HR SPECIALIST

Minnesota Employment Law

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

In the News . . .

Review policies in wake of High Court's same-sex ruling

The Supreme Court's decision legalizing same-sex marriage means HR departments must review company policies to root out all references to the gender of an employee's spouse.

The June 26 decision in *Obergefell v. Hodges* found that the Constitution's 14th Amendment guarantees same-sex couples the right to marry and to have their marriages legally recognized in all states.

The ruling affects all policies that involve employees' spouses, including those concerning retirement benefits, health insurance, dependent care, the FMLA and other family leave. Now, all benefits must provide the same coverage to same-sex married couples as for heterosexual married couples.

Advice: Search all policies and procedures for the terms "husband" and "wife" and substitute "spouse." Train managers on the changes.

White-collar OT threshold doubling to more than $50K

The Obama administration has proposed more than doubling the salary threshold that makes white-collar managers eligible for overtime pay.

The Department of Labor's rewrite of the overtime rule for salaried administrative, executive and

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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.

Capacity, not actual pregnancy, is heart of PDA

A federal appeals court has overturned a case that had been dismissed because an employee couldn't prove that her employer knew she was pregnant. The court clarified that the capacity to become pregnant is at the heart of the Pregnancy Discrimination Act (PDA).

Employers that discriminate against a woman because they believe she might become pregnant (and thus need time off or expensive medical care) violate the PDA even if the woman isn't pregnant.

Recent case: Khadara, a lab technician, is a Muslim woman of Somali national origin. When her husband was involved in a car accident in Belgium, she requested leave to travel so she could assist him in his recovery. Her employer approved FMLA leave. While in Europe, Khadara became pregnant. She did not tell anyone at the lab about the pregnancy.

When Khadara found out she had been removed from the schedule, she called her supervisor from Europe and provided a return date. Her supervisor then allegedly told her that she had heard a rumor that Khadara intended to remain out of the country to raise a family. The supervisor, according to Khadara, added that, "these people have babies left and right." When Khadara

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Stop bogus suits with good discipline records

It happens regularly: An employee is facing escalating discipline and fears for her job—so she files a surprise sexual harassment or discrimination lawsuit, hoping to stop her firing.

But you can fire her—if you can provide complete disciplinary records to justify that the decision had nothing to do with her complaint.

Recent case: Cheryl worked for a prosthetics company. A new office manager criticized her for what the manager called "emotional outbursts." The manager began disciplining Cheryl for being short-tempered and otherwise "emotional."

Cheryl was suspended with pay for two days after yelling at a co-worker about being "disrespected." She was told she was being suspended so she could think about her behavior and determine whether she wanted to keep her job. When she returned to work, she apologized. She was warned that another outburst might mean termination.

The outbursts and failure to follow company rules continued. Cheryl was disciplined for smoking an e-cigarette at her desk, for slamming a phone down and loudly complaining about

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Pregnancy

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asked her what she meant by that, the supervisor allegedly responded, "Never mind."

When Khadara was terminated for alleged job abandonment, she sued.

Her case was initially dismissed because no one working for her employer knew she was pregnant. She appealed.

The 8th Circuit Court of Appeals, which covers Minnesota, reinstated her lawsuit. It concluded that an employee doesn't have to prove that her employer knew about a pregnancy to sue for pregnancy discrimination. She only has to prove that the employer held an employee's potential childbearing against her. (*Yousuf v. Fairview Health Services,* No. 14-3687, 8th Cir., 2015)

Discipline records

(Cont. from page 1)

management's choice of someone else to train a new employee. She was placed on 120 days' probation and warned she faced immediate termination for another outburst.

That's when Cheryl complained that the general manager had sexually harassed her. The company investigated and concluded the charge was unsubstantiated. Shortly after, Cheryl had an argument with yet another co-worker in front of patients. She was fired.

Cheryl sued, alleging she had been terminated for complaining about harassment.

The court disagreed after reviewing the disciplinary records. It was clear that the employer had plenty of proof to back up its assertion Cheryl was fired for repeated arguments and outbursts, not in retaliation for filing the complaint. (*Kaufenberg v. Winkley Company,* No. A14-1514, Court of Appeals of Minnesota, 2015)

Use it or lose it! You must enforce your call-off policy

Employers have the right to set reasonable call-off requirements for when an employee will miss a shift or arrive late. Employees can be required to follow those rules. If someone doesn't, you can discipline him—even if you approved FMLA leave for the absence.

But beware: If you don't consistently enforce the call-off rule, you may be on the losing end of an FMLA lawsuit.

Bottom line: If you are going to have a strict call-off rule, enforce it each and every time. Don't let some employees text their notification, for example, while others have to make a phone call.

> *The key is showing that the employee isn't just a troublemaker.*

Recent case: Delbert worked for Tyson Fresh Meats as a supervisor. He did not come to work on Dec. 28 because he was sick. Instead of calling in, he had his girlfriend (also a Tyson employee) tell his boss that he was ill and would be out for a few days. However, Delbert had his supervisor's cellphone number and sent her a text before the start of his shift notifying her he was ill.

Tyson's policy required a personal phone call to a supervisor to report a call-off.

Delbert got a doctor's excuse for his absence and for additional time off. He filled out a leave form. The company approved FMLA leave for the absence.

But when Delbert showed up for work, he was instructed to not go to the floor and start work. Instead, he was terminated for failing to phone his boss according to the policy.

He sued, alleging interference with his FMLA rights.

Tyson alleged it was legitimate to fire him for not following its call-off rule. But Delbert pointed out that the rule wasn't consistently enforced. In fact, before Dec. 28, he had on several occasions sent texts regarding other absences and had not been disciplined.

The court said Delbert's case would proceed because inconsistent enforcement of the call-off policy could mean that, in this case, Tyson had used the rule as an excuse to terminate someone returning from FMLA leave. (*Hudson v. Tyson Fresh Meats,* No. 14-1852, 8th Cir., 2015)

Don't let bosses undercut your call-off policy

Here are some steps you can take to assure your supervisors aren't unintentionally sabotaging your call-off policy:

- **Require supervisors to report all absences** to HR.
- **Give supervisors a call-off reporting form.** Make sure the form has check boxes for reporting how the call-off was made. For example, if you only allow telephone call-offs, say so on the form and have the supervisor note that the call took place and the time it was received.
- **Train supervisors in the call-off process.** Explain that they may not deviate from the call-off rule for one employee or allow alternative notification.
- **Allow for true emergencies.** The FMLA regulations excuse an employee from following call-off rules if he or she is incapacitated and no one could make the call on his or her behalf. That could be the case with an auto accident, heart attack or other true medical emergency. Allowing late call-off notification under such circumstances won't affect your call-off rule's viability in other nonemergency situations.

Take it with a grain of salt: Investigate discharge recommendations before firing

If you rely on a supervisor to make a firing recommendation and don't independently investigate, you risk terminating someone because of the supervisor's hidden bias. That can mean a large jury award.

At least give the employee a chance to tell his side of the story.

Recent case: Kirk told authorities that he suspected there was a forged document in his department. Soon after, his supervisor began sending reports to HR that Kirk wasn't doing his job. Then the supervisor recommended firing Kirk because he and another supervisor had engaged in horseplay.

Kirk sued, alleging that he had been fired for whistle-blowing. A jury agreed and awarded him more than $200,000. The employer appealed, arguing it didn't know about Kirk's whistle-blowing.

But the court said Kirk's boss did know, and his apparent desire to punish Kirk was attributable to the company because it didn't independently investigate the underlying reasons for discharge the supervisor provided. (*Ludlow v. BNSF,* No. 14-2486, 8th Cir., 2015)

Final note: When it comes to discipline, never rely solely on a supervisor's recommendation, especially when termination could result. Always double-check the facts. That's especially true if you happen to know that the employee recommended for termination has filed a complaint against the company. However, the same rule applies even if you *don't* know. Ignorance is no defense against allegations of a supervisor's bias and desire to retaliate.

Settlement deal required resignation? No unemployment benefits for former employee

Workers whose employers make it unbearable to come to work are still eligible for unemployment compensation. That's called constructive discharge. It essentially allows an employee to quit while arguing that her employer fired her, making her eligible for unemployment benefits.

But what about an employee who files an EEOC complaint alleging unbearable working conditions and then settles the case for a lump-sum payment in exchange for resigning? According to a recent Minnesota decision, that's a voluntary resignation, blocking benefits.

Recent case: Wajiha worked as a Pearle Vision optician for several years, receiving Fridays off for religious reasons. When a new supervisor arrived on the scene, Wajiha found herself scheduled to work on a Friday. She protested to management and was removed from the Friday schedule. However, her supervisor soon scheduled her for another Friday. Wajiha again complained and was, again, removed from that scheduled day.

Wajiha filed an EEOC complaint alleging refusal to accommodate her religious needs and retaliation for complaining about the scheduling.

The complaint was settled with a payment of $25,000 in exchange for Wajiha's resignation. She took the cash and then filed for unemployment compensation, arguing that she had been constructively discharged.

The Court of Appeals of Minnesota ruled she wasn't eligible for the benefits because she had not been constructively discharged. Instead, she had accepted a payment in exchange for resignation. (*Shah v. IMI's of MN,* No. A14-1250, Court of Appeals of Minnesota, 2015)

Legal Briefs

Here's another reason to prevent off-the-clock work

If you don't act to prevent off-the-clock work, you could wind up having to defend against multiple lawsuits. That's because, even if a nationwide class action suit isn't certified, employees who weren't involved in an initial lawsuit can sue on their own.

Recent case: Deshandre worked for a Chipotle Mexican Grill in Golden Valley as an hourly employee. He claimed that he and others like him had been forced to work off-the-clock because the time clock automatically clocked out workers at the end of their shifts even if they continued working.

Chipotle asked the court to toss out the case because it was already defending an identical claim that another worker had filed a year earlier. But Deshandre wasn't named in that lawsuit and no national class action suit had been certified. That, the court concluded, meant he could continue his lawsuit. (*Woodards v. Chipotle Mexican Grill,* No. 14-CV-4181, DC MN, 2015)

No excuse for tardiness? No unemployment, either

Employers have the right to expect their employees will generally show up for and leave work as scheduled. Workers who, without a good reason, are frequently late or leave early aren't eligible for unemployment compensation if they're fired. Those absences, even if largely unintentional, are misconduct.

Recent case: Cassandra suffered from depression, took FMLA leave and then returned. Afterward, she still missed work, was frequently late and often left early. When she was fired, she applied for unemployment.

During the hearing to determine whether she engaged in misconduct, she admitted that most of the absences were due to missing her bus, which was not caused by her depression. Her claim was denied. (*Tart v. American Indian Community Development,* No A14-1705, Court of Appeals of Minnesota, 2015)

If you opt for an employment contract, here's what to include

At-will employment—in which either the employer or employee can end their relationship at any time and for any reason—is the norm for one simple, good reason: It makes it easy to fire or quit. Yet sometimes, it makes sense for employers and employees to enter into employment contracts. Be careful!

Usually the worker is seeking job security, while the company wants to protect its trade secrets and sales territories. However, if you sign an employment contract, you may find that you've given away more than you bargained for. For starters, you compromise your at-will relationship with the employee, likely giving up the right to dismiss her or him without cause.

Another risk: Many employers wind up giving away far too many rights and preserving far too few. This can be a costly mistake if the employee does not work out. Unexpected obligations and commitments can make the separation extremely expensive.

Before entering into any employment contract, you should seek legal advice on its merits and judicial soundness. Typically, a contract should include the following:

- Names of the parties involved
- Term of the contract
- Place the contract will be performed
- Employee's duties and obligations
- Working facilities
- Who controls the rights to inventions and patents, as well as an agreement to maintain trade secrets
- Compensation, including wages, salary, commissions, bonuses, overtime and severance agreements
- Special compensation plans, including deferred compensation, bonuses, profit sharing, stock options and retirement plans
- Expense account, including who pays for travel, meals and lodging
- Covenant not to compete after leaving employment, including time and geographic limitations
- Benefits, including health insurance, life and disability insurance, workers' compensation leave
- Right of either party to terminate with proper notice
- Right to discharge for cause
- Remedies for breach of contract
- Methods to modify, renew and extend the contract
- Laws governing interpretation of the contract
- Date and place of signing the contract
- Signatures (and initials indicating acceptance of certain provisions)
- An arbitration clause stating that all employment-related disputes will be subject to final and binding arbitration.

Self-audit: 5 implied contract red flags

Beware any of these practices, which could limit your right to fire at will.

1. Your job ads use terms such as "permanent employment" or "guaranteed job security."
2. During interviews, candidates are told that if they do a good job, they could stay until they retire.
3. Nonunion workers are told that they have the same rights as unionized workers.
4. Your handbook states that, after a probationary period during which an employee could be terminated without notice, an employee is considered permanent.
5. Your manual states that employees may be terminated "for cause only."

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Minimum wage hike imminent

Minnesota's minimum wage rises on Aug. 1 for some employers. Large employers, with annual sales of at least $500,000, must pay their employees at least $9.00 per hour. Small employers, with annual sales under $500,000, get to keep the current minimum wage of $7.25.

Large employers may pay $7.25 to workers 18 years of age and younger. Any employer may pay a training wage of $7.25 to workers 20 years of age or younger during the first 90 days of employment.

Employers that Minnesota law defines as a "hotel or motel," "lodging establishment" or "resort" may pay a minimum wage of $7.50 to employees working under a summer work travel exchange visitor program nonimmigrant visa, as long as the employer also provides a food or lodging benefit.

Advice: Update payroll software accordingly. Display new minimum wage posters, found online at **www.doli.state.mn.us/LS/Posters.asp**.

Supreme Court ACA ruling affirms employer mandate

The Supreme Court's June 25 decision in *King v. Burwell* guaranteed that Affordable Care Act (ACA) subsidies are available to all qualified individuals, regardless of whether they buy health insurance through a state or federal exchange. It also reaffirmed that the ACA's employer mandate is here to stay.

That's because the employer mandate—which requires most employers to either offer health benefits or else pay a tax—is enforced through penalties triggered when a full-time employee receives subsidized health insurance through an online public health insurance marketplace.

"Had the federal marketplace lost the ability to provide those subsidies in the 34 states it serves, as a practical matter there would have been no enforceable employer mandate," said Mark Holloway of Lockton, the country's largest insurance brokerage.

If you already provide health insurance to your employees, the Court's 6-3 ruling has little effect. As long as you are already in compliance with the ACA, you don't need to change anything.

In Dakota County firing, good HR results in bad PR

The sudden news that a long-time government official is being fired for sexual harassment causes reporters to demand background. When the termination stretches out for weeks, the press gets very curious. And when information isn't at all forthcoming, reporters start asking why.

Dakota County's community development director was recently fired amid allegations of sexual discrimination and harassment. Once word got out that the county intended to terminate him, reporters clamored for details. County officials delayed, noting that the director would remain on the payroll for 60 days following their decision. The county then extended his contract for another week.

Ultimately Dakota County released a termination letter citing the director's "gross negligence," including "making unwanted sexual and romantic advances" toward staff members, treating staff members differently based on gender, making inappropriate age- and gender-based comments, creating a hostile work environment and retaliating against those who cooperated in investigations of his behavior.

Still many in the media wanted more detail. County officials defended the no-information campaign by pointing to the Minnesota Government Data Practices Act. It requires withholding information that may affect others in the workplace, including those who provide confidential information during an official investigation.

Note: While the county's response could have been faster, it did satisfy the law's requirements. Consult your attorney before releasing information about former employees to the public.

Finance firm faces EEOC suit alleging transgender bias

The EEOC has sued Shoreview-based Deluxe Financial Services Corp. for sex discrimination because of the way it treated a transgender employee. According to the complaint, an employee at a company office in Arizona performed her job satisfactorily for many years, but was insulted and criticized once she began presenting as a woman.

Deluxe Financial supervisors refused to allow her to use the women's restroom, and did not intervene when co-workers made insensitive comments. Co-workers consistently referred to her as "him" or "he," creating what the plaintiff called a hostile work environment.

She filed a complaint with the EEOC, which attempted to resolve the dispute through its conciliation process. Those efforts failed and the commission filed suit in federal court on the woman's behalf.

Note: The EEOC views bias against transgender employees as a violation of Title VII's prohibition against sex discrimination. This is the third suit the EEOC has filed on behalf of transgender employees.

$50K OT threshold

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professional employees would raise the bar to $50,440 per year in 2016, up from $23,660. The DOL estimates the move will make at least 5 million more workers eligible for OT pay if they work more than 40 hours in a week.

The proposed rule, announced June 30, doesn't change the duties test defining what constitutes administrative, executive and professional work, but leaves open that possibility.

Learn more about the proposed rule at **www.dol.gov/whd/overtime/NPRM2015/**. Experts believe final revisions could take up to a year.

by Dale Deitchler, Esq., Littler Mendelson, Minneapolis

Medical marijuana will affect workplace policies and testing

On July 1, 2015, medical cannabis became lawfully available under Minnesota's Medical Marijuana Law (MML). The MML's employment protections are more extensive than those offered in any other state legalizing medical marijuana use. Legal compliance will be challenging, making it important for employers to know what constitutes protected use and to understand the MML's effect on testing programs and substance abuse rules.

Legalized on limited basis

Minnesota residents may lawfully use "medical cannabis," but only if diagnosed by Minnesota-licensed medical professionals with one of these qualifying medical conditions (QMC):

- Cancer accompanied by severe/chronic pain, nausea or severe vomiting, cachexia or severe wasting
- Glaucoma
- HIV or acquired immune deficiency syndrome
- Tourette's syndrome
- Amyotrophic lateral sclerosis
- Seizures
- Severe/persistent muscle spasms
- Crohn's disease
- Terminal illness with a less than one-year probable life expectancy accompanied by severe/chronic pain, nausea or severe vomiting, or cachexia or severe wasting.

Smoking marijuana is not legal under the MML. Permitted "delivery methods" are limited to pills, liquids and oil/liquid vaporization (so long as vaporization does not occur in public, including places of employment). The MML does not expressly require employers to allow workplace use or possession of medical cannabis.

Registration in Minnesota's medical cannabis registry is also required and must be maintained. Patients receive a "registry verification," creating a presumption of lawful use, rebuttable if not used for treatment of a QMC.

Impact on employers

Two core MML restrictions apply to employers:

- The MML prohibits discrimination against an applicant or employee based on MML registry status.
- Employers cannot take adverse employment action on the sole basis of a positive drug test result. An employer may do so following a positive test result, however, if there is use, possession or impairment by medical cannabis at work or during employment hours. The MML also establishes a right to present registry verification as an explanation for a positive result under the Minnesota Drug and Alcohol Testing in the Workplace Act, but the MML does not expressly require employers to accept verification as an explanation.

It is, therefore, risky for employers to take an adverse action where registry verification is presented to explain a positive test result—unless there is also evidence of impairment, use or possession of marijuana in a form that does not qualify as medical cannabis under the MML, use or possession at or during work, or other illegal conduct. That's a problem because drug tests generally provide no evidence of impairment.

The MML apparently allows employers to prohibit workplace use or possession, and "vaping" at work is expressly excluded from the MML's protections. Employers should keep in mind, however, that Minnesota's lawful consumable products statute, which restricts employment action for off-duty use of a lawful product, could come into play in a challenge to an employer's illegal drug prohibitions, as could the accommodation obligations imposed on employers by the Minnesota Human Rights Act.

On a positive note for employers, the MML does not protect all cannabis use. Negligence or professional malpractice while under the influence of medical cannabis is not protected, and the MML's protections do not extend to use and possession in prisons, schools or daycares.

Employers with employees covered by U.S. Department of Transportation or other federal regulations prohibiting use of marijuana pursuant to federal law must continue to reject medical cannabis as a basis to explain a positive test result.

Employer policy considerations

Some employers, particularly those with employees who do not perform safety-sensitive work, may allow employees who are medical cannabis patients to test positive and choose to accept registry verification as a recognized explanation for a positive test result.

With zero-tolerance and permissible-use approaches, employers may wish to investigate further when registry verification is presented to explain a positive test result, to inquire regarding whether the use is safe, whether the employee can safely perform his or her job, and whether the employee was impaired or possessed or used medical cannabis at work. Employers should engage in an interactive dialogue with medical cannabis users to determine what, if any, reasonable accommodations are needed for the underlying medical condition. Given the serious nature of the QMCs, employees with registry verification are likely to be disabled.

The interaction of the MML with Minnesota's existing drug testing and anti-discrimination laws will come into play and present a number of legal questions. Consult an attorney regarding how to navigate among potentially competing legal obligations.

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Employers must notify employees of their FMLA rights

HR professionals consistently rate FMLA administration as one of their most difficult tasks. New court decisions constantly affect the FMLA landscape.

THE LAW The FMLA provides eligible employees (those who have been on the job for a year) of covered employers (those with 50 or more employees within 75 miles) up to 12 weeks of unpaid leave for the birth or adoption of a child. Employees may also take leave for their own serious health condition or that of an immediate family member.

The FMLA also provides unpaid leave for employees whose family members serve in the armed forces. Family members may take this leave for a number of "qualifying exigencies" related to military service. Employees who are next-of-kin to someone with a service-related illness or injury qualify for up to 26 weeks of military caregiver leave.

Employers are required to post notices in the workplace informing employees of their rights under the FMLA. Additionally, employers are prohibited from interfering with, restraining or denying the exercise of, or the attempt to exercise, any FMLA right. Prohibited conduct includes failing to notify an employee of his or her rights under the FMLA when aware that the employee is taking FMLA-qualifying leave.

Employers must respond to the request within five business days stating whether the request was approved, denied or the employer needs more information (usually medical). The response must also provide the employee's eligibility status.

WHAT'S NEW A furniture salesman for office superstore Staples needed time off work when his wife fell critically ill. He informed his superiors of the situation in September of 2010. Rather than inform him of his FMLA rights, the company required him to use his paid leave (both sick and vacation) while working from home on many occasions.

By January 2012, Staples managers tired of the arrangement. They determined the salesman was not performing his job satisfactorily and terminated him. He lost his health coverage at a critical time in his wife's health care.

Two months later, the U.S. Department of Labor's Wage and Hour Division (WHD) investigated and determined the company never informed him of his FMLA rights. WHD filed suit in federal court.

During the litigation, the man's wife died. The company ultimately settled, paying the salesman $137,500 in back wages and an equal amount in liquidated damages.

HOW TO COMPLY The settlement procedures provide employers with the broad compliance outline.

Staples is required to "promote an enterprise-wide policy for compliance with the FMLA by providing training for human resources and other managerial personnel with respect to FMLA notice and eligibility requirements; post FMLA enforcement posters in the workplace; and investigate and respond to complaints of potential FMLA violations concerning an employee's notice of FMLA rights, including correcting violations when discovered."

Management training is key

Every manager or supervisor is the potential first contact for an FMLA leave request. For employers, each untrained manager or supervisor represents a potential for costly litigation, bad press and poor workplace morale.

Schedule regular FMLA training for managers and supervisors. The FMLA should be covered as part of initial management training, with a refresher course every year or so.

Tip: Have a different person provide training each time. Those being trained will pay more attention to a new person than one they have heard before.

Have a central point of contact

Many companies opt to train their HR staff on the FMLA's intricacies and then train managers and supervisors to refer all requests to the appropriate point of contact in HR. This arrangement, however, is not a substitute for training managers and supervisors. In fact, it only works if managers know how to recognize legitimate requests for FMLA leave, and understand how to avoid inadvertently retaliating against a leave-taking employee.

Workplace posters

One of the simplest forms of compliance is to post FMLA employee rights and responsibilities in the workplace. The DOL provides downloadable posters free of charge at **www.dol.gov/whd/regs/compliance/posters/fmla.htm**.

The DOL takes seriously employers' responsibilities to inform employees of their FMLA rights. Employers that fail to provide employees with FMLA information may be fined $110 for each violation. Each day without the poster or proper notification constitutes another violation.

Have a policy

Although FMLA regulations provide guidance on complying with the law, employers also have a great deal of flexibility to customize their policies.

Your FMLA policy should spell out how much notice employees need to provide, who their point of contacts are, what the company's policy is on substituting paid leave, etc.

Update the policy annually to ensure it complies with the most recent court decisions. Work with your attorney on the policy update, since he or she will have to defend your action in event of an FMLA lawsuit.

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

Is co-worker resentment a reason to turn down ill worker's telecommuting request?

Q One of our employees requested that we accommodate his health condition by allowing him to occasionally work from home. We are concerned that this arrangement will cause his colleagues to become disgruntled. May we deny the request for this reason? If not, what information may we share with the employee's colleagues so that they are more understanding of the situation?

A There are certain jobs where the essential duties can be performed only in the workplace (e.g., custodians, cashiers and wait staff), and it would be unreasonable to allow work-from-home arrangements for those positions. However, for some other jobs, essential job functions might be effectively performed from home, and consideration should be given to determine whether working from home is a reasonable accommodation.

If the employee can perform his essential duties outside the workplace, the request may be a reasonable one, and the company may not deny the request out of fear that the accommodation will upset other employees.

Additionally, the company may not disclose the reasons it is allowing the employee to work from home unless the employee expressly and voluntarily consents to this disclosure (preferably in writing). To navigate this situation without running afoul of the ADA and possibly HIPAA (among other statutes), the company may ask the employee for permission to share information with the employee's colleagues. But if the employee declines, the company should remain silent.

Are we legally required to stop bullying?

Q We have been hearing so much in the news about workplace bullying. In Minnesota, are employers legally obligated to prevent or stop mean behavior in the workplace?

A Legislation that addresses workplace bullying, abusive conduct or abusive behavior has become increasingly prevalent over the past 10 years. This past spring in Minnesota, SF 1932 and HF 2228 were introduced; if enacted, they would permit a private right of action for unlawful abusive conduct in the workplace.

Those bills define "abusive conduct" as "conduct, including acts or omissions, that a reasonable person would find hostile, based on the severity, nature, and frequency of the conduct." The bills are intended to be broad, further stating that abusive conduct "may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, or epithets; verbal or physical conduct of a threatening, intimidating, or humiliating nature; the sabotage or undermining of an employee's work performance; or attempts to exploit an employee's known psychological or physical vulnerability."

The Minnesota abusive conduct bills have not been approved by the legislature and are not expected to pass this session, but it is likely that similar legislation will be introduced in future sessions until an anti-bullying statute of some kind ultimately passes.

Employers, however, should not wait until then to address workplace bullying. "Bullied" employees who are members of a protected class under federal or state statute may raise hostile work environment claims. And with the rise of retaliation claims, employers are particularly vulnerable to legal exposure if they ignore an employee's concerns about alleged abusive treatment.

The transgendered and restroom access

Q We have a transgender employee who is transitioning from male to female, and she has begun using the women's restroom. This has resulted in some concerns being raised by our female staff. What are our legal obligations with regard to this situation?

A Your question is very timely. Continuing the trend by federal agencies toward greater protections for transgender employees, OSHA has just released "A Guide to Restroom Access for Transgender Workers." The guide provides model practices for employers to follow when providing access to restrooms by transgender employees, including:

All employees should be permitted to use the facilities that correspond with their gender identity. A person who identifies as male should be permitted to use the men's restroom, and a person who identifies as female should be permitted to use the women's restroom.

Employees should be permitted to determine for themselves the most appropriate (and safest) restroom to use. As such, employers should refrain from requiring or deciding which restroom should be used by a particular employee.

No employee should be required to use a restroom facility located away or apart from other employees because of their gender identity or transgender status. Single-occupancy gender-neutral facilities or multi-occupancy unisex facilities may be offered as an option that all employees may choose (but may not be required) to use.

OSHA's full guide is available online: **tinyurl.com/AccessBestPractices.**

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