

LABOR WATCH

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

MINNESOTA SUPREME COURT SPEAKS OUT ON PAYMENT OF UNUSED VACATION

In a long-awaited decision for Minnesota employers, the Minnesota Supreme Court recently held that an employer's obligation to pay out unused vacation balances upon termination is governed by its policies and contracts. Thus, in *Lee v. Fresenius Medical Care, Inc.*,¹ the employer lawfully refused to pay out Personal Time Off to an employee who was terminated for misconduct.

In *Lee*, the court held that Susan Lee was not entitled to her PTO pay. Lee had worked as a dialysis patient care technician for a hospital in Duluth, Minnesota. At the beginning of her employment, she signed an acknowledgement evidencing receipt of an employee handbook. The handbook stated, in relevant part, that employees "earn PTO upon hire at a rate of 7.69 hours per pay period." However, the handbook went on to state, "if your employment is terminated for misconduct, you will not be eligible for pay in lieu of notice or payment of earned but unused PTO unless required by state law."² Fresenius terminated Lee for what it described as a "pattern of behavior" which resulted in "performance and safety issues" and refused to pay her accrued vacation under the terms of the policy.

In its decision, the Minnesota Supreme Court agreed with Lee that vacation benefits may constitute a wage, but payment of unused vacation time is, indeed, "wholly contractual" and entitlement to vacation time or PTO is not governed by statute.³ The court held that parties may properly enter into a contract whereby the employee does not

recover earned vacation benefits if, for example, he or she is terminated for misconduct or fails to give two weeks' notice.

IMPACT

In light of *Lee* and in the absence of legislative action to the contrary, Minnesota employers now have the right and ability to impose conditions on payments for unused PTO or vacation upon termination of employment when the conditions are incorporated into a clear policy. Thus, employers should review their vacation and time off policies to ensure that the policies are clearly and carefully drafted, without ambiguity, and properly acknowledged by employees so that the policy constitutes a binding contract.

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¹ N.W.2d --, No. A05-1887, 2007 WL 3378653, (Minn. Nov. 15, 2007).

² Minnesota courts have established that the terms of an employee handbook will constitute a contractual offer if those terms are definite in form and are communicated to the employee through dissemination of the handbook. An employee's retention of employment, once she has received the handbook, constitutes acceptance of the offer and staying on the job supplies consideration for the offer. Accordingly, the court found that the handbook constituted an enforceable employment contract between Fresenius and Lee.

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PROPER CELL PHONE USE: AT WORK AND BEYOND

After this author's recent presentation on business etiquette at Berens & Tate's 2007 Employment Law Conference, we have been fielding requests for more information on various etiquette issues ranging from handling closed office doors to proper conduct in group meetings. But, because the most questions have come on cell phone issues, this edition will address cell phone etiquette generally and with regard to the workplace.

"Cell phone etiquette" is a relatively new concept, and for anyone who has been in an airport lately, one that has not widely caught on. As a result, there are very few established "rules" that we can follow. Common cell phone complaints include that users speak too loudly on cell phones, forget to turn ringers off in quieter areas like movie theaters, libraries, and churches, and talk about very personal issues in public. Polls have found that greater than 60% of respondents found public cell phone use, even under appropriate circumstances, to be a "major irritant." There have even been numerous reported cases of physical assault related to poor cell phone etiquette.

Generally speaking, though, cell phone use doesn't have to come down to sideways glaring or violence. There are a few rules to follow when using your cell phone in public, especially in or near your workplace. Here are a few tips that even the most seasoned cell phone users could stand refreshing on.

1. Cell phone use while driving. This should be a no-brainer; but yet every time I get in my car, I find myself next to or behind a driver struggling to dial while driving. In a recent poll, 59% of respondents said that they would support outright outlawing of cell phone use while driving. An even greater percentage would support regulation involving mandatory use of "hands-free" devices. Others question government regulation of vehicle cell phone use because there exist many other driving distractions that have not been regulated, including eating and using radios, MP3 players, and GPS systems.

Whatever your take on the appropriateness of cell phone use while driving, do so with the safety of yourself and others in mind. Consider leaving your phone off while driving or letting calls go to voicemail until you're in a location that allows you to check messages and return calls. And, if your cell phone has additional features such as text messaging or email/internet capabilities, give extra thought to the propriety of using such features while driving. While we'd all like to think that we can pay sufficient attention to driving while engaging in other tasks, sometimes that's not the reality.

2. Limitations on volume and content. One of the most frequent complaints survey respondents have of cell phone user involves the volume of the user's voice. It seems to be a natural tendency to change your voice's volume to

match the distance between yourself and your caller; but remember that cell phones have very sensitive microphones. Don't speak any more loudly into your cell phone than you would into a land-line phone.

Along the same vein, you might want to use extra care in speaking softly if you're talking about sensitive topics on your cell phone, such as conversations you may have with your physician or a significant other. Use good judgment about topics that are appropriate for a public venue, including your workplace, and save those extra-personal calls for a private locale.

3. Ringer issues. Complaints about cell phone ringers range from the volume of the ringer to the "cutesiness" of the ring tone. When in a public place, especially the workplace, if you must keep your cell phone on, keep the volume on your ringer low (or switch to vibrate or silent mode) and select a ringer that is situation-appropriate. Save the cell phone rendition of "Baby Got Back" or words of love recorded by your significant other for private locations.

4. Using judgment on when to use your phone. In the workplace specifically, think carefully about whether to leave your cell phone powered on while on your person or at your work station. If coworkers are near, keep your phone on vibrate or silent mode to avoid distracting workers. If you must take an emergency call during a meeting or other situation where it could be rude to answer your phone, excuse yourself politely and take the call somewhere else. Otherwise, use good judgment about when and where to take calls and about which calls actually qualify as important enough to interrupt your work and that of those around you.

5. Issues for employers, specifically. Regardless of how you govern yourself on cell phone issues, you no doubt have concerns about your employees using cell phones. In a survey of employers by the Society for Human Resource Management, over 40% of employers had employee cell use policies even two years ago. Without regard to the details of the policy, every employer should have a policy governing employee cell phone use. Some specifics you may want to include are:

- A ban on cell phone use while driving on company time, whether in a company car or otherwise. You don't want to subject your company to liability for an accident related to your employees' cell phone indiscretions.
- A complete or partial ban on cell phone use during working time or in working areas, especially as regards personal calls and ringer issues.
- A discipline policy for cell phone violators. Spell out what behaviors the company considers inappropriate and the consequences for violation.

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MANDATORY ANTI-HARASSMENT TRAINING: THE FUTURE IS HERE

Sexual harassment has serious implications for employers, often resulting in lost productivity, increased turnover, impaired reputations, and greater risk of liability and litigation expenses. In order to curb sexual harassment in the workplace, many employers implement anti-harassment training. In addition to being a recommended practice, mandating prevention training is a growing trend among state legislatures. To date, seven states require some form of sexual harassment training for in-state companies (Maine and Connecticut have sexual harassment training requirements; Florida, Illinois, Pennsylvania, Texas and Utah have training laws that apply just to state workers). California has gone a step further by requiring training for any company with 50 or more employees with at least one supervisor based in California. Even companies not subject to California's law can look to it as guidance on how to implement effective anti-harassment training.

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Employers Subject to California's Mandatory Training Requirement

All employers with 50 or more employees must comply. It is important to note that there is no requirement that all 50 of the employees work at the same location, or even that all 50 work or are located in California. For example, if an employer only has four employees in California, with 46 employees in other states, the employer will be subject to the law.

Supervisors Requiring Training

For purposes of California's law, a supervisor is anyone with the ability to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or direct them, or adjust grievances or effectively recommend

that action. A supervisor must also utilize independent judgment. The training is only required, however, for supervisors located in California. Employers nationwide may look to California's definition of "supervisor" when selecting which employees to include in training sessions nationwide.

Training Requirements

As a general practice, and required by California, supervisors should have two hours of prevention training every two years. An employer may use live training, e-training, or webinar/webcasts. All training must include questions assessing learning, skill-building activities which evaluate understanding, and hypothetical scenarios with questions, however, there are certain specific requirements for each type of training. For example, e-training must be developed by trainers and instructional designers and there must be an opportunity for a supervisor to ask the trainer questions. An interactive approach has proven to be more effective than a stand-and-deliver method, and is an encouraged format for all training sessions.

Who Can Give the Training Sessions

In order to be a qualified "trainer" under California law, one must be either:

1. An attorney admitted to practice in any state for more than two years and whose practice includes employment law;
2. A "human resource professional" or "harassment prevention consultant" with a minimum of two or more years of practical experience in areas related to sexual harassment, including training, responding to complaints, conducting investigations into sexual harassment complaints and/or advising

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employers or employees regarding discrimination/retaliation/harassment prevention; or,

3. A professor or instructor in law school, college, or university, who has a post-graduate degree or California teaching credential and either 20 instruction hours or two or more years of experience teaching employment law.

If an individual does not meet one of these three qualifications because he or she lacks the requisite experience, the individual may team teach with a trainer meeting these requirements so long as the trainer supervises the individual and is available throughout the training to answer any questions.

Content of the Training

At a minimum, required anti-harassment training must include: (1) the legal definition of sexual harassment; (2) federal and state statutory provisions regarding sexual harassment; (3) what types of conduct constitutes sexual harassment (4) remedies available for sexual harassment in the workplace; (5) strategies to prevent harassment; (6) practical examples; (7) the limited confidentiality of the complaint process; (8) resources available to victims of harassment; (9) a description of the employer's obligation to conduct an investigation of a complaint; (10) training on what to do if the supervisor is personally accused of harassment; (11) elements of an anti-harassment policy; (12) how harassment complaints are filed; and, (13) how to prevent harassment, discrimination and retaliation.

These thirteen elements are also recommended for inclusion in training sessions whether or not in California.

One important aspect of sexual harassment prevention training is that every employer must provide each supervisor with a copy of its anti-harassment policy and require the supervisor to read and acknowledge receipt of the policy. Although having such a policy was encouraged in the past, it is now required by California law. Employers throughout the United States should follow these guidelines and make their anti-harassment policy required reading for supervisors, even if done as part of a company-wide handbook. Again, supervisors should acknowledge, in writing, their receipt of the policy.

Retaining training records is a good practice for all employers. Records can be submitted to the EEOC in defense of a charge or used as evidence during a lawsuit. It is recommended that employers keep records of training for at least three years. The records must include the name of the supervisor trained, the date and type of training, and the name of the training provider. Whether in California or defending a lawsuit, the employer bears the burden to establish and verify that all supervisors are trained.

In California, a supervisor not previously trained must be trained within six months of being hired or promoted into a supervisory role. If a recently hired supervisor was trained within the last two years by a previous employer, then the new employer is only required to provide a copy of the new employer's anti-harassment policy to that supervisor. However, that supervisor must undergo training once the prior training period expires.

Penalties for Noncompliance with California's Law

Failure to meet the requirements of California's mandatory training law will result in an order from the Fair Housing and Employment Commission directing the employer to conduct the harassment training within 60 days.

As a general rule, any employer's failure to provide the required training could be used against them in a sexual harassment claim. An employer's affirmative defense against a sexual harassment claim may be weakened or denied completely if proper training, whether required by law or not, was not provided.

For companies with employees in California, sexual harassment training is the law. Even if training is not mandatory in your state, it may soon be. More importantly, sexual harassment training can decrease an employer's risk of liability in administrative charges and litigation. If you need to comply with California's law, or would simply like more information about anti-harassment training, please contact your employment law specialists at Berens & Tate.

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BE MINDFUL OF EMPLOYEE HORSEPLAY

Practical jokes and horseplay can become common in the workplace. While making sure employees enjoy where they work is important, injuries occurring as a result of horseplay may result in the injured employee being able to file two lawsuits. The first lawsuit would be against the employer for workers' compensation benefits with the second being against his or her coworkers for further damages under traditional tort theories for personal injury.

The exclusive remedy provisions of every state's workers' compensation laws typically shield employers from tort liability for an employee's injury. When a fellow employee is the cause of an injury, that employee is also generally protected by the exclusive remedy provisions. Exceptions to exclusive remedy provisions exist in every state and vary greatly from state to state. However, a recent case in Delaware highlights an exception that may be recognized in most states.

Imagine this: three employees grab a coworker, hold him down, and then wrap him in duct tape, causing him to be injured. As a result, the employee files a workers' compensation claim and wins. Thereafter, he pursues an action against the coworkers causing the injury. The coworkers try to dismiss this case based on the exclusive remedy provisions contained in the workers' compensation laws.¹ Will the case be dismissed?

The answer is "maybe", but the Delaware court noted that if the coworkers' actions were sufficiently extreme so as to occur outside the scope of employment, then the third-party action against the coworkers may proceed. In making such a determination, the court noted that the following four factors should be considered: (1) the nature and degree of the deviation; (2) whether the defendant was in any way performing his duties or had wholly abandoned them; (3) whether the horseplay in question had become an accepted part of the employment; and, (4) the extent to which the nature of the employment may be expected to include some horseplay.²

In sum, if an employee can show that the injury was sustained outside the scope of employment, then he or she would be able to avoid the exclusive remedy provision of the workers' compensation law and sue the coworkers. However, making such a claim is incongruent with the filing of a workers' compensation claim because to recover on the workers' compensation claim the employee would need to show the injury occurred within the scope of employment. But, what if the horseplay only took the coworkers outside the scope of employment and not the injured employee? The analysis may then be similar to cases involving a third-party assault. In such cases where the relationship between the third-party and the employee is related to the employment, then the employee would have a compensable workers' compensation claim and then may also be able to sue the third party, in this case the coworkers.

Admittedly, such a scenario would not be an everyday occurrence, but it could be a very costly one. However, this is a good reminder of an employer's need to be aware of what goes on in the workplace, especially when certain conduct could lead to injury. Bear in mind that the four factors listed above will also be used by a workers' compensation court to determine if an injury caused by horseplay occurred within the scope of employment. Therefore, employers need to pay special attention to factor number three listed above because ignoring horseplay can make it an accepted part of employment and thus any injuries occurring as a result, compensable.

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¹*Graboski v. Mangler*, 2007 Del. LEXIS 301 (Del. July 9, 2007).

²These factors come from 1A Arthur Larson, *The Law of Workmen's Compensation*, §23.01 (2007) and have been adopted in most jurisdiction to determine if an injury caused by horseplay falls within the scope of employment.

PROPER CELL PHONE USE: AT WORK AND BEYOND (Continued from page 2)

You may also want to consider offering a cell phone-friendly space for employees to talk while on break time.

In any event, cell phone use and the problems associated with it are only going to become more prevalent as technology develops. The advent of camera phones, email-capable devices, and cell phones with large file storage capacities has caused employers significant headaches, both for common courtesy/etiquette issues and

security/confidentiality issues. Determine your company's position on these matters and take a look at your policies on technology use. Avoid the consequences Aldous Huxley once foretold, "Technological progress has merely provided us with more efficient means for going backwards."

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EMPLOYEE RETENTION

The recruitment, hiring, and training of new employees is a significant cost to the bottom line and a strain on the company's human resources department. Consequently, forward-thinking employers spend a great deal of time and effort to ensure good hiring decisions. However, this is only half of the equation necessary to lower costs and increase efficiency. Retaining good employees is as important as hiring good employees in the first place.

In some areas of the country, the unemployment rate is at a historic low. In others, certain skilled employees are scarce. As such, trained and dependable employees are one of an employer's most valuable assets. Retaining this workforce gives the employer a competitive advantage over other employers. Of course this leads to the question: How does an employer keep its good employees?

Do not let recruitment, hiring, and initial training lapse. Hopefully, a solid employee-retention program will limit the need for recruitment, hiring, and initial training. However, no amount of effort and planning can eliminate retirements, transfers, and some other inevitable employee departures. When employees leave, conduct an exit interview to determine reasons behind exit.

Recruit, hire, and train with the big picture in mind. Make certain prospective employees understand the actual expectations of the job not the sugar-coated version. Do not throw new employees to the wolves without training.

Continued training. It is easy for an employee to become complacent and bored without continued challenges. Failure to provide challenges works against employers in two ways. On one hand, strong and ambitious employees will go elsewhere. On the other hand, a complacent employee that remains with the company often turns into a poor performer. Continued training is a way to challenge both ambitious and potentially complacent employees.

Money. No discussion of retention is complete without a discussion of pay. However, it is not as simple as "pay them

more and they will stay". Pay is a part of the equation but often not the most important part. The formula is often shockingly simple. Pay the employees what they are worth while affording them opportunities to increase their wages based on skill, effort, results, and promotion.

Non-competition clauses. Companies that employ specialized skill positions and positions with access to confidential information would be well advised to considering entering into restrictive covenants with employees. Obviously, an employer cannot keep an employee from leaving entirely. However, with a restrictive covenant in place the employee's reemployment options are often temporarily limited. Consequently, these agreements tend to have a built-in loyalty component. State law varies regarding the availability and validity of these restrictive agreements.

Work Environment. Do you value and respect your employees? Do they know it? Nobody likes to work for a bully. Nobody likes to work for a pushover. Employers should periodically survey employees and supervisors to determine the state of the workforce. Act on the information. Indecision can be fatal to a retention program.

Evaluations. A detailed job description is important to establish expectations. However, periodic evaluations of these expectations are critical. This is a time when employees can vent frustrations or give new ideas. Also, it is advisable that employers take an opportunity to discuss the employee's role in the organization and his or her goals for career development.

Employers must recruit and hire good employees. More importantly, employers must keep them. Turnover is inevitable, but low turnover is a competitive advantage. The discussion of employee retention could encompass reams of paper, but if the employer focuses on the core ideas, the good employees are less likely to leave.

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