

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

## In the News

### EEOC: Title VII covers transgender employees

Arguing that Title VII's prohibition on sex discrimination covers transgender employees, the EEOC has successfully pursued a bias claim filed by an employee who was fired shortly after beginning a transition from male to female. The case ended with a \$150,000 settlement, putting employers on notice that Title VII covers transgender employees.

The case involved a paraprofessional at a Florida eye clinic who began the gender transition process six months after being hired. Clinic doctors stopped referring patients to her and she was ultimately terminated as part of what the clinic called a reduction in force.

The EEOC determined that the RIF was merely a pretext for sex discrimination, since the clinic filled the position two months later.

**Advice:** Consider including gender identity in your anti-discrimination policies.

### Hodges calls for more worker-friendly policies

In her second State of the City address, Minneapolis Mayor Betsy Hodges called for more regular work schedules, more overtime pay and greater access to paid sick days. Hodges stopped short of calling for a

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## Pay attention to details when disciplining

**A**lways be prepared for a lawsuit from a disgruntled former employee. This is especially true if someone was fired for breaking company rules and believes another employee outside her protected class was treated more favorably.

For example, was the other employee allowed to keep her job under similar circumstances?

The more general your discharge reasons, the easier it is for the former employee to argue that discrimination was in play. Conversely, specific discharge reasons make it much harder to argue discrimination because chances are the fired worker won't find someone similarly situated

(i.e., who broke exactly the same rule) for comparison. See how this played out in a recent case.

**Recent case:** Yordanos, who is an Ethiopian woman, worked for HMS Host at Minneapolis-St. Paul International Airport as a cashier. In addition to her cashier duties, she distributed keys and money to other associates at the beginning of shifts and collected money and dropped it in a cash room at the end of shifts. Company rules required cash drawer reconciliation every shift. Cashiers who were off by more than \$50, either short or over, faced disciplinary action.

Yordanos was fired when her drawer

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## Spell out rules for returning from FMLA leave

**W**hat do you expect an employee to do at the end of approved FMLA leave? Clarify that it's the employee's responsibility to notify the employer and check his schedule when he receives medical clearance.

Then, if the employee ignores your instructions and doesn't show up, it's willful misconduct—making him ineligible for unemployment benefits.

**Recent case:** Dan worked for Pan-O-Gold Baking Co. for over a decade. He took 12 weeks of FMLA leave to have knee surgery and recover from it. He needed an extension before receiving full medical

clearance, which the baking company approved.

Then Dan's medical providers cleared him for work during an exam on New Year's Eve. According to Pan-O-Gold, Dan was told he should report to work the following week and to check his schedule for assigned shifts. Dan claimed no one gave him a return date.

Dan did not show up for two scheduled shifts. On Jan. 4, his supervisor called and told him to report for a meeting. Dan then went to his medical provider, said he was having

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## Discipline details

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was over by \$50.02.

She sued, alleging various forms of discrimination including national origin, sex and race. She identified one male employee with a cash discrepancy over \$50 back in 2009 who wasn't fired. Yordanos also pointed to two employees outside her protected classes who kept their jobs after selling cigarettes to minors.

The company explained that it changed the rules on cash shortages back in 2010, before Yordanos was fired. And it argued that it treated the other two employees differently because they broke an entirely different rule.

The court tossed out Yordanos' discrimination claims based on the employer's detailed explanations. (*Haile v. HMS Host*, No. 14-379, DC MN, 2015)

## Return-to-work rules

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transportation problems and asked her to change the return date to a week later. She changed the form. Dan turned the alteration in at the meeting, but was still fired for being a no-show for two scheduled shifts, and for alleged dishonesty.

Dan filed for unemployment, which was denied. He appealed, alleging he never knew he was supposed to check the schedule and that he had been waiting for a call. A supervisor explained the schedule policy.

The court believed the company's explanation and concluded Dan had committed willful misconduct, making him ineligible for benefits. (*Delk v. Pan-O-Gold Baking Co.*, No. A14-1269, Court of Appeals of Minnesota, 2015)

# Focus on performance—not attendance—when firing employee who used FMLA

**C**autions when dealing with employees who take FMLA leave for a serious health condition. Never count FMLA-related absences against them when tallying attendance records. Doing so interferes with their right to protected FMLA leave. Employers that rely on absenteeism to fire such a worker may find themselves in court arguing over which absences and late arrivals should be included or excluded—and hope they got it right.

A better approach is to focus on performance while the employee is at work. It's permissible to fire a worker for poor performance whether he's on FMLA leave or not.

**Recent case:** Lucinda worked as a nurse at a ManorCare facility. She was already overweight, and when she began gaining even more weight, she worked with her doctors to see what the problem might be. Doctors suspected a kidney problem that was unrelated to her obesity. They prescribed no particular treatment.

Meanwhile, Lucinda periodically missed work, and also had trouble completing her work during some of her shifts. She was soon placed on a performance improvement plan, which highlighted the tasks she needed to complete during each shift and on a weekly basis.

Problems cited included making inappropriate negative comments about her work at the nurses' station, where patients could overhear; failure to notify staff members she had canceled a meeting; taking an extended lunch break and failing to attend patient care conferences.

One Friday when Lucinda left for the week, she had not completed many tasks outlined in the performance improvement plan. She also left a lab report containing abnormal

results on her desk instead of handing it over to another nurse.

Lucinda went to the emergency room the following Monday morning with chest pains. The ER couldn't diagnose the pain and told her to take two days off, with instructions to follow up with her own doctors.

She went to work on Wednesday. ManorCare terminated her for not finishing her work and not

passing on the abnormal results.

Lucinda sued, alleging that her employer interfered with her right to FMLA leave and counted her FMLA protected time against her.

The court disagreed. First, it pointed out that Lucinda's first condition might not qualify as a serious health condition. She never got a diagnosis and her doctors didn't prescribe medications. While ordinarily, time spent seeking a diagnosis for a serious health condition is protected FMLA leave, in this case no diagnosis followed. Nor did the employer deny her any medical visits to figure out what was wrong. As to the chest pain incident, she also received time off as recommended. In other words, whenever there had been an arguable FMLA entitlement, she received it.

Second, Lucinda wasn't fired for missing work, so there was no question over whether the employer counted FMLA leave against her. She was fired for not completing her work before leaving at the end of a full workweek. As the court pointed out, employers are free to discipline employees on or off FMLA leave for poor performance. As long as FMLA leave isn't used as a factor in that discipline, employers are within their rights. The court dismissed the case. (*Dalton v. ManorCare*, No. 13-3743, 8th Cir., 2015)

*You are free to discipline employees—on FMLA leave or not—for poor performance.*

# Good news: Court nixes long statute of limitations for rare associational claim

Employees have many avenues to sue their employers for alleged discrimination. Most are common and have clear-cut deadlines. Some are more exotic.

Consider, for example, an employee's right to sue over her employer's alleged discrimination against her because of who she associates with. Here's what happened when one worker waited more than four years to make a so-called Section 1981 civil rights claim.

**Recent case:** Sharon, who was married to a black man, claimed she was fired when her employer learned of the relationship. She filed Title VII claims on time, but waited more than four years after her discharge to file a civil rights claim under Section 1981, a much older civil rights law.

In 1991, Congress amended several related federal laws to establish a four-year limitation. Before that, Minnesota litigants had six years to sue.

Now a court has determined that the changes apply to Section 1981, too, effectively blocking Sharon's lawsuit. (*Powers-Potter v. Nash Finch Company*, No. 14-CV-0339, DC MN, 2015)

**Final note:** Employers can't do anything about statutes of limitations, but they can prepare for possible litigation. Work with your attorney to establish records retention guidelines, just in case. Don't assume that if a fired worker doesn't file an EEOC complaint within 300 days that the case won't come back to bite. Section 1981, for example, doesn't require an EEOC complaint.

## Court: Arbitration OK as long as employee doesn't have to give up any rights

A federal court has upheld an arbitration agreement negotiated between a union and an employer that compelled individual arbitration for FMLA claims.

**Recent case:** Jeanie worked as a flight attendant. A union represents airline workers, including flight attendants. During the last round of negotiations, the union agreed that all FMLA claims would be resolved through arbitration.

Jeanie suffered from migraine headaches and sinus infections and requested intermittent FMLA leave to use when the conditions flared up. The airline rejected her request, demanding more specific information. A nurse signed a revised form. The airline still rejected the form, and accused Jeanie of altering it.

She was then ordered to undergo an exam, presumably because employers have the right to chal-

lenge FMLA certifications with an independent, employer-paid examination. The doctor the airline chose found her allegedly unfit to work.

Jeanie was then fired for providing fraudulent documents. She sued her employer for FMLA violations.

The airline demanded the case go to arbitration. Jeanie argued the union couldn't give up her FMLA rights on her behalf.

The court disagreed. As long as Jeanie can ask the arbitration for all the remedies like liquidated damages and attorneys' fees, she isn't losing anything. (*Montgomery v. Compass Airlines*, No. 14-557, DC MN, 2015)

**Final note:** Deciding how, when and why to use arbitration agreements is no easy task. Before you even think about implementing an arbitration agreement, make sure you discuss the pros and cons with your attorney.



### You don't always have to be right—just honest

As long as you act in good faith, most courts will uphold your honest HR decisions.

**Recent case:** Angela had back surgery and took FMLA leave. While she was off, her employer discovered what it considered poor performance. The employer imposed an improvement plan and eventually fired her for poor performance and for allegedly offering a co-worker prescription pills for a headache. Distributing drugs at work was against the rules.

Angela sued, alleging her employer punished her for taking FMLA leave and was wrong about the alleged prescription offer.

The court rejected her claims. As to the drug distribution, the court noted the employer spoke with the co-worker and Angela and honestly believed the co-worker's version of events. It tossed out the claim. (*Riniker v. UnitedHealth, et al.*, No. 12-CV-2875, DC MN, 2015)

### Employee failing test? OK to end it early

Generally, employees taking an exam required for promotion should be tested under similar circumstances, take the same test and generally be treated the same.

But sometimes, especially during a hands-on test, it becomes obvious early on that the employee does not have the skill to pass. If that's the case, you can end the test early.

**Recent case:** Rodney, who is black, wanted a promotion to a machinist position. The promotion required a physical skill test. Halfway through the test, Rodney missed a crucial step when he improperly removed a bushing from the lathe. The tester stopped the test and failed Rodney.

He sued, alleging he hadn't received the full time others had.

That didn't matter, concluded the court, when the test was cut short at the point it was obvious he would not pass. (*Washington v. American Airlines*, No. 11-3423, 8th Cir., 2015)



## What HR needs to know about tracking employee time

Time clocks, time cards and time sheets are basic necessities for payroll purposes, workplace record-keeping, FMLA tracking and more.

However, supervisors and HR pros need to understand what they can and cannot do with time records. That's because problems can lead to legal disputes under the Fair Labor Standards Act (FLSA).

### Time-tracking FAQs

Some of the issues that could come into play:

- Whether managers are allowed to alter time sheets
- Whether having exempt employees fill out time cards could alter their employment status
- Methods to prevent employees from falsifying their time records.

#### 1. Is it illegal for managers to change exempt or nonexempt employees' time sheets if they neglect to indicate a day off, etc.?

Time sheets are the property of the company, and it is a company obligation to make sure they are correct. Otherwise they could run afoul of payroll and benefits laws, such as the FLSA and the Employee Retirement Income Security Act.

For example, if a manager alters a time sheet without the employee's knowledge and without a sound business reason, and it alters the employee's deserved pay, then the FLSA may apply.

However, if an employee accidentally leaves off a vacation day, it would seem fair and appropriate that a manager rectify the oversight.

#### 2. Can exempt employees be required to submit time sheets without having their exempt status jeopardized?

Nothing in the FLSA prohibits employers from requiring exempt employees to submit time sheets, as long as

those employees' wages aren't calculated according to the time recorded. Time sheets are a simple and uniform way of tracking all employees' entitlement to vacation, sick, and personal time.

#### 3. What are some suggestions for preventing employees from falsifying their time cards?

Make sure employees keep hours correctly with the following tips:

- Discipline employees who allow someone else to mark their time sheets or punch in their time cards, or who do so for others.
- Reiterate that employees should not punch in or mark their time sheets until they are ready to start working. Eating breakfast, making personal calls or engaging in any other nonwork activities should be taken care of before punching in.
- Remind managers that if employees forget to punch in, they still need to be paid for any hours worked. But also let them know that it is legal to discipline those who consistently forget to punch in for failing to follow policy.
- Stress the need for managers to keep a close eye on employees' hours. Merely issuing an order that nonexempt employees may not put in overtime without prior authorization or that they may not voluntarily work "off the clock" won't shield you from having to pay up if employees don't comply. Employers must pay for work that is "suffered or permitted."
- Don't be afraid to require exempt employees to use time cards or time sheets. Reasons to do so: ensuring they put in a minimum number of hours as required, tracking when certain benefits vest if based on hours worked, etc. Just be sure their pay doesn't fluctuate with the number of hours worked.

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## NLRB probes slow response to post office data breach

The National Labor Relations Board (NLRB) has taken the U.S. Postal Service to task over its delay in informing its employees of a cyber breach in the late summer or early fall of 2014.

Post office and FBI cyber-security investigators have pointed the finger at China as the breach's source. Hackers stole sensitive personnel information, including names, dates of birth, Social Security numbers and addresses for about 800,000 post office staff, including then-Postmaster General Patrick Donahoe.

The American Postal Workers Union, the National Letter Carriers Association and the National Rural Letter Carriers Association filed grievances with the NLRB, claiming that the Postal Service delayed informing employees of the breach.

USPS first discovered a possible breach on Sept. 11, 2014, but did not confirm the theft until Nov. 4. Officials informed employees of the

## Hodges policy push

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citywide higher minimum wage, pushing instead for higher regional minimum wage in the Twin Cities area.

Hodges' call echoes many initiatives the Obama administration is pushing at the national level. New Fair Labor Standards Act rules due within weeks purportedly will require workers to have regular, predictable hours. Similarly, Obama called for paid sick leave in his State of the Union speech in January.

Hodges appears to be walking a fine line between minimum wage hike proponents like the advocacy group 15 Now and business interests, which worry about the impact of higher wages on their bottom lines. One business group, the Minnesota Restaurant Association, immediately issued a statement asking the mayor to remember that restaurants "do not operate in a vacuum."

## Supreme Court: EEOC good faith subject to court review

The U.S. Supreme Court ruled April 29 that courts have the authority to review whether the EEOC made a good-faith attempt to conciliate discrimination complaints before suing employers, as required by Title VII of the Civil Rights Act. The unanimous decision in *Mach Mining v. EEOC* is a limited win for employers.

Illinois-based Mach Mining argued that the EEOC did not negotiate in good faith during its conciliation process and that, as a result, a sexual discrimination case against the firm should be tossed.

A federal district court denied Mach's request, but agreed to let the courts decide if an employer could use the EEOC's bad faith as a defense. The 7th Circuit Court of Appeals ultimately ruled that nothing in the Civil Rights Act allows an employer to challenge the EEOC's sincerity during the conciliation process. Other circuits have ruled that the EEOC's actions may be subject to varying degrees of judicial review.

The Supreme Court's decision resolves that split. The underlying sex discrimination case goes back to a lower court for litigation.

breach on Nov. 10. USPS officials claim the FBI advised them to delay any announcement to discourage even more ambitious attacks.

The unions seek to compel the post office to negotiate protocols for informing employees of data breaches. The USPS has not yet answered the complaint, but did note that it took steps to protect employees in the breach's wake.

## Police union election offers lessons for employers

The highly publicized battle for the leadership of the Police Officers Federation of Minneapolis offers lessons for all employers with unionized workforces.

The changing of the guard—Lt. Bob Kroll toppled longtime union head Lt. John Delmonico—highlighted the clashes that sometimes characterize union elections.

During his 15-year tenure at the police union's helm, Delmonico won kudos for building bridges with City Hall, including current Mayor Betsy Hodges. (That's despite last year's "Pointergate" scandal, in which Delmonico accused Hodges of flashing gang signs at a voter registration event.)

Delmonico ran on his record, pointing to his move to eliminate a residency requirement for officers as

key for boosting minority membership on the force.

Several black officers spoke highly of Delmonico's efforts to be inclusive.

However, Kroll won overwhelmingly on the strength of promises to bring fresh blood to union leadership. Since 2006, Kroll has represented officers during disciplinary hearings.

But Kroll has been the target of disciplinary hearings himself, and has also been accused of police brutality in lawsuits filed against the Minneapolis Police Department.

A separate lawsuit brought by a group of black officers claimed Kroll referred to U.S. Rep. Keith Ellison, who is black and a Muslim, as a terrorist. He has denied making the remark.

**Note:** This story provides a glimpse inside union politics. From time to time, you may have to deal with changes in union leadership. Never get involved in the election. Remember that statements candidates make in the heat of a tight election may not represent intended policy in the future. Labor-management relations are adversarial by their nature.

Remain flexible and be prepared to work with whoever sits across the bargaining table.

## Pregnancy accommodations in light of *Young v. UPS* decision

On March 25, 2015, the U.S. Supreme Court issued its much-anticipated decision in addressing whether employers must provide light duty and other accommodations to pregnant employees as they do for nonpregnant employees who experience a work-related illness or injury.

The court's decision in *Young v. UPS* did not directly answer that question. Instead it provided a framework for pregnant employees challenging workplace accommodation practices under Title VII of the Civil Rights Act, as amended by the Pregnancy Discrimination Act (PDA).

### Light duty for whom?

Peggy Young, the plaintiff, worked part-time as a UPS driver. While drivers are generally required to be able to lift up to 70 pounds, the plaintiff's duties typically included carrying only letters and lighter packages.

After becoming pregnant, Young requested a leave of absence. Soon thereafter, she submitted a doctor's note restricting her from lifting more than 20 pounds, and requested light duty. UPS rejected the request, even though it regularly provided light duty or other accommodations to employees injured on-the-job and certain other categories of employees (both male and female), taking the position that its policy was facially neutral.

Young argued that the PDA requires employers to provide pregnant employees light-duty work if it provides similar work to other temporarily disabled employees.

### Burden-shifting framework

The Supreme Court did not completely adopt either party's position, instead taking a middle-of-the-road approach and holding that the *McDonnell-Douglas* burden-shifting framework applies.

It found that a worker can establish a *prima facie* case of pregnancy

bias by showing that she belongs to a protected class and sought an accommodation, and that the employer did not accommodate her but did accommodate others "similar in their ability or inability to work."

Then the employer has the burden to offer a legitimate, nondiscriminatory reason for denying the accommodation. The court noted that it generally will not suffice to "claim that it is more expensive or less convenient to add pregnant women to the category of those ... whom the employer accommodates."

Once the employer establishes its legitimate, nondiscriminatory reason, the employee must successfully argue that the employer's proffered reason is, in fact, a pretext for pregnancy discrimination. The court explained that this issue could reach a jury if the employee could show that the employer accommodated a large percentage of nonpregnant employees but failed to accommodate a large percentage of pregnant employees.

Keep in mind, however, that the ultimate burden to prove that the decision was motivated by unlawful discrimination always remains with the pregnant employee.

In the end, the court did not find that employers are automatically required to accommodate all pregnant workers just because they accommodate another nonpregnant employee. Nevertheless, it noted that employers should be prepared to justify any differences in their accommodation decisions based on legitimate business reasons beyond cost and convenience, particularly when the employer accommodates a substantial number of nonpregnant employees.

### Issues for Minnesota employers

Minnesota employers should remember that both federal and state law already provide certain protections to pregnant workers. The 2008 amendments to the ADA expanded the

### Accommodating pregnancy: What employers should do

- Review policies related to light duty and reasonable accommodation requests to ensure they are in line with legitimate business needs (not based only on cost and convenience).
- Examine past accommodation requests to determine if pregnant women are being treated disparately.
- Accommodate pregnant employees if an existing program regularly provides light duty or other accommodations to a large percentage of nonpregnant employees.
- Train managers to use an individualized interactive process examining requests for accommodation.

definition of "disability" to include pregnancy-related impairments.

Additionally, Minnesota law requires employers to reasonably accommodate pregnant employees, even when they do not have an accompanying medical condition. For example, the Minnesota Human Rights Act requires employers to provide the same benefits to pregnant women that it provides to nonpregnant employees who are similar in their ability or inability to work.

The Women's Economic Security Act (WESA), enacted last year, included additional obligations for employers to reasonably accommodate pregnant workers. WESA requires that pregnant employees be provided more frequent restroom, food and water breaks, seating and lifting limits over 20 pounds, without proof of medical necessity. Pregnant employees are also not required to accept an offered accommodation or take a leave due to pregnancy.

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# Avoiding the pitfalls of social media: DOL, NLRB implications

Social media has become part of the fabric of business as usual in many organizations. Yet it continues to raise legal liability issues that simply weren't envisioned when many employment laws were enacted.

In April, "Nuts & Bolts" addressed social media's interplay with the Fair Credit Reporting Act and the anti-discrimination laws enforced by the EEOC.

This month, the focus is on laws enforced by the U.S. Department of Labor and the National Labor Relations Board (NLRB).

**THE LAW** The key DOL-enforced laws are the Fair Labor Standards Act (FLSA) and the FMLA.

The FLSA requires employers to pay at least the federal minimum wage and pay nonexempt employees time and a half for hours worked over 40 in one week.

The FMLA provides up to 12 weeks of unpaid leave for the birth or adoption of a child, the employee's serious health condition, to care for an immediate family member with a serious health condition, or to attend to issues related to military deployment. The FMLA also provides up to 26 weeks of unpaid military caregiver leave to an employee who is a service member's designated next of kin.

The National Labor Relations Act (NLRA) addresses all issues related to union organizing and elections. Even nonunionized workplaces must abide by Section 7 of the NLRA, which bars employers from stifling discussion working conditions and pay.

**WHAT'S NEW** Social media blurs the line between being on the job and off. Casual comments that previously might have been overheard a handful of people are now effectively broadcast to a potential audience of millions. What's shared between Facebook friends—say, a manager and her subordinates—may have consequences for all parties involved.

Confusion and possible legal liability may occur when it is unclear whether someone posting on social media is speaking for the company or themselves.

**HOW TO COMPLY** Heavy-handed approaches to managing those issues—such as demanding employees' social media passwords so bosses can monitor content—don't work. They also invite lawmakers' scrutiny; 22 states have either passed or considered Internet privacy legislation in their most recent legislative sessions.

The real question, however, is why would an employer want to monitor its employees' social media accounts? The amount of time spent doing so could not possibly produce any real benefit. The more likely result: lower morale and greater legal liability.

### FLSA issues

If using social media is part of someone's job—in a marketing role, for example—the employee must be paid for that time. For nonexempt employees, that means the clock is effectively punched with the day's first post and ends with the last, possibly forcing the employer to pay overtime. If that post comes from home prior to going to work, the employee is on the clock while driving to work. If the employer asks employers to do the same after work, the same rules most likely apply.

**Advice:** Most business uses of social media are predictable. There aren't many real emergencies that require posting before or after regular hours. Use scheduling software that automatically posts at a later time or date social media messages that are generated during working hours.

If appropriate, ensure that your social media policy emphasizes that any after-hours posting on work-related items are not required and do not represent compensable time.

Also remind employees that they should not speak for the company

unless they have written permission to do so

### FMLA issues

Employers will inevitably come across information about employees' personal lives via social media. It's important to treat that information the same way you do FMLA-related information that comes from any other source. If further investigation seems necessary, you have every right to follow up to ensure that the employee is not abusing his or her FMLA rights.

In a case that drew news coverage last year, an employee who was on FMLA leave to deal with her own serious health condition posted pictures of her vacation to Facebook. She looked so healthy that her employer investigated and ultimately fired her.

### NLRA issues

The NLRA grants employees broad free-speech protections to discuss working conditions and pay. You may not want employees to discuss pay, and probably aren't wild about union organizing.

However, employers that try to discipline employees for exercising their rights will have legal problems.

Your social media policy should not attempt to restrict speech concerning working conditions. That violates the NLRA.

The National Labor Relations Board (NLRB) has been active on this front in recent years. It has repeatedly cited employers for including language that would deter a reasonable person from expressing an opinion on social media.

On the other hand, the NLRB did back an employer that fired an employee for posting plans to intentionally break workplace rules.

Consult with your attorney when contemplating social media policy or employee handbook language that restricts employee speech.



## May we remove a restaurant server from shifts because of sores on her face?

**Q**We have a server at one of our restaurants who has open sores on her face. She claims she can't get a bandage to stick to her chin, leaving the sore uncovered. As a result, we have received a few customer complaints. May we remove the server from her shifts so that we do not lose business?

**A**Possibly, but not without first engaging in further discussion with your employee.

It is not clear from your question whether the server has a health condition that is causing the sores and could be considered a disability. But given the expansive definition of "disability" under federal and state law, you will want to err on the side of caution and engage in the interactive process with the employee.

Employers may certainly restrict employees with sores on hands and arms from waiting on customers unless the employees are able to cover up the sores. An employer's right to restrict employees with sores in other locations of their bodies is a little less clear, but it is certainly understandable that you (and your customers) would have concerns that a server may inadvertently touch the sores on her face and then touch food.

Before you are quick to remove the server from service, you will want to follow up with her to get more information about why she has been unsuccessful in covering her sores.

If she responds that she has not been able to find the right shaped bandage or cannot afford bandages, the company is well advised to offer to purchase the needed items. If the server still refuses to cover the sores, it is less risky to take her off the schedule or have her work other duties (while losing out on tips) until the sores heal.

## Does FMLA apply to same-sex spouses who don't live in states that recognize same-sex marriage?

**Q**We have operations in South Dakota, and one of our employees there has requested FMLA leave to care for his same-sex spouse for an FMLA-qualified reason. The couple was married in Minnesota, but South Dakota does not recognize same-sex marriage. Should we grant the FMLA leave request?

**A**Unless your company is willing to assume significant legal risk, yes. The FMLA regulations traditionally used a "place of residence" rule to determine whether an employee has a "spouse" under the FMLA. Thus, same-sex married employees who resided in a state that did not recognize same-sex marriages—like South Dakota—were not permitted to take FMLA leave to care for their spouse.

In March the U.S. Department of Labor (DOL) issued a final rule revising the regulatory definition of "spouse," using the "place of celebration" rule. Under the new

regulatory definition, same-sex married employees would be able to take FMLA leave as long as the couple was legally married in a state that recognizes same-sex marriage, regardless of where the couple currently resides.

Four states (Arkansas, Louisiana, Nebraska and Texas) subsequently challenged the final rule, and a federal district court issued an order requiring the DOL to stay the implementation of the new regulation. However, the scope of the stay is unclear. It is uncertain whether the stay applies only to the four states as employers, extends to all employers in those four states or applies nationwide.

The DOL has indicated that under the stay it intends to enforce the "place of celebration" rule as to all employees except those who are employed by the states of Arkansas, Louisiana, Nebraska and Texas.

Accordingly, all private employers (including those in Arkansas, Louisiana, Nebraska and Texas) are well-advised to apply the new "state of celebration" spouse definition when assessing requests for family care FMLA leave unless and until the DOL changes its position on enforcement.

Of course, with the issue of same-sex marriage currently before the U.S. Supreme Court, this is an area of law that may see significant change this year.

## Must we pay for time spent preparing to work?

**Q**We have an employee who regularly comes into work a half-hour or more before her scheduled shift in order to get her work station ready and otherwise get herself set up for the day. This preparation time is important to the employee because she does not believe that she can meet the production requirements of her job without it. The employee has been told that she cannot start performing her actual job tasks until the start of her scheduled shift. Our new HR manager has advised that we must pay the employee for the time that she spends preparing for her shift, even though she had no approval to work during that time. Is that right?

**A**Your new HR manager is correct. The state and federal Fair Labor Standards Acts require you to pay your employees for all time spent working, and these statutes broadly define what constitutes compensable work.

It appears from your question that the preparation that the employee is performing is related to, and actually assists in, the furtherance of the company's business. If so, the time is compensable and should be paid, even if it results in overtime to the employee.

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