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FLORIDA
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WEATHER EMERGENCIES

Florida employees: The good stand tall when bad things happen

by Robert S. Turk
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A

Hurricane Irma. For Floridians, that's all you need to say.

My family and I fled our Miami home from "Category 4 Irma." According to Governor Rick Scott, Irma would be "a deadly storm" the likes of which "our state has never seen." With projections pointing to landfall in Miami, we drove to what we thought would be a relatively safe spot—the city of Tampa. Hey, if you want to lose weight quickly and continue to have no appetite, just flee to a "safe" area that ends up becoming the bull's-eye for a hurricane.

For all the anxiety, long gas lines, lack of electricity, lack of hot food, nonstop Weather Channel warnings, and crush of people on the road, I was impressed with so many employees with whom I interacted before, during, and after the hurricane. Almost all performed with grace and professionalism in the face of panicked and demanding customers.

Kudos to the food servers, managers, gas station attendants, police, housekeepers, cashiers, and store employees at their posts all along I-75 from Weston to Tampa both pre- and post-hurricane.

We stayed at one Tampa hotel that had its opening day the Friday before Irma's Sunday night arrival. Its reservation system wasn't even up and running yet. The employees nevertheless hung together, led by their new general manager. Somehow, they were able to assign rooms to the crush of locals (and their pets) who were told to run to higher ground.

Relatives asked us to stay with them at another Tampa hotel, so we moved the Saturday night before the storm. As Irma approached, the hotel lost power. After the storm, even with no power, the staff at the second hotel did all they could to please their guests, including somehow serving three meals a day. The hotel's HR director told me that immediately after the hurricane, more than 70 percent of her staff was on duty. Remarkable, indeed.

Just one restaurant down the street was open on Monday, the day after the hurricane. It was packed. Only one cook and four servers took care of what had to be a record crowd. I went back Tuesday before noon and asked our server how she and the others made it through the night before. She just laughed, told me how tired she was, and how it was "nothing" to show up for work. She told me a coworker had served over $3,500 in food and drink the previous night and was on duty again. She told me she had served over $2,000. That's a lot of burgers, fries, and beer to serve in one evening.

AGENCY ACTION

Agency predicts insolvency for insurance program. The insurance program for multiemployer pension plans is likely to go insolvent by the end of 2025, according to an August 2017 report from the Pension Benefit Guaranty Corporation (PBGC). The multiemployer program covers more than 10 million Americans. The agency said its projections for the insurance program for single-employer pension plans, which covers about 28 million people, show that its financial condition is likely to continue to improve. The program is highly unlikely to run out of money in the next 10 years and is likely to eliminate its deficit within the next three to seven years. But without changes in law or additional resources, the agency projects that the multiemployer program's fiscal year 2016 deficit of $59 billion will increase, with the average projected deficit (looking across multiple economic scenarios) rising to almost $80 billion (in nominal dollars) for fiscal year 2026.

Kaplan takes NLRB seat. Republican Marvin E. Kaplan took his seat on the National Labor Relations Board (NLRB) on August 10. His term ends on August 27, 2020. Before taking the NLRB seat, Kaplan served as chief counsel to the chairman of the Occupational Safety and Health Review Commission, and before that, he served as counsel for the House Committee on Oversight Government Reform and as policy counsel for the House Committee on Education and the Workforce. The nomination of William J. Emanuel, an attorney representing management in employment matters, was confirmed on September 25. With Emanuel taking the last open seat on the NLRB, the Board now has its first Republican majority in a decade.

EEOC issues new EEO law digest. The Equal Employment Opportunity Commission (EEOC) in August announced its latest edition of its federal-sector Digest of Equal Employment Opportunity Law. The new edition features a special article titled "Establishing Disparate Treatment Discrimination," which discusses the analysis of disparate treatment discrimination claims and recent EEOC decisions. The digest is available at www.eeoc.gov/federal/digest/vol_3_fy17.cfm.

MSHA finds no mines eligible for Pattern of Violations notice. The U.S. Department of Labor's (DOL) Mine Safety and Health Administration (MSHA) announced in August that for the third consecutive year, none of the nation's more than 13,000 mining operations meets the criteria for a Pattern of Violations (POV) notice. The screening period started on July 1, 2016, and ended on June 30, 2017. The POV provision in the Federal Mine Safety and Health Act of 1977 is one of the MSHA's toughest enforcement tools. It's reserved for mines that pose the greatest risk to the health and safety of miners. ✤

I tip my hat to the Miccosukee gas station at mile marker 49 on I-75. It was open both pre- and post-hurricane. The lines were long, but the attendants were truly friendly. Miccosukee police kept cars in line and moving. The gas station manager was overwhelmed with customers for hours on end, especially after the gas pumps stopped taking credit cards. But she kept her cool in the face of rude (and a few crazy) customers. She spoke politely to all who complained or had questions.

The one bad apple during the whole trip was a convenience store attendant in post-hurricane Ft. Myers. The area off the exit ramp looked like a zombie apocalypse. The entire area was without power and really battered. However, we stopped and asked if we could use the restroom. "Hell no! I am not cleaning up after anyone!" remarked the clerk.

So, we jumped back in the car and drove to the next exit. In the devastation, there was a Publix Supermarket open and running on backup power. The friendly employees were working as if it was just another workday. They had shown up for work less than two days after the area was almost wiped off the map.

For all the lawsuits, charges of discrimination, and employee complaints I handle every day, it was something extraordinary to see so many employees doing their jobs in such a stellar fashion under such extreme circumstances. Florida employers, you should be proud of your employees!

Robert Turk is a shareholder and the chair of the Labor & Employment Department at Stearns Weaver Miller. You may contact him at rturk@stearnsweaver.com or 305-789-3460. ✤

NONCOMPETE AGREEMENTS

'The lead is mine'— Referral sources can support noncompete agreements

by Jeffrey D. Slanker
Sniffen & Spellman, P.A.

Noncompete agreements limit the ability of individual employees to continue operating in the same line of business in roughly the same geographic area for a certain period of time after they leave an employer. These agreements are valuable tools that businesses can use to protect their interests.

Noncompete litigation can often be contentious, however. Indeed, courts are reluctant to place restrictions on the ability of individuals to earn a living, even if they freely entered into a contractual relationship giving up certain aspects of that very right. Many times, litigation over the validity of a noncompete agreement focuses on whether the scope of the agreement was permissible in both geography and time.

Nevertheless, an equally important consideration that also leads to much litigation is whether the noncompete agreement is supported by a legitimate business interest that justifies the contractual restriction. The Florida Supreme Court recently held that protecting business

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ASK ANDY

Unlimited vacation policies: a curse or blessing?

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

Q *I'm considering adopting an "unlimited vacation" policy, but I'm afraid that employees will take advantage of it and that productivity will suffer. What are your thoughts?*

A Traditionally, employers have crafted time-off policies under which employees either accrue time off periodically (often by the workweek or monthly) or are granted a lump sum of vacation time at the beginning of the calendar or anniversary year. The amount of vacation time increases with seniority—new hires, for example, would be entitled to less vacation than an employee with 10 years of seniority.

Not too long ago, a handful of Silicon Valley tech companies created the concept of unlimited vacation for employees. These are some of the same tech companies that set up game rooms, lounges, and fitness facilities for their employees. Although only a small percentage of U.S. companies have jumped on the unlimited vacation bandwagon, the concept has caught the attention and curiosity of most.

Many HR professionals who have considered—but rejected—the concept of unlimited vacation have done so because they fear employee abuse, which they worry will result in decreased productivity and revenue. Many studies, however, have shown that most employees don't abuse unlimited vacation policies. Interestingly, some companies with these policies have experienced a *decrease* in vacation usage, perhaps because employees fear being tagged as "the abuser." Or maybe, just maybe, employees in an unlimited vacation environment do a pretty good job balancing work and personal commitments.

Benefits

Some commonly cited benefits of an unlimited vacation policy include the following:

- Flexible vacation policies are viewed as valuable recruitment and retention tools.
- Unlimited vacation policies send the message, "We trust you" to employees, which helps improve employee morale and loyalty.
- When companies adopt unlimited vacation policies, they can save the cost associated with paying out accrued but unused vacation on termination under a traditional vacation accrual policy.
- Managers and HR professionals no longer have to spend time tracking accrual and usage of vacation time.

Drawbacks

However, such a policy also has its drawbacks, including the following:

- Hiring and recruitment becomes much more important in an unlimited vacation environment because the "wrong" type of employee may abuse an unlimited vacation policy.
- An unlimited vacation policy that doesn't apply to *all* employees (exempt and nonexempt) may create a sense of resentment and result in decreased employee morale and loyalty.
- Unlimited vacation policies may not be practical in work environments where work isn't "self-directed," such as retail businesses.
- Even with an unlimited vacation policy, employers need to monitor vacation use to make sure that everybody doesn't decide to take vacation at the same time.

Not for everyone

Every workplace has its own personality, and unlimited time-off policies will not work for every company. But if you have a trusting and loyal workforce, and if you're looking to boost morale and attract new talent, it may be just what the doctor ordered.

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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. ✣

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referral sources is such a legitimate interest under certain circumstances.

Facts

The case before the Florida Supreme Court was actually two separate cases that were consolidated. Both cases concerned the home healthcare industry and involved situations in which a home healthcare agency attempted to restrict the ability of its employees to compete after termination through contractual noncompete agreements. The agencies justified the necessity of the noncompetes by claiming their interest in protecting their referral sources and preventing employees from taking referral sources to direct competitors, which happened in these cases.

Before the supreme court's decision, there was some question about whether such an interest was legitimate and could support a noncompete agreement. Indeed, the Florida District Courts of Appeal issued conflicting rulings regarding this exact question.

Florida Supreme Court's decision

The Florida Supreme Court held that the agencies' interest in protecting referral sources did justify noncompetes in certain circumstances. Florida statutes provide the starting point for determining the permissibility of a noncompete agreement. The relevant statute requires a legitimate business interest in order to enforce a noncompete. The provision goes on to list five legitimate business interests that would support enforcing a noncompete, including the need to protect (1) trade secrets; (2) confidential information; (3) substantial relationships with customers, patients, or clients; (4) customer, patient, or client goodwill; and (5) extraordinary or specialized training.

The court held that although the statute didn't specifically list referral sources as a legitimate interest that could support a noncompete, it didn't preclude them from being a basis to support a noncompete. Rather, it held that the list of legitimate interests in the statute wasn't exhaustive.

It's important to note that the court didn't hold that protecting referral sources was automatically sufficient grounds to support a noncompete agreement. Rather, it found that there must be a fact- and industry-specific examination of the context of each case to determine if it supports the restriction on the employee's ability to compete with his former employer. Indeed, an examination of the industry, how important the referral sources are, and an employer's efforts and investment in developing the referral sources are all facts that courts must examine to determine if the protection of referral sources is an interest that can support the enforcement of a noncompete.

The court conducted such an analysis in these cases and found that the protection of referral sources was a sufficient interest to support the noncompete agreements. *White v. Mederi Caretenders Visiting Services of Southeast Florida,* No. SC16-28 and *Americare Home Therapy, Inc. v. Hiles,* No. SC16-400.

Takeaway

Noncompete agreements are valuable tools for employers that want to ensure employees don't take valuable information or resources with them once they leave. The Florida Supreme Court's decision in this case provides you with another potential legitimate interest that would support the enforcement of a noncompete. It also implicitly holds that even an interest that isn't specifically listed in the statute could potentially justify a noncompete agreement.

It is important to note that whether the protection of referral sources or another legitimate interest is sufficient to support a noncompete is a fact-intensive inquiry. As you're exploring options to protect your relationships and information, it's crucial that you consult with employment lawyers during the contract drafting process to evaluate the existence of a legitimate interest and whether a noncompete would be enforceable. A good labor and employment attorney can craft noncompete agreements to withstand court scrutiny and put you on the best footing to protect your livelihood.

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FAMILY AND MEDICAL LEAVE

Avoid these 5 mistakes in your FMLA policy

Despite the fact that it's coming up on its 25th anniversary early next year, the Family and Medical Leave Act (FMLA) continues to cause grief to even seasoned HR professionals. From relatively simple tasks like keeping up with the latest U.S. Department of Labor (DOL) forms, to the trickiest issues of tracking intermittent leave or handling suspected leave fraud, employers large and small can struggle to get it right.

The good news is that many problems are easily solved by correcting some common mistakes in your FMLA and related policies.

5. Not addressing leave after childbirth or adoption

Although you aren't required to do so, consider limiting the use of intermittent or reduced-schedule leave after childbirth or the adoption of a child. The FMLA allows you to require all such leave to be taken in one

continuous block of time. Keep in mind that you need to distinguish between bonding time with the new child and leave taken for an actual medical issue. You can restrict intermittent leave for the first but not for the latter.

You also might want to consider a "hybrid" approach, in which the leave must be taken continuously but the employee is allowed to transition back into the workplace on a reduced work schedule.

4. Not having a minimum increment of leave

Unless you're unconcerned about how much leave an employee takes, it's generally in your best interest to capture all absences that are FMLA-related. While many employers track only "substantial" absences, this approach can cause problems. In short, it increases the risk that the absences will be held against the employee under your attendance policy or will subject her to retaliation from her supervisor (both of which are prohibited by the FMLA).

> **It's unrealistic to track every FMLA-related absence down to the minute.**

Recognizing that it's unrealistic to track every FMLA-related absence down to the minute, the regulations allow you to adopt a minimum increment of leave. This can reduce the administrative burdens of tracking short absences, improve predictability in staffing, and prevent employees from taking a few minutes of leave here or there indefinitely.

In practice, minimum increments of leave can be tricky, so make sure you study up on them before putting one in place.

3. Not choosing an FMLA leave year

Every employer's FMLA policy should state what FMLA leave year it uses. The leave year determines when an employee gets more FMLA leave once he has used his full 12-week allotment (or 26 weeks for military caregiver leave). The types of leave year include:

- **Calendar-year method (or another fixed 12-month period).** The employee gets a new 12 weeks of leave as soon as the new year starts.
- **12-month "looking forward" leave year.** The employee has 12 months—starting on his first day of leave—to take 12 weeks of leave for that particular reason.
- **12-month "rolling back" leave year.** For each day of absence, you look back 12 months to determine whether the employee has any remaining FMLA time.

While each of these approaches has some benefit, the only one that prevents an employee from potentially getting more than 12 weeks of FMLA leave in a row is the rolling backward method, and it is the best choice for most employers. If you don't say which leave year you use, you will be required to use whichever is most beneficial to the employee.

2. Not requiring concurrent leave

Arguably the most important decision to make in your FMLA policy is whether—and how—you require other types of leave to run concurrently with FMLA leave. Requiring concurrent leave prevents employees from stringing together numerous different types of leave and then tacking FMLA leave on top of that. If you offer more than one type of paid leave, we recommend spelling out the order in which they must be used.

Rather than requiring employees to use *all* the paid leave available to them, you might want to consider allowing them to keep some of it in reserve to use after they return to work.

1. Overly generous leave policies

Finally, employers frequently create their own problems by providing paid leave policies that are simply too generous. This is particularly common with nonprofit employers, which can make up for low wages with abundant amounts of paid leave. What typically happens is that the generous leave—combined with the employer's other policies, such as not requiring FMLA leave to be concurrent—results in the employee being out for a long time before the FMLA even kicks in. That's not a situation most employers want to be in.

Bottom line

Take some time to review your FMLA policy in light of the mistakes identified in this article. But don't do it in a vacuum. As mistake #1 demonstrates, sometimes the problem isn't in the FMLA policy itself, but in how it interacts with your other policies. ✤

WAGE AND HOUR LAW

Don't get tripped up by these common hurdles when determining overtime

With all the emphasis and effort that has been placed on employment law over the last decade, it's surprising how many employers still don't have a basic understanding of their overtime obligations under the Fair Labor Standards Act (FLSA). It's easy to overlook a number of tricky scenarios in which you may not even realize you owe an employee overtime.

While it's impossible to touch on every such situation, let's look at some of the most common errors and mistaken assumptions that could get you into trouble.

Work time that seems like it isn't

One of the biggest hurdles to correctly paying employees for overtime is making sure you are capturing all hours worked. If you aren't, there's a good chance you won't always realize when an employee works more than 40 hours in a week.

The following oft-overlooked types of activities are frequently considered compensable and may need to be included when counting hours worked:

- **On-call and other waiting time.** On-call employees (or employees at work who are waiting to be given something to do) may be entitled to overtime pay.
- **Working breaks.** Employees who can't use their break time for their own purposes may need to be paid for it.
- **Preliminary activities.** Employees must be paid for certain before-work activities if they are integral to the work. Examples include putting on safety gear and going through security protocols or checkpoints.
- **Unauthorized overtime.** You may have to pay employees for overtime worked even if you have a policy prohibiting overtime. You *are* allowed, however, to discipline employees who violate your no-overtime rule.
- **Hours worked "off the clock."** You may have to pay overtime for hours worked that weren't initially reported to you if you have reason to know they were worked.

Employees you think should be exempt

Too many employers still use the terms "salaried" and "exempt" interchangeably. The truth is that the main overtime exemptions—for executive, professional, and administrative employees—require more than just a salary. The employees also have to:

- With some exceptions, be paid a minimum salary of $455 per week ($23,660 per year); and
- Perform exempt duties as specified in U.S. Department of Labor (DOL) regulations.

Employees who are paid less than $455 per week ($23,660 per year) are *not exempt* and must be paid overtime. The only exception is that there is no minimum pay requirement for doctors, lawyers, teachers, or outside sales representatives.

Salaried employees who don't perform exempt duties. Employees who meet the salary requirements but don't perform exempt duties aren't exempt and must be paid overtime. The exempt duties tests may be the most complicated part of an exemption analysis. For each employee you want to classify as exempt, you need to closely consider whether she meets any of the exempt duties tests. And don't assume anything—for example, just because an employee has a law degree doesn't mean she's doing exempt work.

Highly paid employees. Being highly compensated doesn't automatically make an employee exempt, no matter how much he makes. While there is an exemption for highly compensated employees, it applies only to those who (1) receive "total annual compensation" of at least $100,000 and (2) perform at least one exempt duty (they don't necessarily have to meet an exempt duties test).

Exclusively "blue-collar" workers should never be classified as exempt.

Earnings to include in overtime calculation

This is an often overlooked area of concern. As you know, overtime hours are paid at "time and a half"—meaning you have to add 50 percent to an employee's "regular hourly rate" for overtime hours.

The problem is that it's extremely easy to miscalculate an employee's regular hourly rate. You have to

include *all* earnings for the week, divide by the total number of hours worked, and then use that number to calculate the overtime rate for the week. Some extras that could easily be overlooked include:

- **Bonuses.** Nondiscretionary bonuses must be included when calculating the regular rate of pay.
- **Premium pay.** This means extra pay for working holidays, night shifts, and so on.
- **Opt-out payments.** If you offer employees the option of a cash payment when they don't enroll in your group health plan, that payment may need to be included in calculating their regular hourly rate. (There are also a number of other compliance concerns associated with such offerings.)

Bottom line

Don't be caught off guard by any of these all-too-common misconceptions about when you are and aren't required to pay overtime. Conduct a comprehensive review of your wage and hour policies and practices, and follow up on an annual basis. It's the first step in making sure you don't have a wage and hour violation or lawsuit in your future. ✤

DISABILITY

Are workers with substance abuse issues protected under the ADA and the FMLA?

Alcohol is the most commonly used addictive substance in the United States, with an estimated 17.6 million Americans suffering from alcohol abuse, according to the National Council on Alcoholism and Drug Dependence. It's also estimated that 4.2 million Americans are dependent on or abuse marijuana. Based on those numbers, there's a significant likelihood that one of your coworkers or employees has a substance abuse problem. This article discusses the general legal requirements under the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA) for employees with substance abuse problems.

Protections under the ADA

Individuals suffering from alcoholism are protected under the ADA if they can perform their job duties safely and effectively. The ADA allows an employer to hold an employee with alcoholism to the same qualifications and job performance standards as other employees. Therefore, you may discipline an employee who currently abuses alcohol and doesn't perform his job effectively.

For instance, there is nothing to prevent you from disciplining or terminating an employee who is frequently absent because of his alcohol abuse. The only caveat to this rule is that you must hold alcoholic employees to the same disciplinary standards as other employees.

An employee with alcoholism is entitled to a reasonable accommodation if he is participating in a treatment program and isn't currently abusing alcohol. A common reasonable accommodation is a leave of absence to allow the employee to attend a rehabilitation program or a modified schedule to allow him to participate in such a program. If an employee informs you that he is an alcoholic, you should work with him to see if there's an appropriate accommodation that would allow him to seek the appropriate treatment for his alcoholism.

By contrast, an individual who is currently using illegal drugs typically isn't protected under the ADA. For instance, a drug test that shows an employee is using illegal drugs bars him from the ADA's protections. Again, you are allowed to hold employees to the performance standards applicable to their jobs regardless of any substance abuse problems they have. And you clearly can prohibit the use of drugs in the workplace and require that employees not be under the influence of any drugs in the workplace.

The ADA doesn't prevent employers from testing applicants or employees for current illegal drug use or from making employment decisions based on verifiable drug test results. A test for the illegal use of drugs isn't considered a medical examination under the ADA. However, an individual with a past drug problem who is no longer using drugs illegally *is* protected under the ADA if he has completed or is participating in a supervised rehabilitation program. The difficult part for employers is determining what constitutes "current drug use."

The Equal Employment Opportunity Commission's (EEOC) Technical Assistance Manual defines "current drug use" as the "illegal use of drugs that has occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an ongoing problem." Unfortunately, the EEOC and the courts have not

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promulgated a clear-cut rule to define current drug use. Thus, it's imperative to carefully consider an employee's recent drug use and enrollment in a rehabilitation program when you're determining if the employee should be terminated.

Protections under the FMLA

Leave under the FMLA may be taken for treatment of alcoholism or substance abuse only in accordance with the instructions of a healthcare provider. The FMLA does not apply to absences caused by drug or alcohol use outside of treatment. In other words, an employee isn't permitted to take FMLA leave simply because he is an alcoholic and cannot make it to work. On the other hand, an employee may take FMLA leave to care for a covered family member who is receiving treatment for substance abuse.

Determining what constitutes treatment for substance abuse versus abuse of the substance isn't an easy task. In *Picarazzi v. John Crane, Inc.*, an alcoholic employee had attendance problems and informed his employer that he needed to attend a rehabilitation program. The employer agreed that he could take 12 weeks of leave under the FMLA to attend the program. However, during the 12-week period, the employee suffered relapses and didn't consistently participate in treatment. As a result, the employer terminated him, reasoning that his absences didn't qualify for FMLA leave because he wasn't actively participating in the rehabilitation program.

The court disagreed and held that to be eligible for FMLA leave, the employee didn't have to be under the care of a physician or enrolled in a rehabilitation institute for each day he was on leave. This decision illustrates the difficulty in determining whether an employee is entitled to FMLA leave when he seeks treatment for substance abuse.

Bottom line

There is nothing in the ADA or the FMLA that prevents an employer from terminating an employee who has performance or attendance problems because he is an alcoholic or a drug addict. However, an employee who seeks treatment for substance abuse is entitled to leave under the FMLA and a reasonable accommodation under the ADA. To minimize liability, you should consult with legal counsel before taking an adverse employment action against an employee who has substance abuse problems. ✤

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