

Trusted compliance advice for Illinois employers

Editor: David B. Ritter, Esq., Neal Gerber Eisenberg LLP, Chicago

**In the News**

**Disabled employees don't find United's skies too friendly**

The EEOC has sued Chicago-based United Airlines for disability discrimination on behalf of disabled employees.

Joe Boswell, who worked at San Francisco Airport, developed a brain tumor that required him to take leave for treatment. United couldn't find an accommodation that would allow Boswell to stay in his previous job.

According to the EEOC, Boswell applied for other open positions at the airline, but was consistently turned down.

The EEOC maintains employers have an obligation to place disabled workers in vacant positions for which they are qualified. In the commission's view, United violates the ADA each time it refuses to do so.

**\$1.3 million due from O'Hare contractor that stiffed workers**

If your organization performs work for the federal government, consider this case a warning: Uncle Sam is watching your pay practices!

A company that provides ground transportation services at Chicago's O'Hare International Airport has settled charges it failed to pay prevailing wages to its employees as required by fed-

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**Warn bosses: One wisecrack can mean trouble**

When supervisors and managers have to deal with an employee they perceive as trouble, emotions can take over. That's bad news.

Warn them that anytime they have to deliver bad news to an employee—for example, while disciplining or firing—they *must* refrain from making smart-aleck comments. Wisecracks are too easy to misinterpret, especially if the employee already thinks the employer is out to get him.

**Recent case:** Vince Saitta, a Sicilian-American, worked as a salesman for a Honda dealership until he was fired for allegedly stealing loose change from a customer's car.

The incident that led to his termination began one day when Saitta was asked to take care of a trade-in. Saitta parked the car and proceeded to clean it out. In the process, he took about 70 cents from the center console and put it in his pocket. When he went back inside, he returned the coins to the customer.

In the meantime, however, a supervisor had seen Saitta pocket the money and asked him whether he had taken something that didn't belong to him.

Later that day, Saitta wrote a note to management, complaining about what he claimed was long-standing

*Continued on page 2*

**Beware discipline for FMLA-related tardiness**

It may be annoying and disruptive, but it is also the law: Employees eligible for intermittent FMLA leave can take that leave before their shifts start if they need to.

You can't punish that tardiness as long as the employee follows your call-in policies and the underlying reason for being late is related to intermittent FMLA leave.

**Recent case:** Mercy Agbejimi worked as a respiratory therapist for Advocate Health Care. Her daughter had serious medical problems that sometimes required someone to stay

with her. When this happened right before Agbejimi was due at work, she had to stay home until she could

*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/whitepaper](http://www.theHRSpecialist.com/whitepaper).

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## Beware wisecracks

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harassment based on his Sicilian heritage. He threatened to sue and noted that he knew the law didn't allow retaliation for complaints.

Even though Saitta had returned the change to the customer, the dealership decided to terminate him for theft. A supervisor delivered the news along with the statement, "If you're going to shoot the king, you better kill the king."

Saitta sued, alleging retaliation and citing the statement as direct proof of the company's intention to retaliate for his complaint.

The court said a jury should determine whether retaliation occurred. (*Saitta v. Melody Rae Motors*, No. 08-C-5018, ND IL)

## FMLA-related tardiness

(Cont. from page 1)

get a relative or someone from her church to come over.

Agbejimi claimed she followed call-in policies each time she was going to be late, calling the technician in charge and notifying her supervisor that she would be late due to her daughter's condition. Still, the employer disciplined her for being tardy.

Agbejimi sued, alleging she had been punished for taking intermittent FMLA leave.

The court said her case could go to trial. It reasoned that employees may use intermittent FMLA leave when they are going to be late due to events related to a condition covered by the FMLA. The case was eventually settled. (*Agbejimi v. Advocate Health and Hospitals Corporation*, No. 08-C-2754, ND IL)

**Advice:** You can require employees to call in to say they'll be late, but don't make them explain the underlying medical reason.

# 'Name, rank and serial number' is still your best bet for references

The old adage, "If you can't say anything nice, don't say anything at all," seems perfectly suited to employer-supplied references.

When an employer asks about a former employee, it's best to provide no information beyond the employee's position and employment dates. Expounding further can lead to defamation or invasion-of-privacy lawsuits.

If you do provide more details, require ex-employees to sign a waiver that releases your organization of liability (see box, at right).

**Recent case:** Florence Hicks, who is black, was fired after months of problems at work. She then applied for a job at Target and understood that she'd get it if her former employer gave her a good reference. But the Target job never materialized.

Hicks sued her former employer, alleging defamation. She assumed she'd gotten a poor reference. But the company was able to show that Target never contacted it, so it couldn't have provided any information. The case was dismissed. (*Hicks v. Medline Industries*, No. 06-3217, 7th Cir.)

**Final tip:** Whatever your policy, train your supervisors on how to handle those inevitable, "Can you tell me about Kevin?" calls.

### Free reference release form

To download a sample employee waiver that releases your organization from liability for references, go to the White Paper section of the HR Specialist site at [www.theHRSpecialist.com/whitepaper](http://www.theHRSpecialist.com/whitepaper).

## Court: Written complaint procedure must be tailored to your 'average' employee

Are your organization's harassment reporting procedures clear? Could all employees in your organization understand how to file a complaint?

A new court ruling should give you incentive to cut the confusion out of your reporting procedures.

Your organization typically can avoid liability in a harassment suit if it can show that the alleged victim bypassed your company's "reasonable" complaint-filing procedures. But if those procedures are confusing, a court may green-light the lawsuit anyway.

**Recent case:** A 16-year-old worker at a Burger King rejected her boss's sexual advances. She complained to her shift manager, who did nothing. Finally, her mom complained to the manager on duty. The boss fired the worker, who sued for harassment.

Burger King argued that it shouldn't be liable because the employee didn't

follow the restaurant's harassment reporting procedures, and that an employee's mother has no standing to put the company on notice of harassment. (The handbook told employees to report harassment to the district manager, but never gave their names or phone numbers.)

**Result:** The court sided with the employee. It said the employee's mother acted as her "agent," similar to the way a lawyer does. Plus, the court said Burger King's complaint procedures were likely to confuse even adult employees.

**Here's what the court said:** "An employer is not required to tailor its complaint procedures to the competence of each individual employee. But, if it is part of the business plan to employ teenagers ... the company was obligated to suit its procedures to the understanding of the average teenager." (*EEOC v. V&J Foods Inc.*, 7th Cir.)



# You don't have to be a mind reader! Make employees follow promotion procedures

Employees who want promotions or transfers have to request them using whatever method the employer sets.

They can't just casually express their desire for the job.

**Recent case:** Carla Hill worked for the U.S. Postal Service and filed several discrimination claims after she developed back problems. She claimed she casually expressed her desire to be transferred to a less physically taxing job as a clerk.

When the post office filled three such openings with other candidates, Hill sued, claiming she had not been offered the jobs in retaliation for her discrimination claims.

But the post office explained that the proper transfer procedure was to write a letter to one's supervisor requesting the job. Hill had not done that, while the three others had. Hill argued that the rule wasn't written, so it must not exist.

The court dismissed her retaliation claim, reasoning that when an employer creates a process, employees have to follow it. While it might have been better for the rule to be written, the court was satisfied the rule did exist and Hill didn't use it. No one expects employers to guess who might be interested in a position based on nothing more than casual conversations. (*Hill v. Potter*, No. 07-CV-6835, SD IL)

**Final note:** Your best bet is to provide clear and explicit instructions for how to apply for open positions—in writing. Then publicize the process and regularly remind employees about it.

**For private employers:** Private employers are generally free to decide when to hand out promotions, unless an employment contract or collective-bargaining agreement puts limits on the organization.

# Beware that bloated résumé: Extra skills don't necessarily mean better qualified

Employees who want a promotion sometimes get upset when they aren't selected, especially if the job winds up going to someone they perceive as less skilled or talented.

But if the spurned employee's extra skills or training weren't necessary, they aren't particularly relevant. And they're certainly no proof that bias tainted the promotion process.

**Recent case:** Kelly Hobbs, who is black, claimed she was passed over for a promotion to foreman in favor of a less qualified white male.

Hobbs said she was much better qualified. How so? She had earned a college degree and had computer skills, while the chosen candidate said he was "computer illiterate" and didn't have a degree.

The court tossed out Hobbs' claim.

It concluded that the foreman job description required neither computer skills nor a college degree. Hobbs' advanced "qualifications" needn't have played any role in the promotion decision. (*Hobbs v. City of Chicago*, No. 07-3591, 7th Cir.)

**Advice:** Make sure your job descriptions include minimum education, experience and skill requirements.

But don't add requirements that really aren't needed to perform the job. All that does is encourage overqualified applicants and discourage perfectly qualified applicants from applying. Remember, overqualified employees are likely to become disappointed and will soon be looking for other opportunities elsewhere. Then you have to start the whole process again.

## Hey, customers! Guess what? We're sexual harassers!

Your company wants to announce its vision to customers, not its verdicts. But that's what a judge is forcing Custom Companies, a Northlake trucking firm, to do.

In a startling ruling, the judge required the company to distribute a notice to its customers informing them of a \$1 million sexual-harassment verdict levied against it.

"Make no mistake about it, this is a big decision. It's really important," said John Hendrickson, the EEOC's regional attorney in Chicago.

**Bottom line:** Other judges may decide to use the same customer-notification tactic when punishing employers in harassment cases. This is one more reason to regularly train all employees—including supervisors—on anti-harassment policies and practices.

## Infertility is considered a disability under ADA

Employees who are infertile may qualify for reasonable accommodations under the ADA. That's true even if the underlying medical condition that caused the infertility has been cured. As a result, you may be required to give infertile employees time off for fertility treatments and even adoption planning.

**Recent case:** A computer programmer developed cancer of the uterus and had to undergo a hysterectomy. When she sued for disability discrimination, the question arose whether she was truly disabled simply due to her infertility.

The court said yes. Because child-bearing is a major life function (as the Supreme Court decided years ago in the *Bragdon v. Abbott* case involving an HIV-positive person), infertile employees are disabled and entitled to accommodations to deal with infertility. (*Yindee v. CCH, Inc.*, No. 05-3069, 7th Cir.)

**Free Report** To learn how far you're required to go in offering accommodations, access our free white paper, *ADA: The Limits of Accommodation*, at [www.theHRSpecialist.com/whitepaper](http://www.theHRSpecialist.com/whitepaper).



# 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 Denver. 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 Denver 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 Denver airport and the flight home are paid time. The drive home from the airport is considered unpaid commuting time.

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## Don't overlook Illinois tax break for hiring veterans

Here's another great reason to hire veterans of military service: Your organization can earn an income tax credit of up to \$600 for every qualified veteran you hire.

Many employers have overlooked the fact that Illinois introduced a Veteran's Tax Credit of 5% of wages—up to \$600 per employee—for wages paid to qualified veterans who work at least 185 days during the tax year. It applies to wages paid to veterans hired after Jan. 1, 2007, who were members of the armed forces, the reserves or the Illinois National Guard on active duty in Operations Desert Storm, Enduring Freedom or Iraqi Freedom.

## No-show 'employee' guilty after cashing paychecks for five years

A Palatine man has pleaded guilty to theft by deception after he failed to report that the telecommunications company Avaya, based in New Jersey, had deposited paychecks totaling \$469,000 into his checking account,

## Pay, federal contractors

(Cont. from page 1)

eral contracting rules. Total Enterprises, Inc. provides transportation at O'Hare, shuttling Transportation Security Administration employees from remote parking lots to various terminals.

An investigation by the U.S. Department of Labor's Wage and Hour Division revealed the company failed to pay prevailing wages and benefits to shuttle bus drivers, parking lot attendants and bus dispatchers.

Under the terms of the settlement, Total Enterprises will pay back wages and benefits totaling \$1,368,946.

**Advice:** If your company does business with the federal government, bone up on the requirements of the many laws governing wage-and-hour issues for contractors. Learn more at [www.dol.gov/compliance/topics/wages-fed-contracts.htm](http://www.dol.gov/compliance/topics/wages-fed-contracts.htm).

## What's the biggest employment law issue you face today?

Asked of Illinois HR professionals at a recent Society for Human Resource Management conference. Here are some of their responses:

"My biggest issue is administering FMLA leave. I would NOT encourage the state legislature to create its own FMLA rules—dealing with federal law is hard enough. Also, HIPAA puts a lot of constraints on how much information you can get from your employees ... We refer to FMLA as 'Forget My Last Absence.'"

— Ellen, Schaumburg

\* \* \*

"Immigration. The country needs to create a fair way for hard-working people to become accepted members of society. Undocumented people who are working hard and paying taxes should be allowed to become citizens and work legally."

— Lori, Glenview

\* \* \*

"The whole idea of leadership development is critical to us. So many of our executives are leaving and we have to make sure our organization has a good succession plan in place. We're starting to do that more aggressively these days."

— Eva, Chicago

despite his never working there.

Anthony Armatys accepted a job with Avaya in 2002, but changed his mind and withdrew the application before his start date.

But Armatys already was entered into the company's payroll system. For five years Avaya deposited checks into his bank account. Armatys even participated in the company's retirement plan, making contributions to an account administered by Fidelity Investments. When he called Fidelity to arrange a withdrawal, he identified himself as an Avaya employee.

That triggered an 11-month investigation that led to Armatys' arrest.

## Lewd butcher kept on well past 'sell-by' date

Jewel Food Stores settled a sexual-harassment lawsuit with four female employees for \$200,000, but the meat department manager who spawned the suit has had a surprising shelf life.

The manager committed numerous lewd acts in front of managers and customers, including throwing a female employee onto a table and simulating having sex with her, swinging a pork tenderloin between his legs and drawing genitalia on butcher paper. He also racially harassed three

of the plaintiffs.

Obviously, the manager had a harassing history. But rather than disciplining him, Jewel transferred him from Lemont to Orland Park, where eight employees testified he harassed them there. After another lawsuit, Jewel demoted him, but didn't fire him.

**Final note:** A sexual harassment policy with no discipline attached is worthless.

## Do you know what your employees are downloading?

A security guard for Hamilton Security & Investigations of O'Fallon was caught trying to download child pornography onto his laptop while working in the guard shack at the Dynege power plant.

Dynege's network security firm detected the attempted downloads, which were blocked by a firewall, and reported them to Hamilton.

A Dynege plant manager, along with another Dynege worker, went to the security shack and confiscated the man's computer. The FBI allegedly found illegal pornographic materials on the laptop and arrested him.

**Final note:** Studies have shown that 70% of Internet porn traffic occurs during the 9-to-5 workday.

## How to reduce liability for harassment: Do the right thing

In a case that has simple yet profound lessons for employers, the 7th Circuit Court of Appeals has ruled that an employer wasn't liable for co-worker harassment—all because the company acted fast and effectively when it discovered the harassment.

It investigated the allegations, ensured the harassed employee had many chances to complain and repeatedly reinforced its harassment policy.

### Noose in the workplace

Tremayne Porter was placed by Burton Placement Services as a temp employee at Erie Foods International Inc.'s Rochelle, Ill., food production facility. Porter was the sole black employee. One evening, a co-worker led Porter to a production area, where a noose made out of white rope was hanging on a piece of machinery. Another co-worker was standing under the noose, allegedly smiling.

Later that night, Porter's supervisor discovered the noose and took it into her office. That's when Porter told the supervisor he believed the noose was directed at him. The supervisor then spoke with the shift supervisor, informed her own direct supervisor and also told HR.

An hour or so later, the supervisor met with HR, which prompted a 15-minute meeting with the third-shift employees, including Porter. The topic of the meeting: employee harassment and Erie Foods' refusal to tolerate it. HR also addressed the company's anti-discrimination policy. Porter did not speak during this meeting.

### Refusing to name names

Later, HR met with Porter and asked him if he knew who was responsible for the noose. Porter refused to name anyone because he did not want anyone to be fired.

The HR representative handed Porter his business card and told him to call

if there were any more problems.

Before long, another co-worker showed Porter and some other employees a noose he had made and later gave Porter a noose in the locker room. The co-worker threatened Porter not to report the incident.

A couple of days later, Porter again met with the HR representative, who asked whether he was prepared to tell who was responsible for

*An Illinois company  
does everything right when  
faced with racial harassment  
in the workplace.*

the latest noose incident.

Porter again refused to implicate any individuals, but did say a co-worker had threatened him. Otherwise, Porter continued to refuse to cooperate.

### Intimidation ... and a lawsuit

Around that time, Porter was subjected to several other incidents. First, Porter claimed co-workers told him they wished he would die. Then someone pushed over his locker as he was trying to change clothing. Porter reported the incidents. The next day, the company bolted the lockers down so they couldn't be moved. Because Porter didn't identify any of the responsible co-workers, Erie Foods took no further action.

Within a few days, Porter quit. He reported the incidents to Burton Placement Services, which later faxed his report to Erie Foods.

Eventually, Porter sued Erie Foods for race-based harassment, constructive discharge and retaliation in violation of Title VII of the Civil Rights Act of 1964.

The 7th Circuit cleared Erie Foods of wrongdoing. It held that the company's supervisors responded

promptly and effectively to Porter's complaints.

They immediately investigated the incidents, and met with Porter and his co-workers to make clear the company's disapproval of such harassment and reinforce its strong anti-discrimination policy.

They attempted to find out who was responsible for the incidents, and reported the incidents to their superiors and HR.

### Not negligent, not liable

The 7th Circuit highlighted Porter's failure to participate in Erie Foods' investigation and said his subjective fears did not excuse this failure. It noted that Porter had many chances to identify his harassers, and yet refused to do so. Porter also failed to report other harassment.

Accordingly, the court held that the company was not negligent in investigating or responding to the harassment of which it had knowledge, and thus was not liable for the racial harassment Porter experienced.

### Lesson learned

Employers can escape liability under Title VII if they comply with well-crafted anti-discrimination policies and immediately investigate and effectively respond to their employees' reports of harassment, even in cases of egregious co-worker harassment.

The 7th Circuit was particularly influenced by the supervisors' and HR's repeated meetings with the complaining employee, as well as their efforts to communicate with co-workers.

Another key factor was the promptness and immediacy of the supervisors' investigation and response. Employers should adhere to their anti-discrimination policies, conduct prompt investigations and, most important, maintain open lines of communication with the complaining employee and his or her co-workers.

## Progressive discipline: How to apply a fair and firm policy

**THE LAW** While no federal or state law requires you to create and follow a progressive-discipline policy, courts often come down hard on employers that promise progressive discipline but fail to deliver it. In fact, many employee lawsuits stem from the employee's perception that he or she didn't receive a "fair" deal.

The most reliable way to protect your organization from wrongful termination charges is to establish a progressive-discipline system and make sure your supervisors enforce it.

**WHAT'S NEW** An increasing number of lawsuits have been filed in which terminated employees complain that employers have violated their own progressive-discipline policies by firing the employee before working through all the rungs on the progressive-discipline ladder.

That's why your policy should include language allowing you to skip progressive discipline and fire employees right away for particularly egregious behavior.

**HOW TO COMPLY** While it's usually your right to terminate at-will employees at any time for misconduct or lax performance, a progressive-discipline policy lets you make clear that problems exist and need improvement.

*How it works:* Your policy simply increases the severity of a penalty each time an employee breaks a rule. Typically, a policy progresses from oral warnings to written warnings, suspensions and then termination.

That way, employees won't be surprised when they reach the end and are fired. By taking the surprise out of the firing, you lessen your exposure to a wrongful-termination lawsuit. Before drafting a discipline policy, make sure employees possess clear job descriptions and an employee code of conduct. It's critical that they know exactly what's expected of them.

### Is your discipline fair? A 5-question self-exam

The perception that management is "against" the workers, once earned, is hard to shake. That's why it's vital to ensure that you treat employees fairly during disciplinary investigations. To make sure supervisors (or you) play fairly, ask these five questions before handing down discipline:

- 1. Does the punishment fit the crime (or is the employee being singled out)?
- 2. Is the discipline consistent? Have different supervisors used different discipline for similar conduct?
- 3. Has the discipline been administered after a proper investigation of the facts? Be a neutral fact-finder until you gather all the facts.
- 4. Is the discipline being taken quickly? A simple investigation that takes weeks could be seen as though your organization is trying to find problems. Inform the employee of the steps you're going through, as well as when you'll respond.
- 5. Is the discipline confidential? Warn everyone involved that speaking about disciplinary investigations or actions is strictly on a need-to-know basis.

### 5-step model policy

Here are the five standard phases of progressive discipline:

**1. Oral warning/reprimand.** As soon as supervisors perceive performance or behavior problems, they should issue oral reprimands. Ask the worker if any long-term problems or skill deficiencies need correcting.

Supervisors should keep detailed, dated notes on the reason for the warning and the response. Don't assume managers will remember specifics about disciplinary actions when a complaint makes its way to court.

**2. Written warning/reprimand.** If the problem persists, supervisors should meet with the worker and provide a written warning that details the problem and the steps needed to improve. If possible, ask another manager or HR rep to sit in.

The written warning should summarize the issues discussed, set a timeline for action and describe in detail the corrective steps agreed upon. Explain the standards that will be used to judge the employee.

Explain the consequences of continued poor performance. Have employees sign this form. Place it in the employee's personnel file.

**3. Final written warning.** If the performance doesn't improve, deliver a final written warning, possibly including a "last chance agreement." Show the worker copies of previous warnings. Again, obtain the employee's signature on the warning.

**4. Termination review.** If problems continue, supervisors should notify HR. In general, supervisors shouldn't hold solo firing authority. However, to preserve supervisors' exempt status under the Fair Labor Standards Act, they should have significant say in hiring and firing decisions.

Some organizations suspend employees while they investigate and decide whether to terminate. Before acting, make sure that your disciplinary measures are consistent with those you've taken in other similar situations. If you don't, a court could say discrimination was the true reason for your actions. Document your reasoning.

**5. Termination.** If you decide to fire, meet with the employee and deliver a termination letter that states the reasons for dismissal.

Next Nuts & Bolts: *Personnel files*

Coming soon: *Attendance policies*



## What are the FMLA eligibility rules for employees who leave and then come back?

**Q** We have an employee who has worked for us for just six months. However, three years ago, she worked for us for about a year before quitting and going back to school. Now she has requested time off under the FMLA. Is she eligible?

**A** Yes. To be eligible, an employee must have worked for 12 months. The 12 months need not be consecutive, although employment prior to a continuous break in service of seven years or more need not be counted.

There are only two exceptions to this rule:

1. The break in service is due to military obligations
2. The break is approved, where a written agreement exists concerning the employer's intent to rehire the employee.

Here, your employee has worked a combined total of about a year and a half within the past three years. Accordingly, she meets the FMLA's 12-month eligibility requirement.

**Note:** Keep in mind that she must have worked at least 1,250 hours in the previous year to be eligible for FMLA leave.

## Can we deduct from his paycheck? Employee ruined a company-issued laptop

**Q** One of our employees was issued a company laptop and later corrupted it by downloading games and other nonbusiness software. Can we recover the value of the damaged property from this employee's next paycheck?

**A** An employer's ability to make deductions from an employee's wages is governed by state law (which varies from state to state) and often depends on the reason for the deduction and whether the employer has obtained the employee's written consent.

Under Illinois law, employers cannot deduct for financial losses due to property damage, unless employees freely give written consent.

## Can I fire a worker who was arrested for DUI?

**Q** As I was reading the newspaper recently, I saw one of my employees featured in the arrest column. She had been arrested the night before for driving under the influence. Committed to maintaining a law-abiding workforce, I would like to terminate this employee. Can I?

**A** No, not based on her arrest. Under Illinois law, employers that have 15 or more employees are prohibited from inquiring into or using the fact of an arrest (or criminal history record information ordered expunged, sealed or impounded) as a basis to discharge, discipline, refuse to hire and so forth.

This restriction doesn't apply to employers that are legally required to conduct criminal background checks for employment in particular occupations or industries.

However, the fact of an arrest does not prohibit an employer from obtaining or using other information that indicates that a person actually engaged in the conduct for which he or she was arrested. The intent of the Illinois legislature was to prevent an inquiry into mere charges or allegations of criminal behavior.

## How can we save on payroll but still have employees work their full schedules?

**Q** We are having trouble making payroll and have asked our employees to give up pay for 20 hours per month while they work their regular schedules. Can we do this?

**A** Under the Fair Labor Standards Act (FLSA) and similar state wage laws, you must pay employees for all hours worked, and an agreement to forgo earned wages is unenforceable. If you are having trouble making payroll but wish to retain your employees while you weather the storm in this bad economy, reducing wages may be your best—and only—option.

Be sure to carefully review and comply with any applicable personnel policies, employment agreements and collective-bargaining agreements before you implement a pay reduction.

Also, keep in mind that asking a salaried, exempt employee to give up pay may defeat his exempt status. If a salaried, exempt employee performs any work in the defined workweek, he must be paid his full salary for the full workweek to preserve the exemption.

More important, the employer may not simply reduce the exempt employee's pay to reflect reduced hours occasioned by the employer. The FLSA requires that if an exempt employee is willing and able to work, he must be paid the full salary.

An employer may, however, require an exempt employee to take a full workweek off without pay, without losing the exemption. Alternatively, it can institute a fixed workweek reduction plan accompanied by a reduction in salary. The latter should not be done on an ad hoc basis, but should be a bona fide program that is not intended to circumvent the FLSA's salary requirements.



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