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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 . . .

Justice Dept. expands sex bias protections

The U.S. Department of Justice has announced it will interpret the ban on sex discrimination in the Civil Rights Act's Title VII to include gender identity. The Department of Justice may not bring actions against private employers, but can enforce the new interpretation against state and local governments.

In July 2014, President Obama issued an executive order barring the federal government and federal contractors from discriminating against employees because of their sexual orientation or gender identity.

Several federal court decisions have ruled that Title VII can protect employees against an employer's discrimination based on gender stereotypes, but the issue of whether Title VII's protections extend to lesbian, gay, bisexual or transgender employees has not come before the Supreme Court.

Supremes: No pay for time spent on security screening

The U.S. Supreme Court on Dec. 9 unanimously ruled that workers at a warehouse are not entitled to pay for the time they spend waiting to undergo anti-theft screenings, nor for the time spent actually being screened.

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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 Littler Mendelson, are co-editors. Contact Susan at sfitzke@littler.com and Sarah at sgorajski@littler.com, or call (612) 630-1000.

ACA vs. ADA: EEOC loses on wellness

The EEOC has lost its bid for a preliminary injunction that would have prevented a major employer from withholding funds from the Health Savings Accounts (HSA) of employees who refused to participate in a wellness program.

The case pits cost reduction provisions in the Affordable Care Act (ACA) health care reform law against ADA medical testing provisions.

Recent case: Several Honeywell employees complained to the EEOC about the provisions of the company's wellness program.

Honeywell employees can participate in a high deductible health plan that includes an HSA. Honeywell only deposits money into the HSAs of employees who participate in the wellness program. It is designed to educate employees about their health status and encourage them to improve their health, which is supposed to reduce the company's health care costs.

Employees who give a blood sample and provide other information receive the HSA contribution and don't have to pay a surcharge.

The EEOC requested a temporary injunction to stop the program, arguing that under the ADA, the testing constitutes an illegal nonjob-related medical test. It said the

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Boss behaving badly? Maybe not harassment

Employers should certainly strive to make their workplaces as pleasant and harassment-free as possible. But, sometimes supervisors make that almost impossible because they can't refrain from acting like jerks.

Fortunately, courts expect employees to have relatively thick skins. No judge wants to micromanage the workplace, and behavior that may be crude or obnoxious isn't usually grounds for a harassment lawsuit.

Recent case: Donald "retired" at age 55 from his sales job at Swedish Match. He did so after having endured what he believed was ageist behavior and same-sex harassment.

The trouble began after a new retail team manager arrived on the scene. He was also an older man, but with a rather abrasive personality. Once, the new manager squeezed one of Donald's nipples and announced that this was "sexual harassment." On another occasion, he allegedly took a towel from Donald, rubbed it against his crotch area and gave it back to Donald.

Donald and several other employees complained to higher-ups about the manager's behavior. The manager

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ACA vs. ADA

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penalties punish refusal to participate in an illegal test.

Honeywell claimed that the ACA clearly allows medical testing and authorizes penalties for those who refuse as part of its medical cost-reduction provisions.

The court denied the injunction request, concluding that it isn't at all clear which law should prevail. Until that is settled, Honeywell can continue to penalize those who won't participate and reward those who do. (*EEOC v. Honeywell,* No. 14-4517, DC MN, 2014)

Final note: Keep an eye on this case. It's almost certain that it hasn't finished working its way through the legal system.

Bosses behaving badly

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received a reprimand and the behavior stopped.

Donald later complained that the same manager made ageist comments, but never reported these to management.

Donald eventually used up his sick, vacation and FMLA leave and then retired. Then he sued, alleging both age discrimination and same sex harassment.

The court dismissed both claims, reasoning that the company never terminated Donald and corrected the alleged sexual harassment when employees complained. Plus, the court said that while the behavior may have been "obnoxious," it wasn't same-sex harassment even if the perpetrator identified it as sexual harassment. It was simply poor behavior. Plus, the employer stopped it as soon as it found out what was going on. (*Rickard v. Swedish Match North America,* No. 13-3729, 8th Cir., 2014)

Whistle-blower alert: Beware punishing employees who report customer wrongdoing

You may prefer a "don't rock the boat" mentality when it comes to reporting to police or other governmental authorities that a customer may be breaking the law. That doesn't mean you can force employees to remain silent—or worse yet, punish them for going to authorities.

Doing that could cost a fortune in damage awards, especially if it turns out that your employee was right.

Recent case: Mike worked as a pharmaceutical sales representative for Bayer. His primary responsibility was selling Mirena, a contraceptive device manufactured and sold by Bayer.

Always consult your attorney before firing someone who may be a protected whistle-blower.

Mike regularly visited doctors who might prescribe the device, including one who ran a women's center and accepted Medicaid patients. During the course of his job, Mike learned that the doctor, instead of purchasing an FDA approved version of Mirena, was importing an unapproved version of the device from Canada and then reselling it by submitting Medicaid claims on behalf of the patients. This meant he made a large profit each time he prescribed the Canadian version. He allegedly bragged to Mike that the importing effort made him about $50,000 in profit per year.

Mike reported his conversations to his own supervisor at Bayer. He was allegedly told that the company had an informal rule against reporting suspected fraud to authorities. At the time, the kind of conduct Mike suspected was widely known in the pharmaceutical industry, including at Bayer. Nothing came of his internal complaint.

Mike then reported his suspicions to federal authorities. Government agents raided the clinic, found unapproved Canadian devices and prosecuted the doctor for Medicaid fraud.

Because Mike ended up cooperating with the investigation and trial, he confessed to his boss that he had been the source of the tip—and added that he feared for his job.

Shortly afterward, Mike was terminated, allegedly for having caused a company credit card account to be closed because of late slow payments.

Mike sued under the federal False Claims Act (FCA), alleging that his employer had terminated him in retaliation for reporting customer wrongdoing.

A jury agreed with him, awarding him back pay of more than $300,000 (which was doubled under a provision in the FCA), plus over $560,000 for pain and suffering. The jury heard testimony that Mike's credit card had been reinstated before he was terminated and that another pharmaceutical rep who also had her account closed was not terminated.

Plus, it considered Mike's argument that he had been punished because the company feared reporting customer wrongdoing would mean lost business.

Bayer appealed, but received only a reduction in the pain-and-suffering award. The remainder of the jury's award was upheld. (*Townsend v. Bayer,* No. 13-1468, 8th Cir., 2014)

Final note: Always consult with your attorney before discharging someone who may be a protected whistle-blower. Make sure your reasons are valid and that you can show that other similarly situated employees faced the same punishment. Otherwise, you risk looking as if you threw the book at the whistle-blower to punish him or her.

Think twice before changing employee's job duties or hours during FMLA leave

Employees who take FMLA leave are generally entitled to come back to their old jobs when they return. If you make any changes to their jobs, be sure you can document solid business reasons that are unrelated to FMLA leave.

Recent case: La Nae worked as a scheduler for a home health service and also filed medical reports. After she announced she was taking FMLA leave, her supervisor informed her that her position would soon change, with her hours reduced to 25 per week. The supervisor suggested that she might want to use her time off to look for another job.

While La Nae was off, an inspection revealed problems with the reports she was supposed to file. The service decided to fire La Nae, and to bypass the progressive discipline program it usually used with underperforming employees.

La Nae sued, alleging several FMLA-related claims, including retaliation and interference with the right to take leave.

The court said her case could proceed, since the rush to terminate seemed suspicious. La Nae hadn't benefited from the usual progressive discipline system. Her job changed during her time off. Plus, her manager had suggested she use her time off to look for a job.

Now a jury will decide whether the service had legitimate reasons for the discharge or had come up with excuses to get rid of someone who took FMLA leave. (*Johnson v. Bethesda, et al.*, No. 13-2575, DC MN, 2014)

Employee's discrimination complaint shouldn't derail legitimate discipline

Some employees think they can keep from getting fired by going to HR or the EEOC with a discrimination complaint. Then, they reason, if their employer does terminate them, it will be retaliation. Fortunately, that's not true.

Recent case: Loralie worked in loss prevention for J.C. Penney. She performed well, but often had trouble with interpersonal relationships at work. When she complained that a co-worker had touched her in a sexually harassing way, the company investigated and warned the co-worker that his behavior wasn't acceptable. It never happened again.

Months later, new complaints about Loralie surfaced. Management opened an investigation, but she refused to answer questions. Then she apparently enlisted help in entering the store manager's office to look at confidential documents. Her boss found out and called HR to request permission to terminate Loralie.

Meanwhile, she complained about the earlier harassment incidents, demanding that the co-worker should be fired. J.C. Penney fired Loralie instead, as planned.

She sued, alleging that she had been retaliated against for reporting the sexual harassment and requesting the co-worker's termination.

The court said employees can't use a complaint as a shield against legitimate discipline and dismissed her lawsuit. (*Musolf v. J.C. Penney,* No. 13-3407, 8th Cir., 2014)

Final note: Consult your attorney when considering the termination of someone who filed past complaints. He or she can make sure you are on solid ground.

Legal Briefs

Alleged joint employer in for long slog in court

Don't count on getting off the hook if you are sued as a joint employer.

Recent case: Several former line cooks for a Mexican restaurant sued after they were discharged, alleging that they had been terminated because they are white. They said management told them that hiring Hispanics was the company way and that Hispanics worked harder and for less money than other workers.

The former employees sued the restaurant, which was a franchise, as well as the company that owned the underlying franchise concept. That company claimed it had no control or direct involvement with the franchise.

The court refused to dismiss, concluding that the former employees should have a chance to prove that they were under two employers. (*Stepan, et al., v. Bloomington Burrito Group, et al.,* No. 14-3288, DC MN, 2014)

Trucking company won't collect fees from EEOC

The EEOC has won a reduction of a large attorneys' fee award it had been ordered to pay for an allegedly frivolous lawsuit.

Recent case: When CRST settled a long-standing legal dispute over alleged sexual harassment in the workplace, it agreed to pay one employee $50,000. The lawsuit had alleged that there were at least two sexual harassment victims and employer knowledge.

After a judge dismissed all other claims, CRST asked the court to pay its legal bills and costs on the theory that the EEOC claims had been frivolous and that it had essentially won the lawsuit. The judge awarded CRST over $4 million. The EEOC appealed.

The 8th Circuit Court of Appeals reversed the award and sent the case back to the trial court with orders to look more closely at the lawsuit to determine which, if any, specific claims had been frivolous. (*EEOC v. CRST Van,* No. 13-3159, 8th Cir., 2014)

4 principles for creating a progressive discipline system that works

The most reliable way to protect your organization from wrongful termination charges is to establish and enforce a system of progressive discipline.

It allows you to ensure that any employee fired because of inferior performance was treated fairly and in accordance with your policies.

No state or federal law requires a company to establish a progressive discipline policy. But if you do promise one, make sure you follow it. Progressively harsher penalties are an important part of progressive discipline, but they are only one element of the overall system.

An employee must understand the reason for the penalty and be given an opportunity to correct the behavior.

Keep these four principles in mind when launching a new progressive discipline system or evaluating an existing one:

Principle No. 1: Generosity

The object of progressive discipline should be to rehabilitate employees, not punish them. Always ask an employee for the reason behind the problem. Never take it for granted or assume anything. If the problem is correctable by additional training, specify what steps you and the employee will take to resolve it.

Document everything that is said and done in case the problem persists and you have to go to the next step in the progressive discipline system.

Principle No. 2: Clarity

Employees must understand that their behavior violates company rules. Employment law differs from civil law in that employees can use "ignorance of the law" as a defense. In other words, if they didn't understand the consequences of their actions, they may be off the hook—and you could be on it!

To make sure your communications are getting through loud and clear, take these steps:

- Be thorough when you are disciplining employees. State exactly how the policy has been violated. Give clear-cut examples of what is unacceptable about the behavior.
- Set the standards to be met so the employees can't claim they didn't know they were doing something wrong. Spell out the consequences if problems continue.
- No matter what the communication situation, try to see it from both sides. Put yourself on the receiving end of your message and see if it makes sense, is complete and provides a solution to the problem.

Principle No. 3: Transparency

If employees are not warned about the consequences of poor performance, a judge or arbitrator may see it as an indication that there hasn't been any effort at rehabilitation.

Principle No. 4: Fairness

Progressive discipline must treat all employees equally. A boss can't slap one worker on the wrist, then fire another for the same offense.

Progressive discipline must happen in this order

Progressive discipline uses five steps, all designed to inform the employee what he or she is doing wrong and providing every opportunity to improve:

1. **Oral reprimand** for a performance deficiency or behavioral infraction, explaining what went wrong and what needs to happen instead.
2. **Written warning** if the problem persists, detailing the objectionable behavior, along with the consequences.
3. **Final written warning,** perhaps accompanied by probationary status.
4. **Termination review** by both HR and the employee's supervisor.
5. **Termination,** the final step.

STAFF

Editors: Susan K. Fitzke and Sarah J. Gorajski, Esqs., Littler Mendelson, (612) 630-1000

Contributing Editor: Anniken Davenport, Esq., HRMNeditor@BusinessManagementDaily.com

Editorial Director: Patrick DiDomenico

Senior Editor: John Wilcox, (703) 905-4506, jwilcox@BusinessManagementDaily.com

Copy Editor: Cal Butera

Production Editor: Nancy Asman

Publisher: Phillip Ash

Associate Publisher: Adam Goldstein

Customer Service: customer@BusinessManagementDaily.com, (800) 543-2055

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State Supreme Court extends time for whistle-blowers to file

The Minnesota Supreme Court has overturned 20 years of precedent, ruling that some whistle-blower cases may be filed up to six years following an employer's discriminatory act.

The case causing the change involved a Minneapolis Public Schools employee who complained of financial improprieties to the school system's superintendent. Her contract was not renewed the following year.

She filed her whistle-blower complaint just a day short of two years after her dismissal.

The court dismissed her claim, stating that the two-year clock started ticking when she was told her contract would not be renewed, not upon her termination. She appealed.

The Minnesota Whistleblower Act recognizes two types of employer retaliation, including discipline or termination because of:

1. Reporting a violation of any law to an employer

2. Refusing to perform an employer's order the employee believes violates any state or federal law.

The Supreme Court differentiated claims based on common law or common law claims later codified into law —which had a two-year statute of limitations—and those based solely on statutes with six-year statutes of limitations.

In this case, the court ruled the employee had six years to file the complaint because retaliation for reporting a violation was a violation created by statute. It is not clear which statute of limitations apply to the refusal to perform an employer's unlawful order.

Advice: Quickly and professionally investigate all whistle-blower allegations. Thoroughly document your findings and the actions you take. Assume that the six-year statute applies and save the documentation.

Unions on the rise: Prepare for 'ambush' elections

The National Labor Relations Board (NLRB) says a new controversial rule issued Dec. 12 will "streamline" union elections. Critics say the result will be "ambush elections" in which voting happens so quickly that employers stand little chance of persuading employees to reject union representation.

The new final rule, which takes effect April 14, covers elections that certify a union to represent workers.

Under current rules, an automatic one-month delay follows after the NLRB receives a petition for a union election. The new rule eliminates the one-month pause, clearing the way for so-called "ambush" or "quickie" elections, which usually come within days. *(Read the NLRB fact sheet at **http://tinyurl.com/ambush14**.)*

Currently, the standard time period for elections is 42 days. After these rules take effect, most elections will likely be held within 10 to 21 days, experts say. Also, employers will have to provide more contact info to unions, including employee personal phone numbers and email addresses.

Practical impact: Employers interested in keeping their workplaces union-free must prepare in advance to react fast to the threat of union organizing.

Online resource For tips on what employers still can (and can't) do to defend against a union campaign, go to **www.theHRSpecialist.com/unions**.

No pay for security screening

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The decision in *Integrity Staffing Solutions, Inc. v. Busk* involved temp workers at an Amazon.com warehouse in Nevada. A class-action lawsuit contended that they had to wait up to 25 minutes to be searched for pilfered goods, time the employees argued should have been paid.

None of the Supreme Court justices bought that argument, ruling 9-0 against the workers. *Reason:* The screenings were "not an integral part" of the workers' jobs.

8th Circuit tosses $4.7M in attorneys' fees that EEOC owed

The 8th Circuit Court of Appeals has overturned a lower court ruling awarding the CRST trucking company $4.7 million in legal fees. A lower court had awarded the fees after it determined the EEOC failed to conduct its conciliation process in good faith.

The EEOC had filed 157 charges of sexual harassment against the company, alleging that female drivers were subjected to "unwelcome sexual conduct, other unwelcome physical touching, propositions for sex, and sexual comments from their lead drivers or team drivers."

Ultimately, the EEOC settled only one of those cases with CRST for $50,000. In 67 cases, the court ruled the EEOC did not properly conciliate the disputes before filing suit.

CRST sought attorneys' fees for those cases and the district court awarded it $4.7 million.

But the 8th Circuit threw out that award, claiming that CRST was not the prevailing party. It said "conciliation is a nonjurisdictional, pre-suit requirement, not an element of a sexual harassment claim."

The appeals court remanded attorneys' fee determinations on the remaining cases to the lower court for a case-by-case determination.

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

NLRB narrows employer limitations on workplace communications

Many employers prohibit employees from using company email systems for any kind of personal communication. A recent National Labor Relations Board (NLRB) ruling, however, may force employers to change those policies.

The NLRB's *Purple Communications* decision asserts that employees are presumptively allowed to use company email systems during nonwork hours in connection with organizing campaigns or to discuss workplace issues with co-workers.

Email: the new water cooler

Purple Communications reverses the NLRB's long-standing position that employers could completely prohibit the personal, nonwork use of email, including for union organizing. The NLRB noted the increased use of technology in the workplace, explaining that email has become "the natural gathering place" for workplace communications in lieu of more traditional gathering places like break rooms.

As a result, the NLRB ruled that when an employee has access to work email, the employer cannot limit its use during nonworking hours by employees discussing working conditions, organizing or otherwise exercising their rights under Section 7 of the National Labor Relations Act.

The decision applies to nearly all private-sector employers, whether they are unionized or not.

Some limitations

The *Purple Communications* decision only applies to employees who already have access to email system for their work. Employers do not have to provide email access to employees who do not already have it.

In addition, the NLRB stated that in special circumstances, an employer might be able to establish an outright ban on nonwork use of company email if it can demonstrate that a ban is necessary to maintain production or discipline. The employer may also apply uniform and consistent restrictions (such as prohibiting large attachments or audio/video files) if necessary to keep the email system functioning efficiently.

The decision does not restrict an employer's ability to monitor email, consistent with its policies on email monitoring, although employers should not increase monitoring in response to union organizing or other workplace discussions.

The *Purple Communications* decision does leave several grey areas. For example, it provides no guidance on what constitutes "special circumstances" sufficient to impose a total ban on nonwork email use.

Also, the decision requires employers to permit employees who have work email access to use it to discuss working conditions during "nonworking times," but ignores the possibility that an email *written* or *sent* during nonworking time might be *read* during work time.

Scrutiny of all employers

This decision follows on the heels of other NLRB cases restricting limitations employers may impose on workplace conduct. Recently, for example, the board rejected several handbook and policy provisions restricting employee behavior, including:

- A policy requiring employees to refrain from negativity in the workplace and when discussing their employer in the community
- A "communication" policy that instructed employees "not to contact the media" and "not to discuss details about your job"
- A social media policy in an employee handbook that required employees' communication to be "appropriate," and a provision subjecting employees to potential discipline for publicly sharing "unfavorable" information "related to the company or any of its employees."

The NLRB's continued examination of company handbooks is yet another example of its reach into the nonunion private sector and company policies aimed at regulating employee conduct.

Key takeaways

In light of the recent trend in NLRB decisions, employers must tread carefully when developing, implementing and administering any policy that an employee could reasonably conclude involves his or her right to organize or engage in protected, concerted activity concerning employment terms or otherwise relating to unions.

After the *Purple Communications* decision, employers should:

- Evaluate each case on its facts to determine whether actual solicitation has occurred before administering any level of discipline for a policy violation.
- Assess their facilities to determine which locations are work areas, nonwork areas and mixed-use areas. If an area is a nonwork or mixed-use area, adverse action for distribution of literature likely will be deemed unlawful by the NLRB, absent "special circumstances" indicating interference with production or work performance.
- Evaluate electronic communication policies strictly prohibiting personal use of business email or requiring that it be used *only* for business purposes.

In addition, be mindful about surveillance and monitoring employee email to ensure that legitimate rules about inappropriate use of the email system are followed.

Susan K. Fitzke and Sarah J. Gorajski are shareholders, advising clients out of Littler Mendelson's Minneapolis office. Emily A. McNee is an associate. Contact them at (612) 630-1000 or send email to Susan at sfitzke@littler.com, Sarah at sgorajski@littler.com, and Emily at emcnee@littler.com.

When employees miss meal breaks, know how to handle pay

In many businesses, employees occasionally must work through their regularly scheduled meal breaks. When this occurs, employers must either provide another time slot for their breaks or pay employees for the time worked. To properly handle meal breaks, employers must have a system in place that allows them to know when an employee is working through a meal break so that the time can be credited properly.

THE LAW The Fair Labor Standards Act does not require employers to offer meal or coffee breaks, although many state laws do. When employers do offer meal breaks, defined in the law as 30 minutes or longer, they are not required to pay employees for that time. Shorter breaks, 20 minutes or less, are compensable.

In Pennsylvania, employers must also provide minors age 14 to 17 a half-hour meal break if they work five consecutive hours or more.

WHAT'S NEW The U.S. Supreme Court recently declined to hear a case on this issue, effectively allowing a 6th Circuit Court of Appeals decision to stand. While this decision is precedent for the states in that circuit (Kentucky, Michigan, Ohio and Tennessee), it may provide employers with a safe harbor of sorts.

The case involved a hospital that allowed nurses to take unpaid meal breaks during their shifts. Of course, medical emergencies don't wait until after lunch. Recognizing this, the hospital created an exception log where nurses could note times they were forced to work through their meal breaks. The hospital relied on this log to complete payroll.

A nurse failed to note her time in the exception log and then sued the hospital, claiming it failed to pay her for missed meal breaks. She claimed the FLSA places the onus on employers to record employee hours, not employees.

HOW TO COMPLY The 6th Circuit found that the hospital gave the employee a reasonable avenue for recording her hours worked. Because she failed to do so, the hospital had no knowledge or her work (and no reason to know about it). The nurse had argued the system allowed employers to remain willfully ignorant of times employees worked through their meal breaks. The appeals court disagreed and with the Supreme Court's decision not to hear the case, that decision stands.

What the court liked

In this case, the hospital had established solid procedures to inform employees about how to report their work time. The hospital's handbook stated that employees would be compensated if they missed a meal break or if it was interrupted for a work-related reason. The hospital provided written instructions and training on how to fill out the exception log, and received a signed acknowledgment from the nurse stating that she understood the meal-break policy.

The court stated, "Under the FLSA, if an employer establishes a reasonable process for an employee to report uncompensated work time, the employer is not liable for nonpayment if the employee fails to follow the established process."

Practical steps to take

Employers can adapt the hospital's policies to their own particular situations. You should:

- Clearly communicate a policy to report and pay for time worked outside normal working hours.
- Educate employees about the policy.
- Create an effective mechanism for employees to report their time.
- Establish a process for handling employee complaints, errors or omissions and rectifying them.

Like any policy, periodically review and update it to ensure you remain in compliance.

Accommodating nursing mothers

Since 2010, employers have been required to provide space and time for nursing mothers to express breast milk. These breaks are unpaid under the FLSA. Employers are required to provide a private space for women to express milk and must allow them as much time as necessary to do so.

When crafting time reporting policies, employers should include provisions allowing nursing mothers to clock out and clock back in on a flexible schedule.

Caveats

The nurse's argument that the employer is responsible for tracking employee hours is technically correct, but open to interpretation.

After all, employers have relied on employees completing time cards, punching a clock or other similar reporting methods for years. In this case, the court saw the exception log in the same light as those other methods. Other courts may disagree.

Because the case is only precedent for the 6th Circuit, the hospital's approach may be more a small cove than safe harbor. Still, the steps are based on common sense and allow for sufficient communication that employers and employees should be able to resolve any pay disputes that may arise.

General communication

The hospital in this case opened the lines of communication to its employees. Employers should create an environment where feedback on policies and procedures are welcomed. Employers can educate employees on workplace regulations and give employees a taste of the regulatory world in which employers operate.

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

Does our lactation room need a lock?

Q An employee will be returning from maternity leave next month. She has indicated she intends to express milk during her breaks. We have a room that is rarely used that seems perfect but it does not have a lock. Will this suffice?"

A Possibly. In Minnesota, employers are required to make reasonable efforts to provide a private space, other than a bathroom or toilet stall, for their employees to express milk.

The room must be shielded from view and free from intrusion from co-workers and the public. The place must include access to an electrical outlet.

Although a locking door is ideal, it is not necessarily required if you take other steps to ensure privacy, such as ensuring the space is used only for lactation and locating the room in a low-traffic area.

But, if your lactation room is a frequently used multipurpose room, you may be required to install a lock if it can be done for relativity low cost.

Consult with an attorney to fully assess whether your efforts to provide a private space are "reasonable."

Can we replace employee who has been on 'FMLA leave' for 14 weeks and isn't due back soon?

Q An employee went out on leave for a medical condition after working for us for 10 months. While the employee was not FMLA-eligible when the leave commenced, he was inadvertently advised that his leave was covered by the FMLA. The employee has now been on leave for 14 weeks, and he is not expected to immediately return to work. We would now like to fill his position. Is this permissible?"

A Probably not. It appears from your question that this employee had his 12-month anniversary while on leave. Therefore, as of that anniversary date, the employee's FMLA rights kicked in.

Once an employee on leave becomes eligible for FMLA leave, an employer is obligated to inform the employee that his eligibility has changed (or, in this case, inform him that he was mistakenly told that he was FMLA-eligible at the outset of his time off and that his eligibility has just kicked in) and then begin designating the leave as FMLA going forward.

The fact that the employee was on a non-FMLA leave when he became FMLA-eligible does not reduce his FMLA entitlement.

Employees can "age" into eligibility while on employer-provided leave, and the employer cannot rely on its generosity in providing "pre-FMLA" leave to reduce the employee's FMLA entitlement.

In the scenario you describe, it does not appear that the employee has exhausted his 12-week FMLA entitlement. He therefore retains reinstatement rights to his position, which should not now be filled.

This scenario assumes, of course, that the employee met the FMLA's 1,250-hour requirement before his leave commenced.

If the employee did not work 1,250 hours in the 12 months preceding his anniversary date, then he would not be FMLA-eligible. In that case, an ADA accommodation analysis would determine whether filling the employee's position is permissible.

Determining when to fill the position of an employee on an extended medical leave is a fact-specific decision filled with legal land mines.

The best course is often to consult an attorney when such actions are being considered.

Must we pay for time spend in security line?

Q To prevent theft, we require our employees to pass through security screenings after they finish their shifts. Because we have a large number of employees, it can take up to 25 minutes for employees to get through the screening line. Do we have to pay our employees for the time they spend in line and going through the security screenings?

A Probably not. This is the exact scenario the Supreme Court recently considered in *Integrity Staffing Solutions v. Busk*. *(See "Supremes: No pay for time spent on security screenings" on page 1.)*

You are required to pay your employees only for activities that are "integral and indispensable" to their principal job duties. Your screenings are likely not compensable because you could eliminate them without impeding your employees' ability to perform their job duties.

Put another way, you have implemented screenings simply as a way to prevent theft, not because they are necessary for employees to complete their work.

It is important to remember, however, that you may have to pay for other pre- or post-work activities.

For example, if your employees work with toxic materials, you would likely have to pay for the time spent showering and changing clothes because those post-work activities cannot be skipped.

Susan K. Fitzke and Sarah J. Gorajski are shareholders, advising clients out of Littler Mendelson's Minneapolis office. Emily A. McNee is an associate. Contact them at (612) 630-1000 or send email to Susan at sfitzke@littler.com, Sarah at sgorajski@littler.com, and Emily at emcnee@littler.com.

To submit your question to Minnesota Employment Law, email it to HRMNeditor@BusinessManagementDaily.com.