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North Dakota
EMPLOYMENT LAW LETTER

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Vogel Law Firm

Vol. 23, No. 1
February 2018

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PERSONNEL POLICIES

NLRB loosens the reins on employee handbook rules

by Vanessa Lystad

Over the last several years, employers have had a great deal of frustration in drafting workplace policies and rules. They have struggled because of decisions and guidance from the National Labor Relations Board (NLRB) stating that seemingly innocuous policies violate Section 7 of the National Labor Relations Act (NLRA) because they ***could*** *be construed as implicating employees' protected right to organize or engage in concerted activities for the purpose of collective bargaining or obtaining mutual aid or protection. Given the broad reach of the NLRB's decisions and guidance, they affected employer policies governing social media, civility, insubordination, and confidentiality, to name a few. In short, they affected basic aspects of the employment relationship, even for nonunion employers.*

Recently, however, the NLRB rescinded that standard and issued a new test for evaluating facially neutral policies that potentially interfere with employees' ability to exercise their rights under Section 7. Seeking to strike a meaningful balance between employee rights and employer interests, the NLRB loosened the standard for evaluating those types of policies, hopefully reducing employers' stress in drafting future employment policies.

NLRB attacks work rules

In 2004, the NLRB began constricting workplace rules with its *Lutheran Heritage Village-Livonia* decision. At issue in *Lutheran Heritage* were workplace civility rules—specifically, rules related to the use of abusive or profane language and harassment. The rules themselves were facially neutral—that is, they did not explicitly restrict employees' right to engage in union or protected concerted activity under Section 7.

The NLRB stated that even if a rule does not explicitly restrict activity protected by Section 7, a facially neutral policy could nevertheless be unlawful. Specifically, a facially neutral policy could be unlawful if employees would *reasonably construe* the language to prohibit Section 7 activity. The NLRB determined that the policies at issue in *Lutheran Heritage* served the legitimate purpose of maintaining order in the workplace and that a reasonable employee would not construe them to prohibit Section 7 rights. Thus, the rules were lawful.

Although the policies at issue in *Lutheran Heritage* were workplace civility rules, the NLRB dramatically expanded the decision to other types of employment policies over the next several years. Moreover, the Board became more critical of policies than it was in *Lutheran Heritage*, almost straining the "reasonably construe" language in order to find Section 7 violations. As a result, the distinction between whether an employee

AGENCY ACTION

Change likely to NLRB's union election rules. The National Labor Relations Board (NLRB) published a Request for Information in December 2017 asking for public input on the Board's 2014 rule that shortened the process of holding union representation elections. The NLRB was seeking comments on whether the 2014 rule should be retained, modified, or rescinded. The Board's action on the election rule was one of a string of party-line 3-2 votes taken in December just days before Republican member and Chairman Philip A. Miscimarra's term ended on December 16. His departure leaves the Board with two Republicans (Marvin E. Kaplan and William J. Emanuel) and two Democrats (Mark Gaston Pearce and Lauren McFerran). Other actions included decisions overruling Obama-era decisions on union organization of "microunits," joint employment, employee rights related to handbook provisions, the "reasonableness" settlement standard in single-employer claims, and bargaining obligations required before implementing a unilateral "change" in employment matters.

OSHA comments on increase in fatal occupational injuries. The Occupational Safety and Health Administration (OSHA) commented in December on the Bureau of Labor Statistics' Census of 2016 Fatal Occupational Injuries showing a seven percent increase in workplace fatalities from the 2015 figures. The 2016 statistics show there were 5,190 workplace fatalities in 2016. The fatal injury rate increased from 3.4 per 100,000 full-time-equivalent workers in 2015 to 3.6 in 2016. More workers lost their lives in transportation incidents than any other event in 2016, accounting for about one out of every four fatal injuries. Workplace violence injuries increased by 23 percent, making it the second most common cause of workplace fatality. The number of overdoses on the job increased by 32 percent in 2016.

EEOC at work on 2018-22 Strategic Plan. The Equal Employment Opportunity Commission (EEOC) released for public comment a draft of its Strategic Plan for Fiscal Years 2018-22 in December as part of the process of approving a new plan. The EEOC accepted comments on the plan through January 8, 2018. The draft plan released for comment has not been approved by the commission and is still under review. The Strategic Plan serves as a framework for the EEOC in achieving its mission through the strategic application of the agency's law enforcement authorities, preventing employment discrimination and promoting inclusive workplaces through education and outreach, and striving for organizational excellence, the EEOC said. The EEOC currently is operating under the Strategic Plan for Fiscal Years 2012-16, as amended through 2018. ✤

would *reasonably* view a policy as implicating Section 7 rights or whether a policy simply *could* implicate Section 7 rights became increasingly vague and uncertain.

General Counsel takes standard to the extreme

Given the number of cases attacking employer rules since *Lutheran Heritage* was issued, in 2015, the NLRB General Counsel issued a memorandum summarizing the decisions. The memo addressed common handbook policies and rules that could implicate Section 7 rights in some respect, including:

- Confidentiality rules;
- Policies on employees' conduct toward the employer and supervisors;
- Rules on employees' conduct toward each other;
- Rules on employee interactions with third parties;
- Policies on the use of company logos, copyrights, and trademarks;
- Photography and recording policies;
- Rules on employees leaving work;
- Conflict of interest policies; and
- Social media policies.

For each category, the General Counsel provided examples of policies found to be lawful and policies found to be unlawful under Section 7. The differences between lawful and unlawful policies, however, were sometimes so slight that they left employers puzzled about how the NLRB would view their policies or how they should revise their policies going forward. In the end, the memo provided more confusion than guidance.

New Board, new test: Boeing standard

Boeing, an aerospace company that designs military and commercial aircraft, maintains policies restricting the use of cameras on its property. Its policy specifically prohibits any

camera-enabled devices, including cell phones, without a valid business need and approved camera permit. Boeing maintains the no-camera policy for both national security and business reasons since it is a federal contractor performing classified work.

A union filed an unfair labor practice charge alleging that Boeing's no-camera rule interfered with, restrained, or otherwise coerced employees in the exercise of their Section 7 rights. Applying *Lutheran Heritage,* an administrative law judge agreed, finding that Boeing's maintenance of the rule violated the NLRA. On December 14, 2017, in a 3-2 decision, the NLRB overturned the administrative law judge's decision and in turn overruled the *Lutheran Heritage* standard. In its place, the majority established a two-pronged test:

> When evaluating a facially neutral policy, rule, or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the NLRB will evaluate two things: (1) the nature and extent of the potential impact on NLRA rights, and (2) legitimate justifications associated with the rule.

Unlike the *Lutheran Heritage* standard, the new *Boeing* standard adopts a balancing test for examining facially neutral policies and considers the employer's legitimate justifications for a rule or policy. The majority wanted to replace the previous standard "with an analysis that will ensure a meaningful balancing of employee rights and employer interests." As a result, the NLRB created three categories for when it reviews rules and policies in the future:

- **Category 1:** Rules the NLRB designates as lawful to maintain because either (1) they do not prohibit or interfere with the exercise of NLRA rights when reasonably interpreted or (2) the potential adverse impact on protected rights is outweighed by justifications for the rules (examples include Boeing's no-camera rule as well as workplace civility rules);
- **Category 2:** Rules that warrant individual scrutiny to determine whether they prohibit or interfere with NLRA rights and, if so, whether the adverse impact on NLRA-protected conduct is outweighed by legitimate justifications for the rules; and
- **Category 3:** Rules the NLRB designates as unlawful to maintain because (1) they prohibit or limit NLRA-protected conduct and (2) the adverse impact on NLRA rights is not outweighed by justifications for the rules (for example, a rule prohibiting employees from discussing their wages or benefits with each other, which is expressly permitted by the NLRA).

Despite establishing the three categories, the NLRB reminded employers in *Boeing* that even if the *maintenance* of a rule is lawful under the new standard, it still will examine the circumstances when the rule is *applied* to discipline employees who have engaged in protected activity under the NLRA. Under those circumstances, an employer can be held liable.

Moving forward

The *Boeing* decision is undoubtedly welcomed by employers struggling to draft or revise employment policies on commonsense matters such as workplace civility. Now employers can provide legitimate justifications for maintaining a rule, and the NLRB will balance the justifications against the potential adverse impact the rule will have on employees' NLRA rights.

Keep in mind that not all facially neutral policies with a business justification are automatically valid. The precise contours of the new standard (including what is and what is not a lawful rule) are unclear. However, employers are, at the very least, granted more latitude to review their policies in light of their business needs going forward.

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DISABILITY DISCRIMINATION

Stayin' alive: ADA compensatory damages claim survives employee

The U.S. 8th Circuit Court of Appeals (whose rulings apply to all North Dakota employers) recently reversed a district court's dismissal of a discrimination claim brought under the Americans with Disabilities Act (ADA) by a deceased employee's estate.

Background

John Guenther, Jr., began working for Griffin Construction Company, Inc., in 2008. For the next four years, he oversaw construction projects across Arkansas and Texas. In the spring of 2012, he was diagnosed with prostate cancer. He requested and received roughly three weeks of leave to receive treatment, and he returned to work when it appeared the treatment was successful.

In 2013, Guenther learned the cancer had spread throughout his body. He notified Griffin that he would need to take another three weeks of leave to undergo radiation therapy. Instead, the company fired him, saying he could reapply for any openings in the future if he wished. Despite its alleged promises to the contrary, Griffin also immediately canceled Guenther's insurance policies.

Guenther filed a timely charge of discrimination with the Equal Employment Opportunity Commission (EEOC). He died before the administrative process was complete. In May 2015—roughly 22 months after Guenther was fired, 20 months after he filed his charge, and

12 months after he passed away—the EEOC issued its right-to-sue letter, having found reasonable cause. Justin Guenther, special administrator of Guenther's estate, then filed suit under the ADA.

Griffin asked the court to dismiss the case, contending the claims didn't survive Guenther's death. The district court applied the Arkansas tort (personal injury) survival statute, agreed with Griffin that Guenther's ADA claim was extinguished at his death, and dismissed the lawsuit. Guenther's estate appealed.

8th Circuit's opinion

On appeal, the court explained that whether a federal claim survives the death of an employee alleging discrimination is a question of federal law. The court noted that Congress could have supplied the answer by explicitly instructing courts how to resolve situations like this one, but federal lawmakers didn't do that. It also noted that the ADA is silent on the claim-survival issue, and there's no general survival statute for cases involving federal questions of law. Therefore, the court stated, the question of survival "is governed by federal common law when, as here, there is no expression of contrary intent" from Congress.

The court recognized that in these types of situations, it's sometimes best to incorporate state law, while a uniform rule throughout federal law is warranted at other times. The court further pointed out that whether to adopt state law or create a uniform federal rule is a matter of judicial policy that depends on a variety of considerations that are always relevant to the nature of the specific governmental interests and to the effects of applying state law. Unlike the district court, the court of appeals was convinced that the relevant considerations weighed in favor of a uniform rule of survivability for an ADA compensatory damages claim.

First, the court reasoned, state law shouldn't be incorporated if doing so would frustrate specific objectives of a federal program. Federal courts must ensure that the application of state law poses no significant threat to any identifiable federal policy or interest. So, the court queried, what did Congress say? Federal lawmakers declared their interest in passing the ADA was to "provide a clear and comprehensive national mandate" with "clear, strong, consistent, [and] enforceable standards" to address the "serious and pervasive social problem" of disability-based discrimination on a case-by-case basis.

The court was persuaded by the estate's argument that terminating compensatory ADA claims upon an employee's death poses a "special threat to enforcement" of the ADA because the very nature of the Act makes it more likely that the employee will die before the case is complete, given the health issue that brings him under the statute's protection. The court reasoned that an employee's death is not a "farfetched assumption" in this situation because ADA claims specifically involve disabled employees alleging they were discriminated against because of their disability and Congress passed the ADA to eradicate discrimination against disabled individuals, some of whom may be targeted precisely because of their poor health.

The court concluded that allowing a state law to terminate an employee's claims when he dies impedes the broad remedial purpose of the ADA. The court further found that Congress' call for a "national mandate" with "consistent" standards and the desire to effect the "evenhanded application" of the ADA's antidiscrimination provisions both weigh in favor of a uniform federal rule.

Griffin argued that incorporating state law wouldn't frustrate the ADA's underlying policies or disrupt uniformity because, by analogy, the courts incorporate state statutes of limitations for ADA claims. (A statute of limitations is a law that prescribes the period of time during which someone can file a lawsuit.) That was comparing apples to oranges, the court replied. Moreover, whatever surface appeal the statute of limitations analogy may have did not withstand closer scrutiny.

Although statutes of limitations require action within a certain time, they will not entirely bar a diligent employee from filing suit. A survivorship statute, on the other hand, may be an absolute barrier to an employee (or his estate) who does everything he can to assert his rights. The court further noted that in the timely filing situation, the employee has an element of control; in the case of survivorship, he does not.

The court added that the backdrop against which Congress remained silent was different for time limits and survivorship. The general practice of applying state statutes of limitations to federal laws has been followed for many years, whereas federal courts have historically applied a well-established uniform rule to address survivorship.

For all of those reasons, the court held that federal common law did not incorporate state law to determine whether an ADA claim for compensatory damages survives or terminates upon the employee's death. As a result, the employee's estate may bring and maintain a lawsuit for compensatory damages under the ADA in his place. (The court specified that it was not opining on whether an ADA claim for punitive damages or a claim under any other federal law would survive.) Accordingly, the court reversed the district court's dismissal of the case.

Bottom line

In this case, the 8th Circuit agreed with every lower court under its jurisdiction that has been presented with the issue of whether an ADA compensatory damages claim survives after the employee's death. Although

that is significant, it's unlikely that it will have any practical effect on companies' employment decisions. Certainly, no legitimate business makes employment decisions assuming it will have no liability under the ADA because the disabled employee won't live long enough to make or litigate a discrimination claim.

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OFFICE ROMANCE

Does #MeToo movement mean #TheEnd for workplace romance?

Recent reports of serious sexual misconduct by prominent men across the country have drawn renewed attention to a variety of issues involving sexual harassment in the workplace. One such issue is how to tell when romantic and/or sexual overtures at work cross the line into sexual harassment or misconduct. The line is often clear—especially for egregious misconduct—but not always. The challenge for employers is to design policies and procedures that make the line clearer for employees and give the employer an opportunity to identify and manage potentially problematic relationships.

Workplace romance policies fall on a spectrum from strict (prohibiting office romances completely) to more permissive (setting certain parameters for such relationships) to no policy at all. While there isn't a "one-size-fits-all" policy that will work for all employers, there are a number of common features to consider and choose from. Let's take a quick look at some of them.

Option 1: strict no-dating policy

While it can be tempting to prohibit employees from dating each other entirely, few employers choose that approach. Not only is it unlikely to prevent employees from getting together, but it also incentivizes them to keep their relationships secret. It's generally better for you to know about office entanglements so that you can take steps to prevent the types of problems they can cause (more on that below).

WORKPLACE TRENDS

Survey finds few employers prepared for surge in work automation. A survey by Willis Towers Watson shows that work automation, including the use of artificial intelligence (AI) and robotics, is expected to surge in the next three years in companies throughout the United States. The survey also shows that few companies and HR departments are fully prepared to address the organizational change requirements related to automation as well as less reliance on full-time employees and more reliance on contingent talents. The Global Future of Work Survey found that U.S. companies expect automation will account for on average 17% of work being done in the next three years. That compares with 9% of work companies say is being done using AI and robotics today, and just 5% three years ago. The survey shows that less than 5% of companies say their HR departments are fully prepared for the changing requirements of digitalization.

Bad hires found to be costly problem for most employers. A survey from CareerBuilder finds that companies lost an average of $14,900 on every bad hire in the last year, and hiring the wrong person is a mistake that affects nearly three in four employers (74%). When asked how a bad hire affected their business in the last year, employers cited less productivity (37%), lost time to recruit and train another worker (32%), and compromised quality of work (31%). The survey was conducted online by Harris Poll from August 16 to September 15, 2017, and included a representative sample of 2,257 full-time hiring managers and HR professionals and 3,697 full-time workers across industries and company sizes in the U.S. private sector.

Study shows many employees not taking full advantage of HSAs. Forty-three percent of all employees enrolled in health savings accounts (HSAs) in 2017 didn't contribute any of their own money to these tax-advantaged accounts, according to the 22nd annual Best Practices in Health Care Employer Survey from Willis Towers Watson. With nearly three-quarters of employers (73%) offering their employees a high-deductible health plan tied to an HSA, this is a missed opportunity for many to reduce their out-of-pocket healthcare costs and potentially save for retirement. To encourage greater participation, a majority (62%) of employers that offer HSAs are giving their employees a head start by contributing seed money to these accounts. In 2017, median seed amounts ranged from $300 to $750 for employee-only coverage and $700 to $1,400 for family coverage, depending on whether employers offered automatic seed money or automatic plus "earned" seed money. ✤

UNION ACTIVITY

Union praises Atlanta ordinance on airport job security. UNITE HERE issued a statement in December 2017 commending an Atlanta City Council vote approving a worker retention ordinance for contracted service workers at the city's Hartsfield-Jackson Atlanta International Airport. The union's statement said that until the ordinance was passed, the airport's contracted service workers had little to no job security. A changeover in contractor could result in large-scale displacement for that company's employees, even when their employer was replaced by another company that performed the exact same service. The ordinance ensures that qualified displaced workers get first opportunity to work the new job.

UAW applauds certification of graduate worker union at Columbia. The United Auto Workers (UAW) praised the National Labor Relations Board's (NLRB) December decision to certify the Graduate Workers of Columbia-UAW (GWC-UAW) as the union for 3,000 research and teaching assistants who work at Columbia University. The Board rejected Columbia's objections to the December 2016 union vote. GWC-UAW leaders immediately requested that the university administration fulfill its obligation to start contract negotiations.

Farmworkers denounce EPA proposals on pesticides. The United Farm Workers (UFW) and the UFW Foundation in December condemned a proposal from the U.S. Environmental Protection Agency (EPA) to rescind two pesticide protections for field workers that were issued by the previous administration. The union opposes voiding the requirement that farmworkers who mix, load, and apply pesticides be at least 18 years old. It also denounced a proposed EPA rule change annulling the right of agricultural employees to obtain information about the pesticides to which they are exposed through their representatives, such as unions or legal aid workers.

Union criticizes poultry industry's push to end line speed limits. The president of the United Food and Commercial Workers International Union (UFCW) in December sent a letter to U.S. Agriculture Secretary Sonny Perdue and leaders in the Senate and House agriculture committees explaining why the union opposes a recent petition by the National Chicken Council to eliminate line speeds at poultry plants. The letter cited a report from the Government Accountability Office on safety and health in the poultry industry as confirmation of the UFCW's concerns. In the letter, the union's president, Marc Perrone, stated: "If this petition is accepted, poultry companies will be allowed to run their food processing lines as fast as they please. Allowing this to occur will put hard-working poultry workers at greater risk of being injured and consumers at greater risk of becoming ill from eating improperly inspected chicken." ✤

In addition, some employees would rather give up their job than their relationship, which may result in a loss of valuable employees that could have been prevented with a more moderate policy.

Option 2: ban on supervisor-subordinate relationships

Most employers that have a workplace romance policy (most don't) prohibit relationships between managers and their direct reports or others with a similar difference in rank. This is important for a number of reasons:

- It can protect lower-level employees from unwanted harassment by a supervisor.
- It can provide some protection from certain types of harassment claims for the employer.
- Assuming there is no harassment going on, it can prevent poor morale among other employees who feel the lower-level employee in the relationship is benefiting from preferential treatment as a result.

Your policy should specify what steps will be taken if a relationship like this does arise. For example, you could require the employee with less seniority (not necessarily the lower-ranking one) to make whatever change is necessary to eliminate the reporting relationship. That could be anything from leaving the company to changing departments or reporting to a different supervisor.

Option 3: disclosure of all relationships

You may want to think about requiring employees to inform you when they become involved with a coworker. While relationships between employees who are at similar levels within the organizational structure don't create the same inherent concerns as those between a boss and a subordinate, it's still better for you to know about them.

First, it gives you the opportunity to lay the ground rules for appropriate conduct in the workplace. (In other words, no PDA.) Second, if the relationship ends, it could degenerate to the point that one of the employees ends up claiming sexual harassment or retaliation. Finally, even if there isn't a problem in the relationship, other employees may complain that it adversely affects them in one way or another, which can hurt productivity and morale.

That is why, at a minimum, you need to have a conversation with the employees (documented in their personnel files) confirming that:

- The relationship is consensual in nature;
- They both understand the company's sexual harassment policy and reporting procedure; and
- They won't allow the relationship (or the end of the relationship) to negatively affect their job performance.

While some employers require employees to memorialize their understanding in a signed agreement, 75 percent of HR

professionals view these so-called love contracts as ineffective because they may cause employees to hide their romantic relationships.

#ActNow

For the past 10 years, the Equal Employment Opportunity Commission (EEOC) has consistently received about 27,000 charges alleging sexual harassment. That number is expected to skyrocket in 2018—in large part because of the renewed national awareness of harassment but also because of a new online tool that makes it much easier to file a charge.

Now is the perfect time to get ahead of the wave. Implement or update a workplace romance policy before the #MeToo movement says #YouToo. ✤

ELECTRONIC WORKPLACE

How (not) to handle negative social media posts

Lawyers frequently get calls from employers that want to know what to do in response to a negative social media post. The offending post could be an unfairly negative review on Yelp. Or it could be a rant by an ex-employee on the company's Facebook page. What to do in response (and what not to do) is a tricky question that has become more complicated by a federal law.

Your options

There are generally three ways to respond to a negative online post or review:

(1) **Delete.** First, you can try to delete it. If it's a comment on your organization's Facebook page, that's reasonably easy. If it's a review on your Facebook page, however, deleting it isn't possible. Some businesses have had success in convincing the website (e.g., Facebook, Yelp) to remove the post. Although deletion may seem like the most desirable option, it probably isn't the best option. Removing a post or comment usually prompts an even more hostile response. In other words, you're likely to just throw fuel on the fire and get the opposite result of what you'd hoped to achieve.

(2) **Deflect.** Another approach is to try to deflect the potential impact of a negative post. To accomplish that, you might consider asking employees to post positive things to counteract the negative comment. This approach is fine as long as you comply with the applicable law. The Federal Communications Commission (FCC) requires a disclosure when the poster is affiliated with the company, service, or product that is being reviewed. That means if your employees post about how wonderful your organization is, they must disclose their employment in the post.

(3) **Deter.** Recently, some organizations have taken a very different approach. Specifically, a business may write into a form contract a provision that penalizes a customer who writes a bad review. A well-publicized incident occurred when a hotel charged a couple $500 for a negative review that one of their wedding guests posted online. As you may imagine, that didn't go over well with the newlyweds, and the story quickly went viral. Another twist on the same idea has been used by healthcare providers. Say you go to the dentist. You sign in, and fill out and sign several forms with lots of small print. One of those forms might transfer your copyright to any online review you later post about the dentist—even a review you haven't yet written! That way, if you do post a negative Yelp review, the dentist merely has to send the form to Yelp, and the site will remove it.

Sound intriguing? Well, don't get too excited. A federal law makes this option unlawful. The Consumer Review Fairness Act (nicknamed the "Right to Yelp Act") bars companies from including nondisparagement provisions in form agreements they ask consumers to sign. The law also prohibits companies from imposing penalties or fees for an online review (much like the hotel mentioned above did).

Finally, the law prohibits an organization from including in a form contract the transfer of intellectual property rights to content in reviews or feedback. However, the law applies only to form contracts, and contracts that are negotiated by the parties are not covered.

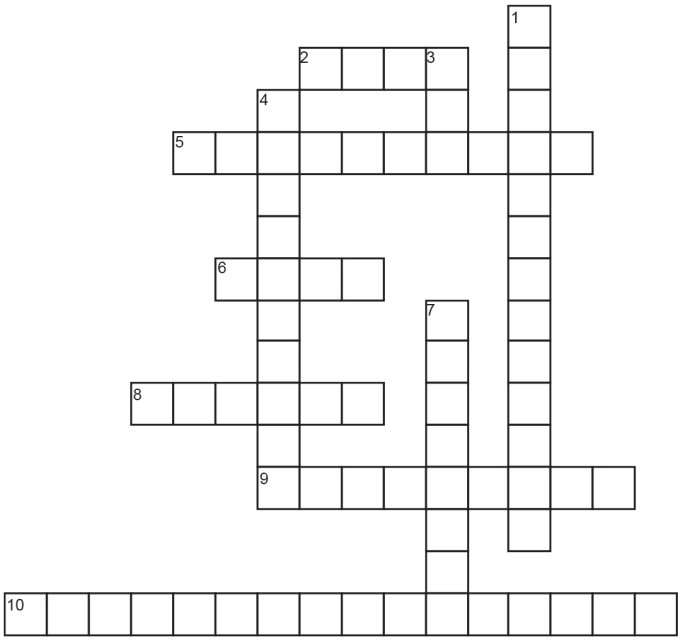
What employers should know

When faced with a negative online review, rating, or post, you should consider your response carefully before you hit "Enter." Here are some key considerations:

- Do not penalize customers for negative reviews.
- Do require employees who post on your website or about your company to disclose their status as employees.
- Think very carefully before deleting a post because your action will almost surely result in a much stronger attack. ✤

JUST FOR FUN

Mindteaser of the month



ACROSS

2 The tax reform bill signed by the president on December 22, 2017, is referred to as the ____

5 Under *Lutheran Heritage*, the NLRB found employer policies unlawful if employees could _____ construe the language to prohibit NLRA activity.

6 The ____ is expected to change union election rules.

8 In _____, the NLRB recently rescinded its previous standard for evaluating workplace policies.

9 The EEOC recently released a draft of its _____ plan for fiscal years 2018-22

10 _____ _____ charges are expected to rise in 2018 in light of #MeToo (two words).

DOWN

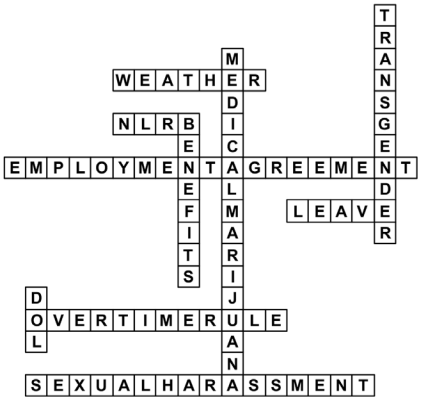
1 A recent survey shows employees are not taking full advantage of _____ _____ accounts (two words).

3 The 8th Circuit recently held that an ___ claim can survive after an employee's death.

4 There has been an increase in work _____, according to OSHA.

7 _____ are expected to increase in the next three years.

Solution for January's puzzle



NORTH DAKOTA EMPLOYMENT LAW LETTER (ISSN 1086-2641) is published monthly for $447 per year by **BLR®—Business & Legal Resources,** 100 Winners Circle, Suite 300, P.O. Box 5094, Brentwood, TN 37024-5094.

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