

# LABOR WATCH

A MONTHLY REPORT ON THE DEVELOPMENTS IN LABOR RELATIONS, EMPLOYMENT LITIGATION, IMMIGRATION, AND HUMAN RESOURCE MANAGEMENT

## HOLIDAYS AND HOLY DAYS: WHAT YOU NEED TO KNOW ABOUT TIME OFF AND PAY

Thanksgiving, Christmas, Kwanzaa, Hanukkah, and the list goes on. As the holiday season approaches, here are several points you need to be aware of when granting employees time off, paid or unpaid, for national holidays and religious reasons.

With regard to holidays, most employees look forward to, and even expect, the day off to celebrate and feast. There is no law requiring time off for nationally recognized holidays, however, for morale purposes it may be recommended. (The Morale Exception). If your doors are closed on a nationally recognized holiday, holiday pay is not required. For hourly employees, an employer is only required to pay employees for time actually worked. The Morale Exception may apply here. Exempt employees must be paid their full weekly salary if

they work any hours during the week in which the holiday falls.

If an employer provides paid holidays, the holiday hours it pays are not counted as hours worked when calculating entitlement to overtime compensation. The receipt of holiday pay can be conditional, such as requiring an employee to work for the company for a specified period of time before becoming eligible for holiday pay. Any conditions to receiving holiday pay should be in writing and available for the employee to review. Finally, an employee scheduled to work on a holiday is not entitled to premium holiday pay. This is also subject to the Morale Exception.

With regard to religious holidays, many employees find religion or become more observant during this time of year. Whether you perceive their sudden devoutness to be legitimate or a transparent scheme to get time off, the main thing to remember is to be consistent in your accommodation of all employees, regardless of religion. Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against employees on the basis of religion. While Title VII applies to all employers with 15 or more employees, many states have adopted similar laws which apply to smaller companies. Once an employee with a bona fide religious belief notifies the employer that a belief conflicts

with an employment requirement, the employer is required to accommodate that belief unless it causes an undue hardship. An undue hardship is an accommodation imposing more than a minimal cost on the employer. The cost can be economic, such as lost business, or having to pay for additional workers or overtime. The cost can also be non-economic, such as compromising the integrity of a manufacturing process or the safety of employees.

Employees are also responsible to assist the employer in resolving conflicts between job duties and their religious needs. This includes notifying the employer of his or her religious commitment as early as possible after the job is accepted or when an employee becomes more observant of their religious beliefs during the course of their employment. Last-minute requests for time off or vague references to a need for time off generally do not constitute notice to the employer triggering liability if the time off is not granted. If an employer allows greater accommodation than the law requires for one religious group, that level of accommodation must also be extended to employees of other faiths. Absence from work for holy day worship or observance is not required to be paid and, unless you want to pay for all such time off, is not recommended.

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# DON'T LET WAGE AND HOUR MISTAKES RUIN YOUR HOLIDAYS

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The holiday season is quickly approaching. Here are some wage and hour issues that commonly pop up during this time. Be prepared!

**Question:** We give holiday bonuses to our employees. The amount they receive is dependent upon their years of service. Are we required to include the amount of the bonus in the employees' regular rate for purposes of computing overtime?

**Answer:** Employers often forget that some bonuses must be included in the regular rate when computing overtime. However, in this case, the holiday bonus need not be included in the regular rate because it is considered a gift. If, however, the bonus amount was based on hours worked, production, or efficiency rather than length of service, the answer would be different. In that case, the holiday bonus is not a "gift" and the amount must be included in the regular rate when computing overtime.

**Question:** Sometimes we must have nonexempt hourly employees work on a holiday. They receive double time for these hours. Does this affect our overtime obligations?

**Answer:** There are a few issues here. First, of course, the holiday hours worked must be considered hours worked for determining whether an employee has worked over 40 hours in the workweek and, therefore, is entitled to overtime. Second, because you are paying at least 1 1/2 times the employee's regular rate for the holiday hours worked, the extra premium pay need not be included in the regular rate. Therefore, the regular rate remains unchanged. (If you were paying less than 1 1/2 times the regular rate, the premium pay would need to be included in the regular rate.) Third, if you would like, you can apply the premium pay towards the amount you owe for overtime. Again, this option is only available because you are paying at least 1 1/2 times the regular rate as premium pay. As this is somewhat complicated, an example might be helpful:

The employee's regular rate is \$10 per hour. The employee receives \$20 per hour for all holiday hours worked. The employee works a total of 43 hours during the week – 35 nonholiday hours and 8 holiday hours. The employee will be paid a total of \$510 [(35 hours × \$10) + (8 hours × \$20)]. The employer owes no additional overtime pay because it can credit the double-time premium pay to its overtime pay obligations.

**Question:** We have a work rule that requires employees to work their entire last scheduled shift before a holiday and their entire first scheduled shift after a holiday in order to receive holiday pay. If an exempt employee misses the day

before a holiday because of personal reasons, can we legally refuse to pay the employee holiday pay?

**Answer:** Probably not. An employer cannot deduct an absence of less than one workweek from an exempt employee's pay if it is caused by the employer's operations. If the employer is closed on a holiday, the exempt employee's salary cannot be reduced because he or she did not work the holiday. However, employers can deduct for full-day absences caused by an employee's personal circumstances. Therefore, the employer need not pay the exempt employee for the day missed prior to the holiday.

**Question:** We are having a holiday party after work hours. Are we required to pay for the time spent at the party?

**Answer:** If you require employees to attend the party, the time is compensable. Also, if employees are led to believe that their jobs will be adversely affected if they do not attend, the employee may have a valid argument that the time spent at the party is compensable.

**Question:** We like the personal touch so we still address our holiday card envelopes by hand. Usually, we hire a temporary employee to perform this work. However, one of our nonexempt employees who regularly earns \$12 per hour has offered to do the work after her regular schedule for \$8 per hour rather than the \$10 we pay the temporary employee. Would we be required to count the hours spent addressing the holiday cards as hours worked for purposes of computing overtime?

**Answer:** Yes. The employee is performing work for the employer even while addressing holiday card envelopes. Therefore, the hours spent performing that work must be added to the hours spent performing her regular work when determining how much overtime is owed. Because the employee is receiving two rates of pay, overtime must be calculated slightly differently. The weighted average method can be used in which case the employee's total earnings from both rates are added together and divided by total hours worked to obtain the regular rate. In the alternative, an employee can agree with the employer in advance of the work being performed that she will be paid during overtime hours at a rate not less than 1 1/2 times the hourly nonovertime rate for the work being performed during the actual overtime hours. The following are a couple of examples:

Example 1:

Jane Doe performs her regular job Monday through Friday from 8 a.m. to 5 p.m. at \$12 per hour, with one hour off for lunch. She addresses holiday cards on the

*(Continued on Page 5)*

## PRACTICAL APPROACHES FOR REDUCING WORKERS' COMPENSATION COSTS

In this time of rising workers' compensation costs, an employer has no excuse for failing to get involved in workers' compensation claims. This is because involved employers can take control of rising costs and create a better work environment. Below are some practical approaches that will get you involved and can lead to reduced costs.

### I. GET INVOLVED

No employer is immune from workers' compensation claims, and ignoring this fact can create even greater liability. The proactive employer, on the other hand, can limit liability by creating an atmosphere focused on safety and that encourages employees to return to work after they have suffered a workers' compensation injury. To create this type of environment, an employer must begin working with employees from day one. Therefore, the first goal for any employer should be to create a firm yet supportive culture regarding injured workers.

#### a. Training

In the defense of workers' compensation claims, many times employees use the excuse "I was afraid" when explaining why they did not report a work injury. This fear is often driven by the current stereotype of workers' compensation claimants as "fakers." Unfortunately, this fear and stereotype can actually increase costs. To move away from such fear and create a culture that accepts work injuries as a natural part of employment, employers need to provide training.

A safe work environment requires immediate training of new employees and ensuring that no one is exempt from training. The emphasis on safety training needs to start at the top of the organization and trickle down to the managers and supervisors so that all incoming employees understand the importance of the training and the creation of a safe work environment. While there are several different ways to train employees, the best way to provide training is to use a variety of techniques that get the point across to employees.

On the job safety training and one-on-one discussions are usually the most effective methods, however, group training and the use of safety videos and other media can be helpful. To make sure training techniques are effective, and that the proper culture is being cultivated, it is important to involve all employees in the development of the training program and the continued analysis of that program. This will give the employees a vested interest in the creation of a safe work environment, and including current employees in the training of new employees will keep safety fresh in the minds of everyone.

#### b. Closed-ended Return to Work Program

The above recommendations will certainly help reduce the number of work injuries, however, just as important is what happens after there is a workers' compensation injury. The best way to reduce costs and foster the proper culture is to have a closed-ended return-to-work policy. A closed-ended return-to-work policy needs to involve the employee, the employer, and any medical providers. This will ensure that any restrictions on the worker are being followed so that a plan can be put together to reduce risks or further injury, and ultimately bring the case to conclusion. Further, understanding that a closed-ended plan may have a duration

of many months will allow a better focus on restoring the employee to his or her prior work ability and avoid rushing employees back into jobs that they are not ready for.

Ultimately, the ability to bring an employee back to work lays with the employer becoming involved in the workers' compensation claim. This includes constant communication with the claimant and the treating physician. The physician needs to understand what jobs are available and what accommodations can be made so that a safe and proper return to work plan can be put together.

It is also extremely important to make sure that any third-party administrator or workers' compensation insurance

*“The emphasis on safety training needs to start at the top of the organization and trickle down to the managers and supervisors so that all incoming employees understand the importance of the training and the creation of a safe work environment.”*

# PRACTICAL APPROACHES FOR REDUCING WORKERS' COMPENSATION COSTS *(Continued from page 3)*

carrier understands your return-to-work policy. This will promote consistency and continuity in your application of the plan and will lead to a better understanding by employees as to what is expected of them regarding returning to work. The major focus of a return-to-work policy is to eventually bring closure to a workers' compensation claim as the loss of communication with an employee can often lead to long periods of absences and increase the chances that an employee may never return-to-work or recover from the injury. An effective return-to-work program will avoid employees becoming dependent on their doctors and will provide them with a social structure that will help them recover more quickly.

## II. ENCOURAGE A HEALTHY LIFESTYLE

Obesity greatly increases the costs of workers' compensation claims. The Duke University Medical Center recently published a study regarding obesity and its effect on workers' compensation costs among its 11,728 employees. The main focus of the study was a person's body mass index (BMI) and its relation to certain workers' compensation costs. In America, a BMI of 18.5 to 24.9 is considered normal, a BMI of 25 to 29.9 is considered overweight, and a BMI of 30 or above is considered obese.

The results of the study showed that employees with a BMI greater than 40 had 11.65 claims per 100 employees and averaged 183.63 days of lost work per 100 employees. The employees in the normal range only had 5.8 claims per 100 employees and only averaged 14.19 lost days of work per 100 employees. Most notably, the medical costs per claim for obese employees were \$51,019 per 100 employees versus \$7,503 for employees in the normal BMI range. This supports the current statistics that show obesity costs U.S. companies an estimated \$13 billion per year.

Obesity also affects the amount of short-term disability used. In fact, a recent study showed that overweight workers had a 26% increase in short-term disability claims versus those with a normal BMI, and obese workers had a 76% increase versus employees with a normal BMI.

An employer's primary defense against obesity is to encourage a healthy lifestyle through the use of a wellness plan. A wellness plan encourages a healthy lifestyle and provides incentives and structure for employees that may

otherwise not seek out the healthiest lifestyle. Another method for improving the overall health of employees is to have an employee assistance plan. An EAP will help link-up employees that are struggling with various areas of their life with the appropriate care. One of the benefits of an EAP that can reduce workers' compensation costs is the ability to reduce anxiety and depressive disorders as those often diminish the desire of an employee to return to work, as well as create a lingering pain cycle that may be difficult to break.

## III. DO NOT FEAR WORKERS' COMPENSATION CLAIMS

Not fearing workers' compensation claims is easier said than done. The rise of workers' compensation retaliation claims and the involvement of third-party administrators or insurance carriers can lead to hesitation by employers when it comes to dealing with workers' compensation claims. The most important thing to keep in mind is that someone that has suffered a work injury is still an employee and needs to be treated as such. For instance, if an injured worker is released to work with restrictions and light duty work is available, then that worker must be required to work all available hours.

Probably the best advice that can be given in this area is to remain consistent. This means that a workers' compensation claimant should not be treated any different than any other employee. The only exception would be the providing of a return-to-work program based on the restrictions that have been assigned to that employee. However, all else needs to remain equal, including the enforcement of attendance policies. Being consistent can avoid workers' compensation retaliation claims by eliminating differential treatment.

While the current litigious climate makes it understandable for employers to tread carefully in regard to workers' compensation matters, failing to act can lead to workers' compensation nightmares ranging from never-ending claims to employees that file numerous workers' compensation claims starting with their first week of employment. Hopefully, the approaches discussed above help eliminate such nightmares and help you save money in the process.

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# HOLIDAYS AND HOLY DAYS: WHAT YOU NEED TO KNOW ABOUT TIME OFF AND PAY *(Continued from page 1)*

Finally, when scheduling examinations or other selection activities, the activity should not conflict with a current or prospective employee's religious needs unless the employer can show that an undue hardship exists for alternative scheduling.

Following these guidelines is a good start to keeping your policies legal and morale high around the holidays. As always,

consultation with a legal advisor who knows your business when making determinations about time off and pay is encouraged.

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# INTERMITTENT FMLA: COUNTING PAID HOLIDAYS AGAINST LEAVE

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For the first time, a federal appeals court has addressed whether paid holidays count against an employee's leave under the Family and Medical Leave Act. The United States Court of Appeals for the First Circuit<sup>1</sup> determined that employers may properly count paid holidays against employees' 12-week FMLA allotment, even if an employee is on intermittent leave.

In *Mellen v. Trustees of Boston University*,<sup>2</sup> a university employee who took her total allotment of intermittent FMLA leave in two blocks sued her employer for incorrectly calculating her leave when it counted three paid holidays. At issue in the case were two FMLA regulations. One regulation provides that employees taking intermittent leave will only have "the amount of leave actually taken" counted toward their 12 weeks.<sup>3</sup> A second regulation provides, "For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave."<sup>4</sup>

The First Circuit noted that *Mellen's* case was the first opportunity for courts to interpret the "intersection" between these two regulations. In deciding how the two regulations worked together, the court determined that because the regulation specifically addressing holidays applied to all types of FMLA leave (general or intermittent), it was "assumed" that the regulation would also define intermittent leave taken in week-or-more intervals.

The *Mellen* decision is significant for employers with employees taking intermittent leave in periods lasting a week

or longer. When a paid holiday falls within a full week of intermittent leave, that holiday still counts against the employee's FMLA leave. Of course, it remains to be seen whether courts in other states will adopt the First Circuit's reasoning. Also, it is important to note that the *Mellen* decision does not impact how employers treat holidays when employees take intermittent leave in intervals less than a week at a time.

*Mellen* is significant for employers, not necessarily because of the result reached, but because it may have created an accounting nightmare for employers had the court reached the opposite result. Thus, employers can, unless other courts or the Department of Labor determine otherwise, reasonably continue counting week-long general and intermittent FMLA leave in entire weeks, even when those weeks contain paid holidays.

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<sup>1</sup>States governed by the First Circuit include Maine, Massachusetts, New Hampshire, and Rhode Island.

<sup>2</sup>*Mellen v. Trs. of Boston Univ.*, No. 07-1151, 2007 WL 2745015 (1st Cir. Sept. 21, 2007).

<sup>3</sup>29 C.F.R. § 825.205(a).

<sup>4</sup>29 C.F.R. § 825.200(f).

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## DON'T LET WAGE AND HOUR MISTAKES RUIN YOUR HOLIDAYS

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weekend at \$8 per hour. She works 40 hours at her regular job from Monday through Friday. On Saturday she addresses holiday cards for 8 hours. The workweek for overtime purposes is Monday through Sunday.

Jane would be owed 8 hours of overtime at 1 1/2 times the rate paid for the work performed during the overtime hours or 1.5 x \$8 per hour.

Example 2:

Jane Doe performs her regular work from Monday through Friday from 8 a.m. to 5 p.m. at \$12 per hour with one hour off for lunch. She addresses holiday cards

Monday through Friday from 7 p.m. to 9 p.m. at \$8 per hour. As a result, she has worked 40 hours by the end of Thursday. Therefore, she would be owed 1 1/2 times her regular rate of \$12 for the hours worked on Friday performing her regular work and 1 1/2 times her regular rate of \$8 for time spent addressing holiday cards on Friday.

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# THE SUPREME COURT IS IN SESSION!

The Supreme Court of the United States reconvened recently, and it is scheduled to address four employment law matters during this term. The following is a brief synopsis of each employment law matter in which the Court will decide.

*Hall Street Associates LLC v. Mattel Inc.* The issue before the Supreme Court is whether parties to an arbitration agreement can agree to expand the scope of what is arbitrable. Both parties agreed to submit any dispute to arbitration. However, they further agreed that either party could then appeal the arbitrator's award to a court of competent jurisdiction and argue that the arbitrator's conclusions of law were erroneous. The United States Court of Appeals for the Ninth Circuit held that this side agreement of allowing an appeal to the arbitrator's award was invalid. Historically, courts have applied the Federal Arbitration Act very narrowly thereby limiting the grounds by which a court can review an arbitrator's award. This decision will decide to what extent parties can mutually agree to allow a court to review an arbitrator's decision and assist employers when drafting mandatory arbitration provisions for all employment disputes.

*Mendelsohn v. Sprint/United Management Co.* The issue before the Court is whether "me too" evidence is admissible in a discrimination case. "Me too" evidence is defined as testimony by other employees who allegedly experienced discrimination during the same layoff. The employer in this case fired Mendelsohn in a reduction in force. Mendelsohn sued for discrimination and her lawyer wanted to put other employees on the stand to say, "Hey, I was discriminated against as well when I was fired in the reduction in force." The trial court said "no," but the United States Court of Appeals for the Tenth Circuit said yes in an age discrimination suit. This decision will have a significant impact for employers and whether we will see a significant rise in litigation following layoffs.

*Holowecki v. Federal Express Corp.* The Supreme Court will decide what constitutes a charge of discrimination under federal civil rights laws. Patricia Kennedy worked for a large transportation company. Believing to be the victim of age discrimination, she went to the EEOC, filing an intake questionnaire and a four-page verified affidavit detailing the facts upon which she based her charge. The EEOC did not treat the submissions as a charge and did not tell the employer that it had received a charge until the plaintiff ultimately filed the official charge some time later. Why does this matter? If a court considers the materials to be a perfected charge, then the lawsuit survives. If the court doesn't consider the materials to constitute a charge, then the trial court tosses the lawsuit out because the plaintiff untimely filed the official charge in excess of 300 days after the alleged discrimination. Regardless of the outcome of this case, it is very important to forward any information from state or federal administrative agencies to legal counsel to ensure all arguments in defense of charges are preserved.

*LaRue v. DeWolff, Boberg & Associates, Inc.* The Supreme Court will consider whether an individual employee who suffers losses in a retirement plan due to fiduciary breach – the plan made bad investments – can sue the plan fiduciaries for the plaintiff's individual losses. Historically, the highest court has gone out of its way to protect fiduciaries and not expose them to liability.

We will continue to keep you apprised of the Supreme Court's decisions with regard to each of these matters.

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