition was actually temporary, his lawsuit was dismissed. The fire department acted based on the knowledge it had at the time the accommodation request was made. (*Anderson v. City of Coon Rapids,* No. 13-3015, DC MN, 2015)

When terminating public-sector employees, be careful how you announce their departure

Government workers have more protections than other employees when it comes to termination. For example, if a public employee is falsely charged with some form of misconduct, she may have a lawsuit.

That's one reason to be careful when announcing a termination. By all means, resist the temptation to make an example out of the fired employee.

Recent case: Janet, who was a community coordinator for the Rochester Public Schools, set her own working hours. When she took a second job with the same school district teaching summer school, rumors spread that she was essentially "double dipping," being paid for two jobs while working just one.

The school district didn't renew Janet's coordinator position and she sued, alleging that her constitutional rights had been violated because the rumors hurt her reputation.

But it turned out that the administration had merely announced that she was taking a teaching job and leaving the coordinator position. It had not done anything to spread rumors about Janet. Her lawsuit was dismissed. (*Szajner v. Rochester Public Schools, et al.,* No. 13-2417, DC MN, 2015)

Final note: At trial, it came out that the district hadn't paid Janet for some of the hours she put in while working her two jobs. She had kept careful records of how she spent her time. The court did order the district to rectify that mistake.

Legal Briefs

Employee claims harassment? Consider transferring him

Employees who are forced to work under conditions that leave them little choice but to quit can still sue, alleging they were constructively discharged.

You can prevent those suits by transferring the employee who says he is being harassed to another equivalent job. Removing the employee from the alleged hostile environment removes the cause for quitting.

Recent case: Markeith, who is black, complained that he was being harassed and discriminated against. He was then transferred to another position. He quit shortly after and sued, alleging constructive discharge.

The court dismissed that part of his lawsuit, reasoning that the transfer removed him from the allegedly hostile environment and therefore also removed his need to quit. (*Thomas v. Hennepin Healthcare,* No. 14-1842, DC MN, 2015)

Cut lawsuit risk by listing minimum job qualifications

Be sure your job announcements list minimum qualifications applicants must have. That way, if someone who lacks the right background sues, the case can quickly be dismissed.

Of course, for this to work, everyone considered for an interview must meet those qualifications.

Recent case: John, who is black, sued a school district when his application to become a principal wasn't considered. The district argued that John simply wasn't qualified because he didn't meet the minimum requirements for the job; he didn't have a K-12 teaching certificate. Other candidates did and the requirement wasn't negotiable. That got the case tossed out. (*Saulsberry v. Minneapolis Public Schools,* No. A14-1197, Court of Appeals of Minnesota, 2015)

Final note: Applicants often sue when they aren't called for an interview for jobs they think they are qualified for. Accept that reality and prepare.

Watch out for, prepare to fix, these 6 common overtime pay errors

One of the easiest ways to trim labor costs is to reduce overtime work. But be careful how you go about reining in overtime. Failing to properly pay for all overtime hours worked could result in more financial harm than good. In addition to paying employees back wages, you will also pay liquidated, or double, damages. And liquidated damages are the rule, rather than the exception.

Paying employees correctly the first time is your best strategy. Employees have two years to sue for mistakes, and three years for willful violations.

Here are six payroll pitfalls you must avoid:

1. Not paying for pre- and post-work activities. Before- and after-work activities are compensable if they are principal activities that benefit the employer, not the employees.

2. Not paying employees who work through breaks. Employees don't need to be paid for their meal breaks if those breaks are at least 30 minutes long and employees are completely relieved from work.

Watch out: Some timekeeping systems automatically deduct for meal breaks, whether or not employees are completely relieved during that time. Rest breaks, which normally last between five and 20 minutes, are compensable.

3. Not paying for waiting time. Employees who show up for work but then must wait around for something to do must be paid for that time. *Example:* Call center employees who spend time waiting for computer systems to boot up must be paid for that time.

4. Not paying for travel time. Employees who report to the office and then travel to job sites must be paid for the travel time between the office and the job site. Travel time to different job sites during the day is compensable. Commuting time isn't normally compensable, even if employees go from home to a remote job site and then return home at the end of the day.

3 legal ways to reduce overtime costs

Eliminate unnecessary overtime hours—along with potential wage-and-hour violations—by taking these steps:

- Find and fix inefficiencies in employees' time management skills.
- Evaluate employees' skill sets. Ideally, employees are working on tasks at which they are the most skilled and can complete in the most efficient and timely manner.
- Check that workloads are reasonable and balanced. Determine whether deadlines can be lengthened, tasks can be reassigned for maximum efficiency, nonessential tasks can be eliminated or processes can be tightened.

Final note: It's ultimately up to you, as the employer, to track overtime hours. If you don't and you get sued, courts will take employees' word on how many hours they worked.

5. Not paying telecommuters for all hours worked. Employees who work from home must be paid for every hour worked, including overtime. The problem is getting telecommuters to accurately track their time. Work with IT to enable managers to monitor remote workers' hours.

6. Averaging hours worked during different weeks in a pay period. Employees are paid per workweek, which is based on a continuous 168-hour period (7×24). Employees who work 50 hours during one week and 30 hours during the second week of a two-week pay period must be paid overtime for the 10 overtime hours worked during the first week. You can't average hours over those two weeks, which would result in no overtime pay.

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Vol. 8, No. 4

HR Specialist: *Minnesota Employment Law* (ISSN 1940-8072) is published monthly by Business Management Daily, 7600A Leesburg Pike, West Building, Suite 300, Falls Church, VA 22043-2004, (800) 543-2055, **www.theHRSpecialist.com**. Annual subscription price: $299.

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Wronged consulate employee seeks $2.3 million in legal fees

A former employee at the Twin Cities Norwegian consulate is asking the country to pay her legal fees after she won a $270,000 equal pay judgment. A federal judge ruled that the woman was paid $30,000 less than a male employee performing comparable work. *(See "Even with best of intentions, prepare to pay if you compensate men and women differently" in the March issue of* Minnesota Employment Law.)

The woman's attorney claimed she worked 6,521 hours on the case at rates ranging from $390 to $410 per hour.

In court documents, the woman alleges Norway attempted to make her lawsuit expensive by providing irrelevant documents, many of which were in Norwegian. The documents were not provided in electronic form and many were heavily redacted. Arranging the documents in a searchable database constituted much of the legal costs.

Progress or gridlock? Bill would expand NLRB

Sen. Lamar Alexander (R-Tenn.) has introduced a bill that would expand the National Labor Relations Board (NLRB) from five members to six. Currently, the president appoints five board members with the "advice and consent of the Senate." By law, two board members must be from the political party other than the president's.

Proponents of the NLRB Reform Act believe the board has been actively pro-union since President Obama's election and hope the legislation will help transform it from "an advocate to an umpire," according to a statement by Alexander. Opponents believe an even political split on the board will inevitably result in repeated tie votes, ensuring that no decisions are rendered on matters coming before the NLRB.

Under Alexander's bill, now being considered by the Senate Committee on Health, Education, Labor and Pensions, the NLRB would have six members, three Democrats and three Republicans. Members would be "appointed by the President, after consultation with the leader of the Senate representing the party opposing the party of the President, by and with the advice and consent of the Senate."

Board appointments have been a bone of contention between Obama and Senate Republicans, with filibuster threats repeatedly bottling up appointments and the president attempting recess appointments that the Supreme Court later ruled unconstitutional.

Don't expect the acrimony to end soon. Even if passed, Alexander's bill will likely fall victim to Obama's veto pen.

Federal judge strikes raises for home health workers

One of President Obama's attempts to stimulate the economy has been nixed by a federal court.

U.S. District Judge Robert Leon ruled that the U.S. Department of Labor overstepped its authority when it ruled in 2011 that the Fair Labor Standards Act covers home health care workers. Leon noted in his opinion that in-home health care workers have always been exempted from the FLSA's minimum-wage and overtime protections.

Home health care trade groups argued that higher labor costs would destabilize the industry and make in-home health care unaffordable for many elderly and disabled people.

The ruling applied only to workers who provide primarily "fellowship and protection," not those who provide more extensive services such as skilled nursing services.

The Labor Department has vowed to appeal the ruling.

Note: The situation regarding pay for home health aides is fluid. If you employ home health aides, confer with your attorney to ensure you are in compliance with current regulations and court decisions.

New FMLA forms

(Cont. from page 1)

Expect yet another revision in coming weeks, possibly containing language reminding physicians not to divulge information that could violate the Genetic Information Non-Discrimination Act. The EEOC is said to be pushing for such a change.

Walmart voluntarily raises its minimum wage to $9

Walmart has announced it will raise its minimum wage to $9 an hour, $1.75 above the current federal minimum wage. By February 2016, those working beneath the yellow smiley faces will have an hourly rate of at least $10. Walmart officials say the move will raise the wages of around 500,000 employees.

The move comes amid rising minimum wage rates in many states. Currently 29 states and the District of Columbia have minimum wages higher than the federal rate.

The legislatures in 10 states and the District of Columbia approved minimum wage hikes in 2014. Minimum wage ballot initiatives in five states passed in the 2014 general election.

Other large employers have announced similar measures recently. IKEA raised its based wage 17% to $10.76 per hour. The lowest paid employee at insurer Aetna now earns $16 per hour.

Labor activists have attacked Walmart's pay practices for decades. Two years ago, the District of Columbia City Council tried but failed to extract higher wage commitments out of the company before approving permits for construction of the city's first Walmart.

by Susan Fitzke, Sarah Gorajski and Jessica J. Schroeder, Esqs.
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What counts—and doesn't—as part of a 'personnel record'

You probably receive at least occasional requests from current and former employees to view or receive a copy of their personnel file. This sounds like a straightforward request. But must an employer produce all documents in the employee's "file?" Must information that may not be in an employee's file be produced?

Minnesota's personnel records statute covers these questions, which can be surprisingly complicated.

Providing a copy of the 'file'

When you receive a personnel file request, first determine if and when you must provide records to the employee. Upon written request, a current or former employee has the right to review what the Minnesota statute calls the employee's "personnel record." That may not coincide with what you consider the employee's file.

Current employees may review their personnel records once every six months. Former employees may request a copy once each year, free of charge, for as long as the record is maintained. Employers must comply with written requests within seven working days (14 if the file is located outside Minnesota).

A personnel record includes the following items, to the extent an employer maintains them: Application or résumé, employment history, job titles, notices of commendation, performance evaluations and discipline, warning and termination forms. Also included are wage/salary history, authorization for wage deductions or withholdings, fringe benefit information and dates of promotions, transfers and other changes. They also include records of attendance, leave and retirement.

Some of this information, such as payroll data and time records, may only be maintained electronically. Even so, such data is still considered part of the employee's personnel record that may need to be produced.

If you do not regularly maintain any of these documents, the personnel records statute does not obligate you to create any such record.

Not part of the record

The following records (among others) are statutorily excluded from the definition of personnel record:

- Reference letters
- Investigation records into violations of law that do not result in adverse action
- Employee testing results
- General comments relating to the employer's staffing (schedules, RIFs, etc.)
- Written information kept solely by the employee's supervisor
- Written comments or data of a personal nature about a person other than the employee, if disclosure would intrude upon the other person's privacy
- Portions of a co-worker's statement that concerns the job performance or job-related misconduct of the employee that discloses the identity of the co-worker
- Medical records.

Gray areas

Despite that list, it is not always clear when you may decline to produce certain information. For instance, an HR manager or an employee's supervisor may have kept their own informal file related to the employee, containing their own comments or notes. In most cases, you do not need to produce those documents. However, if the "manager file" documents verbal or other discipline of the employee not otherwise reflected in the personnel file, those documents may need to be produced.

Likewise, if the manager file is used to track employee performance, and thus may constitute a performance evaluation, that information may need to be produced even if the notes refer to several employees. Before producing those documents, it may be appropriate to redact the names of the other employees.

What leave records should be included in a personnel record? Documents showing dates of leave or changes in the employee's leave status are likely included. However, FMLA leave forms, accommodation requests and other medical records should be maintained separately. Limit access to that confidential medical file.

Internal investigation records

Perhaps the trickiest documents to evaluate are those relating to internal investigations. They may contain employee statements or manager files, which often don't have to be turned over. However, if the documents concern an internal investigation of a potential law violation (such as theft or fraud) that resulted in termination, some, and possibly all, investigation documents may be required to be produced.

There are a few key points to keep in mind when deciding whether to produce them. If the investigation did not result in an adverse employment action, it need not be produced. Documents pertaining to an internal investigation of policy violations—as opposed to a violation of the law—need not be provided. Investigation documents may be withheld if protected by the attorney-client or work product privileges. Where investigation documents must be produced, it may be advisable to produce them in a redacted format to protect employee privacy.

As always, consult your attorney when in doubt.

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How to avoid the pitfalls of social media: The FCRA and EEOC angle

Social media has changed the way people communicate and interact and will continue to do so. Most employment laws were written before the social media era, and courts have struggled to shoehorn social media communications into existing definitions.

THE LAW Because social media affects compliance with many different laws, this month's "Nuts and Bolts" article will focus on the Fair Credit Reporting Act (FCRA) and those laws the EEOC enforces: Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), the ADA and the Genetic Information Nondiscrimination Act (GINA).

Social media aspects of U.S. Department of Labor-enforced laws and applicable state laws will be covered next month.

WHAT'S NEW Social media in all its forms has infiltrated personal lives and the workplace. The reaction from employers has been uneven.

Some have embraced the technology as a way to improve workplace morale, encourage collaboration and augment company recruiting and hiring. Others have attempted to restrict employee social media comments and exploited the glimpse into applicants' and employees' personal lives for less honorable and possibly discriminatory reasons.

HOW TO COMPLY Savvy employers use social media to enhance their recruiting and hiring processes. For example, combing through professional social media sites such as LinkedIn may help identify job potential candidates. Employers may even use social media sites as portals for job applications.

However, employers must be wise consumers of social media information. For example, information regarding an applicant's membership in a protected class cannot factor into the hiring decision.

FCRA requirements

Employers may not view social media the same way they view a credit reporting agency, but depending on how employers use social media, courts may.

For example, third-party companies that perform social media searches and redact all information related to the individual's membership in a protected class are in fact credit reporting agencies for FCRA purposes.

As a result, the law requires employers to obtain an applicant's signed authorization to obtain information. It should include a statement explaining that should the employer reject an applicant based on adverse information obtained from these companies, it must disclose the information used and its source. The applicant then has the right to challenge or explain the adverse information before a final determination is made.

Some employers will maintain that many social media sites do not meet the FCRA's definition of a credit reporting agency and therefore the employer is not required to obtain an authorization or disclose the adverse information's origin. Don't bet on every court coming to the same conclusion.

It is better to err on the side of caution by always obtaining the authorization and allowing the applicant to know the source of any adverse information and have the ability to challenge it.

In-house screening

Social media profiles can be processed in-house as well. The best approach is to have a person in HR who will not be involved in the hiring decision perform the search and redact protected-class information before forwarding the information to the decision-makers.

Gauging influence, risking bias

Using a "social media influence" or Klout score (*see* **klout.com/corp/score**) may open an employer to liability by disparately impacting older workers. This score could be relevant for certain positions such as a social media manager. Like any hiring criterion, the score must be related to one or more of the job's essential functions.

Disqualification by association

Every type of social media relies on networks. Any investigation should focus on the statements and behavior of the applicant, not his or her relatives, friends and associates.

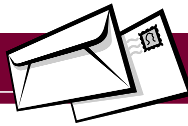
Employers may not assume the applicant possesses the characteristics of those in his network. For example, someone with disabled friends or family may not be disabled, or may have a disability that does not impair the ability to perform the job being applied for. The ADA specifically prohibits discriminating against an applicant or employee because of the person's association with a disabled person.

On the other hand, discovering violent or racist rants online or indications that the person is spending too much time on social media and not enough time on work are legitimate reasons to deny the applicant the job.

Get the right person

Mining personal information about the wrong person wastes time and potentially exposes the employer to liability. Compare more than just the name. For example, most Facebook and LinkedIn profiles provide an educational and employment background. If the information does not match the résumé, have a conversation to resolve the conflict.

Finally, use social media in an evenhanded manner. Each application should be processed in the same way and the same criteria applied to each applicant in order to avoid potential liability.



by Susan K. Fitzke and Sarah J. Gorajski, Esqs., Littler Mendelson, Minneapolis

Do we need to accommodate smokers?

Q We currently have a designated smoking area outside our building. Recently, an employee who is extremely sensitive to certain odors complained that smoke was drifting through our ventilation system into her work space. May we prohibit smoking in certain areas outside our building? If so, do we need to provide another location for our employees to smoke?

A Minnesota law does not currently regulate smoking outside buildings on private property or require employers to provide areas for employees to smoke. Certainly, you may provide another outdoor location for smoking, but you are not required to do so.

You may also allow your employees to smoke in their cars. If you provide another location for smoking, be sure that the area truly is an outdoor space. An outdoor "shelter" is not an outdoor area unless the wall space is more than 50% open.

Also, keep in mind that Minnesota's smoking laws regulate the act of smoking in most indoor public places and workplaces. It does not regulate smoke drifting from an area where smoking is unregulated—such as outside your building.

Consider moving smokers if the smoke is drifting inside the building. Otherwise, you risk employee complaints to state or federal Occupational Safety and Health Administration or the Minnesota Department of Health regarding air quality in your facility. Also, the affected employee may raise disability accommodation concerns.

Do we have to pay overtime for hours an employee spent out on sick leave?

Q Last week, an employee was out sick on Monday but worked 40 hours Tuesday through Friday. She would like to use her sick leave for Monday and claim overtime for those Monday hours. Must I pay her overtime for those hours?

A No. The federal Fair Labor Standards Act and its Minnesota counterpart require employers to pay overtime for all hours worked over 40 in a workweek. Employers need not count paid holidays, paid time off (PTO), vacation, personal or sick leave hours taken by an employee toward the calculation of the overtime requirement. Those hours are not actually worked.

May our employees pool their tips?

Q The waitstaff in our restaurant pools tips with the dishwashers and hosts. Is this OK?

A Maybe. In Minnesota, you cannot require employees to contribute or share tips because a gratuity received by an employee for services performed by that employee is the sole property of the employee. However, employees may voluntarily share tips with other employees as long as the employees agree to share tips without your coercion or participation.

You may, at your employees' request, safeguard gratuities to be shared and disburse them to employees participating in the agreement. You may also report the amounts received as required for tax purposes and post a copy of the applicable tip pooling statute in your workplace.

The bottom line, however, is that your involvement should be extremely limited.

Is a manager allowed to see an employee's FMLA Certification of Health Care Provider form?

Q Our HR department processes FMLA paperwork and tracks FMLA use. When HR receives the completed Certification of Health Care Provider form, does the employee's supervisor have the right to see the form or know the medical reason for the FMLA leave? Or do they just need to know that the employee is covered under the FMLA and how long he or she will be out?

A Supervisors typically do not have a right to access or view an employee's FMLA Certification of Health Care Provider form. The FMLA confirms the confidentiality of the information contained in these forms, and requires them to be maintained as confidential medical records separate from an employee's personnel file.

The FMLA does not specifically prohibit or permit supervisory access to certification forms. Rather, it permits supervisors only to be informed regarding necessary restrictions on the employee's work or duties and any necessary accommodations.

Usually this can be done without sharing the actual certification form or any medical specifics with the supervisor. For example, in the case of a continuous FMLA leave, the supervisor may simply be advised that the employee will be out on FMLA leave for the duration defined on the certification. Nevertheless, there may be occasions where the supervisor's involvement in accommodations decisions requires a greater degree of disclosure, particularly where an employee is seeking intermittent FMLA leave.

Proceed cautiously when sharing any employee medical information with a supervisor. Under no circumstance should the supervisor be involved in any discussions with the employee's health care provider to seek further information or clarification of the certification form.

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