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EMPLOYMENT LAW LETTER

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EMPLOYER RETALIATION

11th Circuit: Federal law preempts Florida whistleblower statute

by Robert J. Sniffen and Jeff Slanker
Sniffen & Spellman, P.A.

Employers in Florida face potential liability for employment lawsuits originating under the state's whistleblower protection laws. There are two whistleblower protection laws in Florida: One protects employees who work for private-sector employers, and one protects employees of public employers. Both laws generally prohibit employers from taking an adverse action (e.g., demotion or termination) against employees who have complained that they were acting in violation a law, rule, or regulation.

In May, the U.S. 11th Circuit Court of Appeals (whose rulings apply to Florida employers) limited the ability of some employees to seek redress under Florida's private-sector Whistleblower Act when it held that a federal law applicable to the employment status of certain bank employees preempts the state law. The decision is a reminder that certain federal laws may provide employers more leeway to address employment issues and hamper employees' ability to bring certain employment law claims.

Facts of the case

Marc Wiersum began working as a vice president in U.S. Bank's Naples office in 2013. U.S. Bank is a federally chartered bank that's headquartered in Minnesota. Wiersum was employed by the bank for only a brief time, but he alleged that during that time, he

witnessed violations of federal law, objected to activities at the bank that violated the law, and refused to participate in those activities.

After U.S. Bank terminated him, Wiersum filed a lawsuit in the U.S. District Court for the Southern District of Florida alleging he was terminated in retaliation for his objections to alleged illegal activity at U.S. Bank, in violation of Florida's private-sector Whistleblower Act. The district court dismissed his suit, holding that his whistleblower claim was preempted by federal law.

The district court reasoned that the Whistleblower Act, which prohibits retaliatory action against an employee for engaging in protected activity, is preempted by the National Banking Act, which permits federally chartered banks to dismiss officers "at pleasure." Because federal law trumps state law, Wiersum couldn't maintain an action under the Whistleblower Act against U.S. Bank. Wiersum appealed.

11th Circuit's decision

The 11th Circuit upheld the decision of the district court, agreeing that the National Banking Act preempts Florida's private-sector Whistleblower Act. The court of appeals explained that preemption simply involves whether and when a state law is subordinated to a federal law or administrative action under the

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Supremacy Clause of the U.S. Constitution, which places federal law on a higher plane than state law.

State laws that conflict with federal laws have no effect under the Supremacy Clause. With that foundation, the court noted that it had to address whether there was a conflict between the National Banking Act and Florida's private-sector Whistleblower Act such that the federal law trumped the state law in the areas where the two conflict.

The court then went on to analyze whether the Whistleblower Act's protections from wrongful termination for engaging in protected activity, or "blowing the whistle," conflict with the terms of the National Banking Act—specifically, the language allowing certain bank employees to be discharged at will. The court noted that under the Act:

A national banking association . . . shall have power . . . [t]o elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, *dismiss such officers or any of them at pleasure*, and appoint others to fill their places.

According to the court, the purpose of that language is to give national banks the latitude to make personnel decisions affecting officers in order to maintain the public trust.

The court noted, on the other hand, that the Whistleblower Act provides, "An employer may not take any

Certain federal laws may provide employers more leeway to address employment issues.

retaliatory personnel action against an employee because the employee has . . . [o]bjected to, or refused to participate in, any activity, policy, or practice of the employer which is in

violation of a law, rule, or regulation." It then highlighted cases from around the country, including the Florida Supreme Court, in which courts held that the National Banking Act preempted wrongful termination statutes similar to the Whistleblower Act.

Stated simply, the 11th Circuit held that the protections against wrongful termination in the Whistleblower Act are inconsistent with banks' leeway to discharge officers at will under the National Banking Act. When the two considerations collided, the court held that federal law must prevail, and Wiersum therefore could not maintain his action against U.S. Bank. *Wiersum v. U.S. Bank, N.A.*, Case No. 14-12289 (11th Cir., May 5, 2015).

Takeaway for employers

Employers are constantly exposed to legal liability under state antidiscrimination and antiretaliation laws.

There are myriad state laws that protect workers from potential harms, including everything from retaliation based on filing a workers' compensation claim to retaliation for whistleblowing. However, as this case illustrates, certain employers and industries may be granted leeway by federal laws that remove the protections of state law as a constitutional procedural matter.

If you're facing the prospect of litigating wrongful termination claims under state law, you would be well served to explore whether any federal laws preempt the state-law claims. If so, you might be able to win dismissal of a potentially costly lawsuit at the early stages of the litigation.

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EMPLOYER LIABILITY

After-acquired evidence saves Florida employer thousands in front pay and reinstatement

by Tom Harper
Law Offices of G. Thomas Harper, LLC

A recent order by a federal judge in the Northern District of Florida shows how a good employment application can save an employer money.

Background facts

Laneitra Fourte worked for West Florida Medical Center Clinic. She went out on medical leave protected by the Family and Medical Leave Act (FMLA) but was fired less than an hour after returning from her leave. She sued and, at trial, explained how her medical leave upset her coworkers at the hospital because they had to cover her shifts while (they thought) she was enjoying "free time" during her medical recovery.

The hospital denied that it fired Fourte in retaliation for taking FMLA leave. Instead, it claimed she was fired for being insubordinate to her superiors during a meeting to address her coworkers' concerns. Nevertheless, in October 2014, a jury found in favor of Fourte on her FMLA retaliation claims.

After being fired, Fourte had a duty to mitigate her damages by trying to find a job comparable to the one she lost. She went to work in a similar job at Fortis for a while, but she was again fired. According to the court, she was terminated by Fortis "for willful violations of established policies." The court viewed that conduct as

a failure to mitigate her damages from the West Florida discharge and ruled that she wasn't eligible for back pay. Ouch!

Fourte filed a posttrial motion with the court asking for reinstatement to her job at West Florida, front pay, an injunction prohibiting discrimination, and mandatory antidiscrimination training for West Florida's managers. The hospital opposed her request, arguing that she wasn't entitled to such relief based on the after-acquired evidence doctrine.

After-acquired evidence

The after-acquired evidence doctrine was created by the courts and affirmed in a 1995 U.S. Supreme Court decision. The doctrine applies when an employer discovers, after terminating someone, that she engaged in

wrongdoing that the employer wasn't aware of during her employment. The wrongdoing must have been so severe that the employee would have been fired for that conduct alone had the employer known about it.

When the conduct is discovered, the employer can step in and claim that any relief the employee is seeking should be cut off at the date the new information came to light. According to the court in Fourte's case, "To [avoid] front pay [damages], an employer must show that the employee would not have been retained in any capacity at the time of trial."

Fourte's employment application

In a hearing on Fourte's motion, the court concluded from her testimony that she had worked for the Santa Rosa County Sherriff's Office but had been forced to



ASK ANDY

Referral bonuses, diversity, and disparate impact liability

by Andy Rodman
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

Q *My company is having difficulty attracting qualified candidates for high-tech positions. We're considering implementing a referral bonus policy, under which a current employee would be paid \$500 for referring a candidate who is hired. Is this type of policy legal?*

A There is nothing inherently illegal about a referral bonus policy. In fact, many companies have successfully implemented such policies to attract and retain qualified employees. Some studies have shown that employees hired through word of mouth are less likely (perhaps up to 15 percent less likely) to quit.

That said, referral bonus policies are not without risk. When it comes to word-of-mouth recruiting, the Equal Employment Opportunity Commission's (EEOC) position is as follows: "While word-of-mouth recruiting in a racially diverse workforce can be an effective way to promote diversity, the same method of recruiting in a non-diverse workforce is a barrier to equal employment opportunity if it does not create applicant pools that reflect the diversity in the qualified labor market."

Essentially, the EEOC is saying that if your workforce is *already* diverse, then word-of-mouth recruiting is permissible and may even promote further diversity. But if your workforce is not diverse, then word-of-mouth recruiting may perpetuate the company's lack of diversity. When a facially neutral policy (e.g., a referral bonus policy) perpetuates a company's lack of diversity, the policy may have a disparate impact on

people with protected characteristics. A policy that has such a disparate impact may violate Title VII of the Civil Rights Act of 1964.

For example, when it comes to word-of-mouth recruiting, one study has found that approximately 71.5 percent of employees refer candidates of the same race, and 63.5 percent refer candidates of the same gender. So if your company already is largely composed of white male employees, then implementing a word-of-mouth referral bonus policy may perpetuate the white male composition of the workforce and inhibit diversity. The policy may even violate Title VII under a disparate impact theory.

When it comes to recruiting, it is prudent to cast a wide net. Don't rely exclusively on a single source to recruit and hire qualified employees. A referral bonus policy may be part of your overall recruiting plan, but don't forget about recruiting through classified ads, the Internet, job fairs, trade groups, and summer internship programs.

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identity will not be disclosed in any response. This column isn't intended to provide legal advice. Answers to personnel-related inquiries are highly fact-dependent and often vary state by state, so you should consult with employment law counsel before making personnel decisions. ❖

resign. West Florida's employment application asks whether the applicant has ever been discharged from a job or forced to resign. If she answers "yes" to that question, the applicant is supposed to explain what happened.

Fourte stated on her West Florida application that she had never been discharged from a job or forced to resign. She then signed her name under the attestation that stated: "I hereby state that the information given by me in this application is true in all respects. I understand that if I am employed and the information is found to be false in any respect, I will be subject to dismissal without notice at any time." She admitted at the hearing that she knew she could be fired if anything on her application was found to be false.

The court also considered testimony in which West Florida's HR official stated that the hospital had consistently enforced the application statement against employees. In addition, the hospital's employee handbook lists "falsifying an employment application" as an example of misconduct that could result in discharge. The policy was in effect while Fourte was employed at West Florida.

The clear policy statements and proof that the policy had been enforced against others were enough for the court to find that West Florida would have fired Fourte based on the falsified application had it known about it while she was employed there. Thus, the court ruled that the after-acquired evidence doctrine applied and cut off front-pay damages, her right to reinstatement, and her request for an injunction prohibiting future discrimination by West Florida.

Since the hospital hadn't opposed Fourte's request for HR training for its managers (including training on employees' FMLA rights), the court let this request stand. So the hospital will have to provide training for its managers, but it avoided damages for back pay and front pay and having to reinstate Fourte to her former job. *Laneitra Fourte v. West Florida Medical Center Clinic*, Case No. 3-14-cv-1-RS-CJK (N.D. Fla., May 5, 2015).

Takeaway

The HR details can make all the difference. In this case, a good hiring process started with a thorough

EMOTIONAL DISTRESS

A picture may be worth a thousand words (or thousands of dollars)

by Andy Rodman
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

Stress. Anxiety. Paranoia. Anger. Fear. Depression. Angst. Those are the types of words you would expect to hear from a former employee suing your company for discrimination or harassment and seeking compensatory damages (damages for alleged pain and suffering). So how does an employee prove the existence of pain and suffering? Often, he simply takes the stand and explains to the jury how the discriminatory or harassing conduct has affected his life. Perhaps he'll call his treating physician, psychiatrist, or counselor to the stand to describe the symptoms and diagnosis in fancy medical terms.

As the employee recounts the impact of the discrimination or harassment on his emotional well-being, how is the jury to know if he's telling the truth? Stress is subjective. It's not something that can be observed and verified, like a broken bone. Right? Maybe—maybe not.

During a recent meeting of the Employers Counsel Network (ECN) in Seattle, University of Washington law professor Lea Vaughn explained how medical developments may help an employee prove the existence of emotional damage (or an employer disprove it). For example, doctors can now use functional magnetic resonance imaging (fMRI) and positron emission tomography

(PET) scans to measure and *visibly observe* the effects of emotional distress on the brain. This medical development may enable an employee's attorneys to show the jury pictures of his brain as proof of emotional damage, which could decrease the need to accept the employee's testimony as the sole evidence of his damage.

Although at least one court has recognized the results of a PET scan as proof of psychological harm, such evidence is by no means universally accepted. As science continues to develop, evidentiary questions and objections will continue to mount. For example, even if an fMRI or a PET scan shows abnormality in an employee's brain, how will he be able to prove that the alleged discrimination or harassment caused, or even contributed to, the abnormality? Could the abnormality have been caused by an unrelated life event, such as a childhood trauma?

It's too soon to tell whether fMRIs or PET scans may become widely recognized as evidentiary tools to prove emotional harm, but the concept certainly brings new meaning to the phrase "A picture is worth a thousand words." In this case, the picture may be worth thousands of dollars in damages. Special thanks to Professor Vaughn for getting me to think about compensatory damages in an entirely new way.

You may contact the author at arodman@stearnsweaver.com or call 305-789-3256. ♣

employment application. If you have a similar application, be sure to check that applicants have answered all the questions and attested that their answers are true. Then make sure the information really is true.

If you don't have a good employment application, send an e-mail to tom@employmentlawflorida.com and we'll send you a copy of our sample application. ❖

REASONABLE ACCOMMODATIONS

6th Circuit delivers new precedent on telecommuting as accommodation

In an 8-5 decision, the 6th Circuit has revisited and reversed its prior decision in a case addressing telecommuting as a reasonable accommodation under the Americans with Disabilities Act (ADA). The case, which involved a former Ford Motor Company employee, may provide persuasive precedent to courts in other federal circuits.

Background

Jane Harris worked for Ford as a steel resale buyer, a position that required her to act as an intermediary between the company's steel suppliers and its parts manufacturers. According to Ford, this work requires a significant amount of teamwork, face time, and unpredictable meetings.

Unfortunately, Harris suffers from irritable bowel syndrome, and her worsening condition began to interfere with her ability to do her job, leaving her unable to drive to work or stand up from her desk on particularly symptomatic days. Harris began to take intermittent Family and Medical Leave Act (FMLA) leave on the most severe days, but these absences began to affect her job performance.

To address the attendance and performance problems, Harris' supervisor agreed to allow her to work on a flex-time schedule and telecommute as needed on a trial basis. Because her work hours were still too irregular and inconsistent, her performance continued to suffer, and this arrangement was abandoned.

Harris then submitted a formal request to telecommute on an as-needed basis, up to four days per week, as a reasonable accommodation. This request was denied because Ford needed her to operate on a set schedule and be able to report to the worksite if and as needed, neither of which she could agree to do. At this time, Harris was offered alternative accommodations, including a cubicle closer to the restroom or a transfer to a position more suitable for telecommuting, but she rejected the alternatives. Her performance continued to decline, and she was eventually discharged.

6th Circuit overturns lower court . . .

The Equal Employment Opportunity Commission (EEOC) filed suit on Harris' behalf, arguing that Ford had violated the ADA by refusing to provide a reasonable accommodation for



WORKPLACE TRENDS

Survey shows illegal interview questions common. Twenty percent of hiring managers participating in a CareerBuilder survey indicated they have asked a question in a job interview only to find out later that it was illegal to ask. More than 2,100 hiring and HR managers across industries participated in the nationwide survey conducted online from November 4 to December 2, 2014. Here are some of the questions interviewers admitted to asking: What is your religious affiliation? Are you pregnant? What is your political affiliation? What is your race, color, or ethnicity? How old are you? Are you disabled? Are you married? Do you have children or plan to? Are you in debt? Do you drink socially or smoke?

Poll indicates workers not worried that robots will take jobs. Sixty-three percent of workers responding to an international poll from careers website Monster believe their jobs will never be replaced by automation such as computers and robots. An additional 10% think it will take more than 10 years for automation to do their job. Despite those beliefs, a 2013 study from Oxford University argues that 47% of today's jobs in the United States could be automated in the next two decades. Forty percent of German respondents believe automation already is able to do their jobs. Workers in India are the most confident in their job security, with 67% answering that they don't think automation will ever be able to do their entire job. Sixty-two percent of U.S. respondents believe it will never happen.

Survey reports heartening news for new grads. A new survey from CareerBuilder shows 65% of employers say they plan to hire recent college graduates this year, up from 57% last year and the highest outlook since 2007. One-third will offer higher pay than last year, and one in four will pay \$50,000 or more. The news isn't all good for new grads, however. "One in five employers feel colleges do not adequately prepare students with crucial workplace competencies, including soft skills and real-world experience that might be gained through things like internships," said Rosemary Haefner, chief HR officer at CareerBuilder. "Jobseekers with a good mix of both technical and soft skills will have the best prospects right out of college." Demand for students with business and technical majors has typically been high among employers, and this year is no exception, with 38% of employers naming business as the most sought-after major. The other top in-demand majors are computer and information sciences, engineering, math and statistics, and health professions and related clinical sciences. ❖



AGENCY ACTION

2016 H-1B visa cap reached. U.S. Citizenship and Immigration Services (USCIS) announced on April 7, 2015, that it had reached the congressionally mandated H-1B visa cap for fiscal year 2016. USCIS also announced that it had received more than the limit of 20,000 H-1B petitions filed under the U.S. advanced degree exemption. The agency will use a computer-generated process to randomly select the petitions needed to meet the caps of 65,000 visas for the general category and 20,000 for the advanced degree exemption. USCIS said it first would randomly select petitions for the advanced degree exemption. All unselected advanced degree petitions then will become part of the random selection process for the 65,000 general limit. Filing fees are to be returned for all unselected cap-subject petitions that aren't duplicate filings.

OSHA updates guidance protecting health-care workers. The Occupational Safety and Health Administration (OSHA) has updated its "Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers." In announcing the update, the agency said healthcare and social service workers are almost four times as likely to be injured as a result of violence as the average private-sector worker. The publication, available at www.osha.gov/Publications/osha3148.pdf, includes industry best practices and highlights the most effective ways to reduce the risk of violence in various healthcare and social service settings.

EEOC fills seats on harassment task force. The Equal Employment Opportunity Commission (EEOC) has announced the membership of its EEOC Select Task Force on the Study of Harassment in the Workplace. The formation of the task force was announced in January. The panel will examine the problem of workplace harassment in all of its forms and look for ways it might be prevented and addressed, according to the EEOC announcement. EEOC Commissioners Chai R. Feldblum and Victoria A. Lipnic will both chair the panel. The task force is made up of 16 members from around the country, including representatives of academia and social science, legal practitioners on both the employee side and the employer side, employers and employee advocacy groups, organized labor, and others.

OSHA renews alliance to protect airline ground personnel. OSHA has renewed its alliance with the Airline Ground Safety Panel to provide information and training resources to members, ground crew unions and contract firms, and workers. The alliance will address worker injuries that occur during operation of ground support equipment; use of seat belts; new and emerging hazards; slips, trips, and falls; ergonomic hazards; extreme temperatures; and understanding the rights and responsibilities of workers and employers under the law. ❖

her disability. The case was dismissed by a lower court, which held that telecommuting four days a week wasn't a reasonable accommodation under the ADA.

On appeal, a panel of three 6th Circuit judges overturned that dismissal because Ford had been unable to show that physical attendance at the workplace and face-to-face interaction were essential functions of Harris' job.

. . . and then takes a U-turn

On April 10, 2015, the 6th Circuit reheard the appeal *en banc*, which means the entire appeals court heard the case. This time, the majority found that Harris' "regular and predictable on-site attendance" was an essential function of her job. From that, the court found that requiring Ford to permit Harris to telecommute "as needed" for as much as 80 percent of her work schedule would remove one of the essential functions of her job (something that isn't considered a *reasonable* accommodation).

In fact—and of significant interest to other employers—the court noted that "most jobs would be fundamentally altered if regular and predictable on-site attendance [were] removed" from the essential functions.

Although the EEOC had argued that technological advances have made telecommuting a more viable option for reasonable accommodations, the court noted the agency had still been unable to demonstrate that said technology would enable the essential functions of Harris' particular job to be performed remotely. The court also pointed out that Harris had been allowed to telecommute on a trial basis but that her performance had continued to suffer and she had been unable to perform several of the primary functions of her job.

The 6th Circuit's opinion certainly doesn't rule out telecommuting as a reasonable accommodation.

The dissent argued that the question of whether Harris' telecommuting proposal was reasonable was a question of fact that should have been left for a jury to decide. *EEOC v. Ford Motor Co.*, No. 12-2484.

Bottom line

It's important to note that the 6th Circuit's opinion in this case certainly doesn't rule out telecommuting as a reasonable accommodation in *all* cases. However, the precedent that "most jobs would be fundamentally altered" if the employee couldn't deliver some measure of regular, predictable on-site attendance may be persuasive to other courts and beneficial to employers.

It's true that the constant stream of technological advances has cleared the way for telecommuting as a reasonable accommodation for many workers and many job functions, but that still doesn't mean *all* positions can or should be performed remotely—not yet, at least.

Overall, this case highlights the importance of complete and accurate job descriptions that clearly represent the essential functions of a job. If an employee's job can't be accomplished outside the physical work location or core business hours, that fact should be clearly reflected in the job description and employment practices and consistently applied to all workers in comparable roles. ❖

EMERGENCY PREPAREDNESS

Prepare for stormy weather with sound policies and communication

It didn't take long for 2015 to demonstrate that it has some exciting weather adventures in store for the United States. As if on cue, once Punxsutawney Phil predicted that six more weeks of winter were in store, parts of New England were buried in record-breaking snowfalls for three weeks in a row. Even parts of the South, usually spared from winter's icy blast, were quite literally frozen in place as an ice storm shut down power, roads, airports, and businesses and even created a state of emergency in Tennessee.

Now, with the shift into summer—and the unpredictability of hurricane season—it's a good time to review the do's and don'ts when inclement weather interrupts your business operations.

Must you compensate employees for missed work?

When weather events interfere with normal business operations, the first question from employers and employees alike is generally one of wages—when employees are unable to report to work, who must be paid? The answer first depends on whether workers are exempt or nonexempt under the Fair Labor Standards Act (FLSA).

Nonexempt employees. The wage and hour rules for nonexempt employees are fairly straightforward. Nonexempt employees must be compensated for time during which they work (or are engaged to wait for work). But if a nonexempt employee performs no work, then you aren't required to compensate him for those hours. When available, the employee may be permitted or required to use paid time off (PTO) to account for work hours missed because of inclement weather.

Note that some states have separate laws requiring employees to be paid a minimum "reporting" wage. For example, if an employee reports to work and then is sent home because of weather, business closure, or lack of work, you still may be required to pay a minimum number of hours to compensate her for the effort she made reporting to work.

Exempt employees. Exempt employees must be paid on a salary basis, which means their pay generally

may not be reduced because of variations in the quality or quantity of work performed (including the number of hours worked in a pay period).

But there are exceptions to this standard. First, if an exempt employee performs *no* work (not even responding to e-mails or phone calls) during the entire workweek—whether because she is unable to report to work or the business has closed operations for the week—then she need not be paid for that week. If available, the employee can be required or permitted to use a week's worth of PTO to cover the closure.

Similarly, an exempt employee's pay (or PTO) may be docked in *full-day* increments if he misses work for personal reasons other than sickness or an accident. In this case, "personal reasons" include an employee choosing not to report to work because of inclement weather when the business is otherwise open. However, if the business is closed for the entire workday, then the employee's pay may not be docked for the day, but he may be required to use PTO to cover work missed because of the business closure.

Finally, exempt employees' pay may *not* be docked in increments of less than a full day. Therefore, if an exempt employee chooses not to work for a full day because of a weather emergency, then you may not dock his pay for the missed hours. You *may*, however, require him to use PTO to make up for the missed portion of the workday.

Your rights and responsibilities in a declared state of emergency

As noted above, Tennessee declared a state of emergency during the February ice storm. This created significant confusion for many employees who believed, incorrectly, that this status meant their employers were prohibited from asking them to report to work and, further, from taking corrective action against those who didn't report for scheduled shifts. As those employees returned to work, they found themselves misinformed with regard to their rights to compensation and protection against discipline for failure to report to work.

First, let's state the obvious. Employers should *always* prioritize the safety of their employees and make intelligent and informed decisions about their ability to report to work.

However, in most states, the declaration of a "state of emergency" is primarily for the function of deploying emergency responders and requesting federal support in relief efforts. State laws and circumstances will vary, but generally, this status doesn't specifically preclude businesses from operating, and you may generally exercise your own discretion in choosing to open and operate. In addition, in the 49 states in which at-will employment is the standard, declaration of a state of



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emergency doesn’t preclude employers from fairly administering standard disciplinary actions—including termination—for unexcused absences.

Again, state laws may vary, and employers should always heed and apply the directives issued by local emergency personnel and executive agencies. However, if you have critical and essential staff who will be expected to report to work in spite of a “state of emergency” declaration, be certain they understand this responsibility and expectation (and the consequences for being unable to meet those needs).

Are employees aware of weather policies and continuity plans?

The most important element of emergency preparedness is communication. In the workplace, this means your inclement weather policies and practices must be communicated to and *understood* by your entire staff. Weather-beaten workers are likely to be frustrated and weary without returning to work to find an unexpected surprise in their paychecks, PTO balances, or unexcused absence tallies.

Consider and review the following issues in particular:

- On what basis will office closures be made, and how will this information be communicated?
- Which employees are able and/or expected to work remotely? Do they have the equipment and access needed to do so without advance notice?
- Will pay practices be based on minimum state and federal law requirements, or will more generous practices be adopted? (For example, will nonexempt employees still be paid for scheduled shifts if the office closes because of an emergency?)
- Will nonexempt employees be permitted to make up missed work hours?
- What are your policies related to childcare? For example, may employees with children who have been displaced from school or daycare bring their children to work? If so, under what circumstances, for how long, and in what areas of the workplace are children permitted?
- Are certain employees considered “essential” employees who are expected to be work-ready in spite of emergency circumstances?
- What happens when employees who are traveling for work are stranded because of bad weather? ♣

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