

In The News ...

Feds increase fines for immigration, I-9 violations

Employers that run afoul of federal immigration laws now face stiffer civil fines. The increases average about 25% and are triggered by a mandatory inflation adjustment.

Example: The minimum fine for knowingly hiring unauthorized immigrants rises from \$275 to \$375. The maximum fine for first violations rises from \$2,200 to \$3,200.

The biggest increase: The maximum penalty for multiple violations rises from \$11,000 to \$16,000 per violation.

Can you tell employees whom they can and can't marry?

The Miami Police Department issued an unusual ultimatum to one of its officers: Leave your husband or lose your job. The officer, who has 21 years of service on the force, ran afoul of a department policy prohibiting officers from associating "in any manner whatsoever with known offenders, known criminals, prostitutes, or persons of ill repute."

The officer's husband was convicted of armed robbery and kidnapping in 1988 after the birth of their second child, and was released from prison in 2002. The couple married shortly thereafter. The Miami Police Department slapped the officer with an 80-hour suspension for violating the policy. She also faces a civil hearing.

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Rein in abuse of intermittent FMLA leave

Employees are becoming well versed in the FMLA game, and you're paying the price.

Unscheduled intermittent leaves now account for a huge portion of all FMLA leaves of absence. And while the law does allow employees to take FMLA leave in small bites for a doctor's visit or to care for a sick relative, it doesn't give them unfettered rights to random work breaks or to arrive late without a good excuse.

That's why employers can (and should) demand medical certifications for all FMLA leaves and challenge intermittent leave requests to create a less disruptive schedule. As a new court ruling shows, the FMLA wasn't intended to cover random breaks that

damage an organization's productivity.

Recent case: Call-center employee Kenneth Mauder, who has diabetes, frequently arrived late to work. His diabetes medicine caused temporary uncontrollable bowel movements. He demanded unfettered permission to take lengthy restroom breaks. The company denied

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Free Report How to Wipe Out Fraud and Abuse Under FMLA

For an 11-step process to thwart employees inclined to "work" the system, download our free white paper, *How to Wipe Out Fraud and Abuse Under FMLA*, at www.theHRSpecialist.com/whitepaper.

You can be sued for commuting accidents

Don't let employees who feel ill or impaired in any way drive home from work. **Reason:** You could be found liable for any accidents they cause.

An important court ruling throws out the conventional wisdom that says companies aren't liable for employees' actions during their typical commute. This ruling says that if an employee can show the job *contributed* to the accident, your company *can* be liable.

Case in point: The day after a company sprayed its factory for bugs, an employee complained that she felt ill at work. A supervisor offered to send her to the company doctor, but she declined. While driving home, she rear-ended another car. She told police she felt lightheaded before the accident.

The person in the other car sued the

company for her injuries. An appeals court let the case go to trial. **Reason:** Companies are usually liable for injuries caused by employees only when the employee is "acting within the course of employment." But an exception exists: If the company could have foreseen a potential risk and didn't stop it, it can be held liable for the resulting injuries. (*Bussard v. Minimed Inc.*, 105 Cal. App. 4th 798, Cal. App., 2nd Dist.)

Bottom line: Pay attention to any illness or injury complaints that could be related to work. Be proactive. Provide transportation to medical care or home. Do the same in other cases in which driving might be impaired, such as after late-night work or where alcohol has been served. The cab fare will be a bargain next to defending a lawsuit.



Mentioning employee's body odor isn't discriminatory

An IT manager sued for national-origin bias, claiming he was fired for what his supervisor considered poor personal hygiene, not poor performance. *His evidence:* The supervisor had confronted him about his body odor. A district court tossed out the case, and a federal appeals court agreed. (*Hannoon v. Fawn Engineering Corp.*, No. 02-2078, 8th Cir.)

Don't try docking pay for smoking breaks

Employers that allow workers to take a series of short smoking breaks must compensate them for the time. *Reason:* Such approved short breaks (20 minutes or less) are "hours worked" under the Fair Labor Standards Act (FLSA). The FLSA doesn't require you to give rest periods in most cases, but also check state law.



'Company Records: What to Keep, What to Dump'

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Intermittent FMLA leave

(Cont. from page 1)

his request because those breaks hurt the call center's responsiveness.

After the company fired Mauder for performance reasons, he sued, alleging he was entitled to FMLA leave for those restroom breaks. The court disagreed, saying that such breaks weren't the sorts of things the FMLA protected unless he actually was too incapacitated to come to work at all. (*Mauder v. Metropolitan Transit Authority of Harris County*, No. 05-20299, 5th Cir.)

Note: In the case of an employee's physical problems, consider whether the ADA applies. It may require periodic breaks as an accommodation.

Create a hiring 'checklist'; lax process will cost you

It's tempting to shorten your hiring process, but don't do it. Give managers clear hiring procedures to follow for each new position. Make a checklist, if necessary. Practice the same procedures for internal and external candidates, match qualifications with job descriptions and be able to defend your decisions.

Case in point: For nearly two years, Joyce Dennis worked in progressively more responsible jobs at a South Carolina hospital. But when she interviewed for a promotion to ER registration supervisor, the hiring manager suggested Dennis wouldn't get it because she was rumored to be having an affair with a doctor. Dennis denied the affair and complained to the hospital's CFO.

The CFO then took over the selection process. He reviewed Dennis' application but never interviewed her. Instead, he hired a friend's husband.

Dennis quit and filed suit, alleging discriminatory failure to promote and defamation. A jury sided with Dennis and awarded her \$161,000 in damages. A federal appeals court agreed, calling the hiring process "peculiarly informal." While Dennis didn't possess all the criteria in the written description of

Job descriptions: How to make them lawsuit-proof

Job descriptions are among the first items that courts examine to determine the legitimacy of a discrimination charge. You can use them as part of a defense in court only if they're accurate and were prepared before the job was advertised or interviewing began. To ensure accuracy, talk to the people already doing the job and their supervisors. *Here's what you need to find out:*

- ✓ The job's essential functions, including any physical requirements.
- ✓ Any secondary duties or responsibilities.
- ✓ Attendance requirements.
- ✓ Any education requirements and special skills necessary to perform the job.
- ✓ Standards to which the person filling the post is held. (A salesperson, for example, may be expected to bring in five new clients per month.)
- ✓ The workers' supervisors.
- ✓ Any positions an incoming supervisor will be responsible for overseeing.

the job, the man who got the job was even less qualified. (*Dennis v. Columbia Colleton Medical Center Inc.*, No. 01-1338, 4th Cir.)

Keep applications and résumés clean, free of notes

During the hiring process, never note applicants' race, sex, religion, age or national-origin information on their applications or any other pre-offer documents unless you're required to do so under affirmative-action laws. If you *are* required, it's best to use a "tear off" sheet that's kept separate from applicant files.

Even better: Advise hiring managers to refrain from writing *anything* on applications or résumés. Since you must retain those documents, making notations of any kind—including "secret codes" or private rating systems that identify or categorize recruits—could create a dangerous paper trail that may be tough to explain later.

Example: Suppose you circled an

applicant's 1971 college graduation date on his résumé. Could that be evidence of age bias? Possibly.

Case in point: After a farming supply company gave applicants written tests, it noted the applicants' race and sex on the test. *The well-meaning goal:* assess whether the test had a negative impact on minority hiring.

A group of applicants sued for hiring bias. The company argued that it merely "observed" the race and sex. The court didn't buy it. While the company didn't formally request the data, it still required the information for employment. As a result, the court let the applicant group pursue a class-action suit. (*Modtland v. Mills Fleet Farm*, No. Civ. 04-3051, D. MN.)

Document 'quitting words' to block unemployment claim

Employees who quit typically aren't eligible for unemployment compensation.

Yet employees who impetuously announce that they've had enough and won't be back still might file for unemployment insurance benefits anyway.

Teach your supervisors how to handle sudden "I quit" outbursts in order to avoid being on the hook for those workers. Specifically, tell supervisors to note the "I quit" in writing, including the date and time and, if possible, the exact wording.

They should then forward the memo promptly to HR for inclusion in the employee's personnel file. Send the employee written confirmation that his resignation has been received and accepted.

Recent case: William Baker worked for Erie Construction. During a break, he asked a co-worker to drive him home and, as they drove along, he told her he had "quit." He then phoned his boss and told him the same thing.

The next day, he called his boss and asked to rescind his resignation. The

boss told Baker to reapply. When he did, HR informed him that his position had been filled and no openings were available.

He filed for unemployment benefits. But Erie brought in the boss, his conversation notes and the co-worker, who testified that Baker had told her he quit. That was enough for the court: It denied the benefits and ordered Baker to pay the court costs of his appeal. (*Baker v. Director of Ohio Department of Job and Family Services*, No. L-06-1198, Court of Appeals of Ohio)

Insist on fluent English *only* if the job requires it

It's clear that you can require bank tellers and phone salespeople to speak fluent English. But can you demand the same of a construction worker or dishwasher?

In many cases, it makes good business sense to require employees to communicate effectively in clearly spoken English. But the EEOC is warning that overly broad policies will violate federal national-origin discrimination law.

So, when *can* you set an English-fluency policy? That depends on the nature of the job. The EEOC says such policies are allowed in positions only

if fluent English is needed "for the effective performance of the position for which it is imposed."

Bottom line: Avoid setting identical fluency requirements for a broad range of positions. And don't require a greater degree of fluency than necessary for that job. You'll stand on safer legal ground if you can document objective business reasons, such as safety or communication with customers.

Case in point: Jesus Romero, a Spanish-speaking dishwasher at a hotel restaurant, was laid off while the hotel

remodeled the restaurant. He was told that he'd be rehired. But when the restaurant reopened, the hotel denied Romero his former job because of a newly implemented English-fluency policy.

He filed a complaint with the EEOC, which sued the restaurant on his behalf for national-origin discrimination. The hotel has suspended its fluency policy pending the case's resolution.

Online resource For more EEOC guidance on English-only policies, English-fluency policies and accent discrimination, go to www.eeoc.gov/origin.

Rethink who can earn overtime under federal rules

HR professionals have scrambled in the past few years to comply with revised Fair Labor Standards Act (FLSA) requirements and determine which white-collar employees are eligible for overtime pay.

The rules should have clarified the issue, but lawsuits are actually increasing. *The biggest issue:* Incorrectly classifying "exempt employees" (not eligible for overtime) and "nonexempt employees" (eligible for overtime).

What changed? Under the new overtime rules, white-collar employees who earn less than \$455 per week (\$23,660 annually) are *automatically* eligible for overtime pay. Those who earn more

than \$100,000 and perform at least one of the defined "exempt" duties will not be eligible.

For employees who earn between those two salaries, you must analyze their duties to see whether they fall into one of the following five exemption categories: executive, professional, administrative, outside sales or computer employee.

Downside: You could be forced to shell out more overtime pay to lower-paid professional workers.

Advice: If an employee's status changes, reclassify that person right away. If an employee's wages are just below the \$23,660 salary threshold, judge whether your payroll costs are

Free checklist How to make the 'exempt vs. nonexempt' decision

To help you determine which employees should be classified as exempt, download our easy-to-use *FLSA Checklist: Exempt vs. Nonexempt Status* at www.theHRSpecialist.com/checklist.

best controlled by simply raising that person's salary above that threshold to retain his or her exempt status (as long as the person still meets the duties test).

Also, review your employee job descriptions. *Remember:* Make the exempt/nonexempt decision based on employees' duties, not their titles.

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Altering time sheets can mean *personal* liability for HR, managers

If you're responsible for approving time sheets or signing off on alterations to the hours reported by employees, take note: It's not just your organization that risks a big fine and costly litigation. Your *personal* assets are also at risk, as a new court ruling shows.

That's because the Fair Labor Standards Act allows employees to sue their bosses, execs and HR professionals for personal liability for altering pay records.

For that reason, make sure supervisors don't tolerate—or, worse, encourage—off-the-clock work or the altering of time records. U.S. Labor Department officials announced last year that they're receiving more complaints about employees forced to work through breaks.

Remember: For breaks to be unpaid, employees must be *completely* relieved of their duties. (That's one reason to discourage them from eating lunch at their desks.)

Recent case: A group of “living assistants” (hourly workers) at a home for the disabled worked 48-hour week-end shifts and were required to check on each resident every two hours, around the clock.

When those employees turned in their time sheets, managers routinely deducted eight hours because each living assistant supposedly got two four-hour breaks. The CEO then signed off on the altered time sheets.

The problem: The employees couldn't leave the building during “breaks” and had to call the main office once an hour. Because the time wasn't their own, the court said they should be compensated.

The kicker: The court held the CEO personally liable, ordering him and the company to pay more than \$500,000 to the employees, including \$155,000 as a penalty. (*Chao v. SelfPride*, No. 06-1203, 4th Cir.)

Workers' comp may cover injuries from suicide attempt

A worker injured his back on the job and complained that he was suffering chronic pain as a result. He claimed the pain caused major depression and anxiety that drove him to attempt suicide.

Lawyers for the man argued that workers' compensation should cover the medical costs resulting from the suicide attempt. The Wyoming workers' comp board tossed out the argument. But the state Supreme Court went for it, saying that the work-related physical injury caused a mental illness that led to the suicide attempt. (*Brierley v. State of Wyoming*, No. 01-166)

Advice: Workers' comp protections vary from state to state. Although this ruling is binding only in Wyoming, it may give ideas to other state compensation boards. That means if mental illness results from a compensable, work-related injury, it also may be covered.

To defend against such claims, you'll

want to show that nonwork problems contributed to the mental illness, such as financial woes, a relationship crisis or a history of mental distress.

As you're monitoring any workers' comp situation, be aware of the mental—as well as physical—effects that an employee may face, and suggest counseling if appropriate.

Cut workers' comp costs: 4 tips

- 1. Establish an accident-prevention program.** Many states offer free consultations with safety specialists. Find details at www.osha.gov/dcsp.
- 2. Investigate all accidents,** not just ones resulting in claims.
- 3. Report accidents promptly.** Delays lead employees to contact lawyers.
- 4. Stay in touch with injured employees and their doctors.** That will help you design an appropriate return-to-work plan.

Beware efforts to sell you government forms, posters

Various government agencies—including the IRS and OSHA—are warning employers about misleading advertising suggesting that employers must buy certain government posters and forms from private companies.

In reality, most forms and posters you need are available free on government web sites. That includes the revised version of the I-9 Form, which has been mandatory for employers since December 2007 (go to www.uscis.gov/i-9)

Note: The U.S. Department of Labor's Poster Advisor site, www.dol.gov/elaws/posters.htm, lets you download most labor-related posters.

You can request new medical certification at the beginning of each 'FMLA year'

A U.S. Labor Department opinion letter makes clear that you can require an employee to provide new medical certification—not just recertification—for his or her first FMLA absence in a new "FMLA year."

FMLA rules allow employers to calculate FMLA leave years (for all employees) in one of four ways: a calendar year; any fixed 12-month period; a 12-month period starting at the employee's first FMLA absence; or a 12-month rolling period measured from the date the employee uses leave.

The Labor letter clarifies that once an employee's FMLA year expires, you can request an entirely new medical certification, not just a recertification, from the employee's doctor.

Final tip: You also can, at your expense, request a second and third medical opinion, as appropriate, if you have any reason to doubt the new medical certification's validity.

New online tool helps employees calculate OT pay

The U.S. Labor Department recently debuted a useful tool that employees (and you) can use to calculate an employee's overtime pay. The web-based Fair Labor Standards Act Overtime Calculator Advisor (www.dol.gov/elaws/otcalculator.htm) asks a set of questions about pay periods, hours worked, hourly pay scales and additional compensation.

Advice: Employees will be using this tool to check whether you pay them correctly, so you should get to it first.

You may be liable for accidents if employees do business by cell phone

You want your managers to stay productive, so you suggest they get wireless phones. You may even buy phones or reim-

burse for them. This is fine, as long as employees don't drive carelessly while using their phones.

In one case, a broker dropped his cell phone, bent down to get it, ran a red light and killed a motorcyclist. The broker's employer agreed to pay \$500,000 to the family, who sued the firm for contributing to the accident.

If you expect staffers to use cell phones for business, be sure to write a policy that requires them to pull over while they talk; or, at the very least, provide hands-free devices.

Don't dock exempt workers' pay for damaged equipment

While you can establish a policy that calls for deductions from nonexempt employees' wages if they damage or lose company equipment, it's not wise to extend that policy to exempt employees. *Reason:* Doing so could jeopardize their exempt status under the Fair Labor Standards Act.

Exempt employees must receive their full, predetermined salaries, "not subject to reduction because of variations in the quality or quantity of work performed." The rules do allow some exceptions, such as certain full-day deductions for safety violations. But a new U.S. Labor Department opinion letter states, "None of the exceptions listed contemplates charging employees a fine for damage to or loss of company equipment." (*FLSA 2006-7*)

Study: Managers overrate their own success

Managers who dish out glowing performance reviews only to later terminate the worker for "poor performance" trigger many employment lawsuits. Now, a new study shows that managers have lofty views of their own work, too.

An impossible 90% of managers think they're among the top 10% of performers in their workplace, according to a *BusinessWeek* poll of 2,000 managers.

Advice: Realistic performance reviews and regular feedback can erase this "Lake Wobegon effect."

Tales from the front lines

Dilbert and the drunken lemurs

The Catfish Bend Casino in Iowa fired David Steward recently after surveillance video showed that Steward posted a Dilbert comic strip on an office bulletin board. The comic strip implied the company's bosses were a bunch of "drunken lemurs."

When Steward went to collect unemployment benefits, the casino challenged, claiming the comic-strip posting should be deemed "misconduct" that eliminates his right to unemployment compensation.

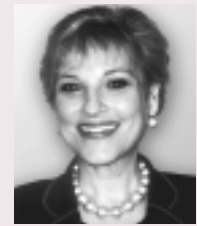
"Basically, he was accusing the decision-makers of being drunken lemurs," the casino's HR director testified. "We consider that misconduct when you insult your employer."

The result: An administrative law judge sided with Steward, saying the posting was a "good-faith error in judgment," not intentional misbehavior.

Can you tell employees whom they can't marry?

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The NAACP is claiming that the department's policy unfairly targets black female officers, and is seeking reinstatement of a number of officers who have been fired because of the policy. Other police departments have similar policies.



A dim-witted way to cut your organization's health costs

Do some of your employees' spouses or children have serious (and expensive) health troubles? It may be tempting to offer suggestions about less-costly treatments—or even to send that employee packing. But don't do it. As this new ruling shows, it's illegal to discriminate against employees based on their relationship with a disabled person.

Case in Point: Phillis Dewitt, a nurse manager at a hospital in Peoria, Ill., was a rising star and received excellent evaluations. The hospital, which was struggling financially, had a partially self-insured health care plan. Over a three-year period, the hospital was regularly notified about the escalating medical costs related to Phillis' husband, Anthony, who suffered from

prostate cancer.

At one point, a supervisor confronted Phillis about those high costs and suggested she consider "less expensive" hospice care over the current chemotherapy treatments. On a separate occasion, the supervisor held a meeting to explain that the hospital would require "creative" cost cuts to ease its financial crisis.

A few months later, the hospital fired Phillis. Her husband died the following year. She sued, alleging that her firing was caused by "association discrimination," which is unlawful under the ADA.

The court sent the case to a jury, saying that "a reasonable juror could conclude that the hospital ... was concerned that Anthony—a multiyear cancer veteran—might linger indefinitely." (*Dewitt v. Proctor Hospital*, 7th. Cir.)

employers from discriminating against employees based on "the known disability of an individual with whom (the employee) is known to have a relationship or association."

2. Remind supervisors: Don't play doctor. The supervisor in this case was pretty much practicing medicine when she recommended that Phillis' husband discontinue chemo and sign up for hospice. Don't go there.

3. Remember: Timing is everything. Courts aren't stupid—they can put the pieces together. In this case, the court said "the timing of Dewitt's termination suggests that the financial albatross of Anthony's continued cancer treatment was an important factor."

Mindy Chapman is an attorney and president of Mindy Chapman & Associates LLC. She is a master trainer, keynote speaker and co-author of the ABA book, Case Dismissed! Taking Your Harassment Prevention Training to Trial.

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To read Mindy's Case in Point blog each week and sign up for weekly e-alerts, go to <http://blog.theHRSpecialist.com>.



The HR I.Q. Test

1. The three most common types of job discrimination complaints filed by U.S. employees (in order) are:

- a. Age, sex, race
- b. Race, retaliation, sex
- c. Race, age, retaliation

2. What's the number one reason that employees say they go to work when they're actually sick:

- a. Saving my sick days for childcare/eldercare emergencies
- b. Too much work to do
- c. Other people depending on me at work

3. Which types of employees are 2.5 times more likely to access pornographic web sites on company-owned computers?

- a. Workers whose monitors don't face the office door

- b. Mobile workers using company laptops
- c. Home-based workers using company computers

4. What does federal law say about extra pay for employees who work weekends, nights or holidays?

- a. It's required at time-and-a-half
- b. It's required at double time
- c. It's not required, but some state laws may apply

5. What are the three fastest growing occupations, in order, in the next 10 years?

- a. Network/data communications analysts, home health care aides, software engineers
- b. Home health care aides, software

- engineers, medical assistants
- c. Software engineers, environmental scientists, home health care aides

6. Percentage of U.S. workers who say they are open about their political beliefs on the job:

- a. 25% b. 52% c. 73%

7. To be eligible for FMLA coverage, employees must have logged at least how many hours with that employer in the previous 12 months:

- a. 1,520 hours
- b. 1,025 hours
- c. 1,250 hours

Sources: 1. EEOC; 2. LifeCare survey; 3. ScanSafe survey; 4. U.S. Department of Labor; 5. BLS; 6. Vault.com survey; 7. U.S. Department of Labor

Answers: 1. B 2. C 3. B 4. C 5. A 6. B 7. C

Rules of the road: Know when to pay for travel time

Employers know they don't have to pay Joe Worker for his typical commute to the office. But pay-for-travel questions often get stickier, especially when they involve nonexempt workers, several work sites or overnight travel.

One of the best ways to navigate the twists and turns of the issue is to figure out whether the travel is mainly for your company's benefit or the employee's benefit. In general, you'll have to pay for travel that benefits you, but not for travel benefiting the employee.

Here are the most important rules to keep in mind:

Home-to-work travel

Under the Fair Labor Standards Act (FLSA) and the Portal-to-Portal Act (an amendment to the FLSA), regular travel to and from work doesn't count as working time unless the employee actually works en route. That is true even if your work site fluctuates. It doesn't matter whether the employee works at a fixed location or different job sites.

But if you require employees to report to a central location to receive their assignments, supplies and tools, then travel time from the central site to the job site is paid time.

One way to get around this: Give workers the option to report to a central location or directly to a job site. That way, the travel time to either place is not considered compensable work time.

All in a day's work

You must count travel that is a regular part of the worker's daily duties as hours worked because federal law considers it "all in a day's work."

This includes travel to different job sites during the workday or time spent driving from customer to customer. It benefits your business, so you must pay.

Day-trippers

The question becomes more complicated when an employee travels on a day trip.

Typically, all travel time on day trips is counted, except meal periods, if the employee travels to another city or job location on assignment. But travel between the employee's home and the train station or airport isn't paid because it falls under the home-to-work rule—even if the travel time to the airport far exceeds the worker's normal commute.

Consider this example: A nonexempt employee flies to a one-day seminar. He leaves his house at 6 a.m. and drives an hour to the airport. He takes a flight and lands at his destination about 8:30 a.m. It takes him another half-hour to take a taxi to the seminar site.

The seminar starts at 9 a.m. and lasts until 4 p.m. The employee grabs a late flight in order to visit with friends and colleagues at the seminar until 5 p.m., then travels back to the airport by 5:30 p.m. to catch a 7 p.m. flight that arrives at 8:30 p.m. It takes him about an

hour to drive from the airport to his home.

How much of this time must you pay for?

Answer: You don't have to pay him for the commute to the airport; that's home-to-work time. You do have to pay him for the time spent traveling via plane and taxi to the seminar, and time at the mandatory seminar.

You don't have to pay for the time he spent mingling after the seminar because he deferred his flight home. But you should pay for the time spent in the taxi and the plane on the way back. You don't have to pay for the drive home from the airport because, again, it's work-to-home time.

Another note: Say an employee volunteered to drive other co-workers from the office to their homes. You need to pay for that time because the driver is "working."

Your compensation obligation changes again if the employee is on an out-of-town trip that requires an overnight stay. Here, you count all travel during normal working hours—no matter what day of the week.

Sleeping time and training

The U.S. Department of Labor also sets "when to pay" rules for these two sticky FLSA issues:

1. Sleeping time: Employees required to be on duty for less than 24 hours are considered "working," even if they're permitted to sleep. Employees required to be on duty for 24 hours or more may agree with their employer to exclude from hours worked any scheduled sleeping periods of eight hours or less.

2. Training programs and meetings: You don't have to pay employees for time spent at training programs, lectures or similar activities as long as they meet the following four criteria: (1) The event is outside normal hours. (2) It's voluntary. (3) It's not job-related. (4) No work is performed during that time.

Case study No pay for extended commutes

David Kavanagh was a refrigerator repairman who had to travel to several grocery stores in Connecticut and upstate New York during the day. His employer paid for travel time between stores but didn't pay for his commute from home to the first store or from the last store to home again at night. Also, he was required to return home each night to receive his assignments for the next day.

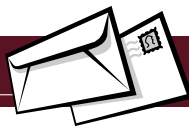
Depending on his job locations, Kavanagh sometimes spent more than seven hours a day in unpaid commuting time—driving to the first job and back from the last. Arguing that he should have been paid for this time, Kavanagh sued the company in an effort to claim more than \$37,000 in overtime.

A federal appeals court tossed out his suit, saying that although the long unpaid commute "strikes us [as] inequitable, nothing in the pertinent statutes and regulations requires the company to compensate for his travel."

Bottom line: The FLSA doesn't require employers to reimburse workers for getting to and from the job, regardless of time spent. (*Kavanagh v. Grand Union Co.*, No. 98-7696, 2nd Cir.)

Next Nuts & Bolts: *Employee handbooks*

Coming soon: *Job applications*



Run FMLA time concurrently with sick leave

Q We have an employee who is going to be out eight weeks for a qualifying serious health condition. The employee isn't requesting to use FMLA leave because she has enough paid sick leave. Can employees choose *not* to use FMLA leave even though they meet the qualifications? And if they qualify for FMLA leave, can we make them use it whether they want to or not? — C.T., Georgia

A It is the employer's obligation to designate leave as FMLA-qualifying whenever it becomes aware of an FMLA-qualifying event. It's not up to your employees to pick and choose when they want to use FMLA time, even if they have sick time or other forms of paid leave in the bank. You should immediately designate this employee's eight weeks as FMLA time, to run concurrently with her paid sick leave. That way, she'll only have four weeks of unpaid FMLA time remaining for the year after she uses up her paid leave. You also should check your FMLA policy to make sure that it requires employees to use FMLA time concurrently with their sick time.

Post job openings in-house

Q We rarely post high-level management jobs internally. Must we post all jobs internally so that someone can't file suit claiming "pre-selection" or that he or she never had a chance to apply? — K.L., California

A While no law specifically requires that all vacant jobs be posted in a particular way, the failure to post vacancies internally opens the door to "glass ceiling" discrimination claims. This is especially true if your practice has resulted in a homogeneous group of high-level managers. **Bottom line:** Cut the chances of lawsuits by regularly posting *all* job vacancies.

References: Stick to the facts

Q An employer asked us for job verification on an employee we fired. It has a written consent form from the worker allowing the query. Can I release information regarding the ex-employee's history with us? — R.F., Colorado

A Don't even think about providing a negative job reference before your attorney reviews the release! In recent years, courts have become more and more tolerant of defamation claims based on job references. From a liability perspective, your safest bet would be to provide nothing more than to verify the former employee's job, title and dates of employment.

Fight 'porn spam'

Q Some of our employees get a lot of spam e-mail that advertises porn sites. I'm concerned that an employee will consider this junk as creating a hostile work environment. What can we do? — M.C., Minnesota

A Yours is a problem facing many employers. To protect your organization, attack it in three ways:

1. **Adopt a communications policy** that says employees may use computers for business purposes only, and that visiting a web site containing sexual material is grounds for discipline.
2. **Invest in software** that filters and screens your e-mail system based on sexual content.
3. **Instruct employees** to delete pornographic spam without opening the messages. Employees who get lots of porn spam may be accessing porn sites. Investigate and act promptly.

Who pays for uniforms?

Q We require employees to wear uniforms. Can we deduct from their paychecks the money to pay for the uniform or clean it? — L.B., Massachusetts

A You can, but with caution. Under federal law, the payroll deductions—whether for the uniform cost, cleaning or both—cannot reduce an employee's wages below the minimum wage. Similarly, the deductions can't reduce the amount of overtime pay due to employees in any workweek. **Note:** Some states require employers to foot the bill for uniforms.

Don't require employees to visit psychologist


Q Can we require an employee to receive psychological counseling or treatment if his behavior has become a hindrance to his job performance? — N.M., Kansas

A No, you can't require employees to receive any medical treatment—psychological or otherwise—as a condition of continued employment. But you're not without recourse. Even if an employee is protected by the ADA (i.e., he/she has a mental condition that rises to the level of a "disability"), that employee is still subject to discipline, up to termination, if he or she violates your policies regarding misconduct. **Final tip:** Remember the "golden rules" of employee discipline: even-handed enforcement and careful documentation.



Jonathan Landesman is a partner in the labor and employment law group at the Philadelphia firm of Cohen, Seglias, Pallas, Greenhall & Furman P.C. He represents employers in court and provides day-to-day advice on personnel policies, discipline, leave and wage-and-hour compliance.

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