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North Dakota
EMPLOYMENT LAW LETTER

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Lisa Edison-Smith, Vanessa Lystad, and KrisAnn Norby-Jahner, Editors
Vogel Law Firm

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What's Inside

What's Online

Podcast
Consider gamification for talent development
ow.ly/Lw4X30hyvw0

Strategy
Management mindset: 6 keys for greater staffing stability
ow.ly/Aqje30hyuBg

Sexual Harassment
Tips for repairing workplace after harassment investigation
bit.ly/2ByzLZZ

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WORKPLACE ISSUES

New year, new me: North Dakota employment law in 2018

by KrisAnn Norby-Jahner

As we say goodbye to 2017, it's time to consider what the employment law landscape will bring to North Dakota in 2018. After last year was ushered out on a wave of sexual harassment allegations and scandals and a flurry of year-end rulings from the National Labor Relations Board (NLRB), it appears that 2018 may be more employer-friendly at the federal level—particularly with the U.S. Department of Labor (DOL) and NLRB—but may also expand some employee rights at the state level. Here are a few topics that North Dakota employers should keep an eye on over the next year.

#MeToo: sexual harassment policies

In light of the #MeToo movement, which was unleashed in 2017 after women began reporting widespread allegations of sexual harassment against powerful men in Hollywood and the media, 2018 will be an important year for reviewing your sexual harassment policy. Even the North Dakota Legislature announced in late 2017 that the Legislative Procedure and Arrangements Committee will begin the process of examining the legislature's sexual harassment policy and ensuring better specificity in the reporting process. In 2018, North Dakota employers should ensure specificity not only in the sexual harassment reporting process but also in communicating with employees about prohibited behaviors, investigation procedures, prohibitions on retaliation, expectations for continuing workplace training, and potential disciplinary measures for policy violations.

This year will be an important year to update your sexual harassment policies and ensure that you follow best practices, including:

- Zero-tolerance policies are clearly communicated and enforced.
- Sexual harassment complaints are properly received.
- Independent investigations are promptly undertaken.
- A hostile work environment is remedied.
- Ongoing sexual harassment training is administered as a proactive preventive measure.
- Workplace investigation findings are clearly communicated.
- Any necessary remedial action is taken.

NLRB decisions

In the final days of 2017, the NLRB issued a flurry of decisions affecting private-sector employers. On December 14, the Board overturned its standard for weighing the legality of employee handbook policies, set out in *Lutheran*

AGENCY ACTION

EEOC cites progress in managing charge inventory. The Equal Employment Opportunity Commission (EEOC) released its annual Performance and Accountability Report on November 15, 2017, showing a decline in charge inventory as a highlight. During fiscal year 2017, which ended September 30, the agency reported it had resolved 99,109 charges and reduced the charge workload by 16.2 percent to 61,621, the lowest level of inventory in 10 years. Additionally, the EEOC handled over 540,000 calls to its toll-free number and more than 155,000 contacts about possible charge filings in field offices, resulting in 84,254 charges being filed. The 2017 report also notes that the agency secured approximately $484 million for victims of discrimination in the workplace.

New NLRB General Counsel sworn in. Peter B. Robb was sworn in as General Counsel of the National Labor Relations Board (NLRB) on November 17 for a four-year term. He was sworn in by the Senate on November 8. Robb replaced Richard F. Griffin Jr., who served in the post from November 3, 2013, to October 31, 2017. Before becoming the NLRB's General Counsel, Robb was a director at the New England law firm of Downs Rachlin Martin PLLC.

Airlines to pay $9.8 million to settle disability suit. The EEOC announced on November 20 that American Airlines and Envoy Air had agreed to pay $9.8 million in stock, which was worth over $14 million on the day of the settlement, to settle a nationwide class disability discrimination lawsuit. The EEOC's suit said the airlines unlawfully denied reasonable accommodations to hundreds of employees. The suit claimed the two airlines violated the Americans with Disabilities Act (ADA) by requiring their employees to have no restrictions before they could return to work following a medical leave. Under that policy, if an employee had restrictions, American and Envoy refused to allow him to return to work and failed to determine if there were reasonable accommodations that would allow him to return to work with restrictions.

OSHA issues rule setting crane operator compliance date. The Occupational Safety and Health Administration (OSHA) in November issued a final rule setting November 10, 2018, as the date for employers in the construction industry to comply with a requirement for crane operator certification. OSHA issued a final cranes and derricks rule in August 2010. After stakeholders expressed concerns regarding the rule's certification requirements, OSHA published a separate final rule in September 2014 extending by three years the crane operator certification and competency requirements. This one-year extension provides additional time for OSHA to complete a rulemaking to address stakeholder concerns. ✤

Heritage Village-Livonia. The *Lutheran Heritage* case involved a "no-camera" rule at Boeing Company that was deemed unlawful because employees "would reasonably construe" it to prohibit protected activity under the National Labor Relations Act (NLRA). The NLRB found the "reasonably construe" standard to be difficult and problematic for employers and the Board itself to interpret and implement in the workplace.

The new standard for evaluating a facially neutral policy, rule, or handbook provision that would potentially interfere with employees' exercise of their NLRA rights will include an examination of (1) the nature and extent of the rule's potential impact on NLRA rights *and* (2) the legitimate justifications associated with the rule. In other words, even if an employee could reasonably construe a facially neutral workplace policy to restrict his exercise of protected activities, the policy will survive if the employer has a legitimate justification for it that outweighs its impact on protected activities.

Moving forward in 2018, you can expect much more flexibility in implementing workplace policies and rules, particularly policies involving prohibitions on cameras at work, protections for confidential information, prohibitions on unprofessional or disrespectful conduct, and limits on social media use. The NLRB has now shown that it will afford employers greater deference in this area.

Also on December 14, the NLRB overturned the Obama administration's broad definition of "joint employer," rejecting the standard that expanded joint employment to include relationships in which one employer exerts indirect control over another entity's workers. Instead, there must be evidence that an employer exerted direct control, which makes it much more difficult for contractors and franchise workers to form unions and provides more protection from litigation for employers

The NLRB's decision aligns federal labor law more closely with North Dakota's recently enacted protections for franchisors and franchisees. In a law passed on March 22, 2017, state lawmakers clarified that in North Dakota, "a franchisee or an employee of a franchisee is not considered an employee of the franchisor." Consequently, any anxiety that North Dakota employers felt over joint-employer liability for franchisors and franchisees should be eased in 2018.

In a split decision issued on December 15, the NLRB overturned a 2016 ruling that limited the changes employers can implement in union workplaces. The new decision restored long-standing precedent allowing businesses to change policies without a union's permission if they have previously taken similar actions.

Also on December 15, the NLRB overruled its controversial 2011 decision that facilitated union organizing of microunits. The Board reinstated the traditional "community-of-interest" standard, which requires an evaluation of the interests of all employees, both inside and outside a proposed bargaining unit, without consideration of whether all employees share an overwhelming community of interest. The focus has returned to how jobs are categorized and classified and similarities between

continued on pg. 4

QUESTION CORNER

Updating your inclement weather policy

by KrisAnn Norby-Jahner

Q *We are currently reviewing our inclement weather policy. Does our company need to pay employees who miss work because of a snowstorm or other inclement weather conditions?*

A Now that our North Dakota winter has arrived, it's a good time to consider creating or reviewing your company's inclement weather practices and policy. Whether you have to pay employees when they miss work because of a snowstorm or other inclement weather conditions is a common question facing North Dakota employers. The answer largely depends on whether the employee is exempt or nonexempt, whether the employee misses work when the business is open, or whether the employee is unable to work because the business has closed for the day. Each employment classification and circumstance should be separately understood and addressed.

Office closes due to inclement weather

The U.S. Department of Labor (DOL) has issued an opinion letter that addresses compensation requirements for exempt employees when the business is closed for weather-related reasons (refer to http://bit.ly/2FJvZyC). The DOL states that if the employer chooses to close the office for less than a full workweek because of inclement weather or another disaster, it must pay an exempt employee's full salary even if:

- The employer doesn't have a bona fide benefits plan;
- The employee has no accrued benefits in her leave bank;
- The employee has limited accrued leave benefits and reducing her accrued leave will result in a negative balance; or
- The employee already has a negative balance in her accrued leave bank.

That directive from the DOL means you are allowed to deduct accrued hours from an exempt employee's vacation or paid time off (PTO) bank when the employee is absent from work because of a business closure. However, if an employee doesn't have accrued vacation or PTO available, you must still pay the employee her full salary when you decide to close the office and the employee's absence is due to your decision.

You may also deduct time from a nonexempt employee's accrued vacation or PTO bank when you close the office for weather-related reasons. However, unlike exempt employees, who must be paid their full salary even if their leave banks are empty, nonexempt employees may receive no pay in this situation if their leave banks are empty. It's entirely within your discretion to implement a policy of not paying nonexempt employees who don't have accrued leave time available when the office is closed because of inclement weather.

Employee misses work when office is open

On the other hand, if an exempt employee misses work because of inclement weather when the office remains open, the employee is considered absent for personal reasons. According to the DOL, you may require an exempt employee who fails to report to work to use vacation time or PTO. When the office is open, an exempt employee who has no accrued time in his leave bank doesn't have to be paid for any full day on which he doesn't report to work because of the weather (i.e., you may place him on leave without pay). However, you must pay an exempt employee for partial-day absences even if he doesn't have any accrued time in his leave bank.

Likewise, if a nonexempt employee misses work when the office remains open, you may require her to use vacation time or PTO. However, if her leave bank is empty, you don't have to pay a nonexempt employee for a partial- or full-day absence.

The author can be reached at knorby-jahner@vogellaw.com or 701-258-7899. ✤

continued from pg. 2

employees' job duties, skills, and training rather than their shared interests.

Noncompete agreements

As North Dakota employers know, noncompete agreements are largely unenforceable under North Dakota law with very narrow exceptions. On December 7, 2017, the North Dakota Supreme Court issued an important decision in *Osborne v. Brown & Saenger, Inc.*, addressing for the first time whether businesses headquartered in other states where noncompete agreements are enforceable can enforce their noncompetes against employees who live and work in North Dakota. The supreme court's answer is no: "Simply put, [an employer] may not contract for [the] application of another state's law or forum if the natural result is to allow enforcement of a non-compete agreement in violation of North Dakota's long[-]standing and strong public policy against non-compete agreements."

Although the case was a loss for the South Dakota employer that filed suit, the court's ruling has favorable implications for North Dakota employers that want to recruit and hire talented employees. The court has leveled the playing field in North Dakota by ensuring that *all* businesses in the state, whether they're headquartered here or in another state, must follow North Dakota's prohibitions on noncompetition agreements.

Paid and unpaid leave policies

Leave policies, including paid parental leave and unpaid sick leave, will be a hot topic in 2018. In August 2017, the Equal Employment Opportunity Commission (EEOC) filed a lawsuit in a Pennsylvania federal court alleging Estée Lauder Companies, Inc., violated the Equal Pay Act (EPA) and Title VII of the Civil Rights Act of 1964 by offering men less generous parental leave benefits than it offers women. Estée Lauder provides new mothers six weeks of paid parental leave for child bonding, while new fathers receive just two weeks. In addition, the EEOC alleges that new mothers receive more favorable return-to-work benefits.

Federal law prohibits discrimination in pay or benefits based on sex. While the North Dakota Human Rights Act also prohibits discrimination based on sex and requires equal pay for men and women, North Dakota hasn't seen a lawsuit specifically challenging a company's parental leave policy. Nonetheless, you should keep an eye on this litigation and any corresponding EEOC directives, particularly if your organization offers any sort of paid leave to employees on maternity or paternity leave.

Moreover, the proposed Parental Bereavement Leave Act, which is currently stalled in the U.S. Senate, would amend the Family and Medical Leave Act (FMLA) to allow eligible employees to take up to 12 weeks of unpaid leave during any 12-month period after the death of a child who was 18 or younger. The majority of states, including North Dakota, currently have no law requiring bereavement leave in the private or public sector. Should the Parental Bereavement Leave Act become law, North Dakota employers would need to review and potentially amend any leave policies that aren't in compliance.

Pay statements

Employers should also keep an eye on legislation currently being considered by federal lawmakers that would affect the information displayed on an employee's paycheck. Under the proposal, employers would be required to issue pay statements that break down employees' wages and benefits by showing how pay is calculated, how much leave time is available, and the amount that's designated as overtime pay.

The type of information that would have to be disclosed would depend on certain factors, including whether the employee is exempt or nonexempt, whether he is salaried or paid by the hour, and whether he has earned commission or bonuses in a pay period. Should the legislation move forward and become law, you would have to work with HR and your legal team to ensure compliance.

Revised overtime rule

Since August 2017, when a federal judge in Texas struck down the Obama-era overtime rule that more than doubled—from $23,660 to $47,476—the minimum annual salary required to qualify for the Fair Labor Standards Act's (FLSA) "white-collar" exemptions, employers have been patiently waiting for a new overtime rule. In its fall regulatory agenda, the DOL announced that employers may see a new proposed overtime rule in October 2018 (see http://bit.ly/2myYg22).

The Trump administration began the rulemaking process for a new, but likely lower, salary threshold on July 26, 2017, by issuing a Request for Information with

a comment period that ran until September 25, 2017. If a new rule is proposed in October, you will once again need to review, and possibly revise, your exempt and nonexempt classifications. Although the salary threshold is unlikely to be set as high as it was in the Obama administration's proposal, the threshold will most certainly increase, and you will need to work carefully with HR and your legal team to ensure compliance.

Transgender/sexual orientation protections

Transgender issues will likely continue evolving in 2018. Although proposed legislation prohibiting discrimination based on sexual orientation didn't pass the North Dakota Legislature in 2017, you can expect conversations about workplace protections based on sexual orientation and gender identity to continue in 2018.

Under the Obama administration, the EEOC extended Title VII's prohibition on sex-based discrimination to discrimination based on sexual orientation and gender identity, but the Trump administration disagrees with that interpretation, and the federal appellate courts are split. After refusing to hear a case that would have decided the issue in 2017, the U.S. Supreme Court may accept a different case in 2018 and finally provide employers clear direction.

DOL opinion letters

In welcome news for employers trying to navigate federal employment laws, the DOL announced that it will once again issue opinion letters in 2018. The Wage and Hour Division (WHD) stopped issuing opinion letters in 2010 and instead began providing more general explanations in administrator interpretations. Opinion letters offer employers and employees more useful guidance on wage and hour issues.

North Dakota employers that are seeking an opinion letter or guidance on a particular topic should visit the WHD's employer website at https://www.dol.gov/whd/foremployers.htm. Employers that want to request an opinion letter in 2018 can do so at https://www.dol.gov/whd/opinion.

WORKPLACE TRENDS

Survey finds most applicants don't negotiate job offers. A survey from CareerBuilder finds that 56% of workers don't negotiate for better pay when they are offered a job. Those who don't attempt to negotiate say they don't feel comfortable asking for more money (51%), they are afraid the employer will decide not to hire them (47%), or they don't want to appear greedy (36%). The survey also shows that the majority of employers expect a counteroffer. Fifty-three percent of employers said they are willing to negotiate salaries on initial job offers for entry-level workers, and 52% say when they first extend a job offer to an employee, they typically offer a lower salary than they're willing to pay so there is room to negotiate.

Employees' caregiving roles subject of study. A new study from Merrill Lynch, conducted in partnership with Age Wave, finds that the 40 million family caregivers in the U.S. spend $190 billion per year on their adult care recipients. The study also found that 84% of employers say caregiving will become an increasingly important issue in the next five years, but just 18% strongly agree that their workplace is currently "caregiving-friendly." "Meaningful, well-designed employer benefits can make a crucial difference in helping caregivers navigate the high stress of caring for a loved one, and help them balance these responsibilities with the rest of their working and financial lives," Kevin Crain, head of Workplace Financial Solutions for Bank of America Merrill Lynch, said in response to the findings. "Just as child care has been an issue in the past that led to revolutionizing HR benefits, the aging of the population means we need to consider how caregiving is becoming an increasingly important issue for employers and employees."

Study points out challenges of remote work. Communicating and working from different locations via technology present significant challenges for remote workers, according to the authors of a new study of 1,153 employees. Fifty-two percent of respondents in the study by David Maxfield and Joseph Grenny, authors of *Crucial Conversations* and *Crucial Accountability,* feel their colleagues don't treat them equally. Sixty-seven percent of remote employees said they don't think their colleagues fight for their priorities, versus 59% of on-site employees. Forty-one percent of remote employees felt colleagues say bad things about them behind their backs, versus 31% of on-site employees. Sixty-four percent of remote employees felt that colleagues make changes to projects without warning them, versus 58% of on-site employees. Thirty-five percent of remote employees felt that colleagues lobby against them, versus 26% of on-site employees. ✤

UNION ACTIVITY

New report touts union benefits to communities. The American Federation of State, County and Municipal Employees, the American Federation of Teachers, the National Education Association, and the Service Employees International Union released a report in November 2017 examining how unions benefit communities. The report, *Strong Unions, Stronger Communities,* looks at case studies in which members of labor unions have worked to aid communities across the country. It cites union worker contributions to communities, such as helping hospitals and airports prepare to respond to the Ebola virus and helping high-school students pursue careers in nursing.

Union praises "Forces to Flyers" program. The president of the Air Line Pilots Association, Int'l (ALPA), has spoken out to commend the U.S. Department of Transportation's (DOT) "Forces to Flyers" initiative aimed at helping military veterans become civilian pilots. "Many of ALPA's members have proudly served our country in uniform, and the union stands ready to assist others in breaking down barriers that may impede them from pursuing carriers in aviation, all while maintaining the highest levels of safety," ALPA President Tim Canoll said. Currently, the industry has more qualified pilots than positions, Canoll said, but he noted the need to ensure an adequate future supply of qualified pilots "who earn good salaries, experience a healthy work/life balance, and can anticipate predictable career progression." He also noted that ALPA has invested member resources for more than 30 years "to mentor and inspire the next generation of pilots and to staunchly advocate for loan-guarantee programs and other incentives to make it more affordable to become an airline pilot."

Unions launch campaign to save TPS. Five labor unions, backed by the AFL-CIO, in November announced a campaign to save the Temporary Protected Status (TPS) designation, which allows certain immigrants to legally live and work in the United States. TPS designations to countries with humanitarian or environmental crises have been renewed annually but have lately come under fire from the Trump administration. UNITE HERE, the International Union of Painters and Allied Trades, the International Union of Bricklayers and Allied Craftworkers, the United Food and Commercial Workers International, and the Iron Workers have launched Working Families United, an immigrant worker advocacy coalition focused on extending TPS. The partner unions represent thousands of TPS union workers in hospitality, construction, and trades industries who would lose their legal worker status if TPS isn't renewed. Campaign leaders claim that termination of TPS also would eliminate a major source of tax revenue since TPS holders pay fees to have their immigration status renewed regularly. ✤

Medical marijuana

Since North Dakota legalized medical marijuana through an initiated measure on the November 2016 ballot, the North Dakota Department of Health has been working on policies and procedures that will allow citizens to exercise their right to use the drug. Currently, an employee who is a registered qualifying patient or a designated caregiver with a valid registry identification card is not subject to arrest or prosecution for being in possession of medical marijuana (or "usable marijuana" as defined under the law) or related supplies.

An employer has the right to ensure that an employee doesn't attempt to perform any work activity while she is under the influence of medical marijuana if doing so would constitute negligence or professional malpractice. An employee may not possess or consume marijuana on a school bus or a van used for school purposes, on the grounds of any public or private school, at any location where a public or private school-sanctioned event is occurring, on the grounds of a correctional facility, or on the grounds of a childcare facility or licensed home day care. Moreover, an employee may not operate, navigate, or be in actual physical control of a motor vehicle, aircraft, train, or motorboat while he's under the influence of marijuana.

The law doesn't require an employer to allow a guest, client, customer, or other visitor to possess or consume medical marijuana on its property, nor are you prohibited from disciplining an employee for possessing or consuming medical marijuana in the workplace or for working while under the influence of marijuana. Additionally, workers' compensation benefits for medical marijuana are prohibited. As 2018 moves forward, watch for new guidance from the health department, and work with your legal team to review your zero-tolerance policies and ensure legal compliance.

Bottom line

The bottom line is, there is much to watch for on the employment law landscape in 2018. As always, you should work closely with HR and your legal counsel to ensure your organization stays up to date and in compliance with all new directives and legal developments in the coming year.

The author can be reached at knorby-jahner@vogellaw.com or 701-258-7899. ✤

EMPLOYEE EVALUATIONS

Employers ditching annual reviews for more frequent feedback

There seems to be a shift in the way employers evaluate workers. A number of large companies (for example, Microsoft, Dell, and Gap) have recently nixed annual review systems in favor of more frequent forms of feedback on employees' performance.

The shift seems like a win-win. Giving employees more timely feedback on their work product means they have the opportunity to change course before small issues become big ones. For employers, there is the benefit of time. Completing formal annual reviews can be a tedious process for supervisors and HR, especially in traditional work environments like large law firms. The idea of scrapping the time-consuming process for periodic check-ins with employees is understandably tempting.

The good

The benefits don't stop with saving time. For employees, more frequent evaluations can demystify the process, open channels of communication, and help them be more comfortable following up with supervisors as questions, concerns, and issues come up throughout the year. Also, there is comfort in knowing where you stand, and regular feedback likely will give employees more comfort.

For employers looking for ways to retain their minority workforce and create an environment with greater equality, straying from the annual review process may be a great place to start. Major publications like Fortune, the Wall Street Journal, and the New Yorker, among others, have reported on how bias plays into employee evaluations, particularly when it comes to gender. Studies show that bias rears its ugly head the most in the scoring format in traditional annual reviews. Bias is much less glaring in reviews that involve narrative-type feedback. Because more frequent reviews often lead to a more informal and conversational format, they may serve to minimize implicit—and therefore hard-to-root-out—biases that plague employers.

The bad

So what are the downsides? For employees, the drawback may be that more frequent reviews can lead to pressure to produce tangible results constantly, which can lead to anxiety. Employees don't want to be without a good answer to a question about what they've been able to accomplish since their last review, but if their last review was only a few months ago, it may be hard for them to make significant strides. Strolling into a review with a year's worth of completed projects, acquired clients, and concrete results under your arm can make anyone look pretty good. And that can translate into a more justifiable request for a merit increase or bonus.

An annual review setup also allows for the normal ebbs and flows of business to level out. A whole year's perspective on an employee's progress can buff out any rough spots that would be much more of a focus in a review covering a shorter period of time.

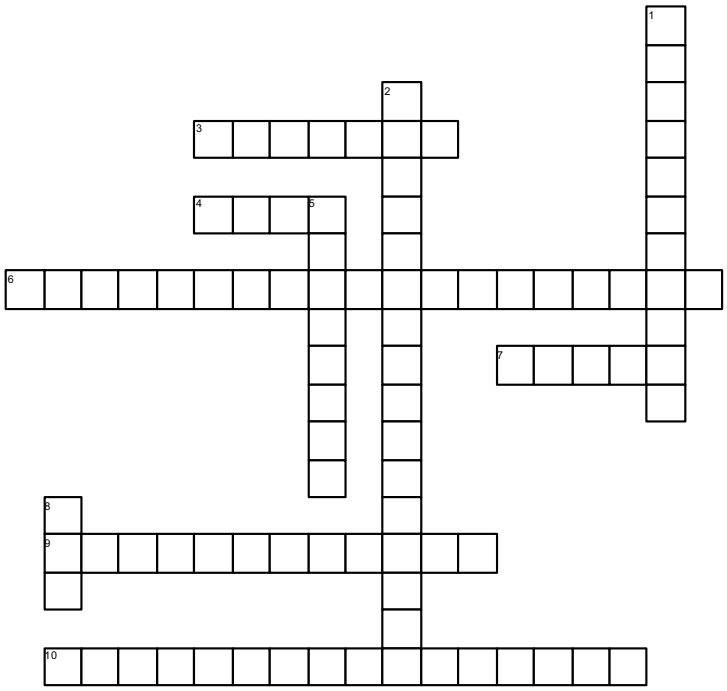
From the employer's perspective, the structure of annual reviews allows them to draw a hard line on performance expectations. If an employee has a whole year to achieve an objective, it's much harder to make excuses if it doesn't happen. When done properly, formal annual reviews and their accompanying paper trails form a clear basis for personnel decisions, regardless of whether they involve promotions or discipline. A lot more effort is required to ensure that periodic reviews involve the same level of documentation.

The middle ground

As is the case with so many decisions employers have to make, a compromise is probably the best bet here. Implementing a balanced approach that includes the benefits of both formats may be the best way to maximize your employee evaluation system. What that means depends on your business needs. One option is a quarterly system in which the yearly evaluation is formal and includes a compensation review and other evaluations serve as regular check-ins on performance and objectives. ✤

JUST FOR FUN

Mindteaser of the month



ACROSS

3 Now that North Dakota's winter has arrived, employers should review their _____ policies.

4 At the end of 2017, the ____ issued a flurry of important decisions affecting employers (acronym).

6 In the age of Weinstein, consider revisiting your _____ _____ to make sure its terms are legally compliant (two words).

7 You might need to revise your _____ policy in light of the proposed Parental Bereavement Leave Act and pending litigation.

9 The DOL may issue its highly anticipated proposal for a new _____ ____ in October 2018 (two words).

10 You should immediately accept, investigate, and remedy any _____ _____ complaints by employees (two words).

DOWN

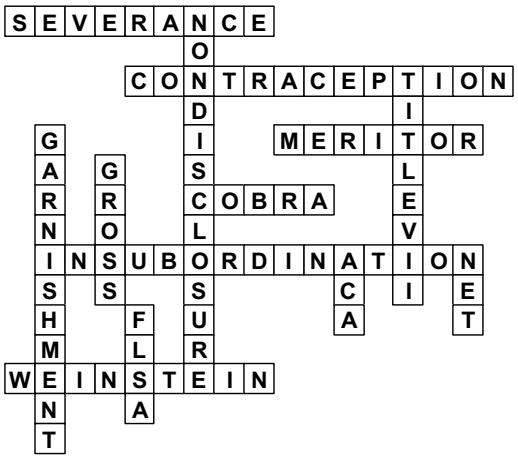
1 Title VII's application to equal rights in the workplace for _____ individuals will continue to be discussed in 2018.

2 The 2017 legalization of _____ _____ may have an impact on North Dakota companies' zero-tolerance policies (two words).

5 To ensure that you meet (and exceed) your legal obligations, consider extending _____ to seriously ill employees who cannot return to work.

8 The ___ will begin issuing opinion letters once again (acronym).

Solution for December's puzzle



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Editorial inquiries should be directed to the editors at Vogel Law Firm, 218 NP Ave., P.O. Box 1389, Fargo, ND 58107-1389, 701-237-6983; 200 North 3rd St., Ste. 201, P.O. Box 2097, Bismarck, ND 58502-2097, 701-258-7899.

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