

## In The News ...

### 'Explosive' growth in pay lawsuits; cases rise by 400%

U.S. employees filed more than 7,500 federal wage-and-hour lawsuits last year, a jump of nearly 400% in the past 15 years, says a study by the Seyfarth Shaw law firm. Top triggers: worker misclassification and unpaid off-the-clock work. Find tips at [www.theHRSpecialist.com/flsa-hours](http://www.theHRSpecialist.com/flsa-hours) and [www.theHRSpecialist.com/flsachecklist](http://www.theHRSpecialist.com/flsachecklist).

### New FMLA forms: Are yours out of date?

The U.S. Department of Labor released new versions of its model FMLA certification and notification forms, which expired this past summer. Plus, the DOL revised its FMLA rights poster that workplaces must display. **Advice:** You can (and should) stick with the old poster. Find links to current forms at [www.theHRSpecialist.com/fmlanew](http://www.theHRSpecialist.com/fmlanew).

### Review I-9 policies in light of new form, more enforcement

Many employers aren't aware they should be using a new version of the *Employment Eligibility Verification (I-9) Form*. Using the old edition could trigger fines. Plus, the feds tripled the number of workplace investigations related to I-9s. Find details, plus the top 10 do's and don'ts of I-9 compliance at [www.theHRSpecialist.com/newI-9](http://www.theHRSpecialist.com/newI-9).

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

Continued on page 2

### 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/FMLAfraud](http://www.theHRSpecialist.com/FMLAfraud).

## HR's 6 worst legal mistakes: Are you at risk?

Employee lawsuits have skyrocketed in the past decade and one small misstep by HR can cost an organization dearly in time, energy and money. Here are the most important legal mistakes that HR needs to protect against:

**1. The wrong words in interviews and job ads.** Make sure anyone who talks to candidates knows to avoid topics that could generate hiring-bias lawsuits—age, race, religion, disability, etc. All questions should focus solely on this question: *How well can this person perform the job?* Also, avoid the taboo topics when advertising the job. (Find a list of 25 illegal questions at [www.theHRSpecialist.com/25questions](http://www.theHRSpecialist.com/25questions).)

**2. Wage-and-hour mistakes.** Employee pay lawsuits have spiked in

the past decade. Make sure employees are classified correctly (exempt vs. nonexempt). Set a policy on unauthorized overtime. Use progressive discipline for employees who work off-the-clock, but pay them for all time worked, whether it was approved or not. Properly calculate overtime pay. Find more advice at [www.theHRSpecialist.com/FLSAtips](http://www.theHRSpecialist.com/FLSAtips).

**3. Rough take-offs and landings.**

Continued on page 2

**Training memo** Teach supervisors how to avoid legal trouble by distributing our Memo to Managers article, *The Dirty Dozen: Manager Mistakes That Spark Lawsuits*, available at [www.theHRSpecialist.com/dozen](http://www.theHRSpecialist.com/dozen).

## Intermittent FMLA leave

(Cont. from page 1)

After the company fired Kenneth 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.

## HR mistakes

(Cont. from page 1)

The beginning and end of an employee's tenure are the most legally risky. Make sure to submit notice of new hires to your state. Avoid making legally binding promises to new staff. Make sure terminated employees can't point to a discriminatory reason for their firing—race, sex, disability, religion, age (over 40) or retaliation for voicing a legal complaint. Keep terminations private and dignified. Employees should never be surprised by firings—give them enough feedback ahead of time.

**4. Allowing an expectation of electronic privacy.** Make sure employees know that their computer usage can and will be monitored. Also, guard employees' data closely.

**5. Failing to train supervisors.** You need to go beyond, "*Here's your handbook.*" Make sure managers know their legal limits in interviews, hiring, day-to-day management and terminations. Big mistake: overly rosy job reviews that become legal evidence when the person is later fired for poor performance.

**6. Failing to accommodate.** You have a legal duty to offer "reasonable accommodations" when an employee has a disability, is pregnant, is called to military duty or wants to attend a religious event. Make sure managers and HR know their duties.

# Keep applications and résumés clean and free of notes

**D**uring 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 1981 college graduation date on his résumé. Could that be evidence of age bias? Possibly.

**Recent case:** 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.)

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

**I**t'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.

**Recent case:** 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

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

### 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 worker's supervisors.
- ✓ Any positions an incoming supervisor will be responsible for overseeing.

# 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. Department of Labor officials announced last year that they're receiving more complaints about employees forced to work through breaks.

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 weekend 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.)

## Foul-mouthed worker trashes his boss on Facebook: Can you fire him?

Don't be so quick to fire employees who go online to attack your organization or one of its supervisors. As odd as it may seem, those employees may be protected under federal labor laws that allow workers to collectively discuss—either online or in-person—the company's working conditions and wages.

The National Labor Relations Board (NLRB) recently drove this point home by ordering a company to reinstate an employee who it fired for posting an obscenity-laden rant about his boss on Facebook.

**The case:** Employees at Pier Sixty, a New York City catering service, were seeking union representation. Two days before the election, a supervisor allegedly chastised workers in front of customers. One worker posted this gripe about the boss on Facebook:

*“Bob is such a NASTY MF-er don't know how to talk to people!! F\*\*\* his mother and his entire f\*\*\*ing family!!*

*What a LOSER!! Vote YES for the UNION!!”*

When the employee was fired, the union filed an unfair labor practices charge with the NLRB.

**NLRB's ruling:** The employee's exhortation to “Vote YES for the UNION” apparently made all the difference. The NLRB ruled that the Facebook post was protected activity under the

National Labor Relations Act (NLRA) because it was focused on the upcoming union election.

The vulgar language seemed to not disturb the NLRB. It said that because similarly course speech was commonly used on the job at Pier Sixty, it was not offensive in the context of the Facebook post and did not constitute insubordination.

**Online resource** For advice on how nonunion employers need to comply with the NLRA, go to [www.theHRSpecialist.com/NLRBnonunion](http://www.theHRSpecialist.com/NLRBnonunion).



### Does a cold or flu qualify for FMLA leave?

FMLA regulations state that “unless complications arise, the common cold and flu ... do not meet the definition of a serious health condition and do not qualify for FMLA leave.” But what's considered a complication that would warrant FMLA leave? It must involve incapacity of more than three days, plus other reasons.

Read an attorney's full analysis of what counts as a “serious” cold or flu that qualifies for FMLA at [www.theHRSpecialist.com/fmlaflu](http://www.theHRSpecialist.com/fmlaflu).

### 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. (*Hannoo 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'

Your *Employment Law* subscription includes access to several online advisory reports. Our report, *Company Records: What to Keep, What to Dump*, explains how long to retain 200 different kinds of business records. It's free with your paid subscription at [www.theHRSpecialist.com/whitepaper](http://www.theHRSpecialist.com/whitepaper).

## Get Legal Advice for YOUR State—FREE Sample

HR Specialist continues to add to its roster of state-specific *Employment Law* newsletters. To view sample issues of all available states, go to [www.theHRSpecialist.com/states](http://www.theHRSpecialist.com/states).

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Find all attorney contact information at [www.theHRSpecialist.com/Attorneys](http://www.theHRSpecialist.com/Attorneys).

### STAFF

**Editor:** Anniken Davenport, Esq., [HREditor@BusinessManagementDaily.com](mailto:HREditor@BusinessManagementDaily.com)  
**Editorial Director:** Patrick DiDomenico, (703) 905-4583, [pdidomenico@BusinessManagementDaily.com](mailto:pdidomenico@BusinessManagementDaily.com)  
**Senior Editor:** John Wilcox, [jwilcox@BusinessManagementDaily.com](mailto:jwilcox@BusinessManagementDaily.com)

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# Assigning black staff to black clients: Is that race discrimination?

Here's a problem you might not see coming: Let's say you have an employee who belongs to a protected class, and whose skills you believe will help when relating to others of the same protected class—language or cultural awareness skills, for example.

Before you decide to assign work to the employee based on those skills, consider whether doing so is, in effect, unspoken discrimination.

That's a particular risk if employees view the job assignment as less desirable, as this new court ruling shows.

**Recent case:** Pamela Altman, who is black, worked as a child-protection investigator for the Illinois Department of Children and Family Services.

She claimed that other investigators didn't like to work in what she referred

to as the inner-city "projects" and therefore she got those assignments. Plus, she alleged other employees were afraid to work with black males, so she got those assignments, too.

Altman sued, claiming that making her take all the cases involving poor black children amounted to race discrimination. The court agreed, rejecting the agency's summary judgment bid and sending the case to a jury trial. (*Altman v. Department of Children and Family Services*, No. 06-CV-771, SD IL)

**Final note:** Don't make assignment assumptions based on race—for example: black customers prefer black clerks. Make sure you're distributing the work fairly and without regard to the race of the employee or the population being served.

## 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](http://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.

## Bad weather no-shows: Must you still pay them?

Say bad weather strikes and an exempt employee calls to tell you she can't make it in to work. Can you deduct a full day's pay from her salary? Yes, you can. What if your workplace closes due to bad weather? That's a different story. We've created a printable flowchart that helps you decide whether you must pay employees (exempt and nonexempt) for inclement-weather-related absences. Download it at [www.theHRSpecialist.com/weather](http://www.theHRSpecialist.com/weather).

## Craft company policy on Twitter, Facebook usage

Employees using Twitter, Facebook and other social-networking sites are creating liability and PR risks with their rants, raves and company gossip—even if they're logging in at home.

**Advice:** Draft a policy on your organization's expectations for employees' use of these tools. Address usage, disclosure of company info and consequence of disparaging comments about the company or co-workers. (Some firms set their networks to block access to Twitter, Facebook, MySpace and other social-networking sites.) For more advice and policy suggestions, go to [www.theHRSpecialist.com/socialpolicy](http://www.theHRSpecialist.com/socialpolicy).

## 'Desk sensors': Are these high-tech babysitters legal?

An increasing number of employers are using small electronic sensors placed under desks (such as the OcupEye device) to tell when employees are present. While employers typically use the sensors for energy efficiency reasons and to make real estate decisions, some employees have balked at the potential privacy issues. **Advice:** While the devices—which only track movement, not sound or any other data—are legal to use, it's best to explain to employees exactly what the devices will monitor before you implement them.

## Beware efforts to sell you government forms, posters

Various government agencies 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



## You be the judge

### Employee injured while driving for coffee: Is he due workers' comp?

In most states, employees can earn workers' comp coverage for injuries that occur "in the course of employment." That can be a fuzzy term. You be the judge.

**The case:** A plumber for a New Jersey plumbing company drove to a work site but the person he was meeting wasn't available for 45 minutes. He decided to drive to a deli five miles away to get coffee. On the way, he was involved in a traffic accident and broke both legs. The workers' comp agency awarded him 100% benefits. The employer appealed, saying the accident didn't arise "in the course of employment." Was he due workers' comp?

**The ruling:** A state appeals court rejected the company's argument and awarded the benefits. It said the plumber engaged in "exactly the kind of brief activity which if embarked on by an inside employee working under set time and place limitations, would be compensable."

**The lesson:** When off-site employees are injured in accidents during slight diversions (such as coffee breaks), courts will probably say they're equivalent to on-site worker diversions, meaning they'd be eligible for workers' comp.

free on government websites. That includes the revised version of the Form I-9 (go to [www.uscis.gov/i-9](http://www.uscis.gov/i-9)).

**Note:** The U.S. Department of Labor's Poster Advisor site, [www.dol.gov/elaws/posters.htm](http://www.dol.gov/elaws/posters.htm), lets you download most posters.

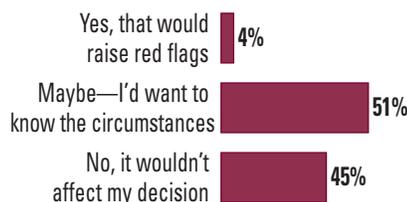
## Must you give access to personnel files?

"I want to see my personnel file," an upset employee may ask one day. Are you obligated to show it to him? No federal law guarantees such rights. But some states do spell out the terms under which employees can inspect their personnel files. For information on each state law, read our white paper, *Access to Personnel Files: 50 State Laws*, at [www.theHRSpecialist.com/personnel50](http://www.theHRSpecialist.com/personnel50).

## Bias against unemployed: States, feds push bills

New Jersey, New York and Oregon have become the first states to make it illegal for employers to refuse to hire applicants just because they're unemployed. Several other states—including California and Ohio—are considering similar bills. A bill in Congress would make it an unlawful practice nationwide. **Outlook:** Look for more states to pass such laws, but it won't get through Congress anytime soon.

### Would you hesitate to hire someone unemployed for a year?



Source: *TheHRSpecialist.com* poll

## Biometric scanners: Friend of the devil?

A Christian employee objected to his employer's use of a biometric hand scanner to clock in employees, saying it was the Satanic "mark of the beast." The company refused to create an alternate system, so he quit and sued for religious bias. A federal jury awarded him \$586,000 in damages.



**The lesson:** Unless it causes an "undue hardship," you're required to offer reasonable accommodations for religious requests. Switching to a timesheet for one worker could have saved a cool half million.

## Must you offer FMLA for the 'possibility' of serious illness?

Don't be so quick to pull out the "request denied" stamp when employees want to use FMLA leave to determine whether they have a qualifying "serious condition." As a court ruling shows, if an employee simply thinks she has a serious condition, she may take

FMLA leave to have it checked out. **Case in Point:** Melody, an optical assistant at a North Carolina eye center, requested FMLA leave to attend a doctor's appointment for medical tests to look into mysterious growths on her cervix.

The company denied the request, saying she wasn't entitled to FMLA leave because she didn't suffer from a qualifying "serious health condition."

*The cited reason:* Melody had not been previously incapacitated or sick for at least three consecutive calendar days, as FMLA rules require.

Melody was told she could only take personal time off (PTO) for her appointments. But since she had no PTO days left, she was told she'd be fired if she attended the appointment. She kept her appointment. The company kept its word. She was fired.

Melody sued, saying she was entitled to use FMLA time for testing. The company argued that she wasn't eligible because her condition didn't rise to the serious level (i.e., three consecutive calendar days of incapacity).

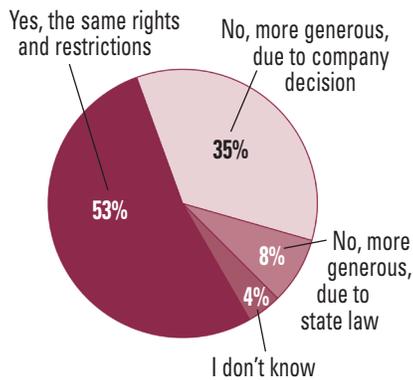
*Result:* The court sided with Melody, saying a doctor's visit to obtain test results to determine whether a serious health condition exists can be covered by the FMLA. (*Baucom v. Cabarrus Eye Center*)

### Lesson learned

**Don't be so fast to fire.** There's always time to terminate an employee, but only do so after a thorough review. Strongly consider legal consultation if there's a potential medical issue.

Remember, employers that pull the termination trigger quickly on employees with medical issues will not get sympathy from juries with access to the corporate wallet.

### Does your family and medical leave policy mirror the FMLA?



Source: HR Specialist online poll.



## The HR I.Q. Test

- What's the No. 1 reason that employees say they go to work when they're actually sick?**
  - Saving my sick days for childcare/eldercare emergencies
  - Too much work to do
  - Other people depending on me at work
- What does federal law say about extra pay for employees who work weekends, nights or holidays?**
  - It's required at time-and-a-half
  - It's required at double time
  - It's not required, but some state laws may apply
- Percentage of U.S. workers who say they are open about their political beliefs on the job:**
  - 25%
  - 52%
  - 73%
- Which types of employees are 2.5 times more likely to access pornographic websites on company-owned computers?**
  - Workers whose monitors don't face the office door
  - Mobile workers using company laptops
  - Home-based workers using company computers
- What are the three fastest-growing occupations, in order, in the next 10 years?**
  - Network/data communications analysts, home health care aides, software engineers
  - Home health care aides, software engineers, medical assistants
  - Software engineers, environmental scientists, home health care aides
- To be eligible for FMLA coverage, employees must have logged at least how many hours with that employer in the previous 12 months:**
  - 1,520 hours
  - 1,025 hours
  - 1,250 hours
- The three most common types of job discrimination complaints filed by U.S. employees (in order) are:**
  - Age, sex, race
  - Retaliation, race, disability
  - Race, age, retaliation

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

Answers: 1. c 2. c 3. b 4. b 5. a 6. c 7. b

## Compensation

## 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 key 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 books 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.

*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."

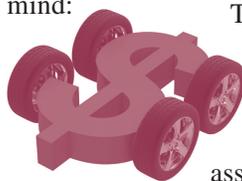
Your obligation changes again if the employee is on an out-of-town trip that requires an overnight stay. Here, you count all travel during normal working hours—no matter what day of the week.

### 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*



## Who pays for uniforms?

**Q** We require employees to wear uniforms. Can we deduct from their paychecks the money to buy and clean the uniforms? — 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 or 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: evenhanded enforcement and careful documentation.

## Must we 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.

## ‘Porn spam’: Is it sexual harassment?

**Q** Some of our employees get a lot of spam email 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 website containing sexual material is grounds for discipline.
2. **Invest in software** that filters and screens your email 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.

## 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.

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