HRHero.com
A division of BLR®

FLORIDA
EMPLOYMENT LAW LETTER

Part of your Florida Employment Law Service

Tom Harper, Managing Editor • Law Offices of Tom Harper
Lisa Berg, Andrew Rodman, Co-Editors • Stearns Weaver Miller, P.A.
Robert J. Sniffen, Jeff Slanker, Co-Editors • Sniffen & Spellman, P.A.

Vol. 30, No. 5
July 2018

What's Inside

What's Online

Podcast
Is your engagement problem really a hiring problem?
ow.ly/UP9o30kpqhE

Evaluations
How to take implicit bias out of performance reviews
bit.ly/2Jy0YmC

Social Media
5 tips for drafting brand-friendly social media policy
bit.ly/2JDa8dC

Find Attorneys
To find the ECN attorneys for all 50 states, visit
www.employerscounsel.net

ECN EMPLOYERS COUNSEL NETWORK
EMPLOYERSCOUNSEL.NET

EMPLOYEE HANDBOOK

Common sense prevails in NLRB's new guidance on handbook policies

by Lisa Berg
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

On June 6, 2018, National Labor Relations Board (NLRB) General Counsel (GC) Peter Robb issued a 20-page memorandum (GC Memo 18-04) instructing the Board's regional offices on how to analyze unfair labor practice charges involving employer handbook policies and work rules. Although it's intended for NLRB regional offices, the memorandum provides a useful blueprint for drafting employee handbook policies. It also sets out a more commonsense approach for analyzing the lawfulness of handbook rules under Section 7 of the National Labor Relations Act (NRLA). Section 7 gives nonsupervisory employees the right to join, form, or assist unions and engage in other concerted activity for mutual aid or protection.

Boeing decision

The memorandum elaborates on the NLRB's recent decision in *The Boeing Co.*, 365 NLRB No. 154 (2017), which established a new test for evaluating the lawfulness of employee handbook rules. The *Boeing* decision reversed an Obama-era rule established in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), under which the NLRB considered a rule, policy, or handbook provision unlawful if workers could "reasonably construe" it to prohibit them from exercising their Section 7 rights to engage in protected concerted activity. The Board's new employer-friendly standard focuses on the balance between a rule's negative impact on employees' ability to exercise their Section 7 rights and its connection to the employer's right to maintain workplace discipline and productivity.

In applying the new balancing test, the NLRB will now determine whether an employer policy or rule fits into one of the following three categories outlined in the *Boeing* decision:

- **Category 1:** Rules that are lawful because (1) when they're reasonably interpreted, they do not prohibit or interfere with employees' exercise of NLRA rights or (2) the potential adverse impact on protected rights is outweighed by the employer's justification for the rule;
- **Category 2:** Rules that warrant individualized scrutiny of whether they would prohibit or interfere with rights guaranteed by the NLRA and, if so, whether any adverse impact on those rights is outweighed by legitimate justifications; and
- **Category 3:** Rules that are generally unlawful because they prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by any justifications associated with the rule.

Law Offices of Tom Harper, Stearns Weaver Miller, P.A., and Sniffen & Spellman, P.A., are members of the *Employers Counsel Network*

BLR®

AGENCY ACTION

USCIS and DOJ announce partnership. Two federal agencies have announced an agreement that expands their collaboration in an effort to better detect and eliminate fraud, abuse, and discrimination by employers bringing foreign visa workers to the United States. In May, U.S. Citizenship and Immigration Services (USCIS) and the Department of Justice (DOJ) announced the memorandum of understanding, explaining that it is aimed at increasing their ability to share information and help identify, investigate, and prosecute employers that may be violating the law. The new agreement expands on a 2010 agreement that enabled the agencies to share information about E-Verify misuse and employment discrimination.

EEOC releases report on federal workforce. The Equal Employment Opportunity Commission (EEOC) in May released its federal workforce report for 2015, showing small increases in both workplace diversity and equal employment opportunity (EEO) complaint filings and small declines in complaint processing time. The annual report informs and advises the president and Congress on the state of EEO throughout the federal government.

More visas for foreign workers announced. The U.S. Department of Homeland Security (DHS) in May announced that an additional 15,000 H-2B temporary nonagricultural worker visas will be available for fiscal year 2018. DHS Secretary Kirstjen M. Nielsen has determined there are not sufficient qualified U.S. workers available to perform temporary nonagriculture labor to satisfy the needs of American businesses for the fiscal year. The new allocation is in addition to the 66,000 visas already issued this year. Nielsen made the decision after consulting with Secretary of Labor Alexander Acosta, members of Congress, and business owners. "The limitations on H-2B visas were originally meant to protect American workers, but when we enter a situation where the program unintentionally harms American businesses, it needs to be reformed," Nielsen said.

DOL announces grants to help injured and ill stay in workforce. The U.S. Department of Labor (DOL) announced in May the availability of $20 million in grants to help Americans who are injured or ill remain in or return to the workforce. The grants are intended to identify new, replicable strategies to help individuals with work-related disabilities stay on the job. The grants represent the first phase of funding for Retaining Employment and Talent After Injury/Illness Network (RETAIN) demonstration projects, which will be administered by the DOL's Office of Disability Employment Policy, in partnership with the department's Employment and Training Administration and the Social Security Administration. ✤

In the memorandum, Robb analyzes common employer rules and provides guidance for the regional offices on placing the rules into the three categories.

Category 1

According to the memo, Category 1 rules, which are generally lawful, include the following types of policies:

- **Civility rules.** Examples include rules that prohibit rude or discourteous behavior, negative or disparaging comments about other employees, and disparaging or offensive language.
- **No photography or recording rules.** Examples include rules that (1) do not address the use of cell phones for communication purposes but prohibit the use of camera-enabled devices to capture images or videos and (2) prohibit employees from recording conversations without prior approval.
- **Insubordination rules.** Examples include rules that prohibit (1) being uncooperative with a supervisor, fellow employee, or guest or (2) conduct that doesn't support the employer's goals or objectives.
- **Disruptive behavior rules.** Examples include rules that prohibit roughhousing, dangerous conduct, or bad behavior.
- **Confidentiality rules.** Examples include rules that make no mention of employees' personal or wage information and prohibit the disclosure of customer information, business secrets, or confidential financial data or other nonpublic proprietary company information.
- **Rules against defamation or misrepresentation.** Examples include rules that prohibit (1) misrepresenting the employer's products, services, or employees or (2) e-mailing defamatory messages.
- **Rules against using employer logos or intellectual property.** Examples include rules that prohibit the use of employer logos for any reason or intellectual property without prior written approval.
- **Rules requiring authorization to speak for the company.** "The company will respond to media requests for the company's position *only* through the designated spokespersons" is an example of a valid rule.
- **Rules banning disloyalty, nepotism, or self-enrichment.** Employers may have a rule that states, "Employees may not engage in conduct that is disloyal, competitive, or damaging to the company, such as illegal acts in restraint of trade or employment with another employer." Rules banning those types of conflicts of interest generally have been deemed lawful, even before *Boeing.*

Category 2

Category 2 rules, which require individualized scrutiny, include the following types of rules:

- Broad conflict-of-interest rules that don't specifically target fraud and self-enrichment;

- Confidentiality rules broadly encompassing "employer business" or "employee information" (as opposed to confidentiality rules directed at customer or proprietary information or employee wages, terms of employment, or working conditions);
- Rules prohibiting disparagement of the employer (as opposed to coworkers);
- Rules prohibiting or regulating the use of the employer's name (as opposed to the employer's logo or trademark);
- Rules restricting employees from speaking to the media generally (as opposed to rules that restrict speaking to the media on the employer's behalf);
- Rules banning off-duty conduct that would harm the employer (as opposed to engaging in insubordinate/disruptive behavior at work); and
- Rules against making false or inaccurate (as opposed to defamatory) statements.

Category 3

Finally, the GC states that the following Category 3 rules are generally unlawful under the *Boeing* framework:

- Confidentiality rules specifically applicable to wages, benefits, or working conditions (e.g., a rule stating that employees are prohibited from disclosing their salaries or the terms of their employment contracts); and
- Rules that prohibit employees from joining outside organizations or require employees to refrain from voting on matters that concern the employer.

Employer takeaway

In light of the employer-friendly GC memo, you may wish to revise your handbook policies and reinsert commonsense provisions that were previously omitted in response to the Obama Board's decision in *Lutheran Heritage-Livonia* (e.g., civility rules and no recording or photography rules). Use caution in relying too much on the three categories, however. As the NLRB specifically noted, the *Boeing* decision applies only to an employer's maintenance of facially neutral rules. Applying a facially neutral rule against an employee engaged in protected concerted activity or promulgating such a rule solely in response to a union organizing campaign is still unlawful.

In addition, the memorandum isn't binding precedent and can be revised or rescinded by a subsequent GC. Thus, when creating handbook policies or rules, you would be wise to consult with experienced labor counsel and ensure that you've established sound business justifications for your rules.

You may contact Lisa Berg at lberg@stearnsweaver.com. ✤

RACE DISCRIMINATION

3-step analysis for deciding if reason for striking potential jurors is discriminatory

by Tom Harper
The Law and Mediation Offices of G. Thomas Harper, LLC

A recent decision by the Florida 5th District Court of Appeals (DCA) dealt with one of the many variables that can determine the outcome of an employee's lawsuit against your company: jury selection. In Florida civil cases, a large pool of potential jurors is called to jury duty. On the morning of the trial, members of the pool are selected at random to sit on the jury that will hear the case. However, your lawyer's right to question prospective jurors to determine if they are biased is very limited in federal court, where the judge handles most of the questioning. State court judges usually allow more leeway and may give your lawyer an hour or more to ask questions of potential jurors.

How peremptory challenges work

Your lawyer doesn't get to "select" the jury that will hear your case. Instead, he may strike (or bar) potential jurors only for cause. "For cause" means a juror has said something in response to a question that indicates she may not view the case impartially. For example, in a Panama City case I tried, a prospective juror stated that his wife worked for the employer and he thought the company had discriminated against her. The court dismissed that juror for cause.

In a civil case with six jurors and two alternate jurors, your lawyer may get two or three "peremptory" challenges (depending on the custom and practice in the county), which he can use to strike a juror for no reason. Thus, a peremptory challenge is one of the main tools your lawyer will have to remove a juror who triggers a bad feeling in the defense team—call it a "gut feeling." Traditionally, peremptory challenges in Florida have been exercised with unfettered discretion. The only limitation is that they cannot be used to discriminate against members of a distinct group by excluding them from jury service.

Trial courts needed some clarity and direction when faced with the possibility that a party is using a peremptory challenge in a purposely discriminatory manner. As a result, the Florida Supreme Court established a three-step analysis in *Melbourne v. State* to be used when one side claims the reasons for striking a juror are racially discriminatory:

(1) A party objecting to the other side's use of a peremptory challenge on racial grounds must (a) make a timely objection on that basis, (b) show that the

continued on page 5

ASK ANDY

A return-to-work FMLA refresher

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

In my opinion, the Family and Medical Leave Act (FMLA) remains one of the most (if not *the* most) difficult employment laws to administer. The federal regulations are lengthy and detail-oriented, setting forth various compliance deadlines, rules, and (of course) exceptions.

The FMLA's return-to-work rules are particularly complex. The general rule is that at the conclusion of her FMLA leave, an employee is entitled to reinstatement to the same position she held when her leave began or to an equivalent position with equivalent benefits and pay. The "same position" component of the rule is self-explanatory. However, deciding whether a job is an "equivalent position" can be complicated.

What does 'equivalent' really mean?

Under the federal regulations, two positions aren't equivalent unless they are "virtually identical" in terms of pay, benefits, status, and working conditions. It's important to note the inclusion of "status" and "working conditions" in the definition. Two jobs with identical pay and benefits may not be equivalent if, for example, one of the jobs is regarded as less prestigious, is less likely to result in advancement or promotion down the road, or even involves a less desirable work environment (such as working in a cubicle instead of a private office with a door).

Also, two jobs aren't equivalent unless they (1) require the "same or substantially similar" duties and responsibilities that entail "equivalent skill, effort, responsibility, and authority" and (2) are in the same or a "geographically proximate" area. The geographic limitation often presents problems. For example, a new job may not be regarded as an equivalent position if it would result in a longer, more difficult, or more costly commute to and from work, even if it comes with higher pay, better benefits, and more authority.

Often, employers place employees on FMLA leave, either temporarily or permanently, for legitimate business reasons. However, the regulations are clear that an employee is entitled to reinstatement even if she has been replaced or the position has been restructured to accommodate her absence. If the replacement was temporary, the employer often can place the returning employee in her original position. If the replacement was permanent, the employer must work its way through the equivalency analysis described above.

Return-to-work exceptions

While the FMLA's return-to-work rules are strict, they are not absolute. Like most legal rules, there are exceptions under which reinstatement isn't required.

Perhaps the most common return-to-work exception falls under the "no greater rights" category. That is, an employee on FMLA leave has no greater right to reinstatement (or other benefits and conditions of employment) than if she had been continuously employed during the FMLA leave period. For example, suppose the employee worked in an accounting department the employer eliminated during her FMLA leave (perhaps to outsource the work). In that situation, the employee wouldn't have reinstatement rights under the Act.

If you're going to avail yourself of this exception, however, be *very* careful. The burden falls on the employer to prove that the position would have been eliminated even if the employee hadn't taken FMLA leave. That isn't an easy burden to satisfy.

Employees also aren't entitled to reinstatement under the FMLA unless they can perform their essential job functions. But if an employee is disabled within the meaning of the Americans with Disabilities Act (ADA), you must consider your reasonable accommodation obligations and whether the employee can return to work now or perhaps in the reasonably foreseeable future with an accommodation.

Many employers require an employee returning from FMLA leave for his own serious health condition to submit a "fitness-for-duty" certification from a healthcare provider. If the medical certification is properly requested (including being noted on the FMLA designation notice) but the employee fails to provide it, you may delay his reinstatement until he produces the certification.

Less common exceptions to the general rule of reinstatement include fraud (reinstatement isn't required if the employee fraudulently obtained FMLA leave) and "key employee" status (an employee among the highest paid 10 percent of employees isn't entitled to reinstatement if it would result in substantial and

grievous economic injury and the employer complied with strict notice requirements).

Bottom line

If you're thinking about not reinstating an employee returning from FMLA leave or placing her into an equivalent position, you should consult with employment counsel. Failing to strictly comply with the law's reinstatement rules could create a significant risk of litigation.

Andy Rodman is a shareholder and director at the Miami office of Stearns Weaver Miller. If you have a question or an issue that you would like Andy to address, e-mail arodman@stearnsweaver.com or call 305-789-3255. Your 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. ✤

continued from page 3

person is a member of a distinct racial group, and (c) request that the court ask the striking party its reason for the strike.

(2) The striking party must provide a race-neutral explanation for the strike.

(3) If the explanation appears to be race-neutral and the court believes that under the circumstances, the explanation is not a pretext, or excuse, for discrimination, the strike will be sustained.

The court's focus in step 3 is not on the reasonableness of the explanation, but rather its genuineness. Throughout the process, the opponent of the strike always has the burden of proving purposeful race discrimination.

Jury candidate did not appear 'engaged' in jury selection process

In Brevard County, the lawyer for Travelers Insurance used a peremptory challenge to remove a black female from the jury in a personal injury case. The lawyer for the injured victim immediately challenged the action by noting the juror is an African-American female and asked Travelers' lawyer for a race-neutral reason for the strike. The company's counsel responded that "based upon his personal observations[,] . . . he was striking her because she was inattentive and did not appear engaged in the jury selection process, thus giving counsel concern that if seated as a juror, this individual would not be focused, pay attention, and actually consider the evidence."

The trial judge ruled that Travelers' reason for the strike was "legally insufficient," which placed the juror back on the jury. The insurance company lost the trial and appealed to the 5th DCA in Daytona. One of its reasons for the appeal was the trial judge's finding that its lawyer's basis for the peremptory challenge was "legally insufficient."

Appellate court's ruling

The 5th DCA viewed the reasons for the strike differently than the trial judge. The appellate court said that like a candidate's verbal responses to questions during jury selection, her lack of interest, inattentiveness, or other nonverbal behavior can constitute a racially neutral reason for a peremptory strike. At the Brevard County trial, the lawyer for the injured person went on the record to indicate that his observations of the black juror were the opposite of Travelers' lawyer's impression. The appeals court found that when the parties disagree over whether nonverbal behavior supports a strike, the only way the proponent of the peremptory strike can satisfy the burden of producing a race-neutral reason is "if the behavior is observed by the trial court or otherwise has . . . support" in the record.

In this case, the judge agreed with Travelers' lawyer's observation that the juror was "not particularly engaged." Thus, based on what happened during jury selection, the appeals court found support in the record (the trial judge's comments) for the nonverbal observations that met step 2 of the analysis.

The 5th DCA held that Travelers was entitled to the presumption that its proffered reason for the strike was genuine. Since the trial court had misapplied the three-step process under Florida law, the appeals court sent the case back for a new trial—and a new jury. *Travelers Home and Marine Insurance Company v. Gallo and Brock,* Case Nos. 5D16-3158 and 4214 (Fla. 5th DCA, June 1, 2018).

Lesson for employers

At trial, an employer doesn't get to pick the jury. Strikes for cause are unlimited but hard to support with the potential juror's answers to the jury selection questions. It is against Florida law to use a peremptory challenge to strike potential jurors on the basis of their race. The reasons for the strikes must be articulated by counsel and supported in the trial record. Florida courts will follow the three-step process outlined above to decide if a peremptory challenge is being used for discriminatory reasons.

You may reach Tom Harper at tom@employmentlawflorida.com. ✤

WORKPLACE TRENDS

Study finds link between workers' clothing and chances for promotion. Research from staffing firm Office Team finds that 86% of professionals and 80% of managers believe that clothing choices affect someone's chances of being promoted. The research shows that HR managers say that jeans, tennis shoes, and leggings are more acceptable to wear to work now than five years ago. In the same time frame, employers have become less tolerant of tank tops, tops that expose one or both shoulders, and shorts. The study found that 44% of senior managers have talked to an employee about inappropriate attire, and 32% have sent staff home based on what they were wearing.

Survey finds workers unwilling to pay more for better health benefits. A survey from Willis Towers Watson shows that most U.S. workers aren't willing to pay more for more generous healthcare benefits. However, a majority of U.S. workers say they are willing to sacrifice more of their paycheck for better employer-provided retirement benefits. The 2017 Global Benefits Attitudes Survey, announced in May, also found that while a majority say their benefit packages meet their needs, many want more benefit choice and flexibility. According to the survey of nearly 5,000 U.S. employees, 66% of respondents said they would be willing to pay more each month for more generous retirement benefits, while 61% would give up more pay to have a guaranteed retirement benefit. Only 38% said they are willing to pay more each month for a more generous healthcare plan.

Research shows high cost of low performers. A new study shows that employees who can't keep up with work demands take a heavier toll on business than some may think. Global staffing firm Robert Half asked CFOs to estimate how much time is spent coaching underperforming employees, and their answer showed an average of 26% of working hours. That's over 10 hours of a 40-hour workweek. Finance executives also acknowledged that hiring mistakes negatively affect team morale.

Study finds more than half of workers 60 and over are postponing retirement. A survey from CareerBuilder shows that 53% of workers at least 60 years old say they are postponing retirement, with 57% of men putting retirement on hold compared to 48% of women. CareerBuilder also pointed out that the statistics were based on small base sizes, and therefore caution should be used in interpreting the results. When asked if they are currently contributing to retirement accounts, 23% said they don't participate in a 401(k), IRA, or other retirement plan, a rate even higher in younger adults ages 18 to 34 (40%). ✤

DISABILITY DISCRIMINATION

Appeals court reinstates Florida lawsuit over website accessibility

by Tom Harper
The Law and Mediation Offices of G. Thomas Harper, LLC

The federal appeals court over Florida has reinstated a lawsuit against Hooters by a person who claimed the company's website wasn't accessible to the blind. This is yet another case involving claims filed under Title III of the Americans with Disabilities Act (ADA).

Duplicate lawsuits

Dennis Haynes, who is blind, sued Hooters in April 2017, claiming the company's website wasn't compatible with the JAWS screen reader software he uses to access the Internet. After filing suit, he discovered that Andres Gomez, who is also blind, had filed a nearly identical suit against the company in 2016 and obtained a settlement. In the suit filed by Gomez, the company had agreed to:

- Place an accessibility notice on its website; and
- Improve its website within 12 months of the settlement to conform with the WCAG 2.0 Web access standard, the recognized industry standard for website accessibility.

Because Haynes was asking for the same remedies, Hooters tried to block his lawsuit, claiming it was "moot," or unnecessary. The federal district court in Miami agreed and dismissed the case. Haynes appealed.

Case may proceed

The federal appeals court over Florida disagreed with the Miami court and ruled that the settlement in Gomez's lawsuit doesn't make Haynes' suit moot. Although Gomez can enforce the terms of his own settlement, Haynes has no rights under that agreement. If Hooters fails to live up to the terms of Gomez's settlement agreement, Haynes cannot make a court enforce it.

What's more, the appeals court examined Gomez's settlement agreement and found that it ends in September 2018. After that date, Gomez will have no rights under the agreement, and nothing in the settlement requires Hooters to update and maintain its website to ensure that it remains accessible to the blind.

In short, since the relief obtained by Gomez doesn't cover everything Haynes is seeking, the first settlement doesn't prevent the second lawsuit from proceeding. *Dennis Haynes v. Hooters of America, LLC,* Case No 17-13170 (11th Cir., June 19, 2018).

Takeaway

A year ago, we reported that a Miami court had found grocer Winn-Dixie in violation of the ADA because its website wasn't accessible to a visually impaired customer (see "Miami judge rules that Winn-Dixie's website violates ADA," on pg. 1 of our July 2017 issue). Accessibility litigants have visited many

Florida cities, filing lawsuits against retail businesses over physical access for people with disabilities (think doors, restrooms, and ramps). The next wave is electronic access. Make sure your business is compliant.

You may reach Tom Harper at tom@employmentlawflorida.com. ✤

WAGE AND HOUR LAW

WHD issues more opinion letters

In a follow-up to its recent reissuance of 17 opinion letters that had been issued (by the Bush administration) and withdrawn (by the Obama administration) in early 2009, the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) has already issued two more opinion letters. As you may recall, the agency had stopped providing such letters during the Obama administration, but the Trump DOL has revived the practice.

The new letters tackle the following topics: (1) whether and in what circumstances an hourly employee's work-related travel should be considered compensable time under the Fair Labor Standards Act (FLSA) and (2) whether short breaks taken for a health condition under the Family and Medical Leave Act (FMLA) are compensable under the FLSA. We don't frequently get much insight into the interplay between the FMLA and the FLSA, so the second letter is particularly interesting and instructive.

Travel time scenarios

In the first opinion letter, the WHD examined several scenarios involving travel time for hourly workers who performed their work responsibilities at different customer locations and had no fixed daily schedule. The employer provided the employees with a company vehicle, which they were allowed to use for work and personal purposes.

Let's take a look at the scenarios addressed, starting with the least complex.

Scenario #1. Hourly workers drive from home to multiple different customer locations on any given day. Some employees may have to report to their employer's offices first to obtain a daily itinerary of work to be performed and where. They drive their company cars the whole time—from home to their employer's location, and then from there to each customer location, and ultimately home at the end of the day.

Analysis. This one sounds easy—commute time isn't compensable, but travel from jobsite to jobsite is. The employee must be paid starting at the first jobsite of the day. An employee's commute to his employer's location at the beginning of the day is noncompensable commute time, while driving time between customer locations is compensable. If he goes directly from home to the first customer location, that drive time is noncompensable. His drive home from the last customer location at the end of the day is also noncompensable.

Scenario #2. An hourly technician travels by plane to New Orleans on a Sunday for a training class beginning at 8:00 a.m. on Monday at the corporate office. The class generally lasts Monday through Friday, with travel home on Friday after class is over or, occasionally, on Saturday when Friday flights aren't available.

Analysis. In general, travel away from home is clearly compensable when it "cuts across the employee's workday." For example, if an employee regularly works from 9:00 a.m. to 5:00 p.m. Monday through Friday, travel time during those hours is compensable not only on those days but on Saturday and Sunday as well.

The problem presented in this scenario, however, was that the employees didn't have regular work hours, so it was impossible to determine which hours during the trip were compensable (when they weren't actually working). The WHD proposed several possible solutions, including:

- Examining hours worked over the past month to determine whether a pattern existed that could be deemed regular work time;
- Using an average start and end time;
- Entering into an agreement with the employee regarding what hours are considered part of his regular work schedule or how much time will be compensated during overnight travel; and
- Other methods as determined by the employer, if reasonable.

Interplay of FLSA and FMLA

The second opinion letter examines two apparently contradictory principles under the FMLA and the FLSA. The first is that under the FLSA, hourly employees generally must be paid for breaks of less than 20 minutes (unless such breaks are predominantly for the benefit of

TRAINING CALENDAR

Call customer service at 800-274-6774 or visit us at the websites listed below.

WEBINARS & AUDIO SEMINARS
Visit http://store.HRHero.com/events/audio-conferences-webinars for upcoming seminars and registration.

8-1 Pay Equity Audits: The Risk of Multi-Million-Dollar Liability Is Real—What to Do Right Now to Correct Disparate Compensation Practices to Minimize Legal Risks

8-2 Convert That Candidate: Sourcing Strategies for Improving Conversion Rates and Reducing Time to Fill

8-3 Form I-9 Recordkeeping: How to Complete, Re-Verify, Store, and Destroy Paper and Electronic Files in Compliance with Federal Law

8-2 Preparing for Active Shooter Scenarios: Strategies that Have Worked for Others

8-7 Multistate Employers' Payroll Tax Pitfalls: 10 Mistakes to Steer Clear of and Practical Strategies for Correcting Missteps Before They Result in Costly Penalties

8-8 Severance Agreements: When to Use Them and How to Draft Them to Limit Company Liability

8-9 Is This Paid Time Off or Not?: Legal Issues to Consider Around Parental and Other Types of Leaves

8-13 Employee Handbooks: Practical Impact of New NLRB Memo and Updates to Make for the Rest of 2018

8-13 Behavior-Based Safety: Understanding Employee Motivations to Build Engagement and Drive Safety Performance

8-14 FMLA Self-Audits: Find and Fix Your Leave Practice Problems Before the Feds Do

8-14 Post-Accident Drug Testing: Avoid Retaliation Claims Under OSHA

8-16 Mental Health and Substance Abuse Benefit Updates: How to Avoid MHPAEA Liability in Light of New Federal Guidance

the employee rather than the employer). The second principle is that under the FMLA, employees generally aren't entitled to compensation for absences—even partial-day absences—that are due to an FMLA-designated condition.

The facts were as follows: Several employees were approved for FMLA leave in the form of one 15-minute break every hour. As a result, in any given eight-hour shift, the employees actually worked only six hours.

The WHD concluded that in this situation, the breaks weren't predominantly for the benefit of the employer because they were necessitated by the employees' serious health conditions. On the other hand, if the employer offered paid breaks to other employees, the employees who took breaks under the FMLA would need to be compensated the same as the other employees for that many breaks per day.

While the opinion letter didn't address this, if you require employees to take paid leave concurrently with FMLA leave, you should pay an employee's short FMLA-related breaks out of any available PTO allotment.

Bottom Line

It's nice to see the WHD publishing opinion letters at what seems to be a good pace after receiving very little guidance of this nature under the Obama administration. Informal guidance such as opinion letters can provide valuable insight into the WHD's perspective on a variety of topics that aren't directly answered by the regulations. The full text of the new opinion letters can be found at https://www.dol.gov/whd/opinion/flsa.htm. ✤

FLORIDA EMPLOYMENT LAW LETTER (ISSN 1041-3537) is published monthly for $447 per year plus sales tax by **BLR®—Business & Legal Resources,** 100 Winners Circle, Suite 300, P.O. Box 5094, Brentwood, TN 37024-5094.

Editorial inquiries should be directed to G. Thomas Harper at The Law and Mediation Offices of G. Thomas Harper, LLC, 1912 Hamilton Street, Suite 205, Post Office Box 2757, Jacksonville, FL 32203-2757, 904-396-3000. Go to www.EmploymentLawFlorida.com for more information.

FLORIDA EMPLOYMENT LAW LETTER does not attempt to offer solutions to individual problems but rather to provide information about current developments in Florida employment law. Questions about individual problems should be addressed to the employment law attorney of your choice. The Florida Bar does designate attorneys as board certified in labor and employment law.

For questions concerning your subscription or Corporate Multi-User Accounts, contact your customer service representative at 800-274-6774 or custserv@blr.com.

HRhero® a division of BLR BLR®