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EMPLOYMENT LAW LETTER

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Vol. 31, No. 9
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What's Inside

What's Online

Tip Credits
Employers like DOL's proposed tip credit rule
http://bit.ly/310pdOi

Seasonal Hiring
4 tips for hiring workers ahead of holiday rush
http://bit.ly/30YHZWc

Free Speech
Trump fan fired over Facebook post wins trial
http://bit.ly/2OsZuvd

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FLSA EXEMPTIONS

Orlando jury awards $1.2M in unpaid overtime to 19 general foremen

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

On October 30, a jury in Orlando found that Asplundh Tree Expert Co. willfully failed to pay overtime to a group of general foremen who worked in the field directing tree trimming crews.

Background

Asplundh is a utility contractor that performs tree pruning and removals, right-of-way clearing and maintenance, vegetation management, emergency storm work, and other tree work for public and private entities. Some of its general foremen were paid hourly, while others were paid a salary.

For example, Antonio Belloso was paid an hourly rate of $17 per hour in 2017. His duties included directing the work of his crew members, helping them with their work, planning work with utility representatives that crews would complete, providing for his employees' and the properties' safety, and handling customer complaints. But paying a foreman hourly made it likely he would be ineligible for the *executive exemption* to the Fair Labor Standards Act's (FLSA) overtime requirements. This meant the company had to track his hours, pay overtime after 40 hours, and pay for all hours he worked.

Most of the general foremen worked daily from 7:00 a.m. to 5:30 p.m. with a 30 minute unpaid lunch. Asplundh allowed them to record their time by simply writing down the total hours worked for the day. The U.S. Department of Labor (DOL), however, recommends using a time record that tracks time in, time off for lunch, time back in after lunch, and time off work. Allowing them to simply list their hours each day limited the value of the Asplundh time records.

Class action lawsuit

In the fall of 2017, Belloso and approximately 60 other Asplundh employees quit their jobs at the same time over issues at work. Of course, some of the unhappy employees reached out to a lawyer, and the FLSA claims followed. A group of foremen, including Belloso, claimed they weren't paid overtime because:

- They were instructed by Asplundh *not to record* hours worked on certain tasks;
- The company deducted 30 minutes for lunch, even when they didn't take lunch breaks; and
- They were instructed *not to record* hours worked that couldn't be "billed" to a client.

Belloso was paid overtime pay at one and a half times his hourly rate and was required by Asplundh to complete

AGENCY ACTION

NLRB switches standard relating to CBA changes. The National Labor Relations Board (NLRB) in September adopted the "contract coverage" standard for determining whether a unionized employer's unilateral change in a term or condition of employment violates the National Labor Relations Act (NLRA). In doing so, the NLRB abandoned the "clear and unmistakable waiver" standard. Under the contract coverage standard, the Board will examine the plain language of the parties' collective bargaining agreement (CBA) to determine whether the change made by the employer was within the compass or scope of contractual language granting the employer the right to act unilaterally. If it was, the employer will not have violated the NLRA. If the CBA doesn't cover the employer's disputed action, the employer will have violated the Act unless it demonstrates the union waived its right to bargain over the change or it was privileged to act unilaterally for some other reason. The decision is *M.V. Transportation, Inc.*

OSHA to handle retaliation complaints under new law. The Occupational Safety and Health Administration (OSHA) has been granted authority to handle worker retaliation complaints under the Taxpayer First Act (TFA), which was signed into law July 1. OSHA will investigate retaliation complaints against employees who provide information regarding underpayment of taxes, violations of internal revenue laws; or violations of federal law involving tax fraud to the IRS, another federal entity listed in the statute, a supervisor, or any other person working for the employer who has the authority to investigate, discover, or terminate misconduct. The TFA also prohibits retaliation against employees for testifying, assisting, or participating in any administrative or judicial action taken by the IRS relating to an alleged underpayment of taxes, violation of internal revenue law, or violation of federal law involving tax fraud.

Boeing partial plant unit deemed inappropriate for union election. The NLRB held in September that a petitioned-for unit at Boeing's South Carolina plant that was limited to two job classifications within an aircraft production line wasn't an appropriate unit for purposes of conducting a union election. The decision resolves a petition filed by the International Association of Machinists Union for a unit of approximately 178 mechanics out of a workforce totaling more than 2,700 employees. Boeing argued the mechanics must be included in the larger community of workers at the aircraft production plant where the company's 787 Dreamliner is built. ✤

and submit weekly timesheets. But he testified he didn't record all hours he worked because his supervisor instructed him "to only report the hours that could be billed to the [customer]."

Asplundh claimed in response to the FLSA suit that Belloso and other general foremen failed to report all hours worked in violation of its policy and "helped organize the mass walk out of approximately 61 Asplundh employees in a manner designed to cause as much financial collateral injury and damage to Asplundh as possible."

As is often the case with FLSA claims, Belloso filed suit against Asplundh as a "collective action" on behalf of all other general foreman in the north (including the Florida panhandle), central, and south Florida regions. The federal court in Orlando conditionally certified a class of "All Employees of [Asplundh] who: (1) are or were employed as 'General Foreperson' in Regions 50, 52, and 55 (north, central and south Florida) during the three years prior to the filing of the suit; (2) were paid an 'hourly rate'; and (3) worked more than [40] hours in a work week without being paid proper overtime compensation."

Asplundh seeks to dismiss

Before trial, Asplundh filed a request with the court arguing the general foremen fell under the FLSA's executive exemption and therefore were ineligible for overtime. Under the DOL regulations interpreting overtime exemptions, an individual is employed in a bona fide executive capacity if all of the following conditions are met:

- He is *compensated on a salary basis* above a certain amount.
- His *primary duty* is the "management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof."
- He customarily and regularly *directs the work of two or more other employees*.
- He is *authorized to hire or fire employees or recommend employment status changes* for employees.

The district court found Asplundh had "waived" its right to assert the executive exemption by raising the defense late in the litigation. Regardless, the court went on to decide the foremen didn't qualify under the exemption.

One issue in deciding if the foremen qualified for the exemption was whether they were paid *on a salaried basis*. Asplundh argued Belloso's pay satisfied the salary basis test—even though he was paid hourly—because he was guaranteed a minimum of 40 hours per week at a set rate. He argued, however, that the salary basis test requires *a predetermined amount of money, not hours*.

The court weighed the evidence of his pay in each pay period and found there were issues of fact about whether he had been paid a guaranteed minimum of 40 hours. It concluded that "the argument that a predetermined number of hours can fulfill the predetermined amount requirement is negated by the regulation itself, which specifically states that 'an exempt employee must receive the full salary for any week in which the employee performs any work *without regard to the number of days or hours worked*'" [emphasis added].

Trial

At trial, lawyers for Belloso and the 18 other general foremen presented evidence about their job duties and hours worked. In addition to testimony that they each had worked more hours than were reported and paid, they submitted e-mails, receipts, and cell phone records showing they had worked after 5:30 p.m. on numerous days.

A supervisor over them admitted that reported hours had been cut and not reported. What's more, the foremen presented testimony that the supervisors were paid a bonus on the profit from jobs and that labor costs were a major factor in the bonus. This gave a *motive* for supervisors to report fewer hours than were actually worked.

Jury verdict

The jury found a preponderance of the evidence supported that each of the foremen had worked overtime for which they were entitled to receive compensation. After about 14 hours of deliberations over three days, the eight-person jury calculated the overtime owed to each of the 19 foremen and awarded a total of $606,045 to the group. They each received a different amount, based on the jury's calculation of each person's overtime hours worked.

Then things really got ugly for Asplundh! Next, the jury was asked if they found by a preponderance of the evidence that the employer's actions were willful or showed reckless disregard for whether the FLSA prohibited its conduct. The jury answered, "YES." The foremen's lawyers immediately asked the court to award liquidated damages. By order entered the same day as the jury verdict, the court ruled that:

> An award of liquidated damages equal to the amount of compensatory damages is required unless the employer can establish a good faith defense. It is generally the district court's job to assess this defense. However, when a jury finds that an employer's violation of the FLSA was *willful*, the district court has no discretion to consider the good faith defense because a willfulness finding precludes it. [citations omitted]

The court granted the oral request for liquidated damages, and the award to each foreman was *doubled* for a total judgment of about $1,212,090. Unfortunately for Asplundh, that will not be all. The lawyers for the prevailing foremen will now ask the court for attorneys' fees and costs in a separate proceeding to decide how much to award their lawyers for their work. (Of course, Asplundh will also have to pay their own lawyers, who work for one of Florida's largest law firms.)

Takeaway

Earlier this year, the DOL proposed a new overtime rule that increases the current minimum salary threshold for overtime exemptions under the FLSA. The agency accepted comments on its proposed rule through May 21. If finalized in its current form, the rule will go into effect on January 1, 2020, and raise the minimum salary necessary for workers to be exempt from the overtime requirements.

Under the proposed rule, employees would have to earn at least $679 per week ($35,308 per year) to be exempt from overtime pay for any hours worked over 40 in a workweek. This is an increase from the current $455-per-week threshold ($23,660 per year). Exemptions will soon come under closer scrutiny. We have prepared an FLSA self-audit you can use to see if your company is in FLSA compliance. For a copy, send an e-mail to: Tom@EmploymentLawFlorida.com.

And note—if Asplundh had retaliated at all for the mass walkout, a violation of the National Labor Relations Act (NLRA) protections on "concerted activities" may have been an option the National Labor Relations Board (NLRB) would have pursued for the employees. Here, however, even though the general foremen were found to be nonexempt, the NLRB regional office in Tampa believed they had sufficient authority to qualify as "supervisors" under the NLRA so that they weren't protected for concerted activities.

Contact Tom Harper at Tom@EmploymentLawFlorida.com. ✤

IMMIGRATION

Preparation, training help employers cope with unsettling ICE news

The thought of immigration enforcement agents surrounding a workplace, seizing business records, questioning employees, and even making arrests is worrisome to say the least. But it has been and likely will continue to be a reality for many employers since audits and raids by U.S. Immigration and Customs Enforcement (ICE) are on the upswing. Plus, the Social Security Administration has once again begun sending "no-match letters" to employers that have W-2 forms with mismatched names and Social Security numbers. Now referred to as educational correspondence (EDCOR) or an employer correction request (ECR), the letters require employers to take action to resolve the problem. So the signals are clear: Employers with undocumented workers are on notice that they face serious consequences.

Time to panic?

Panic will do no good, but employers need to understand how to hold down risks. It starts with verifying employment eligibility of new hires using Form I-9, which requires employees to present documents to their employer confirming their identity and

authorization to work in the United States. U.S. Citizenship and Immigration Services (USCIS) reminds employers they must examine those documents "to determine whether the document(s) reasonably appear to be genuine and to relate to the employee." Employers aren't tasked with investigating the documents employees present, but they need to be on the lookout for obvious fakes.

When ICE conducts raids, workers suspected of being undocumented may be led away in handcuffs, but their employers also face legal risks. The agency says its worksite enforcement strategy focuses on the criminal prosecution of employers that knowingly break the law as well as on the use of I-9 audits and fines.

On its website, ICE says it uses a three-pronged approach:

(1) I-9 inspections, civil fines, and referrals for debarment;

(2) Enforcement through the arrest of employers knowingly employing undocumented workers and the arrest of unauthorized workers for violation of laws associated with working without authorization; and

(3) Outreach through the ICE Mutual Agreement between Government and Employers (IMAGE) to instill a culture of compliance and accountability.

What's IMAGE?

ICE says its IMAGE program, in place since 2006, "enhances fraudulent document awareness through education and training." Employers can become IMAGE-certified by agreeing to:

- Complete the IMAGE Self-Assessment Questionnaire (application);
- Enroll in the E-Verify program within 60 days;
- Establish a written hiring and employment eligibility verification policy that includes an internal Form I-9 audit at least once a year;
- Submit to a Form I-9 inspection; and
- Review and sign an official IMAGE partnership agreement with ICE.

What to do

If ICE suspects an employer is employing undocumented workers, the agency may conduct an I-9 audit, a raid, or both. In an I-9 audit, an agent will serve a "notice of inspection" that requires the employer to turn over I-9 forms and other documents to ICE within three days. Employers should be aware that audits often are the first step the agency will take in preparing to obtain a warrant for a raid.

During a raid, agents arrive with a search warrant that allows them to take records and talk to workers. Employers should be prepared by making sure personnel understand what to do and whom to call. Information from the American Immigration Lawyers Association (AILA) advises employers to send a copy of the warrant to the employer's attorney. At least one employer representative needs to follow each agent to take notes or even video the agents' actions, but employers shouldn't interfere with the agents' work.

The employer should object to any search outside the scope of the warrant. It also should ask for a copy of the list of seized items, AILA says. Employer representatives shouldn't give statements to agents or allow themselves to be interrogated before consulting with an attorney. Also, the employer can inform employees that they don't have to talk with ICE, but they are free to do so if they choose.

Employers should never hide employees or help them leave the premises, and they should never provide false or misleading information or shred documents, AILA says, and if employees are detained, employers should make sure their families are contacted. ✤

WORKPLACE ISSUES

What happened to common decency?

Rudeness is everywhere. Road rage abounds. It's all about "me" these days, and manners are a laughable thing of the past. Our politicians aren't even close to being civil with one another. Political philosophies are far to the right, far to the left, and what you believe is the only thing that's correct. Everyone else's beliefs are just flat wrong—end of debate. This isn't your grandma's America.

The 2016 presidential campaign demonstrated how polarized and opinionated many of us have become. It has also illustrated the pain we can cause each other by using our own bully pulpits and social media platforms. We can be mean, crass, or crude without suffering any repercussions.

How does this ugliness affect our workplaces? It causes anger, embarrassment, suspicion, fear, pain, and loss of legal rights. If we tolerate bigotry and bullying in our workplaces, we run the risk of losing our best people, injuring our most vulnerable workers, and violating our employees' rights to a workplace that's free from violence and from discrimination based on sex, religion, race, national origin, disability, age, or sexual orientation. Why would we allow ourselves to countenance such inhumane behavior? If we think about it, we wouldn't.

What we expect from employees

Somebody once said that in looking for people to hire, you look for three qualities: integrity, intelligence, and energy. And if you don't have the first, the other two will kill you.

—Warren Buffett
Business magnate, investor, and philanthropist

As an employer, you should expect some basic things from your employees. For instance, they should give you an honest day's work for an honest day's pay. But it's more than that if you're the kind of boss who brings out the best in your employees. You can and should expect your employees to be honest and to treat each other and your customers with common decency.

You have the right to expect your employees to be timely, efficient, and precise in the performance of their work. But you should also seek to earn their loyalty.

What employees expect from their bosses

The magic formula that successful businesses have discovered is to treat customers like guests and employees like people.

—Tom Peters
Author and speaker

It should go without saying that the boss should pay good, competitive wages and benefits. She should be honest with her employees and provide a clean and safe working environment.

The boss should not just be an administrator; she should be a leader. She cannot get what she rightly expects from her employees if she doesn't earn their respect. So common decency should begin and end with the boss. She should demand the best from her employees, but she should show kindness, empathy, understanding, and integrity in everything she does. She should be decisive and firm, but not without displaying respect for, and common decency toward, her employees.

When a person is treated well, respected, acknowledged for the good he does, and recognized for his worth, he usually reacts well. Employees appreciate their employer's generosity, and genuine care and concern for them and for their families. If you focus on the good you see in your workforce, instead of the errors you uncover, you will certainly gain your employees' trust.

Lead the return to common decency

Employees who believe that management is concerned about them as a whole person—not just as an employee—are more productive, more satisfied, more fulfilled. Satisfied employees mean satisfied customers, which leads to profitability.

—Anne M. Mulcahy
Former CEO of Xerox

Let's rededicate ourselves to being decent people. Let's lead the way to a better work experience for our employees. Shouldn't we dedicate a fair amount of our time to nurturing our employees, who are our most valuable resources? We certainly dedicate time to our customers. If we give quality time to our employees, we will reap personal as well as monetary rewards.

People spend about a third of their lives at work, interacting with their coworkers. It's worth it to step back, see the value in each of your employees, and treat them with honest-to-goodness goodness. It won't be magic, but it will be noticed. Your employees might just be a bit happier about their jobs. They might

WORKPLACE TRENDS

Growing skills gap called serious drag on business. A new survey of HR leaders shows the skills gap grew by 12% since last year. According to the study "Closing the Skills Gap 2019" from Wiley Education Services and Future Workplace, 64% of the 600 HR leaders surveyed said there is a skills gap in their company, up from 52% in the 2018 report. This year, 44% of HR leaders reported it was more difficult to fill their skills gap than it was last year, and 42% said the skills gap was making their company less efficient. The report also found that 40% of employers estimate that a skill is usable for four years or less and that fast-paced obsolescence escalates the need to hire or train workers.

Survey finds more employers interested in lifetime income solutions. A growing number of employers are adding lifetime income solutions, such as annuities, to their defined contribution retirement plans, according to the "2019 Lifetime Income Solutions Survey" by Willis Towers Watson. The survey found 30% of employers currently offer one or more lifetime income solutions. That's an increase from 23% in 2016. An additional 60% of sponsors have not adopted annuities or other insurance-backed products but are considering them or would consider them. Driving the interest in lifetime income solutions is concern over an aging workforce, increasing longevity, and the financial health of workers.

Slower employment growth rate predicted. The U.S. Bureau of Labor Statistics (BLS) has released employment projections that show employment is expected to grow by 8.4 million jobs to 169.4 million jobs over the 2018-28 decade. That expansion reflects an annual growth rate of 0.5%, which is slower than the 2008-18 annual growth rate of 0.8%. An aging population and labor force will contribute to changes expected over the coming decade, including a continued decline in the labor force participation rate and continued growth in healthcare employment.

Dressing for success: It's still a thing. Even though casual dress is gaining ground in the workplace, job applicants may want to keep a power suit ready, according to research from staffing firm Accountemps. In a survey of senior managers, 52% of respondents reported how someone dresses for an interview is very important, and 42% said it's at least somewhat important. The survey showed that 37% of respondents said candidates should always wear a formal suit to an interview, and 36% felt proper interview attire depends on the position or department at the company. The research also showed that recommended job interview attire varies by industry, with suits more often preferred in finance, insurance, and real estate than in construction or retail. ✤

UNION ACTIVITY

UAW calls for lower drug prices. In a September blog post, the United Auto Workers (UAW) called for Congress and the Trump administration to develop reforms to lower drug prices and end what the union called "Big Pharma's price gouging." The post said more than a dozen organizations, including the AFL-CIO and the American Federation of State, County and Municipal Employees (AFSCME), have joined forces in "support of American health and the ability of our citizens to receive the medications they need at an affordable cost." The union said the cost of prescription drugs is at a crisis level. The reason? Big Pharma's influence in Washington, D.C.

Laws "haven't kept up," union president says. Mary Kay Henry, president of the Service Employees International Union (SEIU) and cochair of California Governor Gavin Newsom's Future of Work Commission, says it's time "to create new ways for working people to join together and build the bargaining power they need to negotiate for better jobs and lift up their communities." In a statement after her appointment as cochair of the commission, she said the country's labor laws "haven't kept up with our changing economy and are useless to most people working service and tech-driven gig jobs." She said workers, the private sector, and government need to address long-standing economic obstacles for communities of color and immigrant communities. She said she wants to ensure California continues to lead the way in building economic power for working families. "As the fifth largest economy in the world, California can chart the course in the United States and around the globe to ensure economic success in the private sector and economic success for working families go hand in hand," Henry said.

SEIU local tries to block Trump administration rules. Members of SEIU Local 200United in September filed a motion to block new Trump administration rules the union claims would hurt its ability to improve care and advocate for veterans. The Local 200United members work at Veterans Health Administration hospitals in New York. The motion to block the orders is based on a number of challenges, SEIU said, including the union's assertion the Trump administration is trying to issue new regulations without giving the public a chance to comment on them, as all new rules require, and its belief that the orders direct federal agencies to violate the law, including the Federal Service Labor-Management Relations Statute, which was written to protect federal employees. Local 200United and the SEIU were seeking to block the orders on behalf of federal employees in Buffalo and Canandaigua, New York, as well as workers across the country who would be affected. ✤

feel a bit more loyal. They might even be a bit more productive. They certainly will feel their fundamental rights as human beings are more respected. A lot of good could come from that. ✤

TERMINATION

Context matters when firing for insubordination

If your state is an at-will-employment state, doesn't it stand to reason that employers may fire someone "at will"? Not necessarily. Increasingly, state laws seem to be chipping away at the at-will employment concept.

Laws preventing discrimination and retaliation (for any number of reasons) mean that, more often than not, employers must be able to demonstrate a legitimate business reason for a discharge.

Firing for insubordination tends to give courts pause about whether the reason is legitimate or pretextual (an excuse). So you must take care in documenting disciplinary matters, such as insubordination, that may result in discharge.

Keeping track of insubordination

What constitutes insubordination in the workplace? Insubordination at work occurs when an employee refuses to obey an order from a supervisor. It can take many forms. In addition to a refusal to carry out work, it can be an eye roll, foul language, or confrontation, to name a few.

What factors should I consider when terminating an employee for insubordination? The decision maker should consider whether the conduct violated a company policy of which the employee was aware. If so, does violation of this policy generally result in discharge? Or, put another way, do you consistently enforce this policy for all employees? If you consistently enforce it, discharge is the obvious next step. If not, you should consider the range of discipline typically given and be prepared to justify why discipline isn't appropriate in this case when it was in the other cases.

Does the employee have a history of discipline or performance issues? If she doesn't have a history of discipline or performance issues, the employee who engaged in (real or perceived) insubordination should be given the opportunity to explain the situation. In some cases, a supervisor may have overreacted to a situation that doesn't rise to the level of a dischargeable offense.

If a disciplinary history exists, has the company previously and properly documented that history? If the performance and disciplinary history hasn't been properly documented, you will have an uphill battle demonstrating a legitimate nondiscriminatory basis for the discharge if you try to rely on the history. Employers with good documentation have more leeway in discharging based on a lesser level of insubordination.

What pitfalls should I consider? Context matters. You shouldn't make discharge decisions in a bubble. Instead, surrounding circumstances must be considered. A change in

circumstances may have caused an otherwise good employee to act out. Determine whether she had a recent supervisory change or recently complained of safety concerns of discrimination. Adverse employment actions taken in close temporal proximity to complaints or supervisory changes are examined more closely by courts and in some situations are given a presumption of illegality.

Bottom line

Most discharge decisions won't result in a claim that the firing was unlawful. But when they do, you must be prepared. Thus, even with at-will employees, you should be mindful when making every discharge decision in the event a claim arises:

- Document the decision at the time of the decision. Subsequent documentation is given less weight and viewed with disfavor by courts and juries.
- Ensure the discharge decision fits with the level of insubordination.
- When in doubt, contact employment counsel for advice. ✤

DRUG TESTING

Changing laws, attitudes pushing employers to explore alternatives to drug tests

Nobody wants an impaired person on the job, especially in a safety-sensitive position. But how can a supervisor know if an employee who seems a little off is high? And—perhaps more important—how can an employer screen applicants to reduce the chance of hiring someone who is likely to come to work impaired? The first thought may be to use drug testing, but that option isn't as simple as it once was.

Testing problems

Employment-related drug testing, particularly preemployment testing, isn't as common as it was several years ago. Back when marijuana was illegal under both federal and state law, the drug-testing picture was clear. There was an emphasis on zero-tolerance policies, and any positive result was grounds for rejecting an applicant or firing an employee. It didn't matter if someone used drugs on or off the job.

Now the picture is murky. Marijuana remains illegal under federal law but not under many state laws. Currently, 33 states allow marijuana use for medical purposes, and 11 allow recreational use. With looser restrictions on marijuana, many employers are hesitant to limit their applicant pool by using preemployment testing. They also don't want to lose employees who may use pot away from work but don't come to work impaired.

Employers can choose from a variety of policies and procedures related to testing. You can use preemployment tests for applicants and random, postaccident, or reasonable-suspicion testing for employees. Many employers use a combination of those screens. Testing methods also vary and carry their own pros and cons. Some tests check urine for the presence of drugs, while others test hair or saliva.

But no test is perfect since they all can turn up an employee's use of marijuana without determining whether he was high on the job. Tests can pick up the presence of tetrahydrocannabinol (THC), the "high"- producing component of marijuana, long after the high has worn off.

Also, with the rise of the cannabidiol (CBD) industry, some applicants and employees can test positive for THC even if they have used a legal product. Unlike marijuana, CBD oil made from hemp is now legal under federal law since hemp was removed from the definition of marijuana in the 2018 farm bill. To be legal under federal law, CBD from hemp must contain less than 0.3 percent THC.

Alternative to traditional tests

So, since traditional testing has shortcomings, how should you protect yourself from impaired employees? Some employers have turned to impairment testing as an alternative to tests that reveal an employee's drug use.

Companies that market alternative tests point to the flaws of traditional drug testing and tout the ability of their products to detect if an employee is impaired because of drug or alcohol use as well as for some other reason, such as fatigue or illness.

Impairment tests launched in the 1990s but didn't catch on in a big way. A few companies are still in the business with products that measure alertness and identify impairment, whether it's caused by alcohol, drugs, fatigue, or something else.

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12-6 Onboarding Training that Works for Better Integration, Employee Contributions, and Retention

12-12 Measure Safety Training Effectiveness: Complying with Federal OSHA 'Verify Competent Performance' Requirements for General Industry and Construction

12-13 Intermittent and Reduced Schedule Leave Challenges: How to Track and Manage to Avoid FMLA Abuse

12-13 Light-duty and Return-to-work Programs: Successful Strategies to Get and Keep Injured Workers on the Job Safely

12-17 Fitness for Duty: Balancing Safety Obligations with the Changing Landscape on Drug Testing, Opioids, Marijuana, and More

12-18 Safety Culture Training for Supervisors: How to Equip Front-Line Jobsite Leaders With Methods and Skills to Motivate and Engage Workers

12-19 What to Expect from OSHA in 2020: Enforcement Trends, Regulatory Developments, and How to Stay Off Its Radar

Training supervisors on how to recognize impairment is another option for employers that don't want to rely strictly on traditional drug tests. The Substance Abuse and Mental Health Services Administration (SAMHSA), an agency within the U.S. Department of Health and Human Services (HHS), has provided guidance for supervisors and HR on ways to handle possibly impaired workers:

- **Know the organization's policies and program.** Supervisors need to understand the program and communicate policies to employees.
- **Be aware of legally sensitive areas.** Care must be taken to follow any collective bargaining agreements and maintain all employees' rights. If drug testing is part of the program, you must ensure laboratory quality control and confirm positive tests. You also must stay up to date on related local, state, and federal laws.
- **Recognize potential problems.** Supervisors should be trained to look for signs of potential problems, such as a change in work attendance or performance; unusual behavior patterns, including sleeping on the job or inability to concentrate; and mood swings or attitude changes. They also should understand that signs alone don't necessarily indicate substance use.
- **Document and act.** Supervisors need to document problems so they will be able to identify patterns in performance or attendance and take corrective action. Supervisors should be able to present an employee with evidence of performance deficits and offer a referral to a company employee assistance program if appropriate. ✤

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