

LABOR WATCH

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

ACCOMMODATING FOOD ALLERGIES IN THE WORKPLACE

Approximately 12 million Americans suffer from food allergies, and the incidence rate appears to be on the rise. Therefore, if an employer has not already been confronted with this issue, it is likely to be confronted with it in the near future. From a legal perspective, employers can be comforted by the fact that federal courts have not found a food allergy to qualify as a disability under the Americans with Disabilities Act.¹ However, the ever competitive market for quality employees and the media climate make it necessary for an employer to consider accommodating a food allergy in order to retain employees and create a healthy and accepting work environment.

A food allergy occurs when the immune system treats a food as a harmful substance and creates specific antibodies for that food. The next time an allergic person eats that food, the immune system reacts by releasing massive amounts of chemicals to protect the body. This reaction can cause symptoms ranging from a tingling sensation in the mouth to the loss of consciousness and even death. The worst, and most publicized reaction, is anaphylaxis, which involves a life threatening drop in blood pressure. For persons that face the possibility of an anaphylactic reaction to food, it is necessary to carry a life saving shot of epinephrine (adrenaline).

of the reaction. The employer should also find out what types of exposure to the food cause a reaction, such as ingestion or simply being in the same room as the food. This information will then let the employer evaluate the risk to the employee and consider the accommodations needed.

The second step is determining whether an accommodation can be made. When considering accommodations, both the employer and food allergic employee need to be aware that it is impossible to guarantee that the employee will not be exposed to the allergen. The best that can be done is to limit the chances of exposure.

The strictest accommodation is to ban the offending food at the workplace all together. To do so, conspicuous signs should be posted alerting people of the ban. In addition, employers need to be ready to enforce the ban if it is violated by an employee. Less restrictive options include allowing an employee to eat at his or her desk or in his or her office, creating an allergy-free floor or zone around the employee, giving the employee extra time at lunch to go home and eat, or designating a lunchroom or break room as allergen free.

No matter the accommodation provided, all employees should be notified of the seriousness of the situation and the specific accommodations being provided. Employee training may also be necessary when the allergic reaction may be life threatening. Such training should include educating other employees on how to properly administer the epinephrine shot and the procedure for calling 911. To provide additional protection, an emergency plan of action can be created, unless the employee does not want such a plan.

Those unaccustomed to dealing with food allergies may think an accommodation that bans a certain food difficult to live with. However, after a little education and time, the change will become second nature and easy to live with. On this I speak with experience, as my house has become

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What can an employer do when its employee is faced with such a serious condition? The first and most obvious step is discussing the situation with the employee in order to gain a better understanding of the specific allergy, including the severity

HISTORY OF WORKERS' COMPENSATION

The following article is designed to give you a basic understanding of the origin of workers' compensation in the United States and its purpose. By the end of the 19th Century, increasing work injuries and decreasing common law remedies produced a drastic need for change in the United States. Coincidentally, in 1893, John Graham Brooks wrote a report on the German compensation system, which United States legislators relied upon to begin intensive investigations into developing a new system. In 1910, representatives from numerous state commissions met in Chicago and drafted the Uniform Workers' Compensation Law. Although the respective states adopted their own workers' compensation laws, they relied upon discussions from the conference in Chicago to set the fundamental pattern of legislation.

Thereafter, the workers' compensation system in the United States grew at a rate unparalleled by any comparable field of law. In 1920, 41.2% of gainful employees were covered by workers' compensation. Coverage rose to 67.4% by 1930 and 75.2% by 1940. In 1980, 87% of all employees were covered by workers' compensation.

By design, workers' compensation is a mechanism for providing cash (indemnity) benefits and medical care to employees who are injured at work. Ultimately, the cost of a workplace injury was intended to be shifted by the employer to the consumer through the medium of insurance. In theory, liability was not supposed to hurt the employer because the employer would include the insurance premium in the cost of production and ultimately the price of the product. However, under an experience-rating system¹ employers may indirectly feel an impact of frequent or large loss claims in the form of increased insurance premiums.

The typical state workers' compensation act operates under the basic principle that an employee is automatically entitled to benefits whenever the employee suffers an occupational disease or an injury by accident arising out of and in the course of employment. Coverage is limited to employees

as opposed to independent contractors. The fact that an employee is negligent or partially at fault for an accident does not lessen entitlement to benefits. Benefits include cash-wage benefits around two-thirds of the employee's average weekly wage, and hospital, medical, and rehabilitation expenses. In exchange for these benefits, the employee gives up the common law right to sue the employer in a civil action for damages. However, the employee's right to sue third persons, whose negligence causes or contributes to the injury, remains. In return, the employer is typically entitled to some form of reimbursement from any proceeds received by the employee through a third-party settlement or award.

Administratively, most states run their respective workers' compensation through commissions. Rules of procedure, evidence, and conflict of laws are relaxed to facilitate and achieve the beneficent purposes of workers' compensation to protect employees. In order to secure liability, the employer is required to insure workers' compensation through private insurance, state-fund insurance, or self-insurance.

Keep in mind that no two states' workers' compensation systems are alike. However, all 50 states follow the same general principles outlined above.

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¹ The April 2008 edition of Laborwatch featured an article entitled "Workers' Compensation: Understanding Your Experience Rating" and can be found at: http://www.berenstate.com/New_Folder/2008Laborwatch/April08LW.pdf

Matthew Bender and Company, Inc., Larson's Workers' Compensation Law, Pub. 340, Rel. 97, Chapters 1-2 (2006 and Supp. 2007).

ACCOMMODATING FOOD ALLERGIES IN THE WORKPLACE

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a peanut and egg-free zone due to my son's food allergies. Making the adjustment sounded difficult at first but was easier than expected. Possibly the hardest part is eating certain foods after reading the ingredient list, which has created a secondary gain by making me eat healthier.

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¹ See *Land v. Baptist Med. Ctr.*, 164 F.3d 423, 425 (8th Cir.1999).

RECOGNIZING AND RESPONDING TO SIGNS OF EMPLOYEE VIOLENCE

It seems that not a week goes by without hearing about a seemingly random act of violence. Unfortunately, it is no longer rare for violence to occur in the workplace. In fact, in 2005, the last year for which statistics were available, there were 564 workplace homicides in the United States. Homicide is extremely rare; however, non-fatal acts of employee against employee violence are common.

It is estimated that over one million acts of violence occur each year. It should go without saying that employee violence creates a host of problems for the employer. Some problems are obvious: lost productivity, increased potential employer legal liability, and potential workers' compensation claims. Other problems are less obvious: increased workers' compensation premiums, strain on human resources, and negative publicity.

Under the "General Duty Clause" of the Occupational Health and Safety Act, employers have a legal obligation to provide a workplace that is reasonably free of hazards. As part of this obligation, employers must take reasonable steps to insure that employees do not cause intentional harm to other individuals. Apart from OSHA obligations, employers must consider potential negligent hiring and retention claims regarding individuals who have demonstrated a propensity to behave violently towards others. In addition to their own employees, employers owe a duty of care to those customers and vendors with whom their employees interact.

Ideally, prevention of workplace violence is the goal. As a practical matter, this is unrealistic. However, résumé and application verification and background checks can help limit potential problem employees before they are hired. In fact, due diligence in hiring may well be considered a necessary reasonable step to insure employees are protected from reasonable hazards. Of course, employers must be certain that a background check is conducted within the scope of its jurisdiction's regulations.

Even with appropriate hiring safeguards and even in the most respectful workplace environments, outside stressors can lead to incidents of workplace violence. Consequently, employers should be aware of the following warning signs that can lead to potential violence:

- Intimidation and bullying;
- Discourteous and disrespectful behavior;
- Verbal abuse;
- Recent demotion or failure to receive a promotion;
- Alcohol or drug abuse;
- Financial problems;
- Isolation from coworkers;
- Sudden deterioration in work performance;
- Family problems such as divorce or child custody;
- Refusal to accept criticism; and,
- Emotional outbursts.

The warning signs are not of equivalent seriousness nor are they indicative of a violent nature in isolation. The signs cannot be viewed in a vacuum. At all times, employers must view the warning signs in their proper context. The employer's response depends on this context and the perceived severity of the warning sign.

In order to respond, an employer must have a plan in place. Many employers have an employee assistance program to respond to such acts. If warning signs are identified, management should refer the employee to the EAP immediately. In addition to the immediate response to specific warning signs, employers should develop a workplace violence prevention policy in response to potential future issues of violence.

"Even with appropriate hiring safeguards and even in the most respectful workplace environments, outside stressors can lead to incidents of workplace violence."

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RECOGNIZING AND RESPONDING TO SIGNS OF EMPLOYEE VIOLENCE

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At a minimum, any workplace violence prevention plan must include:

- An underlying respectful work environment;
- Supervisors trained in conflict resolution;
- Supervisors trained in spotting warning signs of potential violence;
- Detailed policies against harassment, intimidation, and bullying;
- Complaint procedures;
- Continual training on safety;
- Explanation of the employer's zero tolerance policy on violence; and,
- Emergency procedures in the event of an incident.

Violence prevention and the recognition of violence warning signs are not mutually exclusive. Not all violence can be prevented by proactive measures. Consequently, in order for a workplace violence prevention program to be effective, it must not only have warning sign recognition, but also a strong employer commitment against violence. Ideally an employer should maintain a "zero tolerance" policy against violence including prohibitions on harassment, threats, intimidation, and weapon possession. More importantly, however, employers must immediately and fully investigate and remedy violations of the policy.

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BERRY INTERESTING

While fruit is beneficial to one's health, it is the Apple and BlackBerry that may be detrimental to the employer. An employer desires more efficiency and productivity. With the evolution of technology, employers have been able to provide access to their technology systems for business convenience or out of necessity. With the invention of the Apple iPhone and the BlackBerry, employers have realized the convenience that employees have with the ability of using their own devices to access data systems via a mobile device, allowing for instant access and communication with coworkers and clients.

The Apples and BlackBerries of the world allow for many advantages to the employer; however, they also leave many disadvantages with the potential for misuse. These same devices that allow employees to communicate effectively and efficiently with clients are often the same devices that the employee uses to communicate within his or her personal life: text messages, email, Internet use, filming, and, of course, phone calls. Many employers address these similar issues when they provide computers (*i.e.*, desktop and laptop) to employees, yet fail to provide notice of its right and ability to monitor usage of the employee's personal device when used for business purposes. Consequently, employees may mistakenly believe that they have a measure of privacy and are beyond the reach of the employer.

If an employer creates an expectation of privacy, or fails to provide notice to employees of its right and ability to monitor usage of the employees' devices, it may be in violation of the employees' rights. Furthermore, employees may claim that they had an expectation to privacy since the device used was personal.

Misuse can be prevented by setting up boundaries and informing employees of those boundaries. Educate employees about what happens when an employee's personal device is used to access the employer's data system and whether the devices will be monitored and allow access to information transmitted, conveyed or stored on the personal devices. Ideally, employers should make these policies and practices known to employees **prior** to allowing access to its data system and that use constitutes agreement with the policies. Moreover, employers should keep a permanent record of the notice that was provided to its employees and each employee's agreement to the terms of use. Lastly, employers should review their policies to ensure that they are current and up-to-date with today's new technology.

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NURSING MOTHERS AT WORK

Returning to work is often cited as one of the main reasons that nursing mothers discontinue breastfeeding. However, this may soon be a reason no longer. A growing number of states are passing specific laws giving nursing mothers the right to breastfeed and/or express breast milk in the workplace. In just the past year, the following states have become breastfeeding-friendly for working mothers: Indiana, Montana (public employers only), New Mexico, New York, and Oregon, plus the District of Columbia. In addition, Arkansas and Wyoming have passed general laws stating that a mother has a right to breastfeed an infant child in any public place where the mother may legally be or where others are present, which does not expressly specify but could be interpreted to include places of employment.

Although there is no federal law requiring employers to provide accommodations for nursing mothers in the workplace, many states have enacted laws protecting a nursing mother's right to breastfeed and/or express milk in the workplace. In fact, 16 states plus the District of Columbia have specific laws related to breastfeeding in the workplace. These states include California, Connecticut, Georgia, Hawaii, Illinois, Indiana, Minnesota, Montana, New Mexico, New York, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, and Washington.

Generally, these states require or strongly recommend that employers provide a reasonable amount of break time for nursing mothers to express breast milk. Some states also require that employers make reasonable efforts to provide employees with a private and secure room or other location, other than a bathroom or toilet stall, in close proximity to the work area to express milk. In following healthcare breastfeeding recommendations (e.g., exclusive breastfeeding for six months and continued breastfeeding for a minimum of one year), all states with lactation accommodation laws require employers to provide this accommodation for at least one year, but some states do not impose any time limits for the accommodations. Employers in states without time limits for accommodations may, therefore, need to accommodate a nursing mother for as long as she chooses to breastfeed her child.

Texas and Washington do not have laws requiring employers to provide nursing mothers with a break or location for expressing milk, but instead encourage businesses to take this route by allowing those with breastfeeding/expressing-breast-milk policies to self designate and advertise as "mother-friendly" and "infant-friendly" workplaces. Indiana, which just passed a new law allowing breastfeeding in the workplace, is the first state to also require employers to accommodate the storage of breast milk. In addition to requiring employers to provide nursing mothers with a private location, other than a toilet stall, where the employee can express breast milk during any period away from the employee's assigned duties, the law requires employers to provide a refrigerator or other cold storage space for keeping expressed breast milk or to allow the employee to provide her own portable cold storage device to store the breast milk.

Additionally, 38 total states have laws with language specifically allowing women to breastfeed in any public or private location, including Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Tennessee, Texas, Vermont, and Wyoming.

In light of the growing list of jurisdictions that require some sort of accommodation for breastfeeding/nursing mothers in the workplace, employers should consider possibly establishing a lactation policy in their employee handbooks, and training managers, supervisors, and human resources personnel on the right of nursing mothers to breastfeed and/or express breast milk in the workplace.

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THE TEN-MINUTE HR AUDIT

(Series No. 3)

Your task this month is to audit your company's rounding practices. Under Department of Labor regulations, rounding practices are acceptable provided they work not only to an employee's detriment but also to an employee's benefit. Here are a few examples of practices that are unlawful.

Example: Employee John Smith's shift runs from 8 a.m. to 5 p.m. with a one-half-hour lunch from noon to 12:30 p.m. John's employer's time clocks are set up to round to his starting time when he clocks in early and not round at all when he clocks in late. Therefore, if John clocks in at 7:48, the time clock shows a start time of 8:00 a.m. However, if he clocks in at 8:05, the time clock shows a start time of 8:05 a.m. In this case, the rounding practice in both cases work to the employee's detriment and, therefore, would more than likely be considered unlawful.

Example: Employee Jane Brown's shift runs from 8 a.m. to 5 p.m. with a one-half-hour lunch from noon to 12:30 p.m. Jane's employer's time clocks are set up to round to her starting time if she clocks in for work early. At the end of the day, the time clock is set to round to her end time if she clocks out late. Therefore, if Jane clocks in at 7:55 a.m., the time clock rounds her time to 8:00 a.m. If she clocks out for the day at 5:05 p.m. or even 5:10 p.m., the time clock rounds her time to 5:00 p.m. In this case, the rounding practices at the beginning

of the day work to Jane's detriment as do the rounding practices at the end of the day.

If your company uses time clocks, review the documentation of how the time clock was set up and determine whether the rounding practice ever works to the employee's benefit. If not and the employer always benefits from the rounding practice, you have a problem. Don't assume that your practices are acceptable just because the vendor you purchased the time clock from set up your system. Many times, vendors are not familiar with wage and hour laws and will either set up the system in the manner you ask—even if incorrect—or will set up the system in the manner they think will work best—also not always correct.

If you do not have the set-up documentation, pull a few time records and examine whether employees ever receive the benefit of a rounding practice. If still in doubt, utilize various scenarios involving arriving late or leaving early and punch in accordingly at your time clock to see how the time is rounded.

Performing this ten-minute audit can save thousands of dollars. Remember, if you have a problem like this, it can affect multiple employees and result in thousands and even millions of dollars in liability for unpaid wages.

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