

Businesses navigate new trends in employment law

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The rising cost of living in Miami recently prompted the American Welding Society to offer telecommuting options and flexible hours. But new legal questions arose: How would employees report their hours? Who is liable if someone is hurt while working at home?

Enter Mark Neuberger, the society's attorney at Foley & Lardner in Miami. He helped the nonprofit rewrite its employee handbook.

In the next few months, the society will launch new policies. Not every employee is eligible, but the result could be more open parking spaces and happier employees.

"I have this theory we're on the cusp of tectonic change in the employment industry," Neuberger said. "The underlying factors are oil, politics and technology."

Telecommuting is one possible answer to growing costs and legal challenges facing local employers in the coming years, as long as policies and company habits are adjusted to avoid legal problems.

Managers and human resources directors in South Florida are navigating a changing political climate where new standards are proposed for union elections, illegal immigration, sex harassment, federal leave requirements and discrimination. The region continues to lead the country in overtime lawsuits, with no letup in sight.

Election looms large

No matter who wins November's presidential election, South Florida attorneys believe dramatic change will come soon in many areas of employment law.

Already, congressional Democrats are crafting the first changes in years to key legislation like the Family and Medical Leave Act, and writing completely new laws like the proposed Employee Free Choice Act to ease requirements for union elections.

The common thinking is, if Democrats get more power, more so-called labor reforms will be pushed through, for better or worse.

"Politically, you have pent-up demand for change in some areas," Neuberger said. "Also, because of oil and the economy, there's a growing need for changes. And third, technology makes it possible to do things we never could, in terms of working from home or wherever."

Neuberger said none of his clients have been hit with "BlackBerry overtime" lawsuits, where employees file overtime claims for the extra work caused by remote connectivity.

Dora Shade, the society's HR manager, said the company is pleased with the new policies, but telecommuting isn't appropriate for everyone. The society, which sets standards for welding, has more than 100 employees in Miami and 53,000 members worldwide.

"We did research, put together guidelines, investigated the legalities," Shade said. "Mark's advice was we needed to provide laptop computers and not allow company information to be put on personal computers."

Neuberger also told the society that employees are covered under workers' compensation while working at home – but not if they hurt themselves while eating lunch in their kitchen.

Overtime overdrive

Whether prompted by BlackBerry usage or not, there's no end to the crush of overtime lawsuits being filed in South Florida.

Employment attorneys said they continue to spend a lot of time advising clients on how to avoid and litigate the claims.

“My advice is, even if you classify an employee as exempt, you should still keep detailed records. The burden is on the employer,” said Antoinette Theodossakos, partner with Edwards Angell Palmer & Dodge in West Palm Beach.

Theodossakos cited federal court data showing Florida, in many years, generates at least one-third of the nation’s overtime lawsuits under the Fair Labor Standards Act. South Florida accounts for a large chunk of that.

In 2006, there were 4,207 overtime lawsuits nationwide, with 1,860 in Florida (44 percent), of which 1,217 were in South Florida (29 percent). The ratio decreased somewhat in 2007 because the number of lawsuits nationwide grew faster – to more than 7,000 – but Florida’s percentage of nationwide suits over the last eight months is back up to 47 percent.

Theodossakos said Florida employers are targeted because it is a home to many smaller, seasonal companies with less sophisticated resources.

She said there is one cardinal rule for avoiding lawsuits if a company issues BlackBerrys to employees: “Have a strict policy in place, specifically for set hours.”

A recent win

Despite the best precautions, employers are sometimes confronted with overtime litigation. Buckingham Doolittle & Burroughs attorneys in West Palm Beach recently won an overtime case for their clients, Delray Plants owners Ed Koorneef and Randolph Gilde.

Morgan and Morgan, a Florida firm that has handled many similar cases, hit the company with an overtime suit in 2007 that also sought to certify a class. The plaintiff was a non-exempt laborer, Daniel Saldibar.

The big question in a jury trial over Saldibar’s case came down to whether he was an agricultural worker or not under the Fair Labor Standards Act. A jury said he was, and was therefore not subject to overtime requirements. In smaller agricultural operations, overtime payment is not always required for all workers.

“Typically, employers cave. This employer just said ‘I’m sticking to my guns on this one,’” said Buckingham Doolittle partner Sally Still, who worked with managing partner Jeffrey Pheterson on the case. “It was significant to them because they have a lot of people classified as agricultural workers.”

Still said many employers seek to settle overtime lawsuits quickly, and some plaintiff firms rely on that. She said she’s only taken a few FLSA cases to trial.

Union elections

Another current topic in politics and employment law is union elections and the proposed Employee Free Choice Act.

“If Democrats get 60 votes in the Senate, they will be able to override presidential vetoes,” said **Robert Turk**, shareholder at **Stearns Weaver Miller Weissler Alhadeff & Sitterson** in Miami. “The unions are spending a lot of money to elect Democrats, so they will be expecting something in return.”

The Free Choice Act would allow employees to form unions by signing cards authorizing union representation. The AFL-CIO says the law would help “rebuild America’s middle class” and establishing stronger penalties for violation of employee rights when workers seek to form a union.

Turk said the act could also increase peer pressure to sign a card, rather than allowing for private ballots during union elections.

He is advising clients such as the Loews Miami Beach to address outstanding employee concerns now, just in case.

“**Loews Hotel** does very innovative things in terms of benefits, participation, making the staff feel they have a say, so they don’t have to vote for a union,” Turk said.

Staying on top

Verifying immigration status, always an issue in South Florida, is another area that could be affected by the election.

But the House passed legislation July 31 extending E-Verify, the federal government's online system for checking an employee's eligibility to work in the U.S., for five more years. The Senate is also taking up the bill.

Even business groups who contend the E-Verify system is rife with errors supported the extension, saying more time is needed to create a better system. The program is voluntary, but the Bush administration has proposed making its use mandatory for federal contractors.

Avoiding discrimination is a common goal for local businesses, and the U.S. Equal Employment Opportunity Commission has a new emphasis on religion in the workplace, said Norm Davis, senior counsel at the Miami office of Squire, Sanders & Dempsey.

"The EEOC points out there's more diversity in the workplace," he said. "Employers need to be aware of those changes and be prepared to understand what they need to do."

Employers should do their best to accommodate religious needs, as long as it doesn't place undue hardship on the operation. That can include religious dress, time off for prayers and religious events.

"One thing I've been suggesting to employers for some time is to provide paid time off in some quantity, and they can use it for vacation, breaks or a religious holiday," Davis said.

Neuberger said another political hot topic could be the Americans with Disabilities Act. He said courts have been restricting the ADA for years and Congress is contemplating an expansion that would broaden the definitions of whom it protects.

Traffic control

Turk spends a lot of time advising HR personnel about how to avoid problems leading to litigation.

"He's been advising Loews since 1998," said Susanah Fernandez, HR director at the hotel. "Not everything is about legalities. He reviews our handbook and encourages constant communication with employees."

Better communication ensures the same standards are applied for discipline and benefits. With employee input, the hotel just began giving \$25 transportation allowances to every full-time employee.

"He actually taught our management team to think like pilots, and HR is air traffic control," Fernandez said.

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