

Trusted compliance advice for New Jersey employers

Editor: Sandro Polledri, Esq., Genova, Burns & Giantomasi

**In the News . . .**

**Jersey City Rastafarian shaves \$10,000 off UPS**

A federal jury in Trenton awarded \$10,000 to a man who was denied a job at UPS because he refused to shave off his one-inch beard. Roniss Mason of Jersey City claimed shaving violated his Rastafarian religious beliefs and filed a complaint with the EEOC.

Both Title VII and New Jersey’s Law Against Discrimination require employers to reasonably accommodate employees’ religious beliefs.

A UPS spokesperson claimed the company has a long-standing policy of accommodating religious beliefs. Clearly, the jury didn’t believe that policy was applied in this case.

UPS has vowed to appeal. Perhaps it believes it only lost by a whisker.

**Advice:** Provide training on religious accommodation to all employees who make hiring, promotion and firing decisions. EEOC guidance is available at [www.eeoc.gov/laws/types/religion.cfm](http://www.eeoc.gov/laws/types/religion.cfm).

**Immigration crackdown targets employers—not illegal workers**

Fulfilling a pledge President Obama made during the 2008 campaign, the Department of Homeland Security (DHS) has announced its immigration enforcement activities will target employers that hire undocumented workers instead of focusing on arresting and deporting the workers.

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**HR may be personally liable for work mistakes**

The New Jersey Conscientious Employee Protection Act (CEPA) protects employees who report illegal activity. Punishing someone for exercising CEPA rights is also illegal—and supervisors who participate in that punishment may be personally liable for the violation. Simply put, their personal assets are at stake. If HR is complicit, so are you.

**Recent case:** David Gunnings worked as a police officer in Woodlynne. One day, the mayor demanded to know whether Gunnings had written a traffic ticket to the girlfriend of a City Council member. Gunnings hadn’t, but a fellow officer had.

The mayor pushed for the ticket’s dismissal—and Gunnings expressed his opinion that “ticket fixing” is illegal. After the incident, he failed to get a promotion he was in line for.

Gunnings claimed the denied promotion was punishment for complaining about the fixed ticket. But he didn’t just sue the police department—he sued the mayor and others involved in making the promotion decision.

The defendants argued that CEPA doesn’t call for personal liability. The court disagreed. Although he acknowledged that the New Jersey Supreme

*Continued on page 2*

**‘Possibility’ of serious illness triggers FMLA**

You already know that employees can take job-protected FMLA leave for their serious health conditions. But what if the employee just *thinks* he has a serious condition and needs some tests to check it out? Is that leave covered under the FMLA? Yes, it is, as a new case shows.

That’s why employers should never discipline or fire employees while they’re in this “limbo” medical stage. Until you find out whether an employee has a “serious” condition, assume he does and it’s covered under the FMLA.

**Recent case:** James Sarnowski regularly received good reviews at his service manager position for a Rochelle

Park limo company. A year into the job, Sarnowski took six weeks off after undergoing heart surgery.

About a year later, his doctors told him they wanted to check his heart again. Sarnowski had to wear a heart monitor and, depending on the results,

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**Free handout What Managers Need to Know About the FMLA**

Educate your management team about the FMLA and its responsibilities under the law with our Memo to Managers article, *What Managers Need to Know About the FMLA*, at [www.theHRSpecialist.com/memos](http://www.theHRSpecialist.com/memos).

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## Personally liable

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Court had not ruled directly on the issue yet, the judge followed other court interpretations and said there was individual liability. (*Gunnings v. Borough of Woodlynne, et al.*, No. 05-5459, DC NJ)

**Final note:** Several federal laws, including the Fair Labor Standards Act and the FMLA, provide for personal liability for willful violations. Protect yourself by asking for legal guidance *before* making a decision.

## Serious illness?

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he might need further surgery. Sarnowski told his boss right away, explaining that he might be out again for six weeks.

The company fired him one week later, citing performance issues.

He sued, alleging interference with his FMLA rights. The company tried to argue that Sarnowski wasn't covered by the FMLA because he was simply undergoing testing—he hadn't been diagnosed with any serious condition.

The federal court scoffed at that reasoning. It said Sarnowski earned FMLA protection the instant he notified his employer he was undergoing testing for a condition that could be covered under the FMLA. It sent the case to trial. (*Sarnowski v. Air Brook Limousine*, No. 06-2144, 3rd Cir.)



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

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

# Fire at will: The last straw doesn't have to be the same for all employees

Some employees who break rules believe they're immune from firing if someone else committed the same infraction and didn't get fired. That's simply not true.

What may be a firing offense for one employee doesn't have to be the last straw for every other employee. The key is to document—at the time—why you made the decision so you can later explain the difference between the two situations.

**Recent case:** Tyra Coleman, who is black, worked as a Blockbuster video store manager. The company has a progressive-discipline program that calls for warnings for minor rule violations or performance problems, and termination for more serious ones.

Coleman was written up once for failing to keep her store up to company standards. She got another write-up for missing a mandatory meeting and bringing her young grandson to work. She was warned each time that another incident might mean termination.

Shortly after, she closed the store

early because her son had a medical emergency. This time, Blockbuster fired her.

She sued, alleging that a white man had kept his job after closing his store early.

But the court tossed out her case after learning that the white male had no prior disciplinary actions. The early closing was his first offense. The court said Blockbuster was free to treat the two differently under the circumstances. It didn't have to fire everyone who closed a store early. (*Coleman, et al., v. Blockbuster*, No. 08-4056, 3rd Cir.)

### Free white paper What your discipline policy should say

The best way to protect against wrongful-dismissal lawsuits is to establish a clear progressive discipline policy. Access a five-step policy model in our free white paper, *Designing a Progressive Discipline Policy*, at [www.theHRSpecialist.com/whitepaper](http://www.theHRSpecialist.com/whitepaper).

# Workers' comp doesn't cover accidents that occur after hours, off premises

Employers may be responsible for injuries that occur in the employee parking lot or on company premises after employees have clocked out for the day. However, New Jersey courts draw the line at the end of the employer's property line. Employees who are hurt after they turn into public streets or areas over which their employers don't have exclusive control can't claim their injuries are work-related if they aren't on company business.

**Recent case:** Yakup Acikgoz and John Lowden, both employees with the New Jersey Turnpike Authority, crashed into each other while traveling in their personal vehicles. Lowden was approaching the employee parking lot, while Acikgoz, who had clocked out after his shift, had just left the parking

lot. Their cars collided on an access road leading to the turnpike authority facility.

Since Lowden had been driving in the wrong lane, Acikgoz sued him for his injuries. Lowden tried to argue that the case belonged in the workers' comp system. He wanted the court to dismiss the personal lawsuit against him. He claimed that both were still on company business.

The court didn't buy the argument. It said that the access road was open to the public and therefore was not part of the workplace. Besides, Acikgoz was simply commuting home, and Lowden was just picking up a paycheck—not part of his job. (*Acikgoz v. New Jersey Turnpike and Lowden*, No. A-1758-06T3, Superior Court of New Jersey, Appellate Division)

# Professional? Administrative? Executive?

## When in doubt, cite multiple FLSA exemptions



#### Workers aren't entitled to extra pay for job-related ideas

New Jersey employers aren't required to pay employees extra money for coming up with good ideas related to their work. That's because the state's "shop right" doctrine says employers aren't obligated to pay additional compensation for "ideas, knowledge, experience and performance in coming up with a viable process." *But take note:* You still may face claims for using employees' ideas that are NOT related to their regular jobs.

**Recent case:** Gedion Teklewolde, an engineer, sued after Onkyo USA fired him. He alleged theft of his idea for a "Power Plus" product. The court dismissed his compensation claim. Because his product idea related to his engineering job, he couldn't sue for extra pay. (*Teklewolde v. Onkyo USA*, No. 06-1097, DC NJ)

#### Unemployment comp is legit if threat of losing job compelled employee to quit

Telling an employee you aren't satisfied with her work and suggesting you will be looking for a replacement could mean she can quit and get unemployment compensation. You can't push her to "look for another job," and then hope to avoid an unemployment claim by saying she left voluntarily.

**Recent case:** Rachel Shuster is a veterinarian who worked for six years until she was informed the clinic owner didn't want to take her on as a partner when her contract expired. He suggested she seek other employment, but never said he was going to fire her.

Shuster gave 60 days' notice (it was required by her contract) and then filed for unemployment. Her benefits were granted, but the clinic had the decision reversed. It claimed Shuster wasn't facing imminent discharge when she gave her notice, and therefore had quit voluntarily.

She appealed, and the Superior Court of New Jersey reversed because it was clear she wouldn't have a job when her contract expired. Therefore, her preemptive resignation wasn't really voluntary. (*Shuster v. Board of Review*, Department of Labor, No. A-1880-96T2, Superior Court of New Jersey)

Under the Fair Labor Standards Act (FLSA), employees fit into one of two general categories—they are either exempt (not eligible for overtime pay) or nonexempt (eligible for overtime after 40 hours per week).

For employees to be classified as exempt, they must fall into one of these five exemption categories: professional, executive, administrative, computer-related and outside sales.

FLSA regulations provide guidelines and examples for each category, but it can still be hard to figure out where some positions fit. And sometimes, an employee's job may seem to fit into *more than one* category.

If that's the case, don't be shy about noting that in the job description. The fact is, courts often consider more than one exemption when determining whether an employer is entitled to classify an employee as exempt.

**Recent case:** Johnson & Johnson classified sales rep Patty Lee Smith as an exempt employee, saying she qualified under both the outside sales and administrative exemptions.

But Smith sued, claiming she should have been classified as exempt, hourly.

At trial, the court rejected the outside sales classification, saying Smith didn't actually sell prescription drugs to doctors; she just encouraged them to prescribe specific drugs. The outside sales exemption clearly requires actual sales.

But Johnson & Johnson scored on the administrative exemption, which requires nonmanual or office work related to company management or business operations and the exercise of discretion and independent judgment in carrying out the job's primary duties.

Because Smith, among other things, had little direct supervision and was responsible for growing her territory, she met the administrative exemption. (*Smith v. Johnson & Johnson*, No. 06-4787, DC NJ)

**Free checklist** For help in determining exemption categories for your staff, access our free "FLSA Checklist: Exempt vs. Nonexempt Status" at [www.theHRSpecialist.com/checklist](http://www.theHRSpecialist.com/checklist).

## 'Gender expression' is protected in NJ; check your company's dress code

If your organization's dress code and grooming policies set different standards for males and females, discuss the policy with your employment law attorney. A change in state law may mean you must remove any sex-specific requirements.

**Reason:** New Jersey amended its Law Against Discrimination (NJLAD) to include "gender identity or expression" among the list of protected characteristics.

That means employers no longer can discriminate (in hiring, firing, pay, promotions or work conditions) against employees for changing gender physiologically or for dressing, behaving or otherwise identifying with a gender

other than their "assigned sex at birth." The law took effect last summer.

How will it affect your workplace? Dress codes, like many aspects of this law, will require some ironing out in the courts. But it seems safe to assume that you can't disallow, on the basis of the person's gender, any dress, behavior or appearance that's generally acceptable.

The amendment, along with the recently passed same-sex civil union law and the family leave act, signals New Jersey's determination, as state Sen. Ellen Karcher says, to "continue to lead the way, to ensure that everyone has a fair chance to succeed in life" regardless of their gender identity or sexual orientation.



# Use this simple log system to document employee performance

It happens to every manager: You sit down to prepare a staff member's review and realize you can only remember what the person has done for the past few weeks. Or you let a single incident (good or bad) color your assessment.

Never rely on memory to evaluate an employee's performance. Instead, create a simple recording system. Such performance logs don't need to be complicated or sophisticated—a sheet of paper in a folder or a file on your computer will do. (Be sure you keep it secure to maintain confidentiality.)

**Note:** Courts will quickly dismiss many wrongful termination lawsuits if performance logs clearly demonstrate a history of performance problems.

## Recording employee performance: 8 tips

Create a file for each employee you supervise, including a copy of the employee's job description, job application and résumé. Follow these steps for recording performance:

**1. Include positive and negative behaviors.** Recording only negative incidents will unfairly bias your evaluation. Make a point to note instances of satisfactory or outstanding performances, too. One way to ensure balanced

reporting: Regularly update employee performance logs, instead of waiting for a specific incident to occur.

**2. Date each entry.** Noting times, dates and days of the week may help to identify performance patterns—and problems that may cause them.

**3. Write observations, not assumptions.** Be careful about the language you use—your log could become evidence in court. Comments should only focus on behavior you directly observe. Don't make assumptions about why the behavior occurred or judgments about an employee's character.

**4. Be specific.** *Example of poor documentation:* "Employee was late three times last month." *Better:* "30 minutes late on Feb. 5; cited traffic. 45 minutes late on Feb. 9; cited oversleeping. Hour late on Feb. 23; cited car problems."

**5. Don't use biased language.** A *good rule of thumb:* Any statement that would be inappropriate in conversation is also inappropriate in an employee log. That includes references to an employee's age, sex, race, disability, marital status, religion or sexual orientation.

**6. Be brief, but complete.** Use specific examples, not general comments. Instead of saying, "Megan's work was

### EEOC explains when it's legal to fire disabled workers

If you employ people with physical or mental disabilities, a new EEOC guidance document makes it clear that you can hold them to the same performance and behavior standards the rest of your employees are held to. You must, however, make "reasonable" accommodations so disabled employees can meet your standards.

The new EEOC Q&A document, *The ADA: Applying Performance and Conduct Standards to Employees with Disabilities*, helps employers draw the line on how far they must go to accommodate disabled workers. Access the new guidance at [www.eeoc.gov/facts/performance-conduct.html](http://www.eeoc.gov/facts/performance-conduct.html).

excellent," say "Megan has reduced the number of data entry errors to less than one per 450 records."

**7. Track trends.** Note patterns and flag prior incidents of repeated behavior. Bring your observations to the employee's attention only after you've defined a specific problem.

**8. Be consistent.** Don't comment about one person's behavior if you ignore the same behavior in other employees.

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## Harassed for going to Iraq: Margate officer wins lawsuit

A police officer won a harassment lawsuit against the city of Margate for the city's response when the U.S. Army Reserve called him to active duty.

The 15-year veteran of the Margate police force had served in the reserves for 24 years and never had trouble obtaining leave to attend military training in the past. But when the Army called him up for active duty in Iraq, he claimed his supervisors denied his requests for leave, changed his work assignments and reduced his pay. The Army deployed the officer to Iraq, and he served for a year. He's now back on the Margate police force.

The jury awarded the officer \$63,000, plus \$26,649 in legal fees.

**Advice:** Make sure you're familiar with employers' responsibilities under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Learn more at [www.dol.gov/vets](http://www.dol.gov/vets).

## Racial gangster jokes cost Perth Amboy police \$1.9 million

A Middlesex County jury awarded \$1.9 million to Perth Amboy police officer Guadalupe Munoz for racial insults and jokes he suffered after becoming the department's first Mexican-American officer in 2000.

Munoz testified that Police Chief Michael Kohut made disparaging

## Immigration crackdown

(Cont. from page 1)

The new emphasis should put employers on notice: Expect to pay a high price if you shortcut employment eligibility verification processes.

U.S. Immigration and Customs Enforcement (ICE) will focus on criminal prosecution of employers that knowingly hire illegal workers. A DHS statement said the goal is "to target the root cause of illegal immigration."

DHS statistics show that of the more than 6,000 people arrested in 2008 following ICE workplace investigations, just 135 were employers.

## Don't dock exempt workers' pay for damaged, lost equipment

While you can establish a policy that calls for deductions from nonexempt employees' wages if they damage or lose company equipment, it's not wise to extend that policy to exempt employees. *Reason:* Doing so could jeopardize their exempt status, according to the U.S. Labor Department (DOL).

"Deductions from the salaries of otherwise exempt employees for the loss, damage or destruction of (employer property) would defeat the exemption because the employees' salaries would not be 'guaranteed' or paid 'free and clear' as required by the (Fair Labor Standards Act) regulations," a DOL guidance document says.

The department's regulations say exempt employees must receive their full, predetermined salary, "not subject to reduction because of variations in the quality or quantity of work performed." The rules do allow some exceptions, such as certain full-day deductions and penalties for safety rules. But DOL's guidance says, "None of the exceptions listed contemplates charging employees a fine for damage to or loss of company equipment."

remarks during a training session, suggesting that Mexicans were thieves and members of a notorious street gang. Kohut apologized after protesters rallied in the streets, calling for his resignation.

The case shows that, no matter how objective your employment decisions are, it only takes a handful of offensive comments to open up your organization to a \$1 million verdict.

## Study: N.J. working women earn petite paychecks

College-educated women in New Jersey earn 66 cents for every dollar earned by similarly educated men, the second-largest pay gap in the nation after Louisiana. Nationally, college-educated women average 69 cents on the dollar.

And in case you were thinking it's all because of parenting, think again. A study by the American Association of University Women found that the gap appears right after college, when women are not compensated for superior academic performance in comparison to their male peers.

Only one year into their careers, women's paychecks amount to 80% of those brought home by men.

## Study cites N.J. as a hotbed of wage-and-hour claims

A recent report offers some ominous news for New Jersey employers. New Jersey is one of eight states that saw an increase in class-action wage-and-hour cases filed in state court last year, according to the Seyfarth Shaw law firm.

**Advice:** Brace yourself for even more wage-and-hour litigation. Such cases typically increase during economic downturns—as the economic pie shrinks, workers step up efforts to get their share. These cases can get complicated. Have your attorney evaluate your overtime practices—and then make it a priority to implement any recommended changes.

The report also noted a strong correlation between mass layoffs and Age Discrimination in Employment Act charges. As layoffs increase, employers will likely face more age-bias litigation.

## Static over dryer sheets comes out in the wash

Fourteen employees of a Costco store in Hackensack took recycling a bit too far when they started reusing customer coupons for free dryer sheets. When investigators brought the matter to the attention of store manager Sami Nasr, he fired all 14 employees.

Costco might have come out of this episode clean as a whistle, but for a bungled exit interview during which Nasr allegedly called the ring leader of the laundry larceny "the kingpin of the Columbian mafia." Nasr's prosecutorial zeal gave the suds syndicate the opening it was looking for. The employees filed suit claiming harassment and discrimination based on Nasr's comment.

But a federal court determined Nasr's comments didn't stain Costco's case against the group and dismissed the case. With that, the group's hopes went down the drain.

## 7 elements of a social media policy that limits your liability

Whether your employees are blogging reviews on Google, posting endorsement videos on YouTube, getting your company on wiki sites or branding your company on social networking sites such as Facebook, Twitter and LinkedIn, social media is clearly the wave of the future.

Online media like those provide a variety of benefits to organizations. They can help you collect industry-based knowledge, reach new customers, build your brand and publicize your company's name and reputation.

But those benefits come with their fair share of legal risks. You need a comprehensive social media policy to guide employees on your expectations about their online behavior, especially when that conduct occurs in the name of the organization. A policy is the best protection against inappropriate cyberspace conduct.

### The downside of social media

Social media can create liability before, during and after your relationship with an employee.

For example, many organizations use social networking sites to investigate job applicants' backgrounds. In the process, they often discover information that isn't job-related, such as political affiliations, disabilities and social relationships. If that information leaks into the hiring process, it can fuel discrimination lawsuits.

Some of your current employees may be posting confidential information on the web, harassing and discriminating against each other and posting improper reviews, endorsements and defamation against competitors.

After employment ends, companies face the task of severing employee "connections" to customers and clients on the company's Facebook and LinkedIn pages, and stopping terminated employees from making negative comments online and generating bad publicity.

In each of those situations, a comprehensive social media policy can protect you from liability.

As an employer, you're generally responsible for the actions of management-level employees acting within the scope of their employment. You can protect yourself from liability created by rogue managers with a good program of both policy implementation and training.

Here's what your social media policy should address:

### 1. Use of business-related social media

Address how and when you want employees to use social media to support, market and brand the organization. The policy should also inform employees whether they can affiliate themselves with the company on sites such as Facebook, Twitter and LinkedIn. If your organization does allow employees to associate their online profiles with the company, include guidelines on the permissible contents of that profile.

### 2. Confidentiality

Inform employees what you consider confidential company information: client names, projects, price lists, vendors and competitors. Tell them that posting confidential materials on social media sites is a disciplinary/firing offense. While you might be held responsible for your employees' actions when client/competitor confidentiality is breached, a good policy will, at the very least, demonstrate that you took precautions to prevent such breaches. This can help limit your liability.

### 3. Copyright, fair use, financial disclosure

The policy should inform employees that it is improper to use social media to publish protected materials and intellectual property of another company or person.

### 4. Transparency/disclaimers

The policy should instruct employees to always identify themselves and be honest in their posts about who they are and what they do. When an employee's post to a blog or web site outside your company touches or concerns work in any way, she must state that, "the postings being offered are her own and do not necessarily represent the company's opinions, positions or strategies." This insulates your company from the rogue opinions of employees that could potentially create liability exposure.

### 5. Language

You can restrict the language that employees use on social networking sites. Specify that you won't tolerate profanity, inappropriate speech or bad-mouthing of other employees. Communicate the expectation that employees should always be loyal to the company when communicating online.

### 6. Content approval

The policy should require that anything employees post on the company's web site or on "fan" pages must first be approved by a certain department or executive.

### 7. Disciplinary process

State clearly that violating the policy could lead to discipline or termination. Explain what you mean by discipline—for example, oral warning, written warning, suspension, termination. (In New Jersey, if you have any policies that you distribute to employees, you should also have an "at-will" employment disclaimer stating that the policy does not create a contract of employment and that an employee may be terminated at any time, for any reason.)

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## Workplace notices: Are your labor-law posters out-of-date?

**THE LAW** The U.S. Labor Department and (DOL) state governments require employers to post certain employment-law information that explains employees' rights and responsibilities. You also must make sure your federal and state labor-law posters are up-to-date, so that you comply with current standards.

**WHAT'S NEW** Determining which posters the DOL requires and when to replace them can be tricky because required postings change frequently. For example, the most recent change requires U.S. employers to post a notice explaining military-leave rights.

Compliance can also be costly, particularly for employers with operations in multiple states. The average employer spends up to \$1,000 a year in employee time to track, order and follow through on labor-law posting compliance issues. The most commonly altered state-posting rules include: minimum-wage increases, new smoking restrictions, workers' comp revisions, unemployment insurance updates, child-labor law changes and whistle-blower protection rules (*see box, at right*).

**HOW TO COMPLY** All employers, regardless of their size or industry, must post some federal labor-law notices. Other posters apply only to those in certain industries, or those that meet certain

employee-count thresholds.

When you tack up posters, you must put them in a prominent place where they can be readily seen by all employees and applicants. Many employers post notices in more than one high-traffic location, such as lunchrooms, break rooms, meeting rooms and in their HR offices. In some cases, if your employees don't understand English, you must provide notices in their languages.

### The big five

Here are the five main federal poster requirements:

#### 1. Equal employment opportunity.

This poster explains employees' and applicants' rights to be hired and work free from discrimination on the basis of race, color, religion, sex, national origin, age and/or disability.

**2. Federal minimum wage.** You must post this notice if you employ anyone covered under the Fair Labor Standards Act.

#### 3. Job safety and health protection.

The Occupational Safety and Health Administration requires this posting, which outlines your responsibility to provide employees with a safe workplace.

#### 4. Employee Polygraph Protection Act.

This federal notice prohibits most private employers from subjecting applicants or employees to lie-detector tests.

### Required New Jersey posters

- Equal Employment Opportunity
- Family Leave
- Minimum Wage and Overtime Hours
- Wage Payment
- Child Labor Law Abstract
- Child Labor Law (schedule of hours)
- Minimum Wage (food services)
- Minimum Wage (laundry, cleaning and dyeing establishments)
- Minimum Wage (hotels and motels)
- Minimum Wage (mercantile establishments)
- Minimum Wage (beauty culture occupations)
- Minimum Wage (seasonal amusements)
- Mandatory Overtime Restrictions for Health Care Facilities
- Job Safety and Health (public employers)
- Right-to-Know (English and Spanish)
- Conscientious Employee Protection Act (English and Spanish)
- Workers' Compensation Insurance (English and Spanish)
- Unemployment Compensation and Temporary Disability Benefits (English and Spanish)

**5. FMLA.** This notice applies to covered employers—private employers with 50 or more workers, as well as public agencies and schools—and explains an eligible employee's right to take up to 12 weeks' unpaid, job-protected leave.

In addition to the mandatory posters, if you employ workers with disabilities and you pay them under special minimum-wage certificates, you must post notices of those wage rights. Plus, agricultural employers and farm-labor contractors who employ migrant or seasonal agricultural workers must post a notice of employees' rights under the Migrant and Seasonal Agricultural Worker Protection Act.

The DOL offers free, downloadable copies of the required posters at its web site (*see box, at left*).

### Resources for understanding federal poster requirements

- Find compliance advice and downloadable posters at the DOL's poster site, [www.dol.gov/osbp/sbrefa/poster/main.htm](http://www.dol.gov/osbp/sbrefa/poster/main.htm). The site spells out who must post particular notices, penalties for failing to do so and requirements for providing posters in languages other than English. It also suggests cases in which state posters may be required. One section relates specifically to employers involved in federal government contract work.
- The DOL's Poster Advisor site at [www.dol.gov/elaws/posters.htm](http://www.dol.gov/elaws/posters.htm) is a great site to bookmark. The site lets you complete an online checklist that captures information about your industry, workforce, government contracting status and location. It then generates a customized list of posters that apply to your organization. In addition, it suggests state requirements that may apply to your organization. It also includes links to regulatory text, publications and other resources.

For more information about poster requirements, contact the U.S. Labor Department by telephone at (866) 487-2365, or by e-mail at [Contact-OSBP@dol.gov](mailto:Contact-OSBP@dol.gov).

**Next Nuts & Bolts:** *The FMLA*  
**Coming soon:** *Immigration*



## How long must we retain applications, résumés?

**Q** How long do we have to keep applications and résumés? — L.P.

**A** Federal age discrimination law says employers must retain employment applications for at least two years. That's a recommended minimum for applicants who are not hired. That doesn't mean, however, that those applications must be considered "active" for the entire two-year retention period.

Set different retention periods for applicants who become employees. Although you're not required by law to do so, hold on to employees' applications and résumés for the term of that person's employment, plus at least an additional three years.

## Can we fire for incomplete FMLA medical cert?

**Q** An employee recently has contracted a serious health condition for which she requests FMLA leave. The medical certification form, completed by her physician, does not indicate the probable duration of her condition. Can we suspend the employee for the physician's failure to submit a sufficiently complete medical certification form? — N.B.

**A** No, employers should not take any adverse employment action against an employee because of an incomplete medical certification form. The employer must provide the employee a reasonable opportunity to fix any deficiency in the certification. You can do this by giving the employee oral and written notices of the medical certification deficiency and a time frame to rectify the certification form.

If the employee does not cure the deficiency in the allotted time, you will have cause to investigate the condition for bad-faith misconduct by the employee that justifies adverse employment action. In other words, if she doesn't provide the information to justify her request, you probably have reason to suspect she's trying to get leave when she isn't really entitled to it. That's dishonest.

Before you take action, however, make sure it's not just an honest mistake. Maybe she didn't realize her medical condition didn't qualify for FMLA leave. Plus, she may have a disability covered by the ADA, even if that disability isn't a serious health condition under the FMLA. That can happen, for example, if a condition substantially limits a major life function such as walking, but doesn't require time off work.

## No witness needed for disciplinary meeting

**Q** I run a large restaurant and employ only nonunion workers. Recently, I called one of the waiters into my office to issue him a warning for arriving late for his shifts. He told me he had a right to have one of the cooks there witness our exchange. Is he right? — J.L.

**A** Your employee is wrong. While you may want to make an example of your tardy waiter in front of the rest of your staff, you are not required to honor his request. The National Labor Relations Board's (NLRB) current position is that nonunionized, private-sector employers are not obligated to permit their employees to have a co-worker present during disciplinary actions. This is due, in part, to the fact that single nonunion co-workers cannot represent the interests of the entire workforce, as does a union representative.

Keep in mind that the NLRB's position on this issue has shifted more than once over the years.



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**Specialist: New Jersey Employment Law** at (703) 905-8042 or e-mail them to [HRNJeditor@NIBM.net](mailto:HRNJeditor@NIBM.net).

## 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 company used GPS on a company 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.

### DHS finalizes rules allowing electronic I-9s

The U.S. Department of Homeland Security (DHS) issued final regulations in August that give employers greater flexibility to electronically sign and store their I-9 employee

verification forms. The rules, which clarify the June 2006 interim regulations, say employers can use a paper I-9 system, electronic system or a combination of both. Plus, the rules clarify that you must complete I-9s within three business days (not calendar days) of an employee's hire date. Read more details at [www.theHRSpecialist.com/i9rules](http://www.theHRSpecialist.com/i9rules).

### Are bloggers hurting your recruiting potential?

Find out what people (possibly your ex-employees) are saying about your organization on their personal blogs, some of which have heavy readership. To do this, plug your organization's name into a blog search engine, such as Blog Pulse ([www.Blogpulse.com](http://www.Blogpulse.com)) and Google Blog Search (<http://blogsearch.google.com>).