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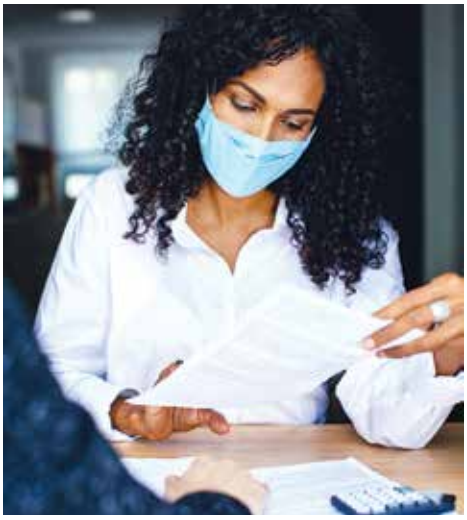
The Lawful Workplace™

Tracking Trends in Employment Practices



In This Issue

Understanding Title VII of the Civil Rights Act of 1964

Supervisors and managers should clearly understand the various laws in place that protect employees from discrimination and harassment. Title VII of the Civil Rights Act of 1964 (Title VII) is one such law; it outlines specific protections for employees regarding race, religion, color, sex, and national origin. Learning about the Title VII ensures that company leaders treat candidates and employees fairly throughout all stages of the hiring process and during employment.

What is Title VII?

The seventh amendment of the Civil Rights Act of 1964, Title VII, outlines five major protected classes: race, color, religion, sex, and national origin. There are now also protections for pregnancy, physical or mental disability, retaliation, and, most recently added, sexual orientation. Through the Civil Rights Act of 1964, employers are prohibited from discriminating against employees based on any of those protected classes.

> *"Learning about the Title VII ensures that company leaders treat candidates and employees fairly throughout all stages of the hiring process and during employment."*

Purpose of Title VII

The purpose of Title VII's protections is to "level the playing field" by forcing employers to consider only objective, job-related criteria in making employment decisions. The above classes of individuals are considered "protected" under Title VII because of the history of unequal treatment, which has been identified in each class. Title VII must be considered when making employment decisions. For example:

- When reviewing applications or resumes, companies may not eliminate candidates on the basis of a "foreign" last name.
- When interviewing candidates, companies may only ask job-related questions and cannot ask about religion or familial status.
- When testing job applicants, companies must treat all candidates the same and ensure that tests are not unfairly weighted against any group of people.

Theories of Employment Discrimination

Since the enactment of Title VII, four employment discrimination theories have emerged under U.S. law: disparate treatment, disparate impact, harassment, and retaliation.

Disparate treatment discrimination occurs when an employer intentionally considers an employee's protected status when taking an adverse employment action, such as a termination or layoff decision. For example, a manager makes it clear that he only hires African Americans for low-level positions, stating that they do not make good managers and, therefore, will never be hired as one.

Disparate impact discrimination, also known as adverse impact discrimination, occurs when an employer adopts a policy or practice that seems neutral and non-discriminatory on its surface but has a disproportionately negative effect on members of a protected class. The following practices have been found to have a disparate impact on protected groups.

- Minimum height requirements have been found to disproportionately affect

(continued on page 2)

Legal Remedies for Title VII Violations

Whenever discrimination is found, the goal of the law is to put the victim of discrimination in the same position (or nearly the same) that he or she would have been if the discrimination had never occurred. The types of relief will depend upon the discriminatory action and the effect it had on the victim. The following are common Title VII remedies.

- **Injunction.** An injunction is a court order requiring the company to stop doing something or to start doing something. For example, a court may issue an injunction to keep an employer from engaging in discriminatory practices.
- **Reinstatement.** A common injunction is an order requiring an employer to reinstate a discharged employee to the individual's former position.
- **Back pay.** Title VII specifically allows for the recovery of back pay in an employment discrimination case. Back pay includes not only lost wages but also other benefits the employee would have received. An employee may only recover back pay for a period of up to two years prior to the date the charge was filed with the EEOC.
- **Front pay.** Front pay compensates the employee for the anticipated future damages resulting from the discrimination, in terms of wages and benefits he or she would have received. In situations in which reinstatement is not practical, a discharged employee may be awarded front pay.
- **Compensatory damages.** Title VII allows for the recovery of damages for emotional distress, job search costs, and other forms of damages that did not fall into back pay or front pay. Compensatory damages are capped at various levels depending on the number of persons the defendant employs.
- **Punitive damages.** If there was intentional discrimination, an employee may be able to recover punitive damages. Punitive damages are assessed not to compensate the victim, but to punish the wrongdoer, and set an example for others.
- **Attorney fees.** Title VII allows a court to award attorney's fees and expert fees to the prevailing party. ✦

Understanding Title VII of the Civil Rights Act of 1964 *(continued from page 1)*

women, Hispanics, and Asians.

- Requiring degrees and aptitude test results that do not correlate to success on the job may unlawfully discriminate against African Americans.
- Clean-shaven requirements have adversely affected African American men who are disproportionately affected by a skin condition aggravated by shaving.
- Strength and physical agility tests may disproportionately impact female workers.

Once disparate impact is established in a court proceeding, the employer must demonstrate that the challenged requirement is job-related for the position in question and consistent with business necessity. If the employee can point to a less discriminatory way to satisfy the business needs, the employer may be obligated to adopt that alternative.

Harassment is a form of disparate treatment (i.e., intentional) discrimination. The theory has its roots in sexual harassment cases under Title VII, but courts have applied the same reasoning to harassment on the basis of other protected characteristics, such as race or religion. Sexual harassment can occur by the opposite sex or by the same sex.

- **Quid pro quo harassment.** This type of harassment occurs when a job benefit is directly tied to an employee submitting to unwelcome sexual advances. For example, a supervisor promises an employee a raise if she will go out on a date with him, or tells an employee she will be fired if she doesn't sleep with him. Quid pro quo sexual harassment occurs when a harasser is in a position of authority over the person being harassed. In this type of harassment, the harasser is usually an employee's supervisor. The supervisor has power over an employee and can promise a job benefit or threaten to remove a job benefit as part of the proposed exchange.
- **Hostile environment harassment.** A hostile work environment occurs when an employee is subjected to comments of a sexual nature, offensive sexual materials, or unwelcome physical contact as a regular part of the work environment. Generally, a single isolated incident will not be considered hostile environment harassment unless it is extremely outrageous and egregious conduct. The courts look to see whether the behavior is both serious and frequent. Supervisors, managers, co-workers, customers, and other third parties can be responsible for creating a hostile environment.

Retaliation. Title VII makes it illegal for an employer to discriminate against an employee because that employee opposed any discriminatory practice; made a charge of discrimination; or testified, assisted, or participated in any manner in an investigation, proceeding, or hearing. The individual employee who claims to be the victim of discrimination can also claim to be the victim of retaliation for complaining about it. For example, if an employee files a complaint with the EEOC claiming he was discriminated against and one week later the employer fires him, he could file a separate claim alleging that the discharge was in retaliation for having filed a complaint.

Title VII Protects LGBTQ Employees

In June 2020, the U.S. Supreme Court held that Title VII prohibits employers from discriminating against an employee because of their sexual orientation or gender identity. The court noted that the plain language of Title VII expressly prohibits discrimination against individuals — not groups — and that discrimination under Title VII simply means "treating that individual worse than others who are similarly situated." The court further reasoned that Title VII "works to protect individuals of both sexes from discrimination and does so equally." Consequently, aggrieved LGBTQ claimants can now simply check the box for "sex" when filing a charge of discrimination with the EEOC. While these protections are new under Title VII, many state anti-discrimination laws already prohibited employment discrimination because of an employee's sexual orientation or gender identity. ✦

Did Company Fire Employee for Reporting Workplace Altercation?

A railroad company employed a man as a foreman in its maintenance shops in Lancaster, Pennsylvania. On August 9, 2017, the foreman and his supervisor had a physical and verbal altercation. The next day, the foreman submitted a workplace violence report to the manager concerning the fight, but the company did not discipline or counsel the supervisor for his actions. After the altercation, the supervisor removed the foreman from overtime opportunities.

A week later, the foreman wore a bulletproof vest to work under his sweatshirt. A co-worker who observed the vest feared for his safety and reported it to management. Company police removed him from the shop floor. He explained that he was wearing it because he didn't trust his supervisor but acknowledged no threats had been made since the altercation.

The shop manager removed the foreman from service that same day at the recommendation of the officers. On September 5, the police issued an investigation notice that charged him with violating the workplace violence policy based on the fact that the bulletproof vest made others feel "threatened, intimidated and distracted, fearing for their safety." After a disciplinary hearing, the company fired him.

The foreman sued the company alleging he was terminated for making complaints regarding safety and security conditions in violation of the whistleblower provisions of the Federal Rail Safety Act of 1970 (FRSA). The company asked the court to the dismiss case, arguing it fired the foreman for violating policy, not for reporting the workplace altercation. The court agreed and dismissed. Outlining the reason for the discipline was not the altercation — it was his wearing of body armor to work. Although seven days separated his report of workplace violence and his being taken out of service, his wearing of a bulletproof vest to work was "a legitimate intervening event" that broke any suggestion of causation that arose from the temporal proximity. ✦

What You Can Learn From This Case

- FRSA promotes safety in railroad operations and protects employees from retaliation for engaging in protected activities, including reporting alleged violations.
- If an employee is fired soon after raising a complaint, it generally suggests some connection between the events.

[Foura v. National Railroad Passenger Corporation a/k/a Amtrack, U.S. District Court for the Eastern District of Pennsylvania, No. 5:19-cv-0394, September 16, 2020]

Did City Unlawfully Fire Employee Who Used CBD to Treat Disabilities?

A city hired a woman to work as a cultural arts program specialist in its parks and recreation department in August of 2015. Her job duties included teaching children's art classes, adult artist development courses, working on city events, and assisting an arts laureate program. The position was part-time with no health insurance or any other benefits but subjected her to a pre-hire drug test, for-cause testing, random testing, and testing for promotions into safety-sensitive positions. In 2011, the woman was diagnosed with bipolar disorder. She also suffered from other ailments and told her supervisor that she took cannabidiol (CBD) to treat her anxiety, chronic fatigue syndrome, and fibromyalgia symptoms.

In March 2018, the city offered her a promotion contingent upon passing a drug test. Her supervisor researched CBD usage and risks of a positive drug screen and told the employee she would be fine. She tested positive for marijuana and the city recommended termination.

She filed a lawsuit against the city claiming she was discriminated against based on her disability in violation of the Americans with Disabilities Act of 1990 (ADA) and state law. The city asked the court to dismiss the case arguing the city's human resources (HR) director, who would recommend her termination, did not know about her disability. It also argued that it had a non-discriminatory reason for her termination – her positive drug test result.

The court agreed. According to the court, there was no evidence she or her supervisor told the HR director, or anyone else in the HR department, of her bipolar disorder and anxiety. Moreover, there is no evidence that she asked for an accommodation. While she generally asserted that modifying a workplace policy is a reasonable accommodation when necessitated by an individual's disability-related limitations, absent undue hardship, she failed to point to any evidence showing her requested accommodation was necessary to address a key obstacle preventing her from performing an essential function of her job. ✦

What You Can Learn From This Case

- The ADA prohibits covered employers from discriminating against a qualified individual based on disability.
- Under the ADA, employers are only required to provide accommodations for employees experiencing workplace problems because of a disability.

[Hamric v. City of Murfreesboro, U.S. District Court for the Middle District of Tennessee, No. 3:18-cv-01239, September 10, 2020]

YOU BE THE **JUDGE**

Was Construction Worker Fired In Retaliation for Safety Complaints?

On June 4, 2015, a general contractor hired a man to work as an assistant superintendent and assigned him to a project in Charlotte, North Carolina. His supervisor was the project manager. The worker noticed his supervisor frequently drank alcohol at lunch and returned to work intoxicated, occasionally acting belligerently. The worker reported the supervisor's drinking to more senior employees several times. On the night of July 16, 2015, the worker ran into the drunk supervisor in their hotel's parking lot. They argued about a workplace safety issue, at which point the supervisor angrily told him to pack his things and leave the job site.

He spoke with the company's president on the phone and complained again about the supervisor's drinking on the job. The president told him to disregard what the supervisor had said about leaving the job site and he would send a senior employee to investigate. The investigator told the worker to stop telling people what was going on at the job site and that whatever happened at the site should stay there.

On July 20, the worker and his supervisor argued over a safety issue outside a bar, and the supervisor punched him repeatedly when he'd turned to walk away. The worker wrestled with the supervisor and put him in a headlock. Afterward, the supervisor told him he was fired, and although he was not formally terminated, the worker realized that he had been let go when his workplace iPad and cell phone were deactivated.

The worker sued the company, alleging termination for reporting safety issues and because the company believed that he would file a workers' compensation claim. A jury agreed and awarded him $65,000 in compensatory damages, $681,000 punitive damages for wrongful discharge, and $441,600 attorney's fees. The company appealed, arguing it fired the worker for the legitimate reason of insubordination and fighting with his supervisors. The appellate court disagreed, noting internal emails provided "ample evidence to support causation" of both of the worker's retaliation theories. ✦

What You Can Learn From This Case

- Unlawful retaliation occurs when an employer penalizes an employee for engaging in a protected activity.
- In workers' compensation, employers may not punish an employee for filing a workers' compensation claim, or in some cases attempting to file a claim.

[Driskell v. Summit Contracting Group, Inc., 4th U.S. Circuit Court of Appeals, No. 19-1456, September 24, 2020]

Did Company Fail to Accommodate Employee's Allergy?

In April 2011, a medical treatment company hired a woman to work in a non-clinical position that did not involve direct contact with patients. In 2013, the company implemented a flu vaccine policy. Employees in areas near patients either receive an annual flu vaccine or obtain an exemption based on medical, religious, or personal reasons. A few years later, the company amended the policy mandating all employees receive the flu vaccine and eliminating exceptions based on personal reasons. Those who were denied an exemption but declined the vaccine could be terminated.

The employee, whose past exemption requests had been granted, submitted a request for an exemption based on an allergy and two previous reactions to the vaccine. She was referred to the employer's doctor, who recommended a skin test to determine if she was allergic to some component of FluBlok. She initially declined, but agreed after learning she would be terminated for failing to comply with the policy. She was suspended with pay until her appointment for the skin test.

Upon receiving a negative reaction to the test, the employee was given the FluBlok vaccine. Forty minutes later, she experienced shortness of breath and palpitations, was given albuterol, an EpiPen, and taken to the emergency department. Her discharge noted a mild allergic reaction; her assessment plan suggested she may have had a panic attack. She returned to work and has been exempted from the vaccination.

She sued the company alleging it violated the Americans with Disabilities Act of 1990 (ADA) because it failed to reasonably accommodate her disability by not allowing her to wear a face mask during the 2017 flu season instead of receiving the vaccine. She argued the vaccine causes shortness of breath and chest palpitations, which impair breathing. The court found she failed to show any impairment when seeking an accommodation and thus did not have a qualifying disability. ✦

What You Can Learn From This Case

- Under the ADA, employers must provide reasonable accommodations to employees with disabilities, unless doing so would pose an undue hardship.
- To be protected by the ADA, one must have a disability, which is defined by the ADA as a physical or mental impairment that substantially limits one or more major life activities.

[Norman v. NYU Langone Health System, U.S. District Court for the Southern District of New York, No. 1:19-cv-067, Sept. 30, 2020]

Policies and Practices for Preventing Workplace Violence

The Occupational Safety and Health Administration (OSHA) defines workplace violence as any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the worksite. According to the Bureau of Labor Statistics, in 2018, there were 5,240 fatal workplace injuries; 403 were workplace homicides.

Categories of Workplace Violence

The Federal Bureau of Investigation (FBI) breaks down workplace violence examples into four different categories:

1. Violent acts by criminals who have no connection with the workplace.
2. Violence directed at employees by customers, clients, patients, or any others for whom an organization provides services.
3. Violent acts by a present or former employee.
4. Violence committed in the workplace by someone who doesn't work there but has a personal relationship with an employee.

Supervisor's Role in Prevention

According to the FBI, "Employers have a legal and ethical obligation to promote a work environment free from threats and violence." The following are actions supervisors can take to help prevent workplace violence:

1. **Encourage employees to accept individual differences.** Personality clashes exist in every workplace. If left unresolved, these issues could result in job dissatisfaction or depression, and even violence. Help negate conflict by organizing activities to help the team get to know each other and recognize differences as positive attributes that play a vital role in the team's strengths.
2. **Watch for warning signs.** People rarely commit a violent act with no warning. A violent act is almost always preceded by a number of warning signs or changes in behavior. Supervisors should become familiar with the actions and attitudes that may indicate disruptive, threatening, or violent behavior. The following are warning signs that may indicate a serious threat of violence.
   - loss of temper on a daily basis
   - frequent physical fighting
   - significant vandalism or property damage
   - increased use of drugs or alcohol
   - increase in risk-taking behavior
   - detailed plans to commit acts of violence
   - announcing threats or plans for hurting others
   - enjoying hurting animals
   - carrying a weapon
3. **Prevent conflicts from turning into harassment or violence.** Supervisors should monitor their teams and observe how they work together. Some team situations can cause tensions, and if these tensions are not relieved, they can fester and grow into a negative workplace, causing violence and harassment. It is important to resolve conflicts quickly.
4. **Encourage a speak-up culture.** Establishing policies and procedures that ensure the reporting, recording, and monitoring of incidents and near misses and that no reprisals are made against anyone who does so in good faith.
5. **Manage visitors and provide security monitoring.** Monitoring visitors is a smart way to prevent violence in the workplace. Security guards, video surveillance, and overseeing a visitor check-in desk are all extra security layers that can deter someone from performing a violent act. This is important in situations where people work alone or in confined spaces, or provide services involving money or alcohol. Also, consider providing after-hours escorts for workers in parking lots who become easier targets when alone. ✦

CDC Guidance for Limiting Workplace Violence

As companies began to implement and attempt to enforce policies to help slow the spread of COVID-19, violent conflicts began to erupt nationwide as some people refused to comply. On August 24, 2020, the Centers for Disease Control and Prevention (CDC) issued recommendations to help limit violent interactions stemming from COVID-19 policies. The following are some recommendations for workers:

Report Threats: Employees should be encouraged to report perceived threats or acts of violence to the supervisor on duty, following any existing policies in place.

Support Co-Workers: Encourage employees to remain aware and support co-workers and customers if a threatening or violent situation occurs.

Don't Argue; Get Away: If a customer makes threats or becomes violent, employees should not argue. If needed, they should go to a safe area such as a room that locks from the inside, has a second exit route, and has a phone or silent alarm.

Don't Force Compliance: When someone appears upset or violent, refusing to follow COVID-19 prevention policies, employees should not attempt to force them to comply as this could escalate the situation.

COVID-19 Prevention Policies that May Trigger Violence

The following COVID-19 policies may cause some customers to become angry and violent.

- Mandatory use of masks.
- Mandatory social distancing.
- Limiting the number of customers allowed into a business.
- Limiting the number of items customers are allowed to purchase, such as hand sanitizers or wipes.
- Limiting certain business hours for at-risk clients or customers.
- Unavailable products for purchase due to shipping delays or shortages.
- Closed dressing rooms or restrooms. ✦

Preventing FMLA Litigation

The Family and Medical Leave Act of 1993 (FMLA) allows qualified employees to take up to 12 weeks of unpaid leave each year for the birth or adoption of a child, to care for their own serious health condition, or to care for an immediate family member who has a serious condition. Managing an employee's FMLA leave can be complicated for supervisors and managers. Here are some common FMLA mistakes that can lead to lawsuits.

Not Recognizing FMLA Qualified Absences

An employee is not required to mention the "FMLA" when requesting leave. It is up to employers to determine if an employee's absence falls under the FMLA. Eligible FMLA leave instances are not limited to medical reasons. In a recent lawsuit, *Moore v. GPS Hospitality Partners IV, LLC*, the court concluded that the employer did not adequately inform the employee that her absence was FMLA qualified and allowed a lawsuit to proceed.

Retaliating After FMLA-Protected Absences

Employers are not allowed to penalize employees in any way for taking FMLA leave. When FMLA is a factor, supervisors need to be careful about disciplining for absences. If employees are eligible for FMLA and are qualified to take leave, they are protected. In the 2017 case of *Walker v. Verizon Pennsylvania LLC,* Verizon was ordered to pay a former employee $619,000 for FMLA retaliation and age discrimination because supervisors took the employee's use of FMLA leave into account when deciding to lay her off.

Expecting Employee to Work on Leave

As a general rule, an employee on leave should be fully relieved of their work and not asked to perform work while on leave. If an employee does perform work while on FMLA leave, any hours spent completing assignments should not count towards the protected 12-week period. In the 2015 case of *Smith-Schrenk v. Genon Energy Services*, a company argued that any work the employee completed while on FMLA leave was voluntary and un-requested. According to the court, however, the employer's actions discouraged the employee from using FMLA leave and disrespected the employee's FMLA entitlements.

Failing to Understand what Qualifies as a Serious Health Condition

Supervisors need to know when an employee's illness becomes a serious health issue. The FMLA considers an illness a serious health condition if:

- The illness requires inpatient care or continuing treatment.
- The illness involves three consecutive calendar days of incapacity.
- The employee requires two or more visits to a health care provider within 30 days.
- The employee requires one visit to a medical provider with a regimen or continuing treatment.

In *Schaar v. Lehigh Valley Health Services, Inc.*, a federal appeals court ruled that an employee may use a combination of lay and medical testimony to establish that she has a serious health condition under the FMLA. In that case, the employee told her supervisor she had been sick all weekend and provided a medical note stating her illness would prevent her from working for two days. According to the court, this was enough to establish her serious health condition and FMLA eligibility. ✦

FMLA Military Family Leave

Eligible employees are entitled to two types of FMLA leave related to a qualifying family member's military service. This type of FMLA leave is referred to as military family leave.

Qualifying Exigency Leave

According to the Department of Labor, an eligible employee may take qualifying exigency leave when the employee's spouse, son, daughter, or parent who is a member of the Armed Forces (including the National Guard and Reserves) is on covered active duty or has been notified of an impending call or order to covered active duty. Unlike non-military FMLA leave, for purposes of qualifying exigency leave, an employee's son or daughter on covered active duty refers to a son or daughter of any age. A qualifying exigency includes:

- short notice deployment;
- attending military events and related activities;
- childcare and school-related activities arising from the military member's covered active duty;
- financial and legal arrangements to address a military member's absence
- counseling;
- rest and recuperation; and
- care of the military member's parent who is incapable of self-care.

Military Caregiver Leave

Military caregiver leave allows an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member with a serious injury or illness to take up to a total of 26 workweeks of unpaid leave during a single 12-month period to provide care for the service member. Generally, the injury or illness must have occurred during the line of duty and may be physical or mental. A covered service member is either a current member of the Armed Forces, including a member of the U.S. National Guard or Reserves, or a veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness, and who was discharged within the previous five years before the employee takes military caregiver leave to care for the veteran. ✦

WORKING FROM HOME

Tips for Time Management

Time management can be more difficult without the parameters of a formal workplace when working remotely. Here are four tips for time management while working from home:

Keep a Schedule. Waking up and getting into a routine makes a big difference in productivity. Set the alarm, get dressed, get a cup of coffee, and stick to a schedule. Set boundaries with yourself and with co-workers, bosses, and clients. Remote workers should schedule work hours when they are most productive.

Create a Workspace. It is crucial to create a boundary between home life and work life, even though the physical space might be the same. Try to carve out space in the home dedicated to work, such as a corner of the kitchen table or a desk in the guest room. Avoid doing anything but work at this location.

Take Breaks. Working from home allows employees the flexibility to take breaks to enjoy personal activities throughout the day. Walking away from work has been shown to increase productivity, so schedule time for snacks, lunch, and exercise. Working from home means employees don't have to go to the gym during peak hours, but can enjoy a quiet morning class or run and return to work feeling rejuvenated and more productive.

Prioritize Sleep. Losing the morning commute allows employees to enjoy more sleep. However, working from home may also tempt employees to stay up later than normal to finish up a work task or binge the latest sitcom. Create a bedtime routine that tells the body it's time to slow down and relax. ✦

RECRUITMENT AND TRAINING

Are Unpaid Internships Lawful?

Many companies offer paid and unpaid internships. Business owners provide interns with valuable experience, and, in return, they receive extra help for their business. Many companies have historically hired interns on an unpaid basis. Though common, the practice of employing unpaid interns may violate state and federal labor laws.

The Law on Unpaid Interns

Under the Fair Labor Standards Act of 1938 (FLSA), most interns in the for-profit private sector will be considered employees subject to the FLSA's minimum wage and overtime requirements. However, if an intern is not an employee within the meaning of the FLSA, then the FLSA's minimum wage and overtime requirements do not apply.

DOL Primary Beneficiary Test

Since 2018, the U.S. Department of Labor (DOL) has applied the primary beneficiary test to determine whether an intern for a for-profit private sector business is considered an employee for purposes of the FLSA. For public sector and nonprofit organizations, the rules do not apply. Seven factors that make up the primary beneficiary test:

1. The intern and employer understand there is no expectation of compensation. Any promise of such, express or implied, suggests the intern is an employee.
2. The internship provides training that is similar to an educational environment, including clinical and other hands-on training provided by educational institutions.
3. The internship is tied to the intern's formal education program by integrated coursework or academic credit.
4. The internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The intern and the employer understand that the intern isn't entitled to a paid job after the internship.

If an analysis of these seven points leads to the conclusion the employer is the primary beneficiary, then the intern is an employee entitled to minimum wage. No single factor is determinative, making the test more like a set of guidelines than a list of rules. Some states impose additional criteria.

Education Is the Goal

Supervisors should be prepared to go out of their way to work with interns. This may result in disruptions to daily routines. Interns should not be viewed as entry-level employees, but students ready to learn. The intern, rather than the company, should be the primary beneficiary of the internship relationship.

Distinguish Volunteers

The primary beneficiary test applies to internships at for-profit employers. The FLSA has an exception for individuals who volunteer, freely and without anticipation of compensation, for religious, charitable, civic, or humanitarian purposes to non-profit companies. Unpaid internships for public sector and non-profit charitable organizations are generally permissible, even if the employer is the primary beneficiary in the relationship. ✦

Supporting Employees with Mental Health Problems

Various mental health issues can appear in the workplace, such as bipolar disorder, post-traumatic stress disorder, depression, and Attention Deficit Hyperactive Disorder, to name a few. According to the Centers for Disease Control (CDC), nearly one in five adults in the United States aged 18 or older reported mental illness in 2016. In addition, 71 percent of adults reported at least one symptom of stress.

The ADA and Mental Illness

The Americans with Disabilities Act of 1990 (ADA) considers emotional and mental conditions to be disabilities, even if the individual is stabilized with medication and treatment. Thus, companies must consider reasonable accommodations for workers when needed. However, employees must be willing to divulge their need for modifications. A supervisor might think an employee who's regularly late for work and misses deadlines is lazy or irresponsible. But, if the supervisor knows that the individual is dealing with a mental health issue, he or she may be able to adjust the employee's schedule or allow the person to work from home. Under the ADA, reasonable accommodations are determined by the interactive process, which takes place between employer and employee.

Examples of Accommodations

The Department of Labor (DOL) gives examples of accommodations that have helped employees with mental illness perform their jobs more effectively. Below are some examples.

- **Flexible Workplace.** Quieter space or working from home.
- **Scheduling.** Part-time hours, job sharing, adjustments in the start or end of work hours.
- **Leave.** Sick leave for mental health reasons, flexible use of vacation time, additional unpaid or administrative leave for treatment or recovery.
- **Breaks.** Breaks according to individual needs rather than a fixed schedule, more frequent breaks or greater flexibility in scheduling breaks, providing telephone breaks during work hours to call professionals, and others needed for support.
- **Food.** Beverages or food permitted at workstations, if necessary, to mitigate the side effects of medications.
- **Modifications.** Reduction or removal of distractions in the work area, partitions, music to block out distractions.
- **Equipment and Technology.** Tape recorders to record and review meetings and training sessions, "white noise" or environmental sound machines.
- **Adjust Job Duties.** Modification or removal of non-essential job duties or restructuring of the job; division of large assignments into smaller tasks and goals; or, additional assistance or training.

Create a Culture that Supports Mental Health Discussions

If supervisors take proactive steps to create a more open and supportive culture, team members should begin to feel more confident to talk about their mental health over time. Supervisors should be approachable and confident about mental health and take steps to normalize conversations about mental health and encourage open dialogue. ✦

How to Have a Conversation About Mental Health

It is important for supervisors to routinely ask staff how they're doing and discuss their mental health. This can build confidence and encourage employees to speak up and get the help they need sooner. The following are suggestions for having a conversation about mental health from Mind, a UK charity organization.

1. **Choose an appropriate place** where the employee feels comfortable. If they are a remote worker, consider whether going to where they are may help.
2. **Use the right words.** Ask simple, open, and non-judgmental questions and let employees explain in their own words how their mental health problem manifests, the triggers, how it impacts on their work, and what support they need.
3. **Don't make assumptions** or try to guess what symptoms an employee might have and how these might affect their ability to perform. Most employees with mental illness maintain positive behaviors and high levels of productivity and may only require support when experiencing a difficult period.
4. **Listen and be flexible.** Each person experiences mental health problems differently, so focus on the person, rather than the problem. Explore together and find solutions to any work-related difficulties the employee is experiencing.
5. **Be open and honest.** If there are specific grounds for concern, like high absence levels or impaired performance, it is crucial to address these as soon as possible.
6. **Ensure confidentiality.** Reassure employees that sensitive information will be kept confidential and shared with as few people as possible. Discuss with the employee what information they would like shared and with whom.
7. **Encourage outside support.** Employees should speak to their physicians about available support, such as medication or therapy. If the company has an Employee Assistance Program, encourage them to seek out advice and support.
8. **Offer Reassurance.** Employees may not always be ready to talk straight away, so make sure to have an open door to let them know they will get the support they need. ✦

LEADERSHIP DEVELOPMENT

Six Tips on How to Manage and Resolve Conflict in the Workplace

Workplace conflict is unavoidable and can occur in various ways: between two employees; among entire teams; or, between supervisors and the team members they manage. A study by the American Management Association (AMA) found that managers spend at least 24% of their day managing conflict. The following six tips will help leaders to handle conflicts in the workplace effectively:

1. **Acknowledge that conflict exists.** When conflict arises, don't avoid it or pretend nothing has happened. Take the time to figure out what is happening and be open about the problem. Whenever possible seek out areas of potential conflict and proactively intervene. Time spent identifying and understanding natural tensions will help to avoid unnecessary conflict.
2. **Allow employees to express their feelings.** Some feelings of anger or hurt often accompany conflict situations. Before any kind of problem-solving can take place, these emotions should be expressed and acknowledged. When assessing how to handle conflict, finding a source of an individual's frustration and recognizing it aloud to them validates what they are feeling. It also shows a willingness to listen and creates a more open space to deal with future conflict.
3. **Clarify the source of conflict.** Defining the cause of the conflict will enable the supervisor to understand how the issue came to grow in the first place. Meet with employees separately at first and question them about the situation. Discuss the needs which are not being met on both sides of the issues. Obtain as much information as possible on each side's outlook. Continue asking questions until all the conflicting parties understand the problem.
4. **Determine underlying needs.** The goal of conflict resolution is not to decide which person is right or wrong; the goal is to reach a solution that everyone can live with. Looking first for needs, rather than solutions, is a powerful tool for generating win/win options. To discover needs, try to find out why people want the solutions they initially proposed.
5. **Agree on the best solution.** After investigating the situation, and determining how the issue may be resolved, both parties need to voice a solution for the problem. Find common ground. Afterward, determine the responsibilities each party has in resolving the conflict.
6. **Determine follow-up actions.** Schedule a follow-up meeting to determine how the parties are doing. If the conflict is causing a disruption in the department and remains unresolved, a supervisor may need to explore other avenues. In some cases, the conflict becomes a performance issue and may become a topic for coaching sessions, performance appraisals, or disciplinary action.

Conflict can be constructive as long as it is managed and dealt with directly and quickly. By respecting differences between people, being able to resolve conflict when it does happen, and also working to prevent it, supervisors can maintain a healthy and creative team atmosphere. ✦

BOOK REVIEW

Bring Your Human to Work: 10 Surefire Ways to Design a Workplace That Is Good for People, Great for Business, and Just Might Change the World *by Erica Keswin*

It is no coincidence that most of the companies annually ranked among those most highly admired and best to work for are also annually ranked among those most profitable and have the greatest cap value in their business segment. However different these companies may be in most respects, all of them have a workplace culture within which personal growth and professional development are most likely to thrive.

Erica Keswin asserts that "people crave work-life balance, sustainable work practices, and authentic, purpose-driven work cultures…Bringing our human to work will help us manage our technology and ourselves, too."

The phrase "bring your human to work" means bringing humanity to work, and, enriching a workplace culture "where people can feel like they are plugged into something bigger than themselves — that's a human culture. That's the kind of place that businesses need to create if they want to succeed in this purpose-driven marketplace and the race for young, very-much-in-demand talent."

Kerswin identifies and explains 10 ways to establish and then strengthen such a culture. The specific initiatives are best revealed within the narrative, in context, but they are directly relevant to all organizations. Machines will have increasingly greater impact in months and years to come. Erica Keswin is convinced that, as a result, "the human touch" will have even greater value in personal relationships, both at work and elsewhere.

Our humanity cannot out-perform new and better technologies, but it can ensure these same technologies improve not only our standard of living but also our quality of life within and beyond the workplace. ✦

[Book Review by Bob Morris, bobmorris.biz]

FROM OUR EDITORIAL DESK

Company Ordered to Pay Back Wages to Workers with Disabilities

After an investigation by the U.S. Department of Labor's Wage and Hour Division (WHD), Pine Castle Inc., a Florida facility for adults with intellectual and development disabilities, will pay $14,487 in back wages to 48 employees for failing to meet the requirements of the Fair Labor Standards Act of 1938 (FLSA).

WHD found the company failed to provide workers with disabilities with services required to pay sub-minimum wages. Under the FLSA, companies must provide services such as career counseling and referral services from the state vocational rehabilitation agency. Since the company failed to ensure its workers received required services, the WHD found it was obligated to pay affected workers the full federal minimum wage of $7.25 per hour.

Wage and Hour Division District Director Wildalí De Jesús, said, "The U.S. Department of Labor is committed to ensuring that all workers receive the hard-earned wages legally due to them and to protecting workers with disabilities from workplace exploitation."

Section 14(c) of the FLSA offers more job opportunities for workers with disabilities when their disability affects their productive capacity for the work being performed. After applying for and receiving a certificate from WHD, the employer may determine their employees' productivity and calculate the appropriate commensurate wage as a percentage of the rate for experienced employees performing similar jobs in the area. ✦

Private Equity Group Must Pay Back Pay for H-1B Worker Payments

Affirming a district court's summary judgment for the Department of Labor (DOL), the Second Circuit held a private equity group must pay back wages to two H-1B program workers. Although the employer paid one employee a larger annual salary than he was entitled to, his monthly pay fluctuated, resulting in underpayments for 10 of the 17 months under investigation. The court held that the DOL regulations governing payment to H-1B workers required payment of no less than one-twelfth of the employee's annual salary on a monthly basis. Each underpayment violated the Immigration and Nationality Act of 1965 (INA).

To hire an H-1B worker, companies must file a Labor Condition Application (LCA) with the DOL and agree to pay the prospective employee the required wage rate set by the INA. The DOL's regulations require employers to pay the employee "cash in hand, free and clear, when due" in "prorated installments paid no less than monthly."

The private equity group, hired two H-1B program employees from 2010 to 2013: a market research analyst and a financial analyst. In the LCA for the financial analyst, the employer committed to pay $65,000 per year. Once the employee started working, he was paid $3,000 per month base salary plus a 3% bonus of the employer's gross monthly revenues. His monthly pay fluctuated depending on the employer's monthly revenues. Sometimes he was paid more than his pro rata share of $65,000, sometimes less.

After investigating, the DOL concluded the company paid the employee more money in 2012 than he was entitled. However, it underpaid the employee for 4 months in 2011 and 6 months in 2012. The agency concluded the company owed the financial analyst $22,713 for the 10 monthly underpayments, giving it no credit for the overpayments. ✦

OSHA Announces $484,069 in Coronavirus Violations

On October 2, 2020, the Occupational Safety and Health Administration (OSHA) announced that since the start of the coronavirus pandemic, it cited 37 establishments for violations, resulting in proposed penalties totaling $484,069. OSHA has cited employers for violations that include the failure to: (1) implement a written respiratory protection program; (2) provide a medical evaluation, respirator fit test, training on the proper use of a respirator, and personal protective equipment; (3) report an injury, illness, or fatality; (4) record an injury or illness on OSHA recordkeeping forms; and, (5) comply with the General Duty Clause of the Occupational Safety and Health (OSH) Act of 1970.

Under the OSH Act of 1970, employers are responsible for providing safe and healthful workplaces for their employees. Higher citations were issued to the following companies:

- Clara Maass Medical Center, $46,266
- Hudson Hospital OpCo LLC, $36,627
- Bell Medical Transport LLC, $24,290
- Atrium Post-Acute Care of Wayneview, $22,555
- 2 Deer Park Drive Ops LLC, $13,494
- Arbor Management Services LLC, $13,494
- Care One at Livingston Assisted Living, $13,494
- Hackensack Meridian Health System, $13,494
- HMH Residential Care Inc., $13,494
- Jewish Home Lifecare, Home Assistance Personnel Inc., $13,494
- Massapequa Center LLC, $13,494
- Natchaug Hospital Inc., $13,494 ✦

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