Here’s something to remember when an employee claims she has a disability that interferes with her ability to work overtime or even a full day. You can offer intermittent FMLA leave as a reasonable accommodation rather than restructuring the job or transferring the employee to another open position.

Remember, the employer, not the employee, gets to pick the ADA accommodation. As long as it is a reasonable accommodation and is designed to let the employee perform his job’s essential functions, you have met your ADA obligations.

Recent case: Vincent worked as a debt collector, calling individuals who owed money and trying to get them to make payments on their debts. He worked eight or nine hours per day and could work more if he chose.

When Vincent was involved in an auto accident, he received time off under the FMLA to heal. He came back to work and soon reinjured his back while helping his son move. Doctors forbade Vincent from working overtime after a supervisor asked him to make up missed time with several 12-hour shifts.

FMLA leave may be ADA accommodation

Employers are supposed to let employees who need FMLA leave know about eligibility and what taking leave means.

But what if you offer a more generous leave plan? Can you be liable for not giving proper FMLA notice?

Recent case: Before the beginning of the school year, Heather, a kindergarten teacher, inquired about long-term sick leave to receive treatment for anorexia. That meant she wouldn’t be able to start the school year on time.

Her school had a generous program that allowed up to three full months off. The first month was fully paid, the second paid at half-time and the third at one-third regular salary.

Heather chose to take the time off and returned to work when it expired. No one had told her about FMLA leave, nor did the employee handbook mention it.

On return to the classroom, Heather was required to show she was recovering and following her medical team’s treatment advice. It soon became apparent that she wasn’t. She began to lose weight again, couldn’t remember her students’ names or follow lesson plans.

Continued on page 2

Offering paid leave covers many FMLA sins

New rules ‘ban the box’ on federal applications

On Nov. 2, President Obama ordered all federal agencies to stop asking job candidates about their criminal backgrounds early in the hiring process.

So far, 19 states have passed so-called “ban the box” initiatives, which refer to a checkbox on job applications in which employers inquire about applicants’ criminal backgrounds. Ban-the-box advocates say such inquiries early in the hiring process unfairly filter out otherwise qualified applicants.

Currently only seven states have laws preventing private employers from requesting criminal histories on their applications. Texas has no such law. Several large employers including Target, Koch Industries and Home Depot have banned the box.

New OSHA site on violence prevention in health care

Noting that health care workers are more than four times more likely than other employees to experience workplace violence, the Occupational Safety and Health Administration (OSHA) has launched a new website to help health care providers curtail violence at work.


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Texas Employment Law is published by HR Specialist and is edited by Michael W. Fox, a shareholder in the Austin office of Ogletree Deakins. He has more than 35 years’ experience representing employers in court and designing employment law policies. Contact him at (512) 344-4711 or Michael.Fox@ogletreedeakins.com.
Resignation announced, then a change of heart: Can refusing to allow return be retaliation?

Here’s a rather novel question being answered for the first time in the 5th Circuit, which has jurisdiction over Texas employers. Can the refusal to accept a request to rescind a resignation ever be an adverse employment action and retaliation for engaging in protected activity?  

Recent case: Tyrikia first worked for Houma Terrebonne Housing Authority in Louisiana for four years as a clerk, answering the phone and taking applications. Then she quit for a better, more challenging position. But she later returned after her former supervisor arranged for what amounted to a promotion and more responsibility.  

By all accounts, Tyrikia was a valued employee for another five years. Then the authority hired a new executive director, Wayne. He asked her to lunch and if she would attend trainings with him involving overnight travel.  

He made comments on her appearance, clothes and weight, making some comment nearly every time he saw her, which was “more or less on a daily basis.” His comments included statements like Tyrikia “must have been thinking about him as [she] got dressed.” He singled her out with similar comments during meetings. When the entire office exchanged Valentine’s Day cards, he displayed the one he received from her but no one else’s. When leaving voice mails, he twice commented on her “sexy voice.” He frequently stared at Tyrikia.  

That’s when Wayne decided he would not accept Tyrikia’s decision to rescind her resignation and remain on board since he felt she was a valuable team member. He reiterated this after she testified, too. Management told Wayne he needed to undergo sexual harassment training as a result of the accusations.  

That’s when Wayne decided he did not report those incidents to her supervisor, but declined to file a formal complaint. However, apparently having had enough, she submitted her resignation, effective in two months. She then extended the effective date by a month so she could train her replacement.  

Meanwhile, her fiancé, who also worked for the housing authority, filed a grievance. That’s when Tyrikia decided to testify about what had happened to her. Under oath, she described Wayne’s behavior and explained that she was resigning in response to his behavior.  

Her supervisor, before even hearing the testimony, urged her to rescind her resignation and remain on board since he felt she was a valuable team member. He reiterated this after she testified, too. Management told Wayne he needed to undergo sexual harassment training as a result of the accusations.  

That’s when Wayne decided he would not accept Tyrikia’s decision to rescind her resignation. And that’s when Wayne sued, alleging that she reasonably expected that she could change her mind before the effective date, based on her supervisor’s recommendation. Plus, she saw Wayne’s refusal to allow her to rescind her decision as punishment for revealing his harassment.  

The court, after concluding the case was novel, said that refusing to allow Tyrikia to change her mind about resigning might be an adverse employment action and could also be retaliation. It looked carefully at the timing and said the close time frame indicated possible retaliation. Tyrikia lawsuit now moves forward.  

(Resignation announced, then a change of heart: Can refusing to allow return be retaliation? (Bernard v. Bishop Noland Episcopal Day School, No. 15-30053, 5th Cir., 2015))

Better than FMLA?  

(Cont. from page 1)  

It seemed like she couldn’t focus on her teaching duties. Then Heather stopped treatment altogether and started missing work without calling in sick. Eventually, the school terminated her for poor performance.  

Heather sued, alleging that no one ever told her about FMLA leave. She said if she had known about it, she would have taken FMLA leave. But the court said that even if she hadn’t received the required eligibility notice, Heather had suffered no harm.  

She had already taken a more generous paid leave, which would have run concurrently with FMLA leave anyway.  

Heather’s case was dismissed. (Bernard v. Bishop Noland Episcopal Day School, No. 15-30053, 5th Cir., 2015)  

FMLA as accommodation  

(Cont. from page 1)  

He then was offered intermittent leave to adjust his schedule for the days he claimed to be in pain. Eventually, Vincent was fired for poor performance. That’s when he sued, alleging that he had been terminated because he was disabled and had been denied a reasonable accommodation of a transfer to a less stressful position.  

The court tossed out Vincent’s lawsuit. It reasoned that by letting Vincent take intermittent FMLA leave, the employer had, in fact, accommodated his back pain, including his need to avoid working overtime.  

It didn’t need to transfer him to another job or change his schedule permanently. (Asher v. United Recovery Systems, No. H14-0661, SD TX, 2015)
Texas government employees who blow the whistle on their employers are protected from retaliation. But it takes more than just voicing an internal complaint or even cooperating in an audit to make a claim of whistle-blower retaliation stick.

The Texas Whistleblower Act requires that the employee’s report be made to an “appropriate law enforcement authority ... if the authority is part of a state or local government entity or the federal government that the employee in good faith believes is authorized to: (1) regulate under or enforce the law or (2) investigate or prosecute a violation alleged to be violated in the report; or (2) investigate or prosecute a violation of criminal law.”

Merely reporting the allegation internally isn’t enough.

Recent case: Dijaira worked as an administrative employee at the University of Texas at Austin. When the university’s Office of Internal Audits told her that it wanted to investigate the UIL, Dijaira agreed to cooperate. She subsequently made a series of allegations about improprieties she believed had taken place.

Soon after, she was terminated. She sued for retaliation, alleging she was a whistle-blower under the Texas Whistleblower Act.

The university disagreed, arguing she had not reported her allegations to outside law enforcement or an agency charged with enforcing the law.

The court sided with the university and threw out the case. (Smith v. University of Texas at Austin, No. 03-14-00509, Court of Appeals of Texas, 2015)

Worker classification: Salary is just one factor that determines exempt status

Don’t make the mistake of thinking that just because an employee is paid a salary, he or she is exempt. The employer must also show that the worker performed exempt work under one of the several exemptions available under the Fair Labor Standards Act.

Recent case: While working as a manufacturing engineer for Dril-Quip, Ronald was paid between $72,500 and $88,500 per year on a weekly salary basis. He did not have a college degree, having completed just one year of higher education. His job was to manage the manufacturing process for specific products so they were produced according to sales for that week.

Ronald sued, alleging that he was wrongly classified as an exempt employee and should have earned overtime for all hours beyond 40 he worked.

Dril-Quip argued he was an exempt administrative employee. Ronald argued that his job required no discretion or exercise of judgment and that he merely followed guidelines. His employer disagreed.

The court said that the case should go to trial so a jury can decide whether he was exempt or an hourly employee entitled to overtime. His high salary alone didn’t determine his status. (Elliot v. Dril-Quip, No. H-14-1743, SD TX, 2015)

Final note: Although Ronald was classified as an engineer, he held no degree. That precluded his classification as an exempt professional employee. Remember, what you call an employee isn’t important, nor is what his job description says he does. What matters is what the employee actually does.
5 ways supervisors can help reduce absenteeism

Say your organization has an attendance policy in place, but you’re still experiencing a high rate of absenteeism. It may be a good idea to get your managers and supervisors together to plan a strategy.

Here’s what others have done in similar situations:

1. Provide outlets for dissent
Not all absenteeism is capricious. When people are denied outlets for their job pressures, they tend to run from them. Managers or supervisors who don’t tolerate complaints force employees to bottle up pressures, which build up over time.

If you make dissent possible by encouraging people to speak up, hearing them out and, where feasible, acting on what you hear, they learn that they don’t have to escape from the workplace to let off steam.

2. Cut the drag of boring work
You can’t eliminate boring work. But you can try to reduce a person’s need to flee from it. Here are two suggestions to consider:

• Expand boring jobs so employees can see their tasks through to a worthwhile result. Giving work a beginning, a middle and an end increases at least threefold the satisfaction to be gained from it.

• Break down boring jobs into smaller pieces so that a variety of tasks can be distributed among more people. Diversifying each person’s job makes the work a little more interesting and a little less boring and time-consuming.

3. Use incentives
Extra pay for showing up is not a radical idea, and it’s relatively cheap. The concept of “well pay” instead of sick pay has proved itself and can be easily adopted.

For example, for each authorized (paid) sick day people do not use by year’s end, they get paid for a day and a half. Or let employees bank sick time to be used against a future disability. These kinds of arrangements can be a magnet to the workplace.

4. Try gimmicks
They’re only good for the short term, but they’re also reusable from time to time.

Try a departmental contest. For example, the person with the lowest number of absences in a three-month period wins a gift card. Use gimmicks sparingly, but play them up when you do. And make them fun, not work: Don’t ask people to do anything except come to work on time.

5. Explain absenteeism’s impact
Employees may not realize that absenteeism affects everyone. When people feel easily replaceable, they think they won’t be missed. If you tell them why they’re needed, they won’t want to stay away.

Sample policy: Absenteeism/tardiness

The company expects all employees to assume diligent responsibility for their attendance and promptness. Regular and prompt attendance is essential to the success of the company and the satisfaction of our customers.

If you are unable to report to work, you must notify your supervisor or department head no later than 30 minutes before your start time on each day of your absence. If you leave a voice mail message for your supervisor or department head concerning your absence, a personal follow-up call must be made by noon on the same day of the absence.

Failure to properly notify the company of your absence will result in an unexcused absence.
Beefed up visa waiver scrutiny could slow business travel

Business travelers entering the United States from Europe could spend more time clearing immigration, especially if they have visited Iran, Iraq, Sudan or Syria. That’s because of tighter security measures and new restrictions imposed on the visa waiver program (VWP) passed in the wake of terrorist attacks on Nov. 13 in Paris and Dec. 2 in San Bernardino.

The VWP permits citizens of 38 designated countries, mostly in Europe, to travel to the United States for business or tourism for up to 90 days without a visa.

The House of Representatives passed new VWP security provisions on Dec. 8, and the Senate was expected to approve similar legislation to be rolled into the 2016 federal spending bill scheduled for votes in both houses by Dec. 22. The White House backs the VWP security measure.

The legislation would prohibit anyone who has traveled to Iraq, Syria, Iran, or Sudan within the past five years from participating in the program. Those travelers would have to apply in person for visas at overseas U.S. consulates before being allowed to travel.

Travelers entering the United States under the VWP should expect increased security screenings and potential delays.

New gun legislation has implications for employers

Gov. Greg Abbott signed two pieces of legislation into law recently, regulating where and how Texans may carry firearms. As of Jan. 1, licensed gun owners may carry holstered handguns anywhere that concealed handguns are permitted.

However, guns are not permitted in hospitals and nursing homes, amusement parks, government buildings and churches, synagogues and other established places of religious worship.

Licensed gun owners will be permitted to carry guns on college and university campuses starting Aug. 1. Private universities may opt out and public universities may establish gun-free zones.

Employers that wish to bar firearms from their property must post signs informing employees and the public of the policy. Those wishing to prohibit concealed weapons must post a conspicuous sign using the exact wording authorized in the ordinance that can be found at www.legis.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=SB321.

Similarly, employers wishing to bar openly carried weapons must post a sign prescribed by the legislation as well. Both signs must meet specific appearance requirements and be posted in both English and Spanish.

Employers may not bar a licensed gun owner from keeping a legally owned firearm in the employee’s locked car in a parking lot the employer provides for the employee’s use. Employers may bar employees from transporting firearms in employer-owned vehicles. Some employers, such as schools and certain oil and gas industry businesses, have broader authority to bar firearms.

Note: This legislation places fairly tight requirements on employers. Employers should have counsel review their firewall policy and signs to ensure they comply with the new laws.

USCIS proposes a new ’smart’ I-9 form to cut errors, confusion

With the current version of the Form I-9 set to expire on March 31, the U.S. Citizenship and Immigration Services (USCIS) last month announced it is seeking public comment on a newly revised “smart” version of the I-9 form. The goal: reduce technical errors and avoid confusion that arises among employers and employees.

The form will ease on-screen data entry and completion of the I-9, but it is not an electronic form. After completion, employers not using an electronic I-9 system will have to print it out for signature. The form features new drop-down lists of acceptable documents. Some fields are validated to ensure data is entered correctly.

For a list of changes and link to the comment page, see the LawLogix blog at www.tinyurl.com/i-9dhs.

Wage-and-hour lawsuits hit new record in fiscal 2015

If your organization hasn’t yet been hit with a pay-related lawsuit, consider yourself lucky. A new report shows that the onslaught of employee wage-and-hour lawsuits continues to rise at a record pace.

In fiscal year 2015 (which ended on Sept. 30), U.S. employees filed 8,781 lawsuits in federal court related to wage-and-hour issues, says an annual study by the Seyfarth Shaw law firm. Since 2000, wage-and-hour federal court filings have skyrocketed 450%.

Why the most recent spike? Blame an intense new focus on independent contractor classification, unpaid internships, joint employer status and the fight for minimum wage hikes.
The Texas Supreme Court has vacated a jury verdict in favor of a former employee who had alleged workers’ compensation retaliation, rendering judgment in favor of the employer.

The Supreme Court found that the employee had not presented evidence that his termination had resulted from anything other than the uniform enforcement of a neutral absence control policy.

The court found that plaintiff Jorge Melendez had failed to present any evidence to support his allegations that the absence policy of his former employer, Kings Aire, had not been uniformly enforced, that his discharge had not been required by such uniform enforcement, or that Kings Aire’s stated reason for discharging Melendez was false.

The case is Kings Aire v. Melendez, (No. 14-006, Texas Supreme Court, 2015).

Injury, FMLA and workers’ comp
Melendez suffered an on-the-job injury on July 2, 2009. Kings Aire placed Melendez on FMLA leave the next day. Melendez’s 12 weeks of FMLA leave expired on Sept. 24, 2009, but as of that date, he had not been released to return to work.

Kings Aire notified Melendez on Sept. 28, 2009, that he had exhausted his FMLA leave and that he had been terminated on Sept. 25, pursuant to the following policy:

“A leave of absence may be granted for any reason acceptable to Kings Aire or required by law.... Except as discussed below or required by law, a leave generally may not exceed three months, and an employee who fails to return to work within three months of the leave of absence will be terminated.”

Melendez filed a lawsuit, alleging he had been terminated in retaliation for filing a workers’ compensation claim.

Dueling arguments
Kings Aire presented evidence that it discharged four other employees pursuant to this policy, two of whom, like Melendez, had been out due to workers’ compensation injuries, and two of whom had been on leave due to personal illnesses unrelated to on-the-job injuries. Kings Aire also presented evidence that several employees suffered work-related injuries, filed workers’ compensation claims, and returned to work without incident because they were able to return in 12 weeks or sooner.

In response, Melendez cited Kings Aire’s FMLA policy, which provided that an employee would be discharged if he or she failed to provide a medical certification of fitness within 15 days after the conclusion of the leave.

Melendez was not afforded this grace period, he said, and so his discharge the day after his leave expired was inconsistent with Kings Aire’s own policy.

Kings Aire disputed this interpretation, arguing that the FMLA policy had to be read in conjunction with the company’s absence control policy, under which employees received the 15-day grace period only if they had not yet exhausted 12 weeks of leave.

“[E]ven assuming reasonable people could disagree about the policy’s meaning,” the court wrote, “the plaintiff made no showing that the stated reason for termination was false.”

Thus, the court reasoned, “Barring unusual circumstances, when an employer terminates an employee consistent with the employer’s uniform enforcement of its leave policy, even when an alternative interpretation of the policy would not require termination, that uniform enforcement is no evidence that an employee’s termination ‘would not have occurred when it did but for the employee’s assertion of a compensation claim or other conduct protected by section 451.001.’”

What it means for employers

The lesson for Texas employers is that their policies must clearly state the outer limit on leaves, and they must be vigilant to enforce that limit in all cases.

Any evidence of exceptions being made to a leave policy will destroy the effectiveness of the defense and may even provide factual support to the plaintiff’s claim of retaliation.

As the Texas Supreme Court noted in Melendez, had Kings Aire allowed Melendez the 15-day grace period, it would have been a departure from Kings Aire’s uniform enforcement of its absence control policy.

To be sure, there is a tension in the law that can prove challenging for employers that must also be mindful of their duty to provide reasonable accommodation under the ADA. The EEOC has taken the position that inflexible leave-of-absence policies may violate the ADA, as the granting of leave may, in some instances, constitute a reasonable accommodation.

Consequently, any absence control policy should include language to the effect of:

“If the employee is unable to return to work at the end of the maximum leave period, his or her employment will be terminated if it is determined that the employee cannot perform the essential functions of his or her job with or without reasonable accommodation.”

This determination should be made only after engaging in the interactive process to satisfy the EEOC’s interpretation of the ADA’s accommodation obligation.

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How the law defines ‘genetic information?’

GINA defines genetic information as “information about an individual’s genetic tests and the genetic tests of an individual’s family members, as well as information about the manifestation of a disease or disorder in an individual’s family members (i.e. family medical history).” The law states:

*Family medical history is included in the definition of genetic information because it is often used to determine whether someone has an increased risk of getting a disease, disorder, or condition in the future. Genetic information also includes an individual’s request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or a family member of the individual, and the genetic information of a fetus carried by and individual or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology.*
Could yelling at the boss be an ADA disability?

Q One of our employees recently shouted at his supervisor, and in doing so violated a work rule. In the course of counseling and disciplining—but not discharging—this employee stated for the first time that he has a disorder which might have caused his conduct. May we still discipline this employee?

A The ADA prohibits discrimination against a qualified employee with a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Based on the facts presented, if the employee has a disability, it is unlikely that imposing discipline for his actions would violate the ADA, provided that the work rule was job-related and consistent with business necessity, and the punishment was consistent with discipline imposed upon other employees for similar work-rule violations.

If an accommodation is requested, the employer should engage in the interactive process to assess whether and to what extent a reasonable accommodation would allow the employee to meet expected standards of conduct in the future.

Can we conduct pre-employment medical exams and then hold them until job is offered?

Q To accommodate out-of-state applicants, my company would like to institute a policy of conducting medical exams when workers interview on-site for jobs. The test results would be sealed (so the information cannot be relied upon in making job offers) and would be reviewed only if an applicant is offered and accepts a conditional offer of employment. This would reduce the number of trips an applicant must make prior to beginning employment with our company. Would such an arrangement violate the ADA?

A Under the ADA, an employer may not ask “disability-related questions” or require a “medical examination” prior to extending a conditional job offer to an applicant. A disability-related question is defined as any inquiry that is likely to elicit information about a worker’s disability. Thus, medical history questions are prohibited at the pre-offer stage. A medical examination is defined as a test or procedure that is designed to obtain information about a worker’s physical or mental impairments or health, and these tests are unlawful at the pre-offer stage.

The EEOC takes the position that a pre-employment inquiry or medical examination violates the ADA even if the employer obtains the applicant’s consent or establishes a mechanism so that the exam’s results are not reviewed until the job has been offered. According to the EEOC, the medical examination must not be conducted until after the conditional job offer has been extended, and passing the exam may only be made a condition of employment if all new employees in the same job have to take the exam. Your proposed policy would likely run afoul of the ADA.

How to address phony harassment accusations?

Q May we include language in our sexual harassment policy imposing discipline on employees who bring false claims of harassment?

A Including a statement that prohibits the bringing of false claims does not violate state or federal law.

However, generally, the purpose of implementing a sexual harassment policy is to encourage employees to bring complaints of inappropriate behavior to the company’s attention. Some contend that promising to punish workers who bring “false” claims will discourage them from making legitimate complaints and result in sexual harassment liability.

For example, in its sexual harassment rulings, the U.S. Supreme Court held that an employer can avoid strict liability for harassment by a supervisor when no adverse employment action was taken if:

1. The employer exercised reasonable care to prevent and correct the harassment, and
2. The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

If a company’s sexual harassment policy includes sanctions for employees who bring false claims, a worker may contend that he or she did not complain about the inappropriate conduct due to a reasonable fear of retaliation.