HR SPECIALIST

Minnesota Employment Law

March 2015
Vol. 8, No. 3

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

In the News . . .

Don't overpay for first shift of daylight saving time

Daylight saving time begins at 2 a.m., March 8. Graveyard-shift workers, therefore, will actually work only seven hours that day. If you pay those employees for a standard eight-hour shift, don't include the extra hour's pay when calculating their regular rates of pay to determine their overtime rates.

The extra hour's pay also isn't included when calculating the number of hours worked.

Union membership continues its slow decline

The percentage of U.S. workers who belong to a labor union fell again in 2014, dropping to 11.1%, down 0.2 percentage points from 2013. The Bureau of Labor Statistics (BLS) annual report on union membership, derived from U.S. census data, found that 14.6 million Americans are union members.

In 1983, the first year for which comparable union data are available, the union membership rate was 20.1%, and there were 17.7 million union workers.

Union members generally earn more than nonunion workers, according to Labor Secretary Thomas E. Perez. "The 2014 BLS data show that among wage and salary workers, those in a union have median weekly earnings

Continued on page 5

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.

Pick one good reason to justify firing

A poor performer may disappoint on many levels, doing lousy work *and* failing to get along with others … harassing co-workers *and* fudging time sheets. While you should document all the problems, you don't have to cite every one when you terminate the employee. Pick one and stick with it.

Recent case: Olen took a job with the IRS and was to be a probationary employee for one year. He was the only black male in a group of 32 employees. His job was to collect stacks of newly filed tax returns from a truck, perform routine coding on them and then take them back to the truck for further processing.

Soon, a co-worker went to a supervisor and said Olen had told her she didn't need to check each return. Olen's supervisor then began checking the stacks and discovered that Olen was checking some, but not all, returns. Olen denied falsifying his work and said he had processed all the documents. He received a warning and from then on, a supervisor checked all of his work.

Olen complained that he was being unfairly criticized. Soon after, he was fired for poor productivity.

He sued, alleging race and sex discrimination. He also argued that

Continued on page 2

Good records are your best defense in court

Can you explain why you terminated one employee and not another for similar conduct? Chances are, if you didn't document specific behavior and provide concrete examples of poor performance, you won't be able to explain it in court.

Resolve to improve documenting disciplinary actions now, before an unhappy former employee sues.

Recent case: Nasrin, a neurosurgery resident, was terminated for poor performance and sued for alleged sex discrimination. She claimed that the seven-year residency program had never managed to graduate a female neurosurgeon in its history and that she had been drummed out because of her sex.

The hospital that runs the program countered that Nasrin had been terminated for a series of errors, including one incident in which she allegedly incorrectly declared a patient brain dead and another when, during surgery on a highly infectious patient, she broke protocol by entering, exiting and reentering an operating room without changing gloves.

She was also cited for poor

Continued on page 2

IN THIS ISSUE

Justify firing

(Cont. from page 1)

because he was fired for one reason—poor productivity—and not for falsifying his work records, the IRS must have been looking for an excuse to fire him. Essentially, he argued that picking a different reason to fire him than the one that was originally raised was evidence that it was just a pretext for discrimination.

The court tossed out the case. It said there was nothing suspicious about choosing one of several reasons for firing Olen. (*Gibson v. Geithner,* No. 13-2817, 8th Cir., 2015)

Good records

(Cont. from page 1)

interpersonal communication, including multiple incidents in which co-workers alleged she screamed at them.

Nasrin tried to counter the hospital's discharge reasons by arguing that a male resident who had commited similar infractions had kept his job. But the hospital produced detailed disciplinary documents showing that Nasrin had far more behavioral problems and made more medical mistakes than the man did. The case was dismissed. (*Fatemi v. White, et al.,* No. 13-2536, 8th Cir., 2015)

Final note: Come up with a system that makes it easy to document workplace problems in detail. Use a checklist. Insist that supervisors write down exactly what happened and when. If there's a communication problem, have co-workers provide written statements. If the employee broke a rule, specify which one and provide a detailed summary of what she did wrong.

Feel free to survey employee attitudes—the results won't be used against you

Employers don't need to fear conducting employee surveys, even if the results may be surprising or disturbing. The results can't be used in any subsequent lawsuit as proof that discrimination or retaliation actually occurred, even if employees' survey responses say that it did.

Recent case: Cynthia, who is black, works for the Minnesota Park and Recreation Board. She was once fired by the board over allegations that she didn't do enough to prevent a subordinate from stealing. However, she was reinstated after appealing the decision.

A survey showing fear of retaliation doesn't prove it actually happens.

Still, she had a rocky relationship with superiors, leading to several suspensions for refusing to sign off on discipline against two subordinates.

The board hired an outside consultant to assess how employees viewed it. The results were surprising: The consultant interviewed employees and found that black workers reported working in fear. The report concluded:

> *There is widespread discontent and complaints about the unfavorable treatment of African American employees in particular and to some extent other employees of color. In our interviews with employees of color, it does not take long before the issues of race surface. And, when discussing these issues, people express an unwillingness to bring these issues up with their superiors for fear of punishment or retaliation. Many express fear of speaking up or of questioning practices. They assume that not only will it not be responded to but that they will also likely be punished—a climate of fear.*

At a subsequent public budget meeting, Cynthia asked whether money was being allocated to address the issues the consultant identified. She was told to ask those questions in private.

Subsequently, she sued, alleging that her performance review was downgraded and that she was retaliated against for exercising her First Amendment rights during the public meeting.

In court, Cynthia tried to have the consultant's report admitted as evidence that the board discriminated against black employees by punishing them for speaking up.

The court said she couldn't use the report as proof of a custom and practice. Instead, the report merely showed that some black employees *believed* that to be the case. Their belief, even if widespread, wasn't evidence that a custom or practice actually exists. The court said that while the survey reflected employee fears of punishment for speaking up, it did not demonstrate a correlation between employees who spoke up and instances of retaliation. It said employees' assumption that they would be punished wasn't enough to prove actual retaliation. The court dismissed that claim. (*Wilson v. Miller, et al.,* No. 13-2286, DC MN, 2015)

Final note: Don't fear a survey. They can be valuable in identifying potential problems. What you do with the information is up to you. Obviously, if many employees express fear of reprisal for speaking up, reporting discrimination and harassment or other protected activity, you may want to see whether that fear has any basis in reality. Use the survey results to look at how you discipline workers. If you see a pattern, fix the problem.

Challenge unemployment by showing worker was fired for misconduct

Employees terminated for misconduct aren't eligible for unemployment benefits. That's because engaging in misconduct is something within the worker's control; absent misconduct he or she would still have the job.

If you fire an employee for misconduct, you can often successfully challenge unemployment benefits—as long as you can document the misconduct.

Recent case: DuWayne, a maintenance worker, received a copy of his employer's safety manual when he was hired. While operating a pallet jack incorrectly, he nearly collided with a forklift. He was warned for not paying attention. A few months later, when he again almost collided with a co-worker, DuWayne got another warning, this time for being unaware of his surroundings. Then, when he was observed walking under a raised forklift load, he was informed that any more safety violations would mean termination.

About a year later, DuWayne stepped out of an aisle without looking and was almost run over. Later the same day, he operated a pallet jack incorrectly and nearly ran into a forklift. He was terminated.

DuWayne applied for unemployment benefits.

He was turned down after his employer presented evidence of the many safety violations. It didn't matter that no one had been hurt. What mattered was that DuWayne repeatedly ignored safety rules. That was misconduct, which disqualified him from the benefits. (*Fries v. Ozark Automotive Distributors,* No. A-14-0659, Court of Appeals of Minnesota, 2015)

Good intentions don't matter: You'll pay if you compensate men and women differently

Employers that don't pay men and women the same for substantially identical work violate the Equal Pay Act (EPA). The employer's intent doesn't matter. What matters is that the pay is unequal. The EPA is a strict liability statute, as one of the world's most gender-equitable nations learned when it was sued in Minnesota.

Recent case: When the Royal Norwegian Embassy decided to hire two professionals in Minnesota to act as Norway's representatives to education and business interests in the United States, their search found two candidates—a woman and a man.

Ellen was offered the education position. Anders, the man, was offered the business position. Ellen had lived in Norway for 20 years and spoke fluent Norwegian. Anders, on the other hand, did not speak Norwegian and had never even been to Norway.

Both jobs required equal skill, effort and responsibility but Ellen was offered a far lower salary than Anders. She also didn't receive health insurance benefits for her partner or her children, while Anders did.

When Ellen began questioning the differences, the embassy argued that Anders, unlike Ellen, was the head of a household with a dependent spouse and needed more money for day care expenses.

Unsurprisingly, Ellen sued for EPA violations.

The embassy's pay plan did not go over well with the court, which found that it violated the EPA even if it didn't intend to discriminate on the basis of sex. (*Ewald v. Royal Norwegian Embassy,* No. 11-CV-2116, DC MN, 2014)

Legal Briefs

No do-overs for employee who files serial suits

An employee who loses a lawsuit over her termination can't revive the litigation a second time just by coming up with a second claim that could have been raised earlier.

Recent case: Robin was a tenured law professor when she was charged with state income tax violations. She was suspended pending resolution of the criminal case and terminated after a jury found her guilty.

She filed a lawsuit challenging the suspension, which she lost. Robin then tried a different approach, filing a second lawsuit alleging that her former supervisors illegally interfered with her employment contract.

The court dismissed the second lawsuit, too, after concluding that it involved the same facts as the first and that Robin could have made the second claim during the first lawsuit. (*Magee v. Hamline University, et al.,* No. 14-1699, 8th Cir., 2015)

NLRB: Workers get to decide on locations to be unionized

If you are in the health care industry and have several facilities, it might be convenient to have one union represent all your employees. Just don't expect the National Labor Relations Board (NLRB) to buy that argument.

It's likely to approve a union election for one facility if that's what a union seeking to represent the employees proposes.

Recent case: When a union petitioned to represent emergency medical technicians in three skill categories at one facility, the employer argued that the union should have to represent employees across all the employer's facilities.

The NLRB disagreed and concluded that the relevant employees at the single facility should decide whether they wanted the ultimate say in union representation of their interests. (*Healtheast Care System v. International Association of EMTs and Paramedics,* No. 18-RC-142171, NLRB, 2015)

7 steps to protect against electronic sabotage by former employees

Not all terminated employees go quietly. Some rant and rave about unfairness. Others plead for a second chance. So when an employee seemingly accepts his or her termination without protest, employers typically let out a sigh of relief. Not so fast. Just a few taps on the keyboard by a vengeful former employee can cause crippling damage to your workplace.

A survey by security software firm Cyber-Ark found that 35% of more than 400 senior IT professionals believe competitors have gained access to their company's highly sensitive information. The culprits, according to 37%: disgruntled former workers.

Being fired can bring out the worst in the best of people. Hard as it is to believe that any of your staff would be saboteurs, it pays to err on the side of caution.

Here are seven tips to help prevent a disaster:

1. Ensure the firing isn't a surprise, whenever possible. One that comes as a shock will be cause more anger than one preceded by warnings, progressive discipline and counseling.

2. Revoke the employee's network access, invalidate passwords, etc., before the termination meeting.

3. Carry out the termination in a neutral location such as a conference room. *Reason:* If you terminate the employee in his or her own workspace, he or she could immediately sabotage the company's network or files.

4. Keep an eye on employees while they collect their belongings. Don't leave them alone in their workspace unless you've already taken steps to prevent copying, deleting or infecting important and confidential files.

5. Don't let a terminated employee bring home company-owned devices. If an employee claims to have personal information saved on company equipment, require him or her to copy the files to a CD while on site and under management supervision. Then, before the employee leaves, have IT inspect the equipment to make sure no files other than personal ones have been accessed.

6. Require remaining employees to change their passwords following the termination of a co-worker. Remind employees of these additional security measures:

- Keep passwords secret. Do not willingly share them with anyone other than IT.
- Log out of the network when away from your desk.
- Invent passwords that are hard to decipher. Don't use your dog's name or any other personal information that your colleagues may know. Use a combination of letters, numbers and symbols.

7. Offer terminated employees a helping hand, such as outplacement services, if available. A kind gesture can go a long way in defusing the anger that could cause electronic sabotage.

Tech Catch 22: Firing IT manager requires special security measures

IT might be entrusted with managing the company's electronic security, but they shouldn't be above suspicion in cases of e-sabotage.

Small employers occasionally find that when terminating an IT manager, no one else knows how to disable his or her access to the company's network. *Solution:* Engage an IT consultant to handle this. They can look for and shut down remote access and backdoors that the manager may have installed.

Consider terminating the manager off-site, such as at an informal lunch meeting, and not allowing access to the office to pick up personal items until the next day.

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

Production Editor: Nancy Asman

Publisher: Phillip Ash

Associate Publisher: Adam Goldstein

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

Vol. 8, No. 3

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

Muslim workers sue Hertz MSP branch for bias

The Hertz car rental operation at Minneapolis-St. Paul Airport faces charges it discriminated against Muslim employees and harassed them. The employees, who worked cleaning vehicles, claimed managers would routinely walk in on their prayers demanding to see the employees' badges.

They also claim managers made disparaging remarks about Islam and imposed higher standards on practicing Muslims than other employees.

According to one of the plaintiffs, the workers had no problems until 2007 when new managers began harassing them. Many of the Hertz workers are of East African heritage.

Six former workers are seeking class status after filing individual EEOC complaints alleging illegal activities from 2008 to 2011. An EEOC investigation determined the workers were "harassed and terminated" because they are black, Muslim or both, and were fired in retaliation for opposing discrimination.

The EEOC issued the fired workers "right to sue" letters, but elected not to sue on the workers' behalf.

The plaintiffs also allege managers changed an existing prayer policy, restricting prayers to specific times and forbade workers from praying on their lunch break. They say management required Muslims to sign the policy, which stated that failure to abide by its terms could result in discipline. All six refused to sign it.

Note: Title VII of the Civil Rights Act requires employers to make reasonable accommodation of employee's religious practices. Employers that refuse or change an accommodation that appears to be working must demonstrate that the accommodation would create an undue hardship on their business operations.

Unions' slow decline

(Cont. from page 1)

of $970, compared to $763 for those not in a union," he said. "That's not pocket change—it amounts to greater than $10,000 a year more for union members."

Continuing a pattern that goes back decades, government employees have a union membership rate (35.7%) more than five times higher than that of private-sector workers (6.6%). Teachers, firefighters and police officers are among those most likely to belong to a union.

In the private sector, industries with high unionization rates included utilities (22.3%), transportation and warehousing (19.6%), telecommunications (14.8%) and construction (13.9%).

Target shoots self in foot with leaked HR doc

The website Gawker.com has published yet another embarrassing internal document from retail giant Target's HR shop.

This one, leaked by employees of the Minnapolis-based company, instructs managers on how to talk to the four generations working in Target stores: veterans, baby boomers, generation X and generation Y. What could possibly go wrong? Plenty.

The document includes a matrix that purports to explain how each generation views a variety of work-related issues. Categories include work style, authority/leadership, communication, recognition and reward, work/family/life balance, loyalty and views on technology.

The problem: The guidelines come across as patronizing to all ages, but older workers in particular. It says so-called veterans are "slow to adapt to change," "rarely question authority" and see technology as "complex and challenging." Such descriptions are pure gold to plaintiffs' attorneys who represent older workers alleging discrimination. They make it easy to persuade jurors that management treats workers differently based on age.

The latest leak follows the similar disclosure of another stereotype-laden document telling Target bosses how to manage women and minority groups.

Workers sue Bloomington restaurant for reverse bias

Panchero's Mexican Grill in Bloomington faces charges it fired white workers who worked as line cooks because of their race. The fired workers claim managers openly stated they preferred white workers for management jobs, but wanted only Mexicans for line positions.

According to a fired general manager, the company justified the policy by stating that Mexicans "work hard" and "don't complain about wages." The manager claims she was fired for refusing to implement the discriminatory policy.

The workers sued Panchero's and Lamont Cos., the South Dakota firm that owns the restaurant. Lamont had moved to be dismissed from the case, but the federal judge hearing it refused, stating it was too early to determine whether the company could be considered an employer.

Note: Employers cannot segregate positions by race, ethnicity, national origin or any other protected class. Doing so violates Title VII of the Civil Rights Act.

St. Paul mayor touts paid leave before State of the Union

St. Paul Mayor Chris Coleman talked up the city's paid leave program at the White House just ahead of President Obama's State of the Union. Effective Jan. 1, city employees may now take paid leave for the birth or adoption of a child. Birth parents receive four weeks of paid leave.

Coleman claims the policy will cost the city $200,000 annually, but says the city will make that back in lower turnover, an advantage he says government has over the private sector. He told the White House press corps, "Everyone says you should run government like a business. We'll never be able to offer the benefits that Google does ... but this helps."

by Susan Fitzke, Sarah Gorajski and Bill Parker, Esqs., Littler Mendelson, Minneapolis

Weigh EEOC guidance when considering criminal histories

In April 2012, the EEOC issued comprehensive guidance addressing the use of an applicants' criminal history in hiring, which it further clarified in March 2014. The guidance offers details and hypotheticals regarding situations when excluding an applicant based on his or her arrest or conviction record could constitute discrimination based on race or national origin in violation of Title VII.

The guidance and litigation that the EEOC pursued in its wake made employers and HR professionals worry about whether, when and how they can rely on conviction histories when making employment decisions.

What EEOC's guidance is …

The EEOC's guidance examines problems with categorically excluding applicants from employment consideration based on criminal history, and suggests some solutions.

For example, the guidance notes that discrimination based on criminal history is not illegal under federal law. However, it can become a form of racial or national-origin discrimination when it reflects "disparate treatment" or has a "disparate impact."

Disparate treatment occurs when two individuals with the same or similar criminal histories are treated differently because of their race, national origin, gender or other protected class.

Disparate impact arises when a neutral policy excluding applicants with criminal records affects certain groups more than others, regardless of employer motive.

The EEOC cites studies finding that, for example, Hispanic and black men are arrested, convicted and imprisoned proportionally more often than white men. The EEOC argues, therefore, that a policy excluding applicants with certain criminal histories may violate Title VII, unless the employer shows its policy does not have a disparate impact, or can prove the exclusion is related to the job and "consistent with business necessity," considering: (1) the nature and gravity of the offense, (2) the time that has passed since the offense and/or completion of the sentence and (3) the nature of the job.

The EEOC recommends a general individualized assessment process for employers wishing to implement exclusionary policies. The policy should, among other things, be limited in time and give excluded individuals an opportunity to demonstrate that they should not be excluded.

The guidance notes arrest records are not reliable evidence that someone commited a crime. Therefore, arrest records should not be used in making employment decisions.

… And what it isn't

The EEOC's guidance is not legally binding and employers may not legally be required to follow it. It is not a declaration that all employment decisions that consider a criminal history must meet the EEOC's desired "job related" and "consistent with business necessity" standards. Rather, the guidance is simply the EEOC's opinion about how employers that wish to use a conviction record in making employment decisions should go about doing that. It need not be used in all cases.

Use of a process consistent with the EEOC guidance may help defend against lawsuits that argue that an employer's policy and practice of using conviction records in hiring has a disparate impact on a protected class.

Must I hire that criminal?

Employers can still decide whom they wish to employ, as long as those decisions and the decision-making method do not amount to prohibited discrimination.

Of course, automatically excluding applicants with criminal histories may be subject to challenge. However, there is nothing unlawful in Minnesota, in and of itself, about refusing to hire an individual upon consideration of that individual's criminal history, even where that history has no connection to the job.

When reviewing an applicant's criminal history and making a hiring decision, employers should assess whether there is any real legal risk that refusing to hire based on a conviction record could create legal challenges. For example, employers may find that the legal risk of refusing to hire someone convicted of some socially undesirable crime that nonetheless has nothing to do with the job in question poses no real legal risk.

Finally, it is important to remember that different states have different rules. Wisconsin, for example, requires that a conviction be substantially related to the job in question if it is the basis for a refusal to hire.

In Minnesota, however, employers may make sound, risk-management-based business decisions in hiring, based on legitimate considerations regarding an applicant's criminal history.

When in doubt, skilled legal counsel can help you navigate your legal obligations and properly assess the risk associated with a refusal to hire based upon an applicant's conviction history.

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

When to use leave as an accommodation for disabled workers

The U.S. Department of Labor-sponsored Job Accommodation Network (JAN) has published new guidance on using leave as an accommodation under the ADA.

The publication, *Leave as an Accommodation*, is part of JAN's Accommodation and Compliance Series. Access it **askjan.org/topics/leave.html**.

THE LAW The ADA requires employers to provide reasonable accommodations to qualified disabled employees or applicants unless doing so would pose undue hardship on the employer.

Sometimes the best accommodation is providing the employee with leave.

Some leave may fall under the FMLA, which entitles certain employees to up to 12 weeks of unpaid leave to recover from a serious health condition.

HOW TO COMPLY Employers are sometimes confused about when to grant leave as an accommodation. The goal of leave is "to provide job-protected time in order to enable a qualified employee with a disability to manage his or her medical impairment and ultimately remain in the workforce." Examples of appropriate use would be to:

- Attend medical appointments related to an episodic or chronic medical impairment such as diabetes, asthma or bipolar disorder
- Obtain medical treatment such as chemotherapy, physical therapy, surgery, counseling and dialysis
- Recuperate from illness or surgery, or a flare up of symptoms associated with an episodic or chronic medical impairment such as multiple sclerosis, epilepsy or a back condition.

ADA or FMLA

When an employee has a condition that qualifies as both a disability (ADA) and a serious health condition (FMLA), the guidance advocates using FMLA leave first, assuming the employee is eligible and has unused leave. That's because the FMLA is often simpler to administer.

As long as the condition qualifies as a serious health condition, it is not necessary to determine whether the employee is disabled for ADA purposes until all FMLA leave has been used. However, when employees exhaust their FMLA leave and still can't return to work, leave as an accommodation under the ADA comes into play.

Accommodation leave is generally unpaid, but employees who have paid leave available may use it in accordance with an employer's leave policy.

Manage accommodation leave

The ADA does not require providing indefinite leave. When requesting medical certification of the need for leave, ask for an anticipated return-to-work date.

Courts disagree about how long employers should allow a worker to take leave. Some have ruled that six months is the maximum; others, one year.

Employers may only deny leave if they can demonstrate that granting the leave constitutes an undue hardship. Each employer's situation is different, but the factors involved in the analysis include:

- Inability to ensure enough employees to accomplish the work
- Failure to meet work goals or adequately serve customers
- The need to shift work to other employees, preventing them from doing their own work or imposing significant additional burdens on them
- Incurring significant additional costs when other employees work overtime or when temporary workers must be hired.

Never deny any accommodation request without performing this analysis. Courts will demand to see the employer's reason for denying the leave.

Intermittent leave

Leave used for accommodation purposes can be intermittent. Intermittent leave allows employees to attend medical appointments or take time off for conditions that flare up from time to time.

Employers are permitted to obtain medical certification of the need for intermittent leave.

Your obligations during leave

Employers are required to hold the employee's position open while he or she is on leave. If you can demonstrate that holding the position open is an undue hardship, you can transfer the disabled employee to an equivalent position for which the employee is qualified for the duration of the leave.

Similarly, if you provide health coverage to your employees, you must keep the disabled employee on the insurance rolls throughout the accommodation.

You may have to modify your attendance policy as part of the accommodation process. For example, disciplining an accommodated employee under a no-fault attendance policy would violate the ADA and possibly the FMLA. Both laws bar employers from punishing employees for taking legitimate leave.

Individualized assessment

The ADA requires employers to individually assess each employee's situation to determine the best course of action.

Leave is a good accommodation choice if it does not create an undue burden on the employer and provides enough time for the employee to recuperate and return to work.

Document each accommodation decision along with the employee's condition at each stage of the process in order to withstand any potential court challenge.

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

When new employee quits, can we deduct vacation time she took but never earned?

Q We permit our employees to take two weeks of advanced vacation before accruing vacation hours. When an employee takes advanced vacation, we typically reduce the employee's negative vacation balance as the employee later accrues vacation. Unfortunately, we recently had an employee quit before accruing sufficient vacation time to correct her outstanding balance. May we deduct the negative balance from her final paycheck?

A This can be a very frustrating situation. In Minnesota, you cannot deduct from an employee's paycheck for a negative vacation balance (or other indebtedness) unless the employee voluntarily provides written authorization for the deduction after the indebtedness is created, setting forth the amount to be deducted from the paycheck.

The deduction cannot exceed the amount established by Minnesota's garnishment laws and it cannot cause the employee's pay to fall below minimum wage. Minnesota employees may not authorize paycheck deductions at the time the vacation advance is provided or pursuant to any generally applied policy.

State laws vary on this issue so the best course is to consult with legal counsel for guidance.

Must we provide a place where our customers can pray?

Q A customer was in our sales showroom in the process of purchasing merchandise when he asked his sales person to provide him with space where he could pray while the sales person finalized the paperwork. Our sales person was surprised by the request but ended up providing the customer with an empty office. Do we need to accommodate a similar request in the future? We would, of course, accommodate a prayer request from one of our employees. But we have concerns with leaving a customer unattended in our office area.

A Your security concerns are certainly understandable, but unfortunately, there is no clear and easy answer here. Your showroom is likely a place of public accommodation under Minnesota law; therefore, you may not discriminate on the basis of religion.

However, there is currently no federal or Minnesota law containing explicit language requiring an employer to provide customers with religious accommodations, such as a space for prayer.

That said, the Minnesota Department of Human Rights has taken the position that employers must provide religious accommodations to customers. Given the uncertainty in Minnesota law, it is advisable to err on the side of accommodating the customer's request, if possible, particularly where the burden of doing so is relatively low.

There is certainly no requirement to provide a customer with access to a room containing unsecure confidential and proprietary information. It may be in your best interest to provide use of an empty, secure conference room or office, if available.

As the facts of your particular situation may be unique, you should consult with an attorney to determine the best course of action to take.

Can we make employees pay for new uniforms?

Q We had to provide an employee with a replacement uniform shirt after he lost the one we gave him when he was hired. Can we require him to pay for this replacement by taking it out of his pay?

A The short answer to your questions is it depends. Minnesota employers may require employees to pay up to $50 toward the cost of a uniform, as long as that $50—whether it is deducted from the employee's pay or advanced another way—does not cause the employee's wage to fall below the minimum wage.

This uniform fee must, however, be paid back to the employee at the time of the employee's termination of employment. While the employer may ask the employee to return the uniform, repayment of the uniform fee is not contingent on the uniform's return.

Furthermore, it is important to note that you may charge the employee only up to $50 for the uniform regardless of its actual cost, or the number of uniforms you must provide. In other words, you should not charge the employee $50 per uniform or—in this case—shirt provided.

That said, if the uniform provided is lost, stolen or damaged by the employee, then the employer may deduct the cost of the uniform from the employee's wages, provided the employee, after the loss has occurred or the claimed indebtedness has arisen, voluntarily authorizes the employer in writing to make the deduction.

Any authorization for a deduction must set forth the amount to be deducted from the employee's wages during each pay period where a deduction will be made. Such a deduction would not be appropriate in the case of normal wear and tear on a uniform.

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

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