

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

In the News

Target to cut 1,400 HQ jobs, employees email complaints

Target, the country's third largest retailer, has announced it will cut 1,400 jobs from its Twin Cities' headquarters. Falling sales, losses from an unsuccessful expansion into Canada and last year's massive data breach have been cited as reasons for the downsizing.

Several headquarters employees have sent anonymous emails to the online site Gawker.com describing dysfunctional management and poor morale in the ranks. Among the allegations: that Target values personality over performance, has ineffective promotions processes and doesn't invest enough in digital infrastructure. Most likely the latter point contributed the devastating data breach.

Other emails claim that stores often retaliate against employees who file sexual harassment complaints.

Note: The harassment allegation bears particular notice. Retaliation and failure to address harassment complaints are often symptoms of a dysfunctional workplace culture in which employees are not held accountable for their actions.

Retaliation hits record: Alert bosses to risk

While employees filed fewer charges of job discrimination in 2014 than the year before, one new statistic

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Use trial accommodation to test feasibility

Do you worry that starting accommodations for a disabled employee may mean you have to continue them indefinitely? Relax.

In fact, a trial accommodation may actually benefit employers in the long run. If the accommodation turns out to be disruptive, impractical or more costly than you thought it would be, you can stop it.

Recent case: Mark worked as a cable installer supervisor for over 30 years when he began having seizures. His job required him to use a company car to visit work sites and inspect installations. After he had his first seizure, state law dictated that he couldn't drive for six months.

Mark asked to ride with others as a reasonable accommodation, which his employer, Mediacom, OK'd. He was warned, however, that this was a trial accommodation and that Mediacom was only making it because it hoped he would soon be able to drive again.

But then Mark had a second seizure, extending his driving restriction. The company continued the accommodation. Eventually, Mark got his license back, but lost it again a few months later following a third seizure.

Mediacom analyzed the accommodation and concluded it could not

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Routine medical care doesn't trigger FMLA

The FMLA is supposed to protect employees from losing their jobs when they can't work due to a serious health condition. Minor maladies such as colds, headaches and body aches usually aren't enough to merit protected leave. That's true even if the employee goes to a doctor and gets a prescription, unless the health care provider also tells the worker to return within 30 days for a follow up or otherwise actively monitors the illness.

Recent case: Kendrick told his supervisor that he had a terrible headache, blurred vision, back and

neck pain and generally didn't feel well. He left work and went to a clinic for a checkup. There, a doctor told him his blood pressure was high and prescribed blood pressure medication. The doctor told him to follow up at some point in the future with his family doctor, but didn't specify when to do so. More than 30 days later, Kendrick did go to his family doctor, who said his blood pressure was normal. He was advised to get more exercise. The prescription wasn't renewed.

Before that second visit, however,

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Trial accommodations

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continue offering it because it was disruptive, required others to work additional hours and interfered with getting work done. Instead, it offered to transfer Mark to another job at a different location, which would not require driving.

Mark said the new job required a commute he couldn't make. The employer countered that there were other employees who commuted from Mark's town who could give him a ride. Mark turned down the transfer and was terminated.

He sued, alleging his accommodation should have been continued.

The court disagreed. It said the employer had shown the trial accommodation wasn't reasonable and dismissed the case. (*Minnihan v. Mediacom*, No. 14-1109, 8th Cir., 2015)

FMLA & routine care

(Cont. from page 1)

Kendrick was fired for missing work. He sued, alleging his time off should have been covered by the FMLA and therefore should not have counted against him.

The court disagreed. It noted that FMLA regulations define a serious health condition as a condition that requires two or more doctor visits within 30 days, or one visit plus a regimen of supervised prescription treatment. Kendrick wasn't told to have a second visit within 30 days, nor did the clinic doctor tell him to report any problems or return for a consultation within a specific time frame. The case was dismissed. (*Johnson v. Wheeling Machine Products, et al.*, No. 13-3786, 8th Cir., 2015)

Wrong classified employees as exempt? Don't take shortcuts when fixing your error

Employers must follow strict rules if they want to rectify misclassification of employees and make up their unpaid overtime. Don't expect to just cut them a check and put a note on the paystub.

Instead, be sure to get the Department of Labor's (DOL) approval of both the amount of pay due and the language of your waiver. If you don't get this right, employees who go to court will be entitled to double their unpaid wages—plus attorneys' fees. That can dramatically increase how much your mistake will cost you.

Recent case: Jennifer was one of a group of employees who worked for ActionLink as brand advocates for LG appliances. They visited 20 stores per week to provide information on the appliances and generally try to persuade customers and salespeople that they were a good value.

ActionLink classified the employees as exempt and expected them to work 60 or more hours per week without additional pay over their salaries, about \$42,000 per year.

One of the advocates asked the DOL to determine whether the employees were properly classified. It concluded they were hourly employees who should have been nonexempt.

ActionLink worked with the DOL to determine how much the employees were owed—without the double-pay penalty the law allows.

The company cut checks and distributed them. Above the checks it included a note that said, "By cashing this check, the employee to whom [it] is made is agreeing that he or she has received full payment" of wages earned, including minimum wage and overtime, up to the date of the check. Many cashed the checks.

Later, the employees sued, alleging they hadn't realized they might be entitled to double damages plus attorneys' fees. They claimed the disclaimer was not valid because it hadn't been approved by the DOL

How to settle wage claims following reclassification

Here's how to properly pay employees who were incorrectly classified:

- Work through your attorneys to determine which employees were misclassified.
- Prepare a breakdown of the wages you believe were owed and provide a copy to your attorneys for DOL review. Your attorneys can provide the waiver language that will satisfy the DOL and will determine the scope of DOL involvement.

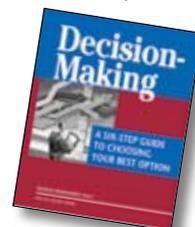
investigator, since he was on vacation when the checks were printed and sent out. He apparently later did approve the language.

The court refused to toss out the claims. It reasoned that because the DOL hadn't pre-approved the check amounts or the disclaimer, and because the language was different than what was on the official DOL disclaimer, the employees had a right to sue for attorneys' fees and double damages. (*Beauford, et al., v. ActionLink, et al.*, No. 13-3265, 8th Cir., 2015)

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Promoting employee: Yeah, that probably doesn't count as retaliation

It's considered protected activity when employees complain about harassment based on ethnicity or other protected characteristics such as sex, race or religion. That means employers can't retaliate against employees for having filed a harassment complaint.

Now a court has clarified the obvious: Promoting an employee isn't retaliation.

Recent case: Dimple, who is of East Asian descent, worked as a staff pharmacist for a CVS store. She complained that other staff pharmacists called her the "little Indian lady," and the district manager criticized her Indian clothing as unprofessional. She said another manager remarked that she was so "bossy" that she "might as well be from Germany."

Even so, Dimple asked for a promotion to store pharmacy manager.

CVS found her a store, promoted her, gave her a salary increase and allowed her to work the new job on a three-day schedule.

Soon, however, it became clear that Dimple was having trouble in her new role. The pharmacy was messy, inspections revealed that drugs were improperly stored and messages on the pharmacy voice-mail piled up. She was placed on an improvement plan and eventually fired when things didn't get better.

That's when Dimple sued for retaliation, alleging that the promotion had been a set-up for her to fail.

The court tossed out her claim. It noted that since the promotion improved her working conditions, came with more money and accommodated her schedule request, it was hardly punishment. (*Jain v. CVS*, No. 14-1498, 8th Cir., 2015)

Court spots the problem: Troubleshooting complex machinery isn't exempt work

With technological advances, just about every job involves using computers or computerized machinery. That doesn't mean an employee whose job it is to repair such equipment is an exempt computer professional. Fixing things like printers and copiers—even the most technologically advanced ones—is hourly work, making the employee eligible for overtime.

Recent case: Charles worked as a field service engineer for Stratasy, a company that develops, sells and services 3D printers. He worked from his home and traveled to customers to install, repair and service the complex computer-operated, software-driven devices. Stratasy classified field service engineers as exempt.

Charles sued, alleging he was really an hourly worker.

Stratasy argued that since Charles

had to figure out what was wrong with the printers and fix them, he was either exempt under the administrative exemption or a combination of administrative and computer professional classifications.

But Charles explained to the court that he really just used guidelines the company provided to determine what was wrong with the equipment, much as any other blue-collar technician might. The court sided with Charles and determined he was entitled to overtime as an hourly employee. (*Longlois v. Stratasy*, No. 13-CV-3345, DC MN, 2015)

Final note: The court also had harsh words for Stratasy because it didn't keep track of its field service engineers' hours worked. That means Charles will have considerable leeway to prove how many hours per week he worked.



Erratic behavior doesn't necessarily signal disability

Just because an employee behaves erratically at work doesn't mean her employer ought to figure she is disabled and in need of accommodation. It's up to the employee to indicate that she is disabled.

Recent case: Marissa received generally good performance reviews, but then her behavior began to change. She shouted at co-workers and sometimes spoke unintelligibly. During one meeting, she began scribbling gibberish on the white board while giving a talk. Co-workers complained and Marissa's boss suggested she take leave.

She went out on FMLA leave, received treatment for bipolar disorder and returned to work. However, she never revealed her diagnosis. When Marissa's symptoms returned along with poor behavior, she was fired.

She sued, alleging her employer should have known she was disabled. The court tossed out the case, reasoning it was up to Marissa to raise disability and ask for help. (*Walz v. Ameriprise*, No. 14-2495, 8th Cir., 2015)

Transfer worker to forestall constructive discharge claim

Employees who feel so harassed that they have no choice but to quit can still sue as if they had been fired. That's called constructive discharge.

But if an employee claims she's being harassed, you can transfer her. That way, it's much harder for her to argue that she had no choice but to quit.

Recent case: IRS employee Rosina, who is black, alleged that her co-workers and supervisors created a racially hostile environment by called her "Aunt Jemima" and a "slave." When a co-worker allegedly pulled a knife on her, she was immediately transferred.

Rosina quit three days later and sued, alleging constructive discharge. The court dismissed her claim, reasoning that she hadn't given the transfer a chance. She was, however, allowed to continue her hostile environment claim. (*Bennett v. Lew*, No. 12-CV-2829, DC MN, 2015)



National-origin discrimination: What managers need to know

The rapidly increasing diversity of the U.S. workforce requires all managers to be aware of their legal responsibilities when dealing with applicants and employees from different races, ethnic groups and religions.

Title VII of the Civil Rights Act forbids job-related bias based on a person's physical, linguistic or cultural traits associated with a national-origin group.

How this form of bias is defined

The law makes it unlawful for employers to treat someone less favorably because he or she (or his or her ancestors) is from a certain place or belongs to a particular ethnic group. Beware job bias based on any of the following:

- 1. Ethnicity**, whether for belonging to an ethnic group or for not belonging to a particular group.
- 2. Physical, linguistic, or cultural traits** involving characteristics linked to a national-origin group (e.g., traditional African attire).
- 3. The perception** that a person belongs to a particular ethnic group.

Beware English-only rules

Establishing language restrictions in the workplace isn't automatically illegal. However, depending on how restrictive the rule is and your reason for it, an English-only rule could be seen by a court as discriminatory.

Before requiring employees to speak only English, examine the reasons why. Does it solve a legitimate business need? Is it unduly restrictive? Could it cause more harm than good? English-only rules must be justified by "business necessity" based on the need to operate safely or efficiently. For example:

- For communications with customers, co-workers or supervisors who speak only English
- In emergencies or other situations in which workers

The EEOC's view: National origin & harassment

Federal law forbids national-origin discrimination when it comes to any aspect of employment.

That includes hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits and any other term of employment.

The EEOC also says:

"It is unlawful to harass a person because of his or her national origin. Harassment can include, for example, offensive or derogatory remarks about a person's national origin, accent or ethnicity. Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted)."

- must speak a common language to promote safety
- For cooperative work assignments in which the English-only rule is needed to promote efficiency
- To enable a supervisor who speaks only English to monitor performance.

Can a thick accent justify not hiring?

In many situations, accent discrimination and national-origin lawsuits go hand in hand, especially when it comes to hiring practices. But when the two can be separated by bona fide occupational qualifications, you stand a strong chance of defending your actions.

The EEOC says hiring managers "may not base an employment decision on an employee's foreign accent, unless the accent seriously interferes with the employee's job performance."

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UM-D women's hockey coach's firing leads to Title IX lawsuit

Shannon Miller is one of the most successful coaches in NCAA women's hockey history, but the University of Minnesota-Duluth concluded she and her all female coaching staff were a luxury it could no longer afford. Citing budgetary reasons, UM-D announced it would not renew their contracts.

Miller has responded with a lawsuit claiming the firings are more about bias than budgets. She notes that her five national titles justify her \$215,000 salary. Male coaches in the same conference make less than Miller, but do not have her track record. Miller is among only a few openly gay NCAA coaches, and may claim bias based on her sexual orientation as well.

UM-D claims the women's hockey program lost \$1.4 million last year.

Retaliation claim record set

(Cont. from page 1)

from the EEOC should make HR and employers stand up and take notice: More than two in five charges last year (42%) alleged some form of retaliation against the employee for pursuing the discrimination claim.

That percentage is an all-time high and retaliation is now the most common EEOC complaint, ahead of race, sex and age discrimination claims.

Advice: Make sure managers know it's unlawful to try to "get back" at employees who complain about discrimination, safety or financial violations.

The EEOC says employers "may not fire, demote, harass or otherwise retaliate against an individual" for filing a job-bias complaint—either internally or to a government agency.

Final note: Expect retaliation cases to grow. Juries and judges are much more receptive to retaliation claims than other job-bias complaints. Also, Congress and state legislators have created several new statutory protections for whistle-blowers in recent years.

New white-collar OT rule could double salary basis

The Department of Labor's much-delayed, anxiously awaited rewrite of the federal rules governing white-collar overtime pay should happen in May or June, according to agency watchers in Washington.

The department is revising the Fair Labor Standards Act's (FLSA) executive, administrative and professional exemptions for the first time since 2004. The effort, which has taken over a year, is nominally intended to "update and modernize" the white-collar exemptions. *The likely effect:* Millions more managerial employees will be eligible for overtime pay.

Based on HR industry buzz, look for these changes:

- **The salary basis** of the Fair Labor Standards Act could more than double. The cutoff beyond which many white-collar workers are no longer eligible for overtime will be substantially higher than the current \$455 per week (\$23,660 per year). The new salary basis is likely to fall somewhere between \$40,000 and \$50,000 per year.
- **The duties test**—which until now has ruled out overtime pay for employees who perform even one of the exempt duties of an executive, administrative or professional employee—will soon become much more employee-friendly. One scenario reportedly under consideration: requiring overtime pay unless managers spend at least half their workweek doing managerial tasks.

Advice: Start planning now for the rule's upcoming release. It's not too soon to begin a review of your employee classifications and job descriptions. *Your goal:* Determine how your pay systems will be affected if many exempt employees suddenly become nonexempt.

Timing note: If the new rule is released by June, expect it to go into effect in August 2016.

Hibbing School District caught between DHR and arbiter

Hibbing High School postponed the arbiter-ordered return of a fired assistant principal after parents and the state Department of Human Rights weighed in. DHR had concluded the assistant principal had probably discriminated against female students during his tenure.

He had appealed his firing to an arbiter who ordered him reinstated with pay, claiming the district lacked sufficient evidence to fire him.

Parents allege the man would pull female students from class to discuss sensitive personal matters and possible dress-code violations. The charges did not include any sexual harassment allegations.

DHR Commissioner Kevin Lindsey stated the school district was "failing to protect its students" because it failed to appeal the arbiter's decision. DHR has sent the matter to the attorney general's office for possible action.

Attorneys for the assistant principal labeled the charges as "people spreading rumors about him and attempting to ruin him and make his life miserable."

Patient suicide raises staffing issues at St. Peter facility

The union representing workers at the Minnesota Department of Human Services (DHS) mental hospital in St. Peter has criticized staffing levels after a patient committed suicide by hanging himself. Part of the union's evidence of understaffing: Patients had to help employees cut down the man's body.

DHS cited budget cuts as the reason for using what the American Federation of State, County, and Municipal Employees has called a "skeleton crew."

An independent examiner is investigating the 28-year-old man's hanging. Staff had removed him from the suicide watch list the week before he killed himself.

The MWA: More time—and more protection—for whistle-blowers

Recent changes to the Minnesota Whistleblower Act (MWA) and the way in which Minnesota courts interpret it should put employers on watch. Late last year, the Minnesota Court of Appeals extended the statute of limitations for MWA claims from two to six years. The ruling comes on the heels of 2013 amendments to the MWA, which, plaintiffs argue, expand the scope of the statute's coverage.

Statute of limitations

In *Ford v. Minneapolis Public Schools*, the Minnesota Court of Appeals overturned 20 years of precedent and held that because an MWA claim is created by statute, the longer six-year limitations period applies, not two years. The practical impact of the court's decision is that an employee may now file a claim in court for an alleged violation of the MWA for up to six years after the employee claims to have made a complaint or report protected by the statute.

The court held that the six-year statute of limitations applies to actions based on retaliation for reporting a violation of law, but did not analyze whether other claims under the MWA are subject to the longer six-year statute. It is unclear whether courts will allow different limitations periods for different subsections of the same statutory claim.

What's a good-faith report?

This new uncertainty comes after 2013 amendments to the MWA, which added statutory definitions for several key terms. Plaintiffs' attorneys argue that these definitions expand the scope of the MWA, which prohibits employers from penalizing an employee for making a good faith report of a violation or suspected violation of law to an employer, governmental body or law enforcement official.

Previously, Minnesota courts had

defined a "good faith report" as one made "for the purpose of exposing an illegality." The MWA now defines "good faith" as "any statements or disclosures," as long as the statements or disclosures are not knowingly false or made in reckless disregard of the truth.

Plaintiffs' attorneys argue that the new definition protects any statement, whether or not the individual sought to blow the whistle on any wrongdoing, as long as the individual believed the statement to be true and it was not demonstrably false. This interpretation, however, undermines the purpose of the law, and it remains unclear how the courts will view the impact of this amendment.

More new definitions

Similarly, the MWA now defines "penalize" as "conduct that might dissuade a reasonable employee from making or supporting a report, including post-termination conduct by an employer or conduct by an employer for the benefit of a third party."

Prior to the amendments, Minnesota courts required that a material change in the terms or conditions of employment occur before a perceived employment action could be actionable under the MWA. This no longer appears necessary, and the amendments to the MWA appear to expand the range of actions perceived to be negative by an employee that could be found to be actionable.

The MWA's definition of "report" now includes any "verbal, written, or electronic communication by an employee about an actual, suspected or planned violation of a statute, regulation or common law, whether committed by an employer or a third party."

With these amendments, the plaintiffs' bar may assert that whistle-

blower coverage now extends to situations in which the purported wrongdoing has not yet occurred, and will protect employees who report unlawful conduct by anyone, not just an employer.

More common law protection

Finally, the MWA amendments added protections to suspected violations of common law. This could be a substantial expansion of the scope of the statute. For example, the report of an alleged breach of a contract may now be considered protected conduct under the MWA.

Plaintiffs have argued that the amendments to the MWA effectively overrule decades of Minnesota case law, creating additional uncertainty as to the scope of protections provided under the MWA. As cases filed prior to the amendment conclude and actions commenced under the new law proceed, we can expect the scope of protections under the MWA to slowly become clearer.

What employers must consider

For now, potential whistle-blower claims have a shelf life of six years. Employers should carefully investigate employee allegations of wrongdoing and document the steps taken in those investigations.

Liability will continue to hinge on whether there was a causal connection between the employee's complaint or report and the alleged negative employment action. Strong documentation regarding both the investigation and the reasons for any adverse action against an employee will remain critically important in avoiding whistle-blower liability in Minnesota. Employers should retain such documentation for at least six years.

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Supreme Court creates new pregnancy discrimination framework

The Supreme Court ruled on March 25 that a pregnant UPS employee who was denied a light-duty position is entitled to a new trial. The Court's framework for pregnancy discrimination cases allows employees who show that an employer policy that creates a "significant burden" for pregnant employees violates the Pregnancy Discrimination Act (PDA).

THE LAW The PDA amends Title VII of the Civil Rights Act. It requires that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work"

The ADA Amendments Act of 2008 (ADAAA) requires employers to accommodate workers whose disabilities are temporary even if they occurred outside the workplace.

WHAT'S NEW Peggy became pregnant while working as a driver for UPS. Because of previous miscarriages, her doctor imposed a 20-pound lifting restriction on her early in pregnancy. That restriction would later become 10 pounds. UPS requires drivers to be able to lift up to 70 pounds and lift 150 pounds with assistance. Presented with Peggy's lifting restrictions, UPS placed her on unpaid leave, and she lost her health coverage.

Peggy filed an EEOC complaint alleging that UPS accommodated other workers with lifting restrictions, but specifically excluded pregnant employees from those accommodations. That practice, she asserted, violated the PDA.

After losing rounds in the lower courts, Peggy appealed to the Supreme Court. (*Young v. UPS*, No. 12-1226, U.S. Supreme Court, 2015)

After the Court agreed to hear the case, but before oral argument, the EEOC issued new guidelines on accommodating pregnant workers that said that pregnant workers were

entitled to any accommodation the employer provided other similarly situated workers.

In deciding the case, the Supreme Court dismissed the EEOC guidelines as going too far and creating a "most favored nation" status for pregnant employees. It also disagreed with UPS' position that the law merely equated pregnancy discrimination with sex discrimination.

Burden-shifting test

Instead it ruled that pregnant employees can establish a *prima facie* case by showing that they were pregnant, they requested an accommodation that was denied, and that the employer provided similar accommodations to other disabled workers.

The employer must then show that the accommodation was denied for a "legitimate, nondiscriminatory reason." That reason may not be that accommodating pregnant workers is more expensive than accommodating other groups.

It's hard to conceive of a reason that would work.

If an employer did, however, then the employee may attempt to show that the employer's reason is pretextual and discriminatory and show that the rule creates a "significant burden" for pregnant employees. If the employee can show the employer accommodates a large percentage of nonpregnant employees while failing to accommodate a large percentage of pregnant workers, the Court said the case must go before a jury.

HOW TO COMPLY Although the High Court rejected the "most favored nation" status for pregnant workers, its ruling in *Young v. UPS* most likely establishes something that is very similar.

Since the ADAAA requires accommodation of short-term disabilities whether they occur on the job or not, employers should probably focus first on the employee's medical restrictions and their likely duration, not the cause

when determining accommodations.

The Supreme Court didn't rule on the ADAAA's disability provisions because it wasn't the law when Peggy was pregnant in 2006. In fact, the court specifically said it was offering no opinion on whether the ADAAA (or the EEOC's subsequent interpretation that temporary lifting restrictions resulting from on- or off-job activities are disabilities requiring accommodation) would have changed the outcome. It did, however, say that both may "limit the future significance of our interpretation."

The best approach may therefore be to accept pregnancy restrictions as disabilities and make reasonable accommodations as you would for any other disability.

Moving the issue into the reasonable accommodation realm does offer employers some advantages. For example, the ADA does not require employers to create light-duty jobs. Employers may fill existing light-duty jobs with disabled employees if they so choose. As long as this process does not discriminate against pregnant workers, it should be meet this decision's requirements.

Unpaid leave, the accommodation provided in this case, could still be an option as long as it was offered to all similarly situated employees regardless of the reason for their disability.

Coordinate leave

Employers can defuse the "significant burden" argument by coordinating time off with paid leave and maternity leave. Once a pregnant employee has medical restrictions that prevent her from performing her job's essential functions, she is eligible for FMLA leave.

FMLA-covered employers should have policies in place covering paid leave substitution for unpaid leave. To comply with this decision, that policy should treat leave for pregnancy or other serious health conditions similarly.



How should we provide required posters for employees who work from home?

QWe have a number of employees who work solely from home. For them, is electronic delivery or posting of the notice required by the new Women's Economic Security Act sufficient? Do we need to have the employee acknowledge receipt?

AThe Women's Economic Security Act (WESA) is not entirely clear as applied to employees who work only from home. However, the Minnesota Department of Labor takes the position that the notice required by WESA, as well as other mandatory Minnesota workplace posters, may be "posted" by sending employees an email with the actual posters as attachments.

Remote employees need not hang the notices or posters at their homes. Obtaining the remote employees' acknowledgment that they received both the WESA notice and any other workplace poster distributed electronically is advisable.

In addition, you should keep in mind that the federal DOL takes the position that employers should print and mail a hard copy of the required federal workplace posters to home-based employees—and, again, it is advisable to have the employee acknowledge receipt.

Can we restrict service dogs at work?

QAn employee with epilepsy wants to bring a dog to work to assist her in the event of a seizure. Our business is not conducive to having animals at work. Must we permit her to bring her dog?

AThe provisions of the ADA applicable to places of public accommodation (Title III) create a specific obligation for privately-owned businesses open to the public to permit disabled individuals to bring service animals into their facility, with very limited exceptions.

While the provisions of the ADA applicable to employers (Title I) do not specifically address or require employers to permit service dogs in the workplace, the EEOC takes the position that permitting the use of a service dog at work by a disabled employee may be a reasonable accommodation under the ADA.

Whether the use of a service dog may be a reasonable accommodation in this circumstance will depend upon the unique circumstances of the employee's position, medical condition and nature of your work environment, which are not readily apparent from your question. You would not have to permit the use of a service animal in any circumstance that would fundamentally alter the nature of your business or in a manner that would pose a direct threat to the employee with the dog or other individuals.

The law does not require permitting an employee to bring a pet dog to work. Rather, a service dog is one that

has been specifically trained to assist an individual with a disability in a manner directly related to the individual's disability.

So-called seizure dogs can be trained both to help individuals in the event of a seizure and to predict when someone is about to have a seizure, giving the person time to take medication, call for help or move to a safe location.

Carefully consider whether your employee may need the service dog as a reasonable accommodation, or whether there is an equally effective reasonable accommodation that might permit the employee to continue performing the essential functions of her job.

Responding to requests for reasonable accommodations in the workplace are always fact specific and require careful consideration of, among other things, the requesting employee's physical or mental disability and its limitations, essential functions of the employee's position, nature of the employer's business and whether the requested accommodation would pose a direct threat and past practice.

Don't hesitate to seek an attorney's advice as you work through the interactive process with an employee who is requesting an unusual accommodation, as the process can be filled with unanticipated land mines.

Is early termination OK when employee who is on FMLA submits her resignation?

QAn employee who is off on an approved FMLA leave just submitted her resignation, providing two weeks' notice. Our employee handbook asks employees to provide a two-week notice when possible. May we terminate the employee's employment immediately rather than wait two weeks?

AProbably yes, but with caution. The FMLA regulations allow employers to terminate the leave immediately when the employee unequivocally communicates that he or she has no intention of returning to work.

Before you act, carefully examine your past termination practices. When employees who are not on FMLA or another legally protected leave give notice of resignation, does your company generally terminate those employees early? If not, you may be at risk for a potential discrimination lawsuit.

Although the risk of legal action may be lessened by the FMLA regulations, it is advisable to consult with an attorney if your practices appear inconsistent. And certainly, the course of action with the least amount of risk would be to just wait the two weeks.

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