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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 . . .

Twin Cities rated nation's 16th best place for jobs

The Minneapolis-St. Paul area scored well on Glassdoor.com's recent "Best Cities for Jobs" ranking. The online jobs portal site rated major metropolitan areas based on

- Hiring opportunity: Determined by the ratio of active job openings to population
- Cost of living: Determined by the ratio of median annual base salary to median home value
- Job satisfaction: Determined by a minimum of 1,000 company reviews shared by local employees on Glassdoor.

The Minneapolis-St. Paul scores showed 48,231 job openings for a population of 3,495,176.

Median base salary in the Twin Cities is $52,000 and median home value sits at $210,300.

Employees rate their job satisfaction at 3.2 on a scale of 1-5.

Put together, those scores placed the Twin Cities 16th out of the nation's 50 largest metro areas.

The top five ranked cities in the survey were Raleigh, N.C.; Kansas City, Mo.; Oklahoma City; Austin, Texas, and Seattle.

Note: Surveys such as these can be valuable recruiting tools when seeking out employees who might need to relocate.

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.

Suit filed? Arbitration pact may still work

Employers use arbitration agreements to keep employment-related litigation out of the courts. But what if you don't have an arbitration agreement in place when former employees file a wage-and-hour class action lawsuit against your company? Can you suddenly spring an arbitration agreement on current employees and expect it to work?

Surprisingly, yes, according to the 8th Circuit Court of Appeals.

Recent case: Jacqueline and several other former servers at a pizza chain filed a class-action lawsuit alleging they were subjected to illegal tip pooling in violation of the Fair Labor Standards Act. Other former employees soon joined the suit.

Then, a month after litigation began, the chain had current employees agree to arbitration for any employment-related complaints. The agreement explained its scope, the required procedures for invoking arbitration, the effect the agreement would have on employees' ability to pursue relief in court, the right of every employee to opt out of the agreement free of retaliation and how to opt out effectively.

Along with the arbitration agreement, each employee received an opt-out form and an explanatory memorandum from the restaurant's

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What's work for unemployment comp purposes?

Workers who are collecting unemployment compensation benefits and "perform services" for 32 hours or more per week aren't eligible to receive benefits for that week. If they work for fewer than 32 hours, they do receive benefits.

But what about time spent on-call? Do those hours count toward the threshold? A recent court decision says they don't.

Recent case: Jolene worked for Thermospas Hot Tub Products until she was laid off for six months. When called back, she again began selling products strictly on a commission basis.

She had to be available to work 32 hours per week. Leads for possible customers were frequently scarce, and Jolene often went two weeks without a lead. Because she was required to be on standby, she could not work another job.

When she had no appointments, Jolene did paperwork, followed up with customers—and searched for more secure employment. She also collected unemployment compensation benefits, claiming just the hours she actually worked. Jolene reported

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Arbitration agreement

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general manager. The memorandum was a two-page document that described the agreement's fundamental terms in plain English. It specifically explained that one effect of the agreement, should an employee not opt out, would be to prevent the employee from joining Jacqueline in her class-action suit.

Jacqueline and her fellow former employees tried to have the agreements invalidated.

The court said they could not—only current employees had the right to do so. The case now proceeds without current employees unless one of them decides to challenge the arbitration agreement. (*Connors, et al., v. Gusano's, et al.,* No. 14-1829, 8th Cir., 2015)

Unemployment comp

(Cont. from page 1)

an average of 13 hours per week, with the most hours reported being 25 in one week.

She was denied unemployment compensation based on being on stand-by for a full 32 hours per week. Jolene appealed.

The Court of Appeals of Minnesota reversed, concluding that she was eligible for benefits because she didn't actually "perform services" other than waiting during most of the 32 hours per week she had to be available. (*Van Wyhe v. Thermospa Hot Tub Products, et al.,* No. A14-1786, Court of Appeals of Minnesota, 2015)

Final note: The court did say that hours spent doing volunteer work or engaged in self-employment count as "performing services." What doesn't count is sitting around at home waiting for possible leads that may or may not come in.

Of gangs, G-Men and a dogged cop: Careful discipline prevails in court

Employers that take their time to discipline troublesome employees who refuse to follow the rules often make out well if that employee later sues.

That's because they will have clear and unambiguous evidence that the employee deserved the discipline—not because he was a troublemaker, but because he couldn't follow the rules others did.

The key is showing that the employee isn't merely a troublemaker.

Recent case: Michael was a lieutenant in the Minneapolis Police Department (MPD), where he was assigned to be the commander of the Violent Offenders Task Force. The task force was a collaboration between several agencies, including the MPD, the FBI, the U.S. Attorney's Office and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

The task force conducted a wiretap investigation of a gang. When Michael learned that some gang members had threatened to kill police officers, he told an assistant U.S. attorney and an ATF agent.

Believing that local law enforcement should be notified, Michael also told a local police chief that the U.S. Attorney's Office would brief the chief's department about an ongoing investigation. ATF officials believed that this disclosure was inappropriate because the investigation involved a wiretap. An ATF supervisor emailed Michael, stating that he was "a detriment to this investigation" and barred him from ATF offices.

As part of an unrelated investigation, the FBI and the MPD arrested a suspected gang leader. During an interview, the suspect named six MPD officers who he claimed were corrupt. Four of those officers are black, two are white. The suspect's claims triggered a corruption investigation into the six named officers in which the suspect served as an informant. Michael interviewed the informant and accused him of lying. This angered the FBI, which also banned Michael.

Michael was disciplined several times over the following weeks and continued to speak out against the informant's allegations. He was eventually demoted.

That's when he sued, alleging that he was being retaliated against for standing up for the black officers allegedly implicated in corruption, as well as for reporting on the alleged threat against police officers.

The city of Minneapolis explained to the court that it had valid reasons for disciplining Michael, including its conclusion that his behavior endangered the police department's relationship with federal agencies such as the FBI. It also pointed out that several times, it had to request fitness-for-duty psychological exams because Michael persisted in telling others outside the chain of command that informants were either revealing plans to shoot police officers or lying about corrupt officers.

The court threw out Michael's retaliation claims. While he might have believed he was trying to protect black officers from a lying informant and from being targeted for death by gangs, it was clear that the city had solid, independent evidence that Michael had gone too far with his allegations.

There was no evidence the department had done anything to punish Michael for his activities other than properly discipline and demote him for interfering with department and federal agency investigations. (*Keefe v. City of Minneapolis,* No. 13-3069, 8th Cir., 2015)

Retired is retired, even if there's no written notice that employee is stepping down

Employees who voluntarily retire aren't eligible for unemployment benefits. That's because retiring is considered the equivalent of quitting.

But recently, a retired employee challenged her retirement and applied for unemployment, arguing that she never put a retirement request in writing and therefore her employer couldn't oppose her request for benefits.

Recent case: Over several years, Lorraine, a nurse, had "casual conversations" with her co-workers, telling them that she intended to sell her house and retire so she could spend time with her family.

In late 2013, she sold her house to her employer for use as a new residential home for patients living in the area.

Lorraine told co-workers she would be retiring at the end of February and moving into a condo in the Twin Cities.

Then she allegedly asked HR for an extension of her retirement date until May. She got that approval.

On her last day, the company threw a party to wish Lorraine a happy retirement.

Within a week, she filed for unemployment compensation, arguing she had been terminated and that her employer should be barred from arguing she retired because she never made a written, formal request to retire.

The court didn't buy her argument. Retirement requests don't have to be written and it was up to the court to determine whether to believe Lorraine's claims or her employer's account. It believed the employer. (*Rosenthal v. Cardinal of Minnesota*, No. A14-1684, Court of Appeals of Minnesota, 2015)

Choose just one: Temporary worker can't sue both the client and the temp agency

Do you sometimes "audition" potential permanent employees by hiring temporary workers from an agency? Watch out!

You likely would be liable for any workers' compensation claims if the worker chooses to make a claim against you rather than the temp agency.

On the other hand, in most temp worker arrangements the worker won't be able to double-dip by suing the other company for negligence.

Recent case: Antwan went to a temp agency, Aerotek Temp, and accepted an assignment as a welder for Northern Metal Fabricators. While on the job, he received instructions on how to use a drill to drive holes into metal pieces. However, the drill bit flew off and injured Antwan's face.

Antwan filed a workers' comp claim against Aerotek and a tort lawsuit against Northern Metal Fabricators, alleging that they had both been negligent in providing a drill that was defective or for not providing the right training. He argued that Northern Metal was not his employer, but a third party liable for his injuries.

The court disagreed. It pointed out that Antwan knew he was a temp-to-permanent-hire worker and accepted the assignment to Northern Metal. That made the two companies part of a common enterprise. Antwan could pick which employer to collect benefits from, but could not sue the other company in addition to collecting workers' compensation benefits. (*Dukes v. Northern Metal*, No. 13-CV-03647, DC MN, 2015)

Legal Briefs

Review noncompete agreement before hiring

Employees with specific skills and knowledge unique to an industry often work under the terms of noncompete agreements, which prevent direct competitors from poaching key workers and thus unfairly competing against the worker's former employer.

Before you hire employees from the competition, make sure they don't have an existing noncompete agreement. When in doubt, consult an attorney.

Recent case: When Neal went to work for his former employer's direct competitor, the former employer went on to lose over $500,000 during the next year. His new employer, on the other hand, saw an increase in revenue over $600,000.

His former employer sued, and the court said the profit swing could be attributable to Neal's move. A jury will decide if that's the case. (*St. Jude Medical v. Hanson, Biotronik,* No. 13-2463, DC MN, 2015)

Failure to call off is employment misconduct

Employees who don't call off work as company rules require may be guilty of misconduct. That means they lose the right to unemployment compensation if they are fired.

Recent case: Janvier worked for the U.S. Postal Service and sometimes took time off under the FMLA for a back injury. The post office requires employees to call off before the start of their scheduled shift. Janvier did not and was terminated.

Janvier applied for unemployment compensation. She argued that she couldn't call because her medication made her sleepy.

That argument didn't persuade the court. It concluded that, absent a solid medical explanation for why she couldn't call, she could have figured out a way to avoid oversleeping and therefore could have called in. Her benefits were denied. (*LeViege v. U.S. Postal Service,* No. A14-1303, Court of Appeals of Minnesota, 2015)

Beware legal risks of raising employees' titles in lieu of pay

When budgets for raises are lean, it's tempting to reward employees with a better title than a hefty pay increase. That's risky.

"While employers may have good intentions, if you start inflating titles, the titles themselves don't reflect the duties of the position and required expertise," says John Skousen, a partner with the law firm of Fisher & Phillips in Irvine, Calif. It can also cause confusion about exempt/nonexempt job classifications—and result in a lawsuit that will cost far more than a proper raise would have.

Skousen urges employers to consider these issues before succumbing to "title inflation:"

Steer clear of negligent promotions. It's risky to give someone a responsibility he is not capable of doing—or a title that suggests something he is not really doing. This may occur inadvertently when "promoting" by consolidating two or more positions into one job, leaving an employee unable to perform certain new functions in the glorified job.

Employers are largely liable for employees' actions and if they aren't properly trained or were negligently promoted, the company is responsible for that action.

Beware title changes to reward overwork. During the Great Recession, many employers combined two 40-hour-per-week jobs into one that the job-holder was expected to do in 60 hours. That's still happening. Risks include increased turnover due to injuries or job turnover.

Skousen advises employers to be smart: Evaluate the risks of spreading out more work and responsibility to fewer employees just to save money.

Don't play the name game. Companies started calling staff "associates" several years ago, and it's lost much of its value today. Similarly, "consultants" are no longer sophisticated business consultants making $200,000 per year giving sound advice to companies. Now everyone's a "consultant" instead of a "salesman." Reserve management titles for people who actually manage.

Ensure exempt and nonexempt accuracy. Employers giving supervisory title changes may also assume they can shift a nonexempt employee to exempt status. But if actual job duties or responsibilities do not change much, there may be legal ramifications for misclassification and a potential lawsuit seeking unpaid overtime.

Remember past lessons learned. Legacy effects of inflated titles have lingered after every recent recession. Skousen compares job title inflation to grade inflation in education: "If everyone has an 'A,' how do you discern between the best and the average?"

5 questions to ask: To promote or pay more?

Before offering a promotion without a commensurate compensation bump, ask these questions:

1. Is the employee a key high-performer who would be difficult and costly to replace? If so, it may be less expensive to raise the title, but promise a compensation review in six months.
2. Can you afford to offer other perks in lieu of pay? Instead of a title bump, consider offering more vacation time, bonuses, flexible work schedules and professional training.
3. How do salaries of the current and new positions compare? If the market salary of the current job is competitive with that of the new position, then a no-pay promotion may make sense.
4. Is it a real promotion? Don't hand out titles unless they reflect actual responsibilities.
5. Do I understand the legal risks?

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Franken introduces bill limiting mandatory arbitration

Sen. Al Franken has co-sponsored a bill with Rep. Hank Johnson (D-Ga.) that would limit what issues employers could force employees to arbitrate.

The bill, the Arbitration Fairness Act, seeks to reverse two key U.S. Supreme Court decisions that effectively bar class actions under arbitration agreements.

The bill would also bar arbitration agreements from including resolution of consumer, civil rights and antitrust claims.

Franken contends that the original Federal Arbitration Act only applies to disputes between businesses. However, court decisions over the years have expanded the law to cover interactions between businesses and consumers.

In particular, Franken cited decisions in *AT&T v. Concepcion* and *American Express v. Italian Colors* that upheld class-action waivers.

Under the proposed law, parties could only agree to arbitrate covered disputes once the disagreement arose, not before.

Note: Employers should have their attorneys review all arbitration agreement to ensure they comply with existing law.

It's time to replace your old OSHA poster

For the first time since 2007, OSHA has revised the "It's the Law" poster that all employers must display. Take down your tattered old copy and replace it with the new one.

The free poster—download a copy at **www.osha.gov/Publications/poster.html**—informs workers of their workplace safety and health rights, and employers of their responsibilities. The poster has been updated to include new OSHA obligations for employers, which must now report every fatality and every hospitalization, amputation and loss of an eye.

It also describes employer responsibilities for training workers in a language and vocabulary they can understand and posting citations at or near the place of an alleged violation.

Display the poster in a place where workers can see it. OSHA requires reproductions to measure at least 8½" x 14".

New FMLA forms are valid for three years

The U.S. Department of Labor has finally gotten around to revising its official FMLA forms on more than a month-by-month basis. The core suite of FMLA forms—doctors' certifications of serious health conditions, notices of rights and responsibilities and designation notices—now carry an expiration date of May 31, 2018.

Download them at **www.dol.gov/whd/fmla/**.

The DOL had been revising the forms monthly since previous editions expired in February.

In addition to a new expiration date, the revised forms also include specific references to the Genetic Information Nondiscrimination Act, which limits collection of data on hereditary health conditions that could be used to discriminate against employees.

EEOC conciliation in wake of *Mach Mining* decision

On April 29, the U.S. Supreme Court issued its unanimous decision in *Mach Mining v. EEOC,* a case that set new standards for challenging whether the EEOC engaged in a good-faith conciliation process before suing.

In the wake of the decision, employers can expect more pre-litigation outreach from the EEOC.

By law, the EEOC is supposed to inform employers of charges against them and engage in conciliation. The idea is that before an employer has to defend itself in court against a powerful federal agency, it should have an opportunity to know what the charges are and get a chance to correct the discrimination or harassment problem.

The case: The EEOC received a sex discrimination complaint against Illinois-based Mach Mining. It concluded the claim had merit and sent a letter to the parties inviting them to conciliation.

The EEOC told Mach Mining it would be in touch.

The next time Mach heard from the EEOC was in a letter stating that conciliation efforts had failed—a troublesome finding since Mach had neither participated in nor even known of any conciliation efforts.

The EEOC sued anyway.

Mach Mining said the EEOC had not attempted good-faith conciliation and asked the court to review the process.

The EEOC argued that its decisions could not be legally challenged.

The Supreme Court disagreed. It ruled that a federal court can be asked to determine if the EEOC told the employer about the charges and followed up by discussing the allegations with the employer. If that didn't happen, the employer may have a chance to start over using conciliation. (*Mach Mining, LLC v. EEOC*, No. 13-1019, U.S., Supreme Court, 2015)

How conciliation should now work: If challenged after filing suit, the EEOC will have to provide an affidavit outlining its conciliation efforts.

It won't have to provide any details on what was discussed, since that's confidential.

If the employer disagrees, it can file its own affidavit or offer other evidence challenging that the EEOC didn't provide basic information about the claim or that it didn't reach out.

The court can then order another conciliation attempt before litigation can proceed.

by Susan Fitzke, Neil Goldsmith and Sarah Gorajski, Esqs., Littler Mendelson, Minneapolis

NLRB's relentless attack on employment policies continues

In recent years, the National Labor Relations Board (NLRB) has steadily, aggressively increased its scrutiny of employment policies found in almost every employee handbook. Seemingly well-intentioned and generally accepted policies have been found to violate the National Labor Relations Act (NLRA) because they are seen as chilling employee rights to engage in protected, concerted activity.

In March, NLRB General Counsel (CG) Richard Griffin issued a report addressing the intersection of common employment policies and the NLRA. While not binding, the report reveals likely NLRB enforcement priorities. Employers should take heed.

The GC's report provides direction regarding the legality of some of the most frequently litigated handbook topics. Even for employers experienced with recent NLRB cases, there are surprises. The report describes workplace rules as unlawful not only when they reasonably would be read to prohibit protected activities, but even when the rules simply seem ambiguous.

The policies under attack

Keeping information confidential: The report essentially states that rules prohibiting disclosure of employee or personnel information are virtually always unlawful. This includes prohibitions on disclosing employee lists, contact information, personnel files, handbooks, policies and pay or benefits information. Broad rules explicitly or implicitly encompassing employment information or workplace conditions will be considered unlawful if they don't clarify that they exclude discussions protected by the NLRA.

Disparaging the company: The report identifies as unlawful rules that the GC found explicitly or implicitly limit employee rights to engage in zealous advocacy and criticism of their employers, both internally and externally. That includes some rules requiring civility toward management or prohibiting employees from engaging in "disrespectful," "negative," "inappropriate" or "rude" conduct toward supervisors.

The report also took issue with rules requiring only truthful statements about the employer out of concern this restricts protected statements. Even rules prohibiting "defamatory" conduct are not safe from scrutiny.

Acting respectfully and courteously: The NLRA protects employees' right to argue and debate one another about unions, management and workplace conditions. Even when these discussions become "contentious … intemperate, abusive and inaccurate," the GC states that they do not lose protection. As a result, prohibitions on "negative" or "inappropriate" discussions, or prohibitions on co-worker harassment (not discriminatory or sexual harassment) are generally considered unlawful.

Making internal complaints: Exclusive complaint reporting requirements that can be construed to restrict protected complaints to co-workers or the public are considered overly broad. Even suggesting that employees should use an internal complaint procedure instead of communicating to co-workers or others is unlawful.

Communicating with the media: Rules restricting or requiring preapproval of public statements about the employer are viewed as interfering with rights protected by the NLRA because they restrict employees' ability to publicize labor disputes. Employers must ensure that rules do not prevent employees from speaking to the media.

Using company logos, copyrights and trademarks: The report concludes that workplace rules cannot prohibit employees' fair protected use of the employer's intellectual property. In the GC's estimation, fair use includes, among others, using the employer's name and logo on picket signs, leaflets and other protest material.

Soliciting other employees: The NLRB has considered presumptively invalid rules banning solicitation during business hours. In the report, the GC states that solicitation rules should be drafted to allow employee solicitation during nonwork time. The GC will treat electronic distributions of literature, such as through email, as coworker solicitations and subject to the rule permitting such communications during nonwork time.

Taking pictures or video on company property: The GC takes the position that employees have the right to photograph and make recordings in the workplace, including the right to use personal devices for that purpose, during nonwork time. The report explains that restricting that right could prevent employees from engaging in concerted activities, such as "posting a photo of employees carrying a picket sign, … documenting a health or safety concern, or discussing or making complaints about statements made by [the employer] or fellow employees."

Review handbook, policies

The NLRB's focus, when reviewing policies and handbook provisions, is on what a reasonable employee would infer after reviewing them. Innocent mistakes and misunderstandings, or lack of intent to mislead employees or to restrict the exercise of their rights is no defense to a claim that a rule violates the NLRA.

Accordingly, employers should carefully review their handbooks and policies in light of the NLRB's current precedents and positions.

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After Supreme Court ruling, 401(k) vigilance is critical

A new decision by the U.S. Supreme Court has upped the fiduciary ante for employers that offer defined contribution retirement plans.

THE LAW The Employee Retirement Income Security Act (ERISA) requires employers that offer retirement plans that include investment options to monitor those options with an eye to protecting employee/beneficiary interests. Employers may be liable for damages employees suffer from imprudent investments or investments with excessive fees or costs.

The Uniform Prudent Investor Act requires informing employees if an investment that was previously considered prudent becomes imprudent due to "changed circumstances."

WHAT'S NEW The Supreme Court recently issued a unanimous ruling that signals changes in ERISA compliance. The case, *Tibble v. Edison International* (U.S. Supreme Court, No. 13-550, 2015), involved a holding company for several energy companies. Edison operated 401(k) plans for about 20,000 employees.

A group of current and former plan beneficiaries sued, alleging Edison violated its fiduciary duty of prudence when it offered the "retail class" shares of three mutual funds instead of the "institutional class." "Retail class" shares carry higher costs.

The plaintiffs filed the suit in 2007 alleging Edison violated ERISA in funds it added to the plan in 1999 and 2002. A federal district court ruled Edison did violate its fiduciary duty, but that the plaintiffs could only seek damages for the 2002 funds because ERISA only provides a six-year window for such claims.

Decision appealed

The plaintiffs appealed to the 9th Circuit, arguing that they could sue as long as the 1999 funds were in the plan. The U.S. Department of Labor filed a brief in the case, asking the court to recognize a "continuing violation" argument, where each time a beneficiary suffered a loss because of a plan administrator's fiduciary failure, the six-year period started over again.

The 9th Circuit did not buy the "continuing violation" argument, ruling that only "changed circumstances" would allow for a "full diligence review" of investment options. A failure to meet its fiduciary duty during a "changed circumstances" review could start the six-year clock moving again.

Supreme Court decision

The Supreme Court agreed to hear the question of whether beneficiaries could sue under ERISA after the six-year period had expired. The High Court did not address this issue head on. Instead, it remanded the case to the 9th Circuit for that court to determine whether Edison met its fiduciary obligation to conduct "regular review" of its investment options. The decision also failed to address the "continuing violation" theory advanced by the DOL.

HOW TO COMPLY The Supreme Court remanded the case, so the story is not over yet. Employers should monitor the 9th Circuit's decision to understand all the ramifications.

'Changed circumstances'

The Supreme Court's decision was short on specifics, but indicated that it expected employers and plan administrators to proactively honor their fiduciary duties under ERISA. In particular, the court's emphasis on the Uniform Prudent Investor Act, means that plan administrators must be familiar with its content and the specific investments it covers.

While the court didn't provide much detail, it did seem to indicate that employers and plan administrators cannot just wait for a "changed circumstances" scenario to arise before examining investment options.

Plan administrators should take a broad view of what constitutes "changed circumstances." Any significant change in an investment's risk factors or costs should trigger some sort of review.

Administrators should develop guidelines for when to re-evaluate individual investments and when a full diligence review is in order outside the normal review schedule. Employers should ask for a plan administrator's guidelines and have them reviewed by their attorney to avoid any liability.

Any "full diligence" review should include a market analysis to determine if substantially similar investment options could be offered in a lower-cost form. That should help deter similar legal challenges to the one Edison International faced.

Put regular reviews in place

Employers conducting a regular review of investment options should have criteria for selecting, monitoring and removing funds offered under 401(k) plans. Mutual funds and other investment options should be reviewed for the level of fees charged to the fund, the performance of the funds against their appropriate benchmarks and the fiduciary's adherence to the plan's investment policy statement.

Again, all this must be documented to show that the employer regularly reviewed the investment options and uniformly applied selection and removal criteria to all options.

DOL looking for due diligence

The fact that the DOL filed a brief in this case indicates it is closely monitoring defined contribution plans to ensure plan fiduciaries are getting the best possible options for plan beneficiaries.

In particular, investigators are looking at the issues raised in this case concerning fees.

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

How should we handle news that employee previously signed a noncompete agreement?

Q We received a letter from a competitor informing us that our new employee used to work for them and is now in violation of noncompetition agreement with the competitor. What should we do?

A You should act quickly to make some initial determinations. First, obtain a copy of the noncompetition agreement, either from the competitor or your employee. After reviewing the agreement, it may (or may not) be possible to conclude that the employee is not violating the agreement.

Assuming that the employee's current work appears within the agreement's scope, consider whether the noncompetition provisions are valid and enforceable.

In Minnesota, noncompetition agreements are valid if they are reasonable in scope and supported by proper consideration. Restrictions that prohibit competition in a limited geographic area or district or that limit the employee from communicating with former contacts and customers with whom he or she had direct contact on behalf of the competitor are often found valid.

Time restrictions of up to two years are often found to be reasonable, though context matters. A broader or longer restriction may be valid if it relates to a high-level executive, but not if a front-line salesperson is involved.

Even where the agreement may be overly broad, it will not likely void the entire agreement. Rather, a court may simply scale back the overly broad terms.

Companies that employ someone in violation of a noncompetition agreement may be liable for tortious interference with contract, following what are often expensive and hotly contested legal actions. Proceed cautiously and consult an attorney. In most cases, it benefits both employers to discuss whether there is a mutually agreeable compromise that would protect everyone's interests.

Should we terminate an admitted drug user?

Q Following a recent accident on our loading dock, an employee admitted he used marijuana before his shift. Afterward, the employee and the others involved were required to submit to a for-cause drug test pursuant to our drug testing policy. The employee who admitted being high failed the drug test. However, there was an irregularity with our testing vendor, and it was not able to complete the confirmatory re-test of the employee's specimen. Can we terminate the employee who admitted to working under the influence of marijuana?

A Termination may not be the best course of action. Once the employee admitted to pre-shift drug use, you could have terminated the employee. However, once he was required to submit to a drug test, the company must strictly comply with Minnesota's drug testing statute.

In this situation, compliance is impossible because there is no sample available with which to complete the necessary confirmatory re-test. Further, because the employee was already required to submit to the test and there was an initial positive test result, it will be very difficult to prove that he was terminated because of his admitted illegal drug use, not the positive test.

Additionally, termination would not be the result in any event because the statute requires offering the employee the opportunity for treatment.

And one final wrinkle to consider: Was the employee's marijuana use pursuant to Minnesota's new medical marijuana statute? The passage of that law is likely to complicate application of drug testing programs. Consult an attorney with any questions regarding how Minnesota's drug testing statute or disability discrimination laws apply to employees taking prescribed medical marijuana.

How does a tip credit work with minimum wage?

Q May we count tips received by our employees, including restaurant servers, toward the payment of their minimum wage?

A Maybe, depending on the state where the tipped employee works. The federal Fair Labor Standards Act (FLSA) establishes a minimum wage that must be paid and a maximum tip credit that may be applied toward satisfying minimum wage obligations for tipped employees.

Under the FLSA, an employer may take a tip credit between the current federal minimum wage ($7.25 per hour) and the minimum wage set for tipped employees ($2.13 per hour). The tip credit taken, however, may not exceed the amount of tips actually received by the employee in a given workweek. If an employee does not earn $5.12 per hour in tips in a workweek, the employer must make up the difference in wages.

However, a number of states, including Minnesota, prohibit employers from applying the tip credit. Minnesota law specifically prohibits employers from taking a tip credit and requires employers to pay tipped employees the same minimum wage as other employees.

"Large employers," defined as those generating $500,000 or more in gross annual volume, must pay their Minnesota employees at least $8.00 per hour. This rate will increase to $9.00 per hour on Aug. 1, and to $9.50 per hour on Aug. 1, 2016.

Given the state differences related to minimum wage and tip credit practices, it is a good idea to talk to an attorney to ensure that your compensation practices comply with federal and state wage-and-hour laws.

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