

Trusted compliance advice for Florida employers

Editor: Ralph A. Peterson, Esq., Beggs & Lane RLLP, Pensacola

**In the News**

**Feds launch initiative to ID misclassified 'contractors'**

The U.S. Department of Labor (DOL), in conjunction with the IRS, has announced a "misclassification initiative" aimed at employers that misclassify employees as independent contractors.

A Government Accountability Office report labeled misclassification a "significant problem" with "adverse consequences" for the government. The report estimated misclassification would cost the federal government \$7 billion in lost payroll taxes over the next 10 years.

The DOL's budget allocates \$25 million for the initiative. Approximately 100 investigators will be assigned to the project.

For its part, the IRS will perform random audits of employers to determine whether they are properly classifying their employees.

**3 Florida employers make '100 best places to work' list**

A Toyota and Lexus dealer and automotive services company, a health care system and an employee-owned supermarket represent Florida on *Fortune* magazine's 100 Best Companies to Work For list.

JM Family Enterprises of Deerfield

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*Florida Employment Law* is published by **HR Specialist** and is edited by Ralph A. Peterson, a partner with **Beggs & Lane RLLP**, Florida's oldest law firm. He is a board-certified labor and employment lawyer. Contact him at (850) 432-2451 or [RAP@BeggsLane.com](mailto:RAP@BeggsLane.com).

**New worry: RICO charges for hiring illegals**

The immigration landscape keeps changing, and employers must keep up. Even employees who are in the United States illegally can sue you for failing to pay them overtime and minimum wage.

And now you also have to worry about employees who claim you hired illegal workers as a way to cut labor costs and therefore put legal workers at a competitive disadvantage.

Clever attorneys have begun filing RICO (Racketeer Influenced and Corrupt Organizations) Act lawsuits, alleging that some employers are essentially running "mob" operations.

**Recent case:** Kyle Edwards and several other U.S. citizens sued their

former employer, a Ruth's Chris Steak House franchisee, claiming that the owner engaged in racketeering by knowingly hiring illegal immigrants and encouraging them to remain in the country.

Edwards and his colleagues claimed Ruth's Chris management supplied the illegal immigrants with the names and Social Security numbers (SSNs) belonging to former legal employees as a way to get around federal immigration laws.

The trial court dismissed the case, but the 11th Circuit Court of Appeals recently reversed.

It concluded that, if it were true

*Continued on page 2*

**Face age discrimination claims head-on**

Here's a twist, courtesy of the U.S. Supreme Court's *Gross v. FBL Financial Services* age discrimination decision. The court ruled that employees have to show that "but for" their age, their employer wouldn't have fired them.

Prior to that decision—even if an employee could show age might have been a factor in a firing decision—all an employer had to show was that it would have made the same decision whether or not age was a factor.

Not so anymore. Employees now

have to produce direct evidence of discrimination—and employers have to attack that evidence head on.

**Recent case:** Josephine Mora was 62 years old when she was fired from her job as a fundraiser at the Jackson Memorial Foundation. She sued for age discrimination.

Two former employees testified they had heard Mora's boss tell her, "You are very old, you are very inept. What you should be doing is taking care of old people. ... I need someone younger

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## New worry: RICO charges

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that the restaurant provided SSNs and names for illegal immigrants, that amounted to encouraging them to illegally immigrate for work opportunities. That could amount to a corrupt practice under RICO.

The court ordered a jury trial. (*Edwards, et al., v. Prime, Inc., et al.*, No. 09-11699, 11th Cir.)

**Final note:** Don't think this applies to your company? Think again if you rely on local managers to provide hiring documents. Double-check all SSNs and names against former employees' identification to make sure the information isn't being "recycled."

## Age discrimination

(Cont. from page 1)

that I can pay less and I can control." Another former employee heard the supervisor say Mora "is too old to be working here."

The foundation tried to have the case dismissed by showing the court that it would have decided to terminate Mora whether or not the supervisor had made such comments. The court rejected that argument.

Instead, it ordered a trial. Now a jury will have to sort out whether the foundation fired Mora because of her age. (*Mora v. Jackson Memorial Foundation*, No. 08-16113, 11th Cir.)

**Final note:** It is now more important than ever to keep your workplace free of any ageist comments. Employees' attorneys know the only way to win age cases is with direct evidence and they will scour for that evidence. Don't let them find any.

**Advice:** Anytime you are considering firing a worker over age 40, it's a good idea to consult your attorney.

# Track all hours worked just in case exempt status fails

The Fair Labor Standards Act (FLSA) requires employers to pay hourly employees time-and-a-half for every hour worked in excess of 40 hours per week. But exempt employees are paid the same salary no matter how many hours they work. Thus, many employers assume they don't need to keep track of the hours exempt employees actually work.

Wrong! Since it's conceivable that employees could contest their exempt status, you should track all hours worked by all employees.

If you made an error and an employee is later found to be non-exempt, you'll have to figure out how much back pay you owe. If you don't know how many hours the employee worked, you're stuck with his or her (likely inflated) figures.

Plus, the employee will want to calculate overtime based on salary divided by 40. If you have accurate figures, you can divide salary by the actual hours worked. The total tab will probably be less (*see box at right*).

**Recent case:** Enrique Torres

worked for Bacardi and claimed he was wrongly classified as exempt. He sued and the court said it would let a jury decide. However, because Bacardi kept accurate records of its employees' work hours, the court allowed the company to calculate what it owed in overtime by dividing Torres' salary by the actual hours he worked per week rather than by 40. Then, for each week, the overtime due equaled half the hourly rate times the number of hours in excess of 40 worked that week.

(*Torres v. Bacardi Global Brands*, No. 06-20689, SD FL)

### Calculating overtime for lost exempt status

Assume \$1,000 salary and 55 hours worked for this example:

- $\$1,000 \div 40 = \$25$  per hour  
Then  $\$25 \div 2 = \$12.50$  per hour  
Then  $\$12.50 \times 15 = \$187.50$  overtime
- $\$1,000 \div 55 = \$18.19$   
Then  $\$18.19 \div 2 = \$9.10$  per hour  
Then  $\$9.10 \times 15 = \$136.50$  overtime

## Firing? Pick a reason and stick with it

Presumably, when you terminate an employee, you have good reasons for doing so. Carefully document your rationale and then stick with it.

If you pile on more reasons later, it may look as if you are trying to cover up a discriminatory decision with a host of excuses for why you fired the employee.

**Recent case:** Lisa Holland was a technician for the Hillsborough County Sheriff's Department. She became pregnant, and sued when she was fired soon after for poor performance.

However, as she began the lawsuit process, different people involved in

her termination came up with reasons other than performance. One person said the department no longer needed her services.

The contradictory explanations were enough to send her pregnancy and sex discrimination and retaliation case to trial for a jury to sort out. (*Holland v. Gee*, No. 8:08-CV-2458, MD FL)

### Free report Fire the right way

Learn six tips for legal terminations. Download "The Right Way To Fire" at [www.theHRSpecialist.com/whitepapers](http://www.theHRSpecialist.com/whitepapers).

# Stop lawsuits before they start: Set clear process for posting job opportunities

It seems logical enough: Employees shouldn't be able to sue over promotions they never applied for. But in some cases where positions were never posted, employees have successfully sued, alleging they would have applied had they known there was an opening.

Fortunately, the 11th Circuit Court of Appeals won't allow those employees an automatic win—if the employers can show that the workers never expressed a desire for *any* promotion.

**Recent case:** Greg Nance, who is white, sued his employer after an Asian employee was promoted to an engineering manager position that Nance believed he should have received.

The promotion was never posted, so Nance didn't know it was open. If he had known, he argued, he would have applied.

But the employer testified that Nance had never expressed any desire for any promotions, or they would have considered him. The court dismissed his case. (*Nance v. Ricoh Electronics*, No. 08-16429, 11th Cir.)

**Advice:** Post every job opening or promotion, along with the minimum requirements for the position. Include a cutoff date for applications and specify how employees can apply. Tell employees where they can look for openings, or include announcements on paystubs or in the company newsletter.

That way, you have clear evidence showing which employees were interested. It may mean processing more applications, but that's better than having to defend an expensive and time-consuming lawsuit that you may or may not win.

## Lies on FMLA form? That's a firing offense

Employers expect truth from their employees and can discharge employees who don't live up to those standards. Falsifications of any kind, if documented and substantiated, constitute grounds for dismissal.

**Case in point:** Tabitha Newton, a consumer loan specialist at SunTrust Bank, often took intermittent leave for migraine headaches. When she came down with an earache, she asked her doctor to provide certification for FMLA leave. The doctor's office, however, wrote the wrong return date on the certification form. When Newton called and asked them to revise it, a doctor's assistant told her to change it herself and sign it with the doctor's initials.

Her supervisor became suspicious and asked Newton if she had altered the form. Newton denied doing so. When her doctor's office said it hadn't changed the form, but had suggested Newton alter it, the supervisor

asked Newton again. One more time, Newton lied and said she hadn't altered the form.

SunTrust Bank fired Newton for dishonesty and she sued, claiming the termination was retaliation for taking FMLA leave. The court dismissed the case, saying that employers are entitled to expect honesty in all dealings, including answers to questions on FMLA forms. It didn't matter that the doctor had authorized the alteration; she had still lied. (*Newton v. SunTrust Bank*, No. 06-CV-604, MD FL)

### Free report How to Wipe Out Fraud and Abuse Under FMLA

For an 11-step process to prevent fraud by FMLA users, access our three-page primer, *How to Wipe Out Fraud and Abuse Under FMLA*, at [www.theHRSpecialist.com/whitepapers](http://www.theHRSpecialist.com/whitepapers).



### Firing after delivery can still be pregnancy discrimination

Here's an employer argument that didn't work: It couldn't have been pregnancy discrimination when we fired her because she wasn't pregnant anymore.

**Recent case:** Leah Valentine worked for Legendary Marine, a boating supply retailer. When she became pregnant, she trained a co-worker to fill in for her during her maternity leave. Then she worked until going into labor.

A few days later, the store terminated Valentine, allegedly as part of a reduction in force. She claimed discrimination under the Pregnancy Discrimination Act.

Her former employer argued that since she wasn't pregnant when she was fired, it couldn't have discriminated against her due to pregnancy.

The court rejected the argument, reasoning that an employee terminated because she has just given birth would, naturally, have been terminated because of pregnancy. It ordered a trial. (*Valentine v. Legendary Marine*, No. 3:09-334, ND FL)

### Train front office to act fast when legal papers arrive

As an HR professional, you know you can't ignore legal documents. But what if a new secretary doesn't know she should forward legal papers to HR, or the papers end up in the in-box of an absent manager?

Missing deadlines in those legal documents can mean losing the lawsuit before it really begins.

That's why you should train all employees who could conceivably receive legal documents what to do. Remind them that time is of the essence.

**Recent case:** Zafar Arain sued his former employer for discrimination based on his Muslim religion. The company ignored the complaint.

Because it did, the court ruled in Arain's favor based strictly on his complaint. Now, all he has to do is tell the court what his damages were. (*Arain v. Double R Remodeling*, No. 6:08-CV-2036, MD FL)



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

When to pay nonexempt workers for travel locally or on overnight trips baffles many employers. Mistakes can spark anything from mild complaints to class-action lawsuits—a black eye for you either way.

The Fair Labor Standards Act (FLSA) sets rules on compensating hourly employees for travel time. The best way to decipher them is by using a case study.

## Home-to-work travel

Let's say Robert Smith is a nonexempt employee who sometimes travels for work. You don't need to pay for his commute to work; the Portal-to-Portal Act of 1947 covers that.

But suppose you ask Robert to pick up some company documents on his way in to work. In that case, you'd pay him from the time he picks up the documents. The law says that if the travel is for the company's benefit, it's compensable. If it's purely commuting, it's not.

## Working at different locations

The U.S. Department of Labor says travel time spent by employees as part of their principal activity, such as travel to other job sites during the workday, is considered "work time" and must be paid.

For example, say Robert reports to headquarters before making his rounds to visit other company locations. In that case, the commute to headquarters is commuting time, but all travel from headquarters until his last stop is paid time.

Time from the last stop to home is unpaid commuting time. Any travel that is a regular part of the employee's job is paid time.

## Out-of-town day trips

Generally, time spent traveling to and returning from the other city is work time. You can exclude regular commuting time and meal breaks.

For example, say Robert drives to the airport and takes a 6 a.m. flight to a seminar in Atlanta. He arrives at 8:30 a.m. and takes a cab to the seminar.

The seminar runs from 9 to 5, with an hour lunch break. After the seminar, he chats with friends for an hour before taking a cab back to the airport. He flies back to his base city and drives home.

Which hours count as "compensable" time?

You don't have to pay Robert for his trip to the airport; that's commuting time. But you do have to pay him

## On-call and waiting time

Here's how to account for paid time when employees are on standby to work.

- **On-call time:** Employees who remain on-call on the employer's premises are considered to be working, so they get paid. In most cases, employees who are on-call at home (or who tell their bosses where they can be reached) are not considered to be working, so they don't get paid.
- **Waiting time:** Employees are paid for waiting time when they are "engaged to wait." Employees fall under that definition if they're required to be at a work site while waiting to perform work.

from the time he arrives at the airport through his flight, cab ride and during the Atlanta seminar. (You don't have to pay for his lunch period.)

Do you pay for Robert's chatting time with friends? If there are no other flights home until later, yes. But if Robert simply opts for a later flight to socialize, no.

The cab back to the Chicago airport and the flight home are paid time. The drive home from the airport is considered unpaid commuting time.

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## After decade in court, at least the lawyers can claim victory

Former West Palm Beach police officer William McCray has waged a 10-year battle against the city, claiming he suffered discrimination because he is black.

Last year, a jury sided with McCray and awarded him \$230,000, although it ruled against a claim that he had endured pain and suffering as a result of the discrimination. But the city appealed, claiming McCray's actual lost wages due to discrimination amounted to only \$3,000.

Palm Beach County Circuit Judge Donald Hafele agreed and reduced the verdict to \$3,000.

Now McCray can accept the reduced verdict or seek a new trial in hopes a new jury will be more sympathetic. One other option: The city could make a settlement offer.

Regardless, West Palm Beach will still pay out a bundle of money. Because the jury sided with McCray in his jury trial, the city already owes more than \$200,000 for McCray's legal fees.

## No, I'm not God, I just play him on the PA

Fort Lauderdale-Hollywood International Airport fired a skycap who broadcast an anti-gay message over

### 'Best places to work'

*(Cont. from page 1)*

Beach ranked 28th in the country. The company owns the nation's largest Toyota and Lexus dealerships and provides automotive services throughout the East.

Coral Gables-based Baptist Health South Florida came in 32nd.

Lakeland-based Publix Super Market bucked the economic trend by building 36 stores and adding 29,000 employees in 2009.

Publix is the state's largest private company; JM Family Enterprises is the second largest.

## EEOC: Railroad had two disciplinary tracks—one for whites, one for blacks

CSX, the Jacksonville-based freight railroad, faces racial discrimination charges after it disciplined a black train engineer and conductor working out of its Cincinnati yard.

According to an EEOC complaint, Edward Gay admitted to an operating violation and then requested leniency, something white engineer/conductors frequently did. The EEOC claims that white CSX employees who committed more serious violations were granted leniency and reinstated within 45 days.

Gay was out of work for two years until an arbitrator ordered CSX to reinstate him.

The EEOC claims the disparate treatment of black and white workers clearly violates Title VII of the Civil Rights Act. The suit seeks back pay for Gay, compensatory and punitive damages and injunctive relief.

**Advice:** Racial, religious or gender bias can easily seep into your disciplinary processes if you're not vigilant. Periodically review your disciplinary records to see if protected classes experience any worse punishment than others. That's a sign that bias may be a problem in your organization.

the public address system. The employee later admitted he downloaded a recorded Bible passage to his cell phone and then played it twice over the loudspeakers as a prank.

A gay couple collecting their luggage following a red-eye flight heard the message and complained.

You can't always control what your employees decide to do, but a swift response is the next best thing. The airport fired the porter and issued a statement saying, "Broward County has a zero-tolerance policy for these types of offenses."

## DCF whistle-blower wins \$1 million verdict

Gerolyn Shapiro, a former child welfare investigator, sued the Florida Department of Children and Families (DCF) for wrongful termination and retaliation under the state's whistle-blower statute.

Shapiro alleged that she was terminated in retaliation for testifying before a grand jury in an investigation into alleged wrongdoing by a fellow DCF employee. According to Shapiro's complaint, that same employee created a hostile work environment for her, eventually leading to Shapiro's firing.

The DCF denied any wrongdoing, but a Palm Beach circuit court jury disagreed and awarded Shapiro \$1 million. DCF is seeking a new trial.

## Orlando man tries to take bite out of Apple

Apple Computer's hip youth culture may have met its match in Michael Katz, a former employee who is suing the company for age bias.

Katz started working at the Apple Store at Orlando's Mall at Millenia in 2006 when he was 60 years old.

He claims that from the time he was hired, he had sought a promotion from his "Mac specialist" position to "creative," a higher job classification. Each time a position opened, it was filled by someone at least 15 years younger than Katz, according to an age discrimination lawsuit he filed in federal court last October.

Katz left the store in 2007 and filed a complaint with the EEOC, which investigated and found that discrimination probably did occur.

The EEOC issued Katz a "right to sue" letter. Apple's attorneys promise to fight the charges in court. If Apple cannot get the case dismissed, it will head to trial.

**Note:** The computer industry has a reputation of discriminating against older workers. That means employers in that industry must not only guard against such discrimination, but must also document every hiring, firing and promotion decision to show that the moves were made for sound, non-discriminatory business reasons.

## Design restrictive agreements that protect you—and stick in court

Do you rely on restrictive agreements (also known as noncompete agreements) to prevent employees from working for the competition and stealing your customers? If so, now is a good time to make sure those agreements will stand up in court.

A recent 11th Circuit Court of Appeals case—*Proudfoot Consulting Co. v. Gordon*, No. 08-14075, 11th Cir.—illustrates the obstacles and complexity that can trip up employers that take former employees to court.

The appeals court affirmed a trial court's injunction enforcing Proudfoot's restrictive agreements and preventing former employee Derrick Gordon from working for the competitor. But the court also refused to make Gordon pay damages for breach of contract and reversed a judgment that would have paid the company more than \$1.6 million.

### Terms of the noncompete

The agreement in *Proudfoot* set out a six-month post-termination moratorium that prohibited Gordon from working for any of Proudfoot's direct competitors, contacting the company's clients and soliciting its employees.

The agreement also barred Gordon from ever using or disclosing the company's confidential information and required him to return the company's materials and information after his employment ended.

When Gordon initially gave notice of his resignation, Proudfoot apparently felt confident he would comply with the restrictive covenants and would not attempt to obtain employment with a competitor.

### Out the door, info in hand

But there were signs that Gordon wouldn't abide by the agreement; Proudfoot apparently missed those signs because of complacency or, perhaps, misguided confidence in the agreement's deterrent effect.

During meetings in which Proudfoot

### How to enforce restrictive agreements

Take these steps to make sure restrictive agreements remain in force:

- **Conduct exit interviews** to obtain details about the employee's new employer and the work he or she will be doing.
- **Ensure the employee returns** all company documents, material and data. Review computer files to make sure no confidential information may have been electronically copied and forwarded.
- **Reiterate the employee's obligations** under the restrictive agreement.
- **Have the employee sign a statement** confirming intent to comply with the restrictive covenants and acknowledging his or her obligations and liabilities under them.
- **Consider notifying the new employer** about the terms of the restrictive agreement. Consult your attorney before doing this to minimize the risk of a tort claim of intentional business interference.

executives tried to convince Gordon not to leave, Gordon lied about his next job and stated that his new position would be with a noncompeting business. He never mentioned that he would really be working for one of Proudfoot's direct competitors. Proudfoot officials did not press for any further information about the prospective employer.

The company was also aware that during his employment, Gordon had access to, received and, in many instances, used information about specific clients, projects, operations and pricing information. He had copies of training materials, company employee lists and his clients' business cards. Some of this material was in the form of electronic files he had downloaded. Gordon took that information when he left.

Now that the 11th Circuit has ruled—affirming the validity of the restrictive agreement but disallowing damages—it appears Proudfoot may have won the battle but lost the war.

### What the court wants to see

The 11th Circuit ruling in *Proudfoot* noted several troubling aspects that an employer can encounter and must surmount to enforce restrictive agreements. It said employers have several ways to use restrictive agreements to protect legitimate business interests.

Agreements can restrict an employee from working only with his or her own past customers. Simply knowing other customers' identities and pricing terms won't put the employee in violation of the agreement. The employer would have to be able to prove that the employee had access to *non-public* pricing information or company strategies that actually give the new employer a competitive edge.

Agreements can restrict use of specialized training "*beyond* what is usual, regular, common or customary" in the company's industry. It's not "specialized" enough if it only addresses the company's particular methodologies, practices and procedures.

Geographic limits spelled out in the agreement must be reasonable—for example, areas where the employer has clients and competitors.

The 11th Circuit also addressed how it will treat breach-of-contract damages. Damages may be awarded if the employer can prove it would have actually obtained business if not for the former employee's violation of the terms of the agreement.

The employer must prove it suffered damages. In other words, a breach-of-contract lawsuit can't simply be an attempt to claw back the competitor's profits—that's not a legitimate breach-of-contract remedy in Florida.

## Make sure your e-communication policy covers social networks

The widespread use of blogs and social networking websites such as Facebook, LinkedIn and Twitter has employers worried about what their employees are keyboarding and texting.

**THE LAW** Generally, employers may regulate workplace speech and communication. Some laws, such as the Civil Rights Act, the ADA and others, actually require employers to control abusive or harassing speech when it's based on race, religion, national origin, color, ethnicity, gender or disability.

At the other end of the spectrum, the National Labor Relations Act bars employers from muzzling employees when the employees are discussing working conditions or even pay.

Common law gives employers protection against the loss of trade secrets, slander and libel. Many states have laws requiring keepers of personal information to report data security breaches. Employees who let confidential data loose on the Internet may be costing employers a lot.

**WHAT'S NEW** The key laws governing employee communications were written in the 1930s, '60s and '90s—long before the rise of social networking. What would have been an offhand comment to one co-worker 40 years ago can now be typed on a keyboard and travel to a potential worldwide audience of millions at the speed of light. Employers must develop electronic communications policies to cope with the new technology.

Because no single law governs employee communications, employers must navigate among slices of law that govern communication on certain subjects. Further complicating the picture are court decisions that limit employers' options when it comes to monitoring email, text messages and social networking and blog posts.

A parallel concern: Overbearing electronic communications policies

may stifle workplace collaboration and creativity. Social networking platforms may be great places for workers to tag-team projects, discuss new ideas and generally build camaraderie.

**HOW TO COMPLY** Employers concerned about employee electronic communications should craft a policy that addresses those concerns in an evenhanded fashion. First, the obvious items:

- Communications that seek to harass, alarm, threaten or annoy the recipient should be banned on all company-owned devices, including computers, faxes and cell phones.
- Any communication of trade secrets is strictly forbidden.
- Any communication of confidential information is also forbidden.

Employers should develop punishments for violations, but the punishments should fit the crimes. Particularly egregious violations—such as sending customer lists to a competitor or threatening to harm a co-worker—should be grounds for termination and criminal investigation. On the other hand, lesser violations may be better addressed through progressive discipline. In short, don't write a policy that ties your hands.

### Your space and my space

Generally, courts have held that employers may regulate what occurs on their electronic devices. However, some recent decisions show courts backing off this absolute protection for employees.

In early 2009, a New Jersey appeals court ruled that an employee had a reasonable expectation that his employer would not read email sent and received on a personal account even though it was sent from a company computer. A California court ruled that an employer could not access employee text messages without the employee's permission if it paid an outside service to send the messages.

### When employees post on their own time and their own dime

So how should employers handle communication on the employee's own time and equipment? While employers' options are limited, some key provisions are in order:

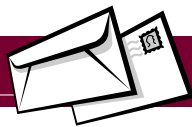
- **Employees must never claim to represent the company in electronic communications unless they have express authorization to do so.**
- **Employees should be reminded that they are not authorized to release trade secrets or confidential information when using social media.**
- **Employees should understand that, while they may discuss working conditions, criticisms of bosses and co-workers could be potentially libelous or harassing.**

Some employee information found on social networking sites can cause inadvertent trouble. For instance, employees who reveal a disability may not want a current or prospective employer to know about it. Employers that stumble on such information probably should not act on it. Some plaintiffs' attorneys argue that seeking personal disability information about a current or prospective employee on the Internet is the same as asking about a disability during an interview. The ADA bars such inquiries.

Similarly, the Internet is full of anecdotal stories of employees who placed pictures of themselves in scantily clad or provocative poses on their sites, only to have their employer terminate them shortly thereafter. Whether these stories have any merit is questionable, but it shows that employees have as many concerns as employers do in this brave, new electronic world.

Coming next month: *Job testing and discrimination*

Coming in February: *Managing HR liability*



## What's the hourly rate for family member caring for employee out on workers' comp?

**Q** One of our employees was injured at work and is now receiving workers' compensation benefits and leave. One of his family members provides attendant care for him. What hourly rate of pay should this family member receive for her services?

**A** Section 440.13(2)(b)(1) of Florida's Workers' Compensation Act states: "If the family member is not employed or if the family member is employed and is providing attendant care services during hours that he or she is not engaged in employment, the per-hour value equals the *federal* minimum hourly wage."

Thus, if you are paying attendant care pursuant to this statute, you currently should be paying the federal rate of \$7.25 per hour. (Florida's minimum wage is the same amount.)

## Employee wants FMLA leave: Can we contact her health care provider?

**Q** When one of our employees requested FMLA leave, we asked for medical certification of a substantial health condition from her health care provider. We received the form, but cannot read some of the physician's handwriting and do not understand some of the responses. We also need additional information not requested in the medical certification form. Having it would help HR administer FMLA leave and possibly accommodate any of the employee's medical limitations. Can we seek clarification from the health care provider? Can we request the additional information not covered on the medical certification form?

**A** Under the new FMLA regulations, an employer is allowed to contact the health care provider to seek clarification, understand the health care provider's handwriting and understand the meaning of a response. The employer, however, must first obtain consent for this

contact from the employee, as required by the HIPAA.

Nevertheless, the FMLA expressly prohibits an employer from asking a health care provider for additional information beyond that required by the medical certification form.

## At what point does retired worker become ineligible for PTD workers' comp?

**Q** If an injured worker has a catastrophic injury under Florida's Workers' Compensation Act and subsequently retires, does that mean the employee is not entitled to permanent total disability (PTD) workers' compensation benefits?

**A** The answer depends on whether the employer and the insurance carrier can conclusively prove that, even with this catastrophic injury, the employee still had a substantial earning capacity following the employee's date of reaching maximum medical improvement.

Simply assuming that an employee's retirement should terminate PTD benefits is a mistake. But if the employee conclusively still possesses a substantial earning capacity although retired, the PTD benefits can be stopped.



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*Florida Employment Law does not attempt to offer solutions to individual problems, but rather to provide information about current developments in Florida employment law. Questions about individual problems should be addressed to the employment lawyer of your choice. The Florida Bar designates qualified attorneys as board certified in labor and employment law.*

## HR FYI

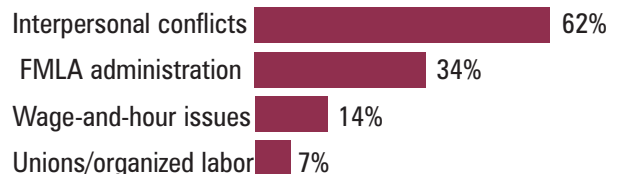
### Notify employees if you're tracking them by GPS

More businesses are using GPS systems to track their employees for productivity, safety and customer-service reasons.

*Example:* A waste-disposal system used GPS on an employee vehicle to catch an employee speeding. Some employees have complained that GPS systems violate their privacy. **Bottom line:** You're legally allowed to use the technology to track employees while they're on the job, but it's wise to first let them know you're doing it.

## Question of the Month

### Which of the following issues causes the biggest problems in your organization?



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