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North Dakota
EMPLOYMENT LAW LETTER

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LABOR LAW

Jimmy John's: concerted activity that'll make you freak

by Seth A. Thompson

A recent case from the U.S. 8th Circuit Court of Appeals (whose rulings apply to all North Dakota employers) illustrates the complexity of determining when concerted activity during a labor dispute becomes so disloyal toward the employer that it loses its protection under the National Labor Relations Act (NLRA).

SCOTUS sets the standard for disloyalty

The NLRA protects union and nonunion employees who engage in "concerted activities . . . for mutual aid or protection." To determine whether an activity is concerted, courts inquire, "not whether an employee acted individually, but whether the employee's actions were in furtherance of a group concern." Thus, concerted activity refers to the activities of employees who have joined together to try to improve their terms and conditions of employment.

Although it is an unfair labor practice to interfere with or restrain employees in the exercise of their rights under the NLRA, an employee's right to engage in protected concerted activity is not without limit. An employer may discipline an employee for seemingly protected conduct if the conduct is so openly disloyal that it loses protection under the Act.

In 1953, the U.S. Supreme Court set forth the standard for disloyalty in a case called, coincidentally, *Jefferson Standard*. In the case, unionized television technicians in Charlotte, North Carolina, were embroiled in a labor dispute with their employer, Jefferson Standard. Employees peacefully picketed the employer, a broadcasting company, during nonworking time; however, in the words of the Supreme Court, "several . . . technicians launched a vitriolic attack on the quality of the company's television broadcasts."

The employees distributed thousands of handbills claiming Jefferson Standard considered Charlotte a "second class city" because no local programs were aired on the Charlotte station. The handbills made no reference to a labor controversy, collective bargaining, or the union. Jefferson Standard responded by discharging 10 of the employees who distributed or sponsored the handbills.

The federal agency responsible for enforcing the NLRA, the National Labor Relations Board (NLRB), deemed the terminations an unfair labor practice. However, the Supreme Court disagreed, holding that the employees' activity may have been protected in other circumstances, but the handbills were so disloyal that they lost protection under the NLRA. The Court noted that the

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. ✤

handbills were distributed at a "critical time in the company's business"; they were a "sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income"; and they didn't specify that they were part of an ongoing labor dispute.

The Supreme Court ultimately fashioned a three-pronged test for determining when concerted activities lose protection. Under the test, an employee's disparagement of his employer or its products is protected under Section 7 of the NLRA if it:

(1) Occurs in the context of an ongoing labor dispute;

(2) Is related to that dispute; and

(3) Is not egregiously disloyal, reckless, or maliciously untrue.

If that test seems squishy to you, take comfort that you are not alone. Three justices dissented in *Jefferson Standard,* noting the test, based on "imprecise notions [such as] as 'discipline' and 'loyalty' in the context of labor controversies," provided virtually no guidance to the NLRB or the courts about how to apply it. The dissenting justices concluded, "One may anticipate the Court's opinion will needlessly stimulate litigation."

Jimmy John's workers go too far

In 2011, six Jimmy John's employees were terminated by MikLin Enterprises, the Jimmy John's franchisee for which they worked. The group of employees had helped lead an unsuccessful effort to unionize approximately 170 Jimmy John's employees at 10 different sandwich shops in the Minneapolis area in 2010.

One of the main issues driving the failed organizing effort was the employees' demand for paid sick leave. Employees complained that they were unable to call in sick unless they lined up a replacement worker. To apply pressure on MikLin, the employees organized group action in February 2011 via a "march on the boss," in which they demanded paid sick leave.

To pressure MikLin, the employees designed posters and placed them on community bulletin boards at Jimmy John's

stores. The posters prominently featured two identical images of a Jimmy John's sandwich. Above the first image were the words, "YOUR SANDWICH MADE BY A HEALTHY JIMMY JOHN'S WORKER." The text above the second image said, "YOUR SANDWICH MADE BY A SICK JIMMY JOHN'S WORKER." "HEALTHY" and "SICK" were in red letters, larger than the surrounding white text.

Below the pictures, the white text asked: "CAN'T TELL THE DIFFERENCE?" The response, in slightly smaller red text, said, "THAT'S TOO BAD BECAUSE JIMMY JOHN'S WORKERS DON'T GET PAID SICK DAYS. SHOOT, WE CAN'T EVEN CALL IN SICK." Below that, in slightly smaller white text, was the warning, "WE HOPE YOUR IMMUNE SYSTEM IS READY BECAUSE YOU'RE ABOUT TO TAKE THE SANDWICH TEST."

MikLin quickly removed the posters from store bulletin boards. Employees then distributed a press release, a letter, and the sandwich poster to more than 100 media contacts, including local newspapers and major news outlets. The press release highlighted "unhealthy company behavior." Its second sentence framed the message: "As flu season continues, the sandwich makers at this 10-store franchise are sick and tired of putting their health and the health of their customers at risk." The release further declared: "According to findings of a union survey, Jimmy John's workers have reported having to work with strep throat, colds and even the flu."

The release ended with a threat: If MikLin's owners would not talk with union supporters about their demands for paid sick leave, the supporters would proceed with "dramatic action" by "plastering the city with thousands of Sick Day posters." Also attached to the press release was a letter to MikLin's owners, asserting that health code violations occurred at their stores nearly every day.

MikLin fired the six employees who coordinated the attack and issued written warnings to three employees who assisted them. In response, the union filed an unfair labor practice charge with the NLRB. After the Board found that its actions violated the NLRA, MikLin appealed the case to a three-judge panel of the 8th Circuit, which sided with the employees. MikLin petitioned for a rehearing before the entire 8th Circuit (known as an *en banc* hearing), arguing that the employees' poster campaign was so disloyal, it wasn't protected under the Act.

In July 2017, the full 8th Circuit reversed the three-judge panel's ruling, holding that the poster campaign wasn't protected concerted activity because the communications were a "sharp, public, disparaging attack upon the quality of the company's product and its business policies." The court noted that alleging a food industry employer is selling unhealthy food is the "equivalent of a nuclear bomb" in a labor relations dispute.

Indeed, the court noted that when employees convince customers not to patronize an employer because its labor practices are unfair, settling the labor dispute brings the customers back, to the benefit of the employer and the employees. By contrast, sharply disparaging the employer's product as unhealthy, unsafe, or of shoddy quality causes harm that outlasts the labor dispute, to the detriment of the employees as well as the employer.

The court further noted that the employees' claims about the sandwiches were "materially false and misleading." The press release and the letter alleged that daily health code violations were occurring, putting the public at risk of getting sick. That statement was untrue, said the court, as evidenced by MikLin's record with the Minnesota Department of Health.

The court rejected the NLRB's argument that MikLin had to show that the employees had a subjective intent to harm its operations. According to the court, rather than inquiring into the employees' motive, the critical question under the *Jefferson Standard* test is "whether employee public communications reasonably targeted the employer's labor practices, or indefensibly disparaged the quality of the employer's product or service." *MikLin Enterprises, Inc. v. Nat'l Labor Relations Bd.*, 861 F.3d 812 (8th Cir., 2017).

Bottom line

The result reached by the 8th Circuit seems logical. However, employers should note that the attack waged on MikLin began in early 2011. An administrative law judge (ALJ) found that neither the "Sick Day" posters nor the press release attacks crossed the line into unprotected conduct. The NLRB itself then affirmed the ALJ's findings. On appeal, a three-judge panel of the 8th Circuit also ruled in favor of the employees. Only when the full 8th Circuit heard the case did the employer prevail, more than six years after it terminated the employees. Employers should recognize what the dissent in *Jefferson Standard* noted: The test for determining if employees' disloyal actions or communications cross the line into unprotected conduct isn't always clear.

When employees—union or nonunion—engage in concerted activities, you should first determine if the activity or communications are occurring in the context of an ongoing labor dispute. If so, verify that the activities are related to that dispute. Then consider whether the activities are egregiously disloyal, reckless, or maliciously untrue. If they are, they probably aren't protected under the NLRA. Because these types of inquiries are very fact-specific, contact your labor and employment attorney to discuss the situation in detail before you issue any discipline.

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QUESTION CORNER

Guidance on conducting effective workplace investigations

by KrisAnn Norby-Jahner

Q *An employee recently complained that she feels she is being harassed by her supervisor, and we want to conduct a workplace investigation. Should we investigate her complaint ourselves? How do we put together an internal investigation?*

A Deciding whether to conduct an internal workplace investigation or seek the services of an outside investigator can be difficult. Depending on the nature of the allegations and the employees involved, conducting the investigation internally may create a host of questions and concerns about neutrality or bias. On the other hand, retaining the services of an outside investigator (whether it's a law firm or an HR consultant) may escalate an already tense situation and cause resentment or suspicion among your employees. Although it's important to handle employee complaints consistently, deciding who will investigate them is often a fact-specific determination that should be analyzed on a case-by-case basis.

Conducting the investigation

If your company decides to move forward internally, you'll have the benefit of quickly deescalating the situation by promptly addressing and investigating the employee's concerns. Choose your internal investigative team carefully to ensure as much objectivity and neutrality as possible. Most internal investigators are HR professionals, managers, or business owners.

The team should never include the individual against whom the complaint was alleged. Employees must be able to speak candidly about their workplace conditions in a nonconfrontational environment, and an employee shouldn't be forced to face her alleged harasser directly unless she agrees to do so before an arranged meeting. In a neutral workplace investigation, the investigative team acts in good faith and listens fairly to both sides. Investigators shouldn't be personally involved in the alleged incident(s) of harassment, should have a thorough understanding of company policies and EEO obligations, and should be able to remain impartial, objective, and fair during the investigation.

The Equal Employment Opportunity Commission (EEOC) has published general guidelines for conducting effective workplace investigations, available at https://www.eeoc.gov/policy/docs/harassment.html. It should be the goal of the investigators to gather all relevant facts and speak to all employees who may have knowledge of the allegations. The investigative team should aim to gather facts about when and where the incident(s) occurred, who was involved, whether there were any witnesses, the nature of the offensive conduct (e.g., discrimination, harassment, retaliation), and the effect of the alleged incident(s) on the complaining employee (e.g., anxiety, inability to perform work duties, hostile work environment).

Asking the complaining employee to provide a written statement is often helpful, and some employers have developed a complaint form for that purpose. The employee who was accused of misconduct should also have a fair opportunity to respond. Moreover, it's important to emphasize throughout the investigation that no employee who has made a complaint or is participating in the investigation will be retaliated against, either by management or by coworkers. Be clear that any employee who exhibits retaliatory behavior will be disciplined appropriately, up to and including termination.

Documenting the investigation

It's highly advisable to document your investigation throughout the entire process. Keep a record of when the complaint was made, who was interviewed, when and where the interviews took place, who was present for the interviews, what was disclosed, what the ultimate findings were, and what action was taken and why. Having a careful record of the investigation will be extremely important if the EEOC or the North Dakota Department of Labor ever asks you to produce evidence that you conducted a fair and neutral workplace investigation.

However, be aware that investigative notes and documentation probably won't be privileged material in a future lawsuit, which means your notes may be used as evidence. Therefore, your documentation should focus on clear and concise fact-finding; should be accurate; should be written contemporaneously with, or soon after, each interview; should identify the note-taker and when the notes were taken; should be reviewed and signed by the interviewee; should not admit any liability or fault by the company; should be free from retaliatory language against any employee; and should be free from opinions and conclusions.

All investigative notes and findings should be kept in a confidential file separate from your personnel files. Only certain documents generated during the investigation should be placed in employees' personnel files (e.g., recommended discipline, probation, termination, or training). It's a good idea to have your legal team review your documentation to ensure that it's properly drafted and eliminates or reduces your legal liability in future lawsuits.

Concluding the investigation

Once all interviews have been conducted, the investigator should carefully review the notes and consider inconsistencies, credibility, specific evidence, any behavioral patterns, and the strength of witnesses' observations and statements. Ultimately, the investigator must determine whether a company policy was violated, whether the alleged conduct occurred, and what the company's response should be. Any action you take should be reasonable and responsive to the employee's complaint, and you must ensure consistency with company policy, past practices, EEO guidelines, and any legal requirements.

Although your response must address the specific situation that you investigated, it's important to ensure consistency in your responses to certain types of allegations. For example, if you offer antidiscrimination training and probation to the harasser after you substantiate claims of sexual harassment, you should consider whether you intend to implement the same action the next time you're faced with a sexual harassment complaint. Employees generally look for fairness in their workplace, and you can expect your workers to scrutinize the investigative process for objective implementation of company policies. Inconsistency in applying your policies or complying with EEO guidelines can lead to lawsuits.

Common corrective actions taken at the end of workplace investigations include oral or written discipline, probation, termination, changes to the supervisory relationship, and workplace training. If you have any questions about the type of action you should take, reach out to your legal team for further guidance.

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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.

> **It's extremely easy to miscalculate an employee's regular hourly rate.**

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. ✤

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).

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

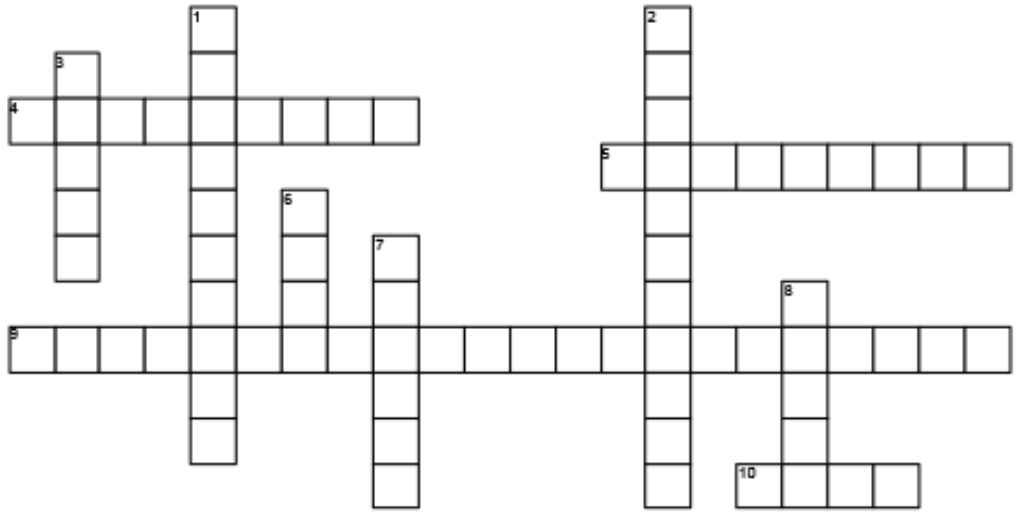
Finally, employers frequently create their own problems by providing paid leave policies that are simply too generous. This is particularly common with nonprofit employers, which can make up for low wages with abundant amounts of paid leave. What typically happens is that the generous leave—combined 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. ✤

JUST FOR FUN

Mindteaser of the month



ACROSS

4 The NLRA protects employees who join together in _____ activity to improve their terms and conditions of employment.

5 If an employee's public criticism of his employer has a _____ motive, it will be deemed an act of disloyalty and lose NLRA protection.

9 After receiving a complaint of discrimination, a company may decide to conduct a _____ _____ (two words).

10 The ____ has published general guidelines for conducting effective workplace investigations (acronym).

DOWN

1 Extra compensation for working holidays and night shifts is called _____ ___ (two words).

2 Employers must ensure employees who initiate or participate in a workplace investigation aren't subjected to _____.

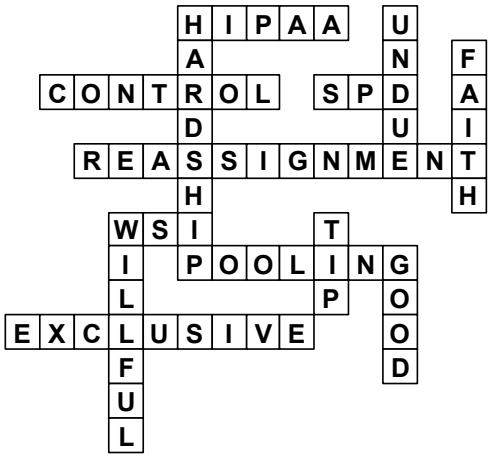
3 When calculating an employee's regular rate of pay, you must include any _____ or other nondiscretionary compensation.

6 The ____ is an important federal employment law that will be 25 years old early next year (acronym).

7 Not all salaried employees are considered _____ from overtime under the FLSA.

8 True or False: The NLRA applies only to unionized workers.

Solution for September's puzzle



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