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North Dakota
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Vogel Law Firm

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WORKERS' COMPENSATION

ND Supreme Court: Employee may receive WSI benefits *and* sue employer

by Lisa Edison-Smith

When is the "exclusive remedy" of the North Dakota Workforce Safety and Insurance Act (WSI Act) not, in fact, exclusive? The North Dakota Supreme Court recently addressed a case involving an initially misclassified independent contractor. The rather complex questions in the case involved whether a worker hired as an independent contractor, whom North Dakota Workforce Safety and Insurance (WSI) later determined to be an employee, could both collect workers' compensation benefits and sue her employer. In a decision that highlights the dangers of worker misclassification, the supreme court said that the employee's lawsuit could continue. Read on to find out why.

The 'exclusive remedy' compromise

Like most states, North Dakota provides an "exclusive remedy" provision in its workers' comp law. In short, an employee gives up the right to sue her employer for workplace injuries in exchange for a workers' comp system that provides the assurance of benefits regardless of the employee's own fault for the injuries. That's the great compromise of workers' comp law. If a worker is an "employee," the WSI Act provides that workers' comp benefits are her "exclusive" or only remedy, and the injured employee forfeits the right to bring an individual lawsuit against her employer.

The exclusive remedy provision comes with a catch, however. To receive immunity from suit, the employer must have complied with the provisions of the workers' comp law. One employer learned that failing to comply with the workers' comp law can come with a substantial cost.

Facts

In 2012, Dawn Vail was hired as a welder's helper by S/L Services, a Montana company. S/L treated Vail as an independent contractor and didn't include her or other welder's helpers in wage reports it filed with WSI. She signed a W-9 form for independent contractors and reported her compensation as an independent contractor to the IRS for the 2012 tax year.

Vail suffered a workplace injury on May 25, 2013, and filed a claim for her injuries with WSI. The agency required S/L to complete a worker relationship questionnaire to determine her eligibility for benefits. WSI determined that Vail was in fact an employee and awarded her workers' comp benefits. WSI also ordered S/L to file a report of all wages it had paid to all employees, including Vail and any other welder's helpers, for the past six years.

S/L filed a payroll report with WSI but didn't include Vail's wages or the wages of other welder's helpers. WSI

AGENCY ACTION

DHS allowing additional visas for temporary workers. The U.S. Department of Homeland Security (DHS) and the U.S. Department of Labor (DOL) announced in July 2017 that U.S. businesses in danger of suffering irreparable harm because of a lack of available temporary nonagricultural workers will be able to hire up to 15,000 additional temporary nonagricultural workers under the H-2B program. To qualify for the additional visas, petitioners must attest, under penalty of perjury, that their business is likely to suffer irreparable harm if it cannot employ H-2B nonimmigrant workers during fiscal year 2017. Labor Secretary Alexander Acosta and then-Secretary of Homeland Security John Kelly (who is now White House chief of staff) determined that there aren't enough qualified and willing U.S. workers available to perform temporary nonagricultural labor to satisfy the needs of some American businesses.

Premium processing for certain visa petitions resumes. U.S. Citizenship and Immigration Services (USCIS) announced in July that premium processing for certain cap-exempt H-1B petitions would resume. The H-1B visa has an annual cap of 65,000 visas each fiscal year. Additionally, there is an annual "master's cap" of 20,000 petitions filed for beneficiaries with a U.S. master's degree or higher. Premium processing will resume for petitions that may be exempt from the cap if the H-1B petitioner is an institution of higher education, a nonprofit related to or affiliated with an institution of higher education, or a nonprofit research or governmental research organization. Premium processing also is to resume for petitions that may also be exempt if the beneficiary will be employed at a qualifying cap-exempt institution, organization, or entity.

USCIS using revised Form I-9. USCIS has released a revised version of Form I-9, Employment Eligibility Verification. As of September 18, employers must use the revised form, which has a revision date of July 17, 2017. Among other things, the new form adds the Consular Report of Birth Abroad (Form FS-240) to List C. Employers completing Form I-9 on a computer will be able to select Form FS-240 from the drop-down menus available in List C of Sections 2 and 3. E-Verify users also will be able to select Form FS-240 when creating a case for an employee who has presented that document for Form I-9. Also, all the certifications of report of birth issued by the State Department have been combined into selection C #2 in List C. Another change is the renumbering of all List C documents except the Social Security card. For example, the employment authorization document issued by DHS on List C changed from List C #8 to List C #7. ✤

issued S/L a premium based on the payroll report, after adjusting the report to reflect its determination that Vail was an employee and to include her wages for the premium period. S/L paid the adjusted premium for the period from August 23, 2012, to August 31, 2013, which covered the date of Vail's injury.

In November 2013, Vail filed a claim for overtime with the North Dakota Department of Labor and Human Rights (NDDOL) based on her status as an employee. S/L contested the claim, but the NDDOL disagreed, concluding that Vail was an employee entitled to overtime pay during her employment with S/L.

Meanwhile, Vail also filed a personal injury lawsuit in federal district court for the injuries she sustained while working for S/L. The company argued that it had paid all of its workers' comp premiums for her and that her receipt of workers' comp benefits barred her claim under the exclusivity provisions of the WSI Act.

The federal court initially disagreed with S/L and ruled that Vail wasn't barred from suing the company even though it paid workers' comp premiums for the period during which she was injured and received benefits. To resolve the issue, the federal district court asked the North Dakota Supreme Court to answer several questions related to whether Vail's lawsuit was barred under state law. (In other words, through a process known as a "certified question," the district court asked the supreme court to interpret the state law.)

North Dakota Supreme Court's decision

The supreme court first noted that in North Dakota, an employer that violates the coverage provisions of the WSI Act isn't protected from immunity from civil liability for injuries suffered by employees in the course of their employment. Further, an employee may receive workers' comp benefits "and in addition may maintain a civil action against the employer for damages." Although WSI may have a claim for benefits already paid to the injured worker (called a subrogation interest), the employee may seek civil damages under the "dual remedies" provision of the WSI Act.

When an employee sues for a work-related injury, the court explained, the employer has the burden of establishing that it is immune from suit under the exclusive remedy provisions of the WSI Act. An employer that "willfully misrepresents" the amount of its covered payroll to WSI or "willfully fails to secure coverage for employees" is in violation of state law and guilty of a Class A misdemeanor.

North Dakota provides a sort of safe-harbor method for employers to determine whether a worker is an employee under workers' comp law. If an employer requests a determination of employment status from WSI and the agency subsequently determines that an independent contractor is actually an employee for workforce safety and insurance premiums, it may not require the employer to retroactively pay fees or penalties unless it determines the employer hired the contractor "willfully and intentionally" with the purpose of avoiding premiums. The safe-harbor process provides employers an incentive to request determinations of worker status and pay for the protection of

the exclusive remedy allowed by workers' comp insurance coverage.

The court determined that despite the safe-harbor provisions in the statute, Vail could maintain a civil action in addition to her WSI claim if S/L willfully and intentionally failed to report her wages as well as the wages of other welder's helpers. Thus, the remaining issue was whether S/L's misrepresentation of its payroll and failure to secure coverage were willful.

S/L argued that to establish that its violation was "willful," Vail had to show that it intentionally made a false statement to WSI, not that it simply made an erroneous statement. In addition, S/L argued that an employer can avoid liability under the statute by showing it had a good-faith belief that a worker wasn't an employee. The supreme court rejected those arguments, concluding that Vail wasn't required to show that S/L knew it was violating state law or intended to deceive WSI or violate the law.

S/L's ignorance of the law or good-faith belief that Vail wasn't an employee didn't preclude a finding that it acted willfully. The North Dakota Supreme Court instructed the federal court that S/L wasn't immune from civil liability under state law merely because it didn't intend to defraud WSI or know of its state law obligations. *Vail v. S/L Services, Inc.*, No. 2017011, 2017 ND 202.

Practical pointers

This case is a warning beacon of the many dangers of misclassifying employees as independent contractors. Not only did an "independent contractor" obtain overtime and workers' comp benefits, but she was also allowed to proceed with a lawsuit against her employer for her work-related injuries. Here are some tips for avoiding this worst-case scenario:

- **Always consider the real nature of your relationship with a worker up front.** Never hire a worker as an independent contractor without first seriously considering whether she is really an employee entitled to state and federal protections. When in doubt, consult legal counsel.
- **Remember, more control equals an employment relationship.** There are a multitude of tests for independent contractor status under state and federal law; however, the common element is control. The more control you have over the worker, the more likely the relationship will be considered an employment relationship.
- **It isn't enough to treat a worker as a contractor.** The fact that a worker may complete independent contractor tax paperwork or have a valid contractor identification number is insufficient to establish that you don't have an employment relationship. The actual nature of the relationship and employer control over the worker are key.
- **Good faith or ignorance of the law isn't a defense.** In this case, S/L contended that it honestly but mistakenly misclassified Vail and other welder's helpers. An employer's good faith and lack of intent to defraud aren't enough, however. Similarly, paying actual premiums and benefits to Vail wasn't enough. She still has a potential civil action against S/L despite its ignorance or good faith.
- **Consider using the safe-harbor provision of the statute.** The supreme court specifically noted that an employer that seeks an administrative determination of a worker's status is generally entitled to amnesty from penalties if it hasn't willfully violated the statute. If you seek a status determination, you must, of course, be prepared to comply with the results and pay premiums for the worker. However, you may avoid the "dual remedy" predicament and other penalties for misclassification and failure to pay premiums if you act promptly when hiring the worker and before an injury occurs.

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REGULATIONS

WHD is pivoting on a dime on Obama-era regs

President Donald Trump's campaign was based in large part on the promise of reshaping government to be leaner, meaner, and more employer-friendly. One of his first actions was to sign an Executive Order instructing the various regulatory agencies to reduce regulatory burdens on businesses. While that directive is being met with varying degrees of speed and success by different federal agencies, one that seems to be going full speed ahead is the U.S. Department of Labor (DOL) and, more specifically, its Wage and Hour Division (WHD).

In the roughly three months since Secretary of Labor Alexander Acosta was confirmed by Congress, the WHD has placed a number of pending regulations on hold for further review and withdrawn or expressed the intent to withdraw regulations and guidance documents that were already in effect. Let's take a quick look at some of the more significant changes already made or being considered.

Minimum salary requirement

Perhaps the hottest HR topic of 2016 was the Obama administration's final regulation raising the minimum salary requirement for white-collar employees to be classified as exempt from $23,660 to $47,476 per year. The new requirement was originally scheduled to take effect on December 1, 2016, but was delayed by a court ruling at the last minute.

In late July 2017, the WHD announced that it would be seeking public comments about the minimum salary requirement, including the salary-level test, the

exempt-duties test, the effect of bonuses and incentives on the salary test, and the salary test for highly compensated employees. One of the more interesting ideas apparently being considered is using a different minimum salary level for different types of white-collar exemptions.

The deadline to submit comments was September 25, 2017.

Tip-pool regulation

Under the Fair Labor Standards Act (FLSA), employers are allowed to count a portion of an employee's tips as wages in order to satisfy minimum wage requirements. In the past, different federal appeals courts have disagreed over the proper distribution of tips by an employer that pays its employees at least the full minimum wage and therefore doesn't need to use the tip credit to meet minimum wage requirements. These employers frequently establish a "tip pool," meaning they accumulate tips received by all tipped employees and distribute them evenly to some part of the employee population.

One question that many courts historically disagreed on was whether employers could distribute tip-pool proceeds among all employees, even those who don't customarily receive tips (such as kitchen and maintenance staff). In 2011, the WHD issued regulations that said no, they couldn't. Now, however, the WHD has begun the process of revoking the 2011 regulations and says it won't be enforcing them in the meantime.

Going forward, employers that use a tip pool will need to look to case law to determine their legal obligations, at least until the issue is resolved by the U.S. Supreme Court or a new regulation is issued.

Joint employment definition

During the Obama administration, the DOL issued an administrative interpretation (AI) that allowed two separate businesses to share legal responsibility for an employee if they both exercised at least "indirect control" over him. This was an expansion of the previous definition of joint employment, which required both companies to exercise direct control over the employee. This created problems for parent, subsidiary, and affiliated companies; employers that used staffing agencies or outsourced certain payroll or HR functions to a third party; and franchisers that relied on franchisees to set employees' work conditions.

The WHD has now withdrawn the AI, and it is no longer available on the DOL website. While the law hasn't technically changed, the existence of a joint-employment relationship will now be determined by using the previously applicable "direct control" standard rather than the Obama administration's broader "indirect control" test.

Independent contractor interpretation

Another Obama-era AI took the position that "most workers" are employees, not independent contractors, under the "economic realities" test used by courts. This was a part of the Obama DOL's enforcement initiative on misclassification of independent contractors. While it remains to be seen, withdrawal of the AI may be a sign that the DOL intends to back off of the intense focus it had been placing on independent contractor arrangements during the Obama administration.

Other DOL changes

The DOL has been busy outside the WHD as well, taking action on such items as fiduciary rules for Employee Retirement Income Security Act (ERISA) plans (delayed effective date), electronic reporting of injury and illness data to the Occupational Safety and Health Administration (OSHA) (delayed deadline), and disability claims procedures for ERISA plans (under review).

Bottom line

It looks like this is only the beginning when it comes to the regulatory environment for employers. It's hard to predict what will come next, but as always, we will be working to provide you with all the information you need to remain compliant in your workplace practices. ✤

EMPLOYEE BENEFITS

Sloppy benefits administration is a lawsuit waiting to happen

For many employers, benefits administration is something of a poor cousin to human resources. Often, the responsibility for managing benefits—especially health and welfare benefits—falls to a relatively inexperienced employee, frequently one in payroll who has no prior HR training or experience. And, very often, that person reports not to HR but to the CFO, COO, or a similar position.

Even if it's handled by a more experienced HR professional, benefits administration can get the short end of the stick. It gets far less attention in legal and HR circles than the "hotter" topics, such as harassment and discrimination, overtime requirements, or the Family and Medical Leave Act.

So with open enrollment approaching for employers with a calendar-year plan, we thought it might be a good time to look at some of the top mistakes we see in the arena of benefits administration.

Beware these pitfalls

Mistake #5: not having a plan document or summary plan description. Most employee benefits plans (other than government and church plans) are covered by the Employee Retirement Income Security Act

(ERISA). Two of the key requirements for sponsors of ERISA plans are to (1) have a written plan document and (2) provide a summary plan description for employees explaining their benefits in simple terms. Many employers assume that insurance certificates provided by their carrier meet these requirements, but they don't.

Mistake #4: assuming you don't need to worry about the Health Insurance Portability and Accountability Act (HIPAA). If you sponsor a self-insured group health plan, then you are almost certainly subject to HIPAA, and you need to get HIPAA policies and procedures in place ASAP. But even fully insured employers have an obligation to safeguard employee health information they receive if it meets the definition of "protected health information" under HIPAA.

Mistake #3: not reading (or understanding) your contracts/ administrative service agreements. For every employee benefit you offer, you need a clear understanding of what the carrier will do, what your broker will/can do, what you are required to do, and what you are farming out to a third-party administrator, such as a COBRA administrator. The contractual documents issued by various insurance companies can be called different things, but you need to look for whatever document lays out precisely which responsibilities are the carrier's and which ones are yours. Otherwise, there is a very good chance something will get missed, and that could harm not only your company but your employees as well.

Mistake #2: giving employees tax or legal advice. Of course you want to help your employees as much as possible, but there are some questions you just shouldn't answer. For example, whether an employee can (or should) continue contributing to a health savings account (HSA) after she turns 65 is an extremely complicated issue that the employee should discuss with a tax or legal adviser—NOT YOU! There are numerous other examples, such as the obligation to maintain health insurance when a married couple separates, whether a significant other qualifies for coverage as a common-law spouse, and so on. If you don't know the answer, ask yourself whom you would have to ask to find out. If it's an accountant or attorney, then that's who the employee should be talking to. Which leads us to . . .

Mistake #1: Pressuring your benefits broker for legal advice. While benefits brokers are very knowledgeable on a lot of aspects of insurance and related benefits, there are some questions you shouldn't expect them to answer. The main motivation we see for clients going to their brokers instead of a lawyer for advice is to avoid legal fees. But that is shortsighted at best. Here are some of the risks:

- No matter how knowledgeable they are, brokers aren't attorneys and are unlikely to provide the depth of analysis you need on complex or nonstandard issues.
- Even if your broker has compliance attorneys on staff, they should be telling you up front that they aren't practicing law and can't provide you with legal advice.
- Communications with your broker aren't protected by the attorney-client privilege.

WORKPLACE TRENDS

Survey says most workers don't want employers to ask about salary history. A survey from Glassdoor finds that 53% of U.S. workers who are employed or unemployed but looking believe employers shouldn't ask candidates about their current or past salary history when negotiating a job offer. The online survey queried more than 1,300 U.S. adults. Sixty percent of working women and 48% of working men said they believe salary history questions shouldn't be asked. Some cities and states have passed laws banning employers from asking about salary history, and more are considering such laws as a way to discourage gender bias in compensation. While most workers don't want employers to ask about current or past pay, they do want more pay information up front from employers. Ninety-eight percent of the U.S. workers in the survey said they want to see pay ranges included in open job listings.

Employers seeing benefit costs rise. The cost to provide employee benefits, measured as a percentage of pay, increased 24% between 2001 and 2015 for U.S. employers, according to an analysis by Willis Towers Watson. The increase was fueled largely by a doubling of healthcare benefit costs, according to the analysis, titled "Shifts in Benefit Allocations Among U.S. Employers." The analysis found the total cost of employer-provided benefits—health care, retirement, and postretirement medical—rose from 14.8% percent of pay in 2001 to 18.3% of pay in 2015. During that period, healthcare costs for active employees more than doubled, rising from 4.7% to 11.5% of pay. Total retirement benefits, which include defined benefit, defined contribution, and postretirement medical plans, declined by 25% between 2001 and 2015, from 9.1% to 6.8%.

Survey finds negative publicity takes toll on recruiting. A survey from CareerBuilder finds that 71% of U.S. workers would not apply to a company experiencing negative publicity. The survey says female workers are much more likely not to apply to a company experiencing negative press than their male counterparts, 79% compared to 61%, respectively. The online survey, conducted in May and June 2017, included representative samples of 2,369 full-time employers and 3,462 full-time U.S. workers across industries and company sizes in the private sector. Twenty-six percent of employers say their company has experienced negative publicity, resulting in a hit to their hiring process. Sixty-one percent of those employers combined report fewer job offers being accepted, fewer candidate referrals from employees, and fewer job applications as a result of the negative publicity. ✤

UNION ACTIVITY

Union leader hails decision to allow more H-2B visas. Terry O'Sullivan, general president of the Laborers' International Union of North America (LIUNA) has spoken out in favor of the U.S. Department of Homeland Security's (DHS) decision to allow an additional 15,000 H-2B visas. "While LIUNA has long expressed concern about the use of H-2B visas in the construction and landscaping industries, we appreciate the restraint shown by [DHS] and the [U.S.] Department of Labor [DOL] with this relatively modest increase in the number of visas allowed this year," O'Sullivan said after the decision was announced in July 2017. "LIUNA supports the new requirement that employers seeking H-2B visas must demonstrate that their business will suffer 'irreparable harm' under penalty of perjury, as well as the new tip line to report H-2B abuses and employer violations."

AFL-CIO president speaks out against NLRB picks. AFL-CIO President Richard Trumka has voiced his objections to President Donald Trump's picks for the National Labor Relations Board (NLRB). Trumka expressed concern that Marvin Kaplan and William Emanuel may not be committed to the rights and protections guaranteed by labor laws. "On their face, the résumés of both nominees appear to be in direct conflict with the mission of the NLRB," Trumka said in July. He said adding Kaplan and Emanuel to the Board "can further empower corporations and CEOs to take away our freedoms at work."

Union video targets privatization. The American Federation of Government Employees (AFGE) has released a video criticizing efforts to privatize government services. "Government's job is to serve the public. Business's job is to make a profit," the video says. It continues by saying, "Your tax dollars already pay for these services. Why sell them off to profiteers who will cut corners." AFGE produced the video in response to proposals by the Trump administration and lawmakers to privatize many key government programs and services. "Politicians often talk about wanting to run the government more like a business," AFGE President J. David Cox Sr. said. "But what that really means is handing over public services to private corporations, who will raise costs and lower services just to make a buck."

Steelworkers criticize delay in action to support steel industry. United Steelworkers International President Leo W. Gerard spoke out in July against reports that the Trump administration had decided to delay action in support of the domestic steel industry. "Delay is devastating," Gerard said. "Since the president announced an investigation in April, attacks on the U.S. steel sector have skyrocketed, with imports up 18 percent." He went on to say that workers' hopes were raised during the campaign, but now workers "are sick and tired of Washington politicians saying they care and dragging their feet." ✤

- Getting the right information and advice from an attorney can be quicker and cheaper in the long run than a lengthy and expensive lawsuit.

Reflection time

So, be honest. Do you see yourself committing any of the above mistakes? If so, congratulations! The hardest part is admitting you have a problem. ✤

WORKPLACE VIOLENCE

Active shooter: What should you do?

There is no shortage of media coverage on public violence. Because of all the attention given to mass shootings, many employers are considering whether they need an active shooter policy. This article provides guidance on how to address the issue.

Do you need an active shooter policy?

An active shooter situation is just one type of workplace violence your company could face. Despite the amount of media coverage, active shooters are extremely rare. Most employers are better served by a general policy on workplace violence. Your policy should include three key components:

(1) **A clear prohibition of actual or threatened violence.** Employees should have no doubt that this is not a joking matter. Employees who lose their composure and threaten to injure others should be subject to severe discipline, up to and including termination, regardless of whether they actually intend to follow through on the threat.

(2) **A response plan.** If workplace violence occurs, employees need to know what to do. Every workplace is different, but basic response plans should include a process for locking down the worksite, isolating the armed individual to the extent possible, and contacting authorities. Implement a policy of retreating when possible and contacting law enforcement for aid.

(3) **A mandatory reporting component.** Finally, employers should have a mandatory reporting policy. Employees who overhear threats of violence must report them to management so they can be investigated and addressed. The best possible outcome is identifying and neutralizing threats before they become physical violence.

Bottom line

Employers should have a plan on how to address workplace violence, but an active shooter policy is not required. Instead, craft a policy that addresses all types of workplace violence, including verbal threats and catastrophic active shooter situations. Having one policy ensures that employees follow a single plan of action and means they are less likely to get confused in an emergency. ✤

REASONABLE ACCOMMODATION

Considering reassignment as an accommodation for a disability

Suppose an employee returns to work after an injury or illness, but because of a medical or psychological condition, he can no longer perform the essential functions of his job. The employee points out another job at your company for which he is qualified and requests a transfer. Must you reassign him as a reasonable accommodation under the Americans with Disabilities Act (ADA)? While reassignment to a vacant position may be a reasonable accommodation under the ADA, there's no requirement that you must reassign the employee.

Reasonable accommodation obligation

An employer is obligated under the ADA to provide a disabled employee a *reasonable* accommodation, not a *perfect* accommodation. Reasonable accommodations can include making your facilities readily accessible to and usable by the disabled employee, restructuring his job, allowing him to work a part-time or modified work schedule, or reassigning him to a vacant position.

Disabled employees are not entitled to the accommodation of their choice. Although you may take the employee's preference for one accommodation over another into account, the ultimate choice of which accommodation to provide is yours. Generally speaking, reassignment is necessary only if the employee is unable to perform his current job with or without an accommodation. If the employee isn't able to perform his job and, as part of the interactive process, you are considering reassigning him, you can weigh several factors to determine whether reassignment is reasonable.

Deciding whether an accommodation is reasonable

First, you aren't required to create a new job for a disabled employee. You also aren't required to "bump" another employee so you can reassign the disabled employee. The position must be vacant at the time of the accommodation request. Reassignment might also be a reasonable accommodation if you know a position will become vacant soon. For example, if you know an employee in a job for which the disabled employee is qualified will be retiring soon, you might reassign the disabled employee to it after the other employee retires.

You also don't have to reassign a disabled employee if, under a collective bargaining agreement (CBA) or another well-established system, you make job assignments based on seniority and an employee with more seniority is eligible for the position. On the other hand, your policies may sometimes have to take a back seat to your obligation to reasonably accommodate an employee's disability. For instance, if you have a policy against allowing lateral transfers, you may have to make an exception if such a reassignment is the only way to reasonably accommodate a disabled employee.

You also aren't required to reassign a disabled employee if the reassignment would require a promotion that he isn't otherwise eligible for. You should first consider a lateral transfer to an equivalent position. If there are no available positions, you may reassign the employee to a lower-paying position if he cannot be accommodated any other way.

The U.S. 4th Circuit Court of Appeals upheld the transfer of an assistant principal to another school where he made less money because the applicable CBA provided that salaries were determined by school populations. The court found that the reassignment reasonably accommodated the assistant principal's condition, which required that he work in a less stressful environment than his previous school.

Finally, you don't have to offer a reassignment if it would cause an undue hardship on your business. You should be aware that "undue hardship" means more than a little hassle. One court has characterized it as "an action requiring significant difficulty or expense." Whether there is actually an undue hardship will vary from case to case. Some things to consider are the cost of the accommodation, the number of employees in the company, the company's financial resources, and the impact of the accommodation on the company's operations.

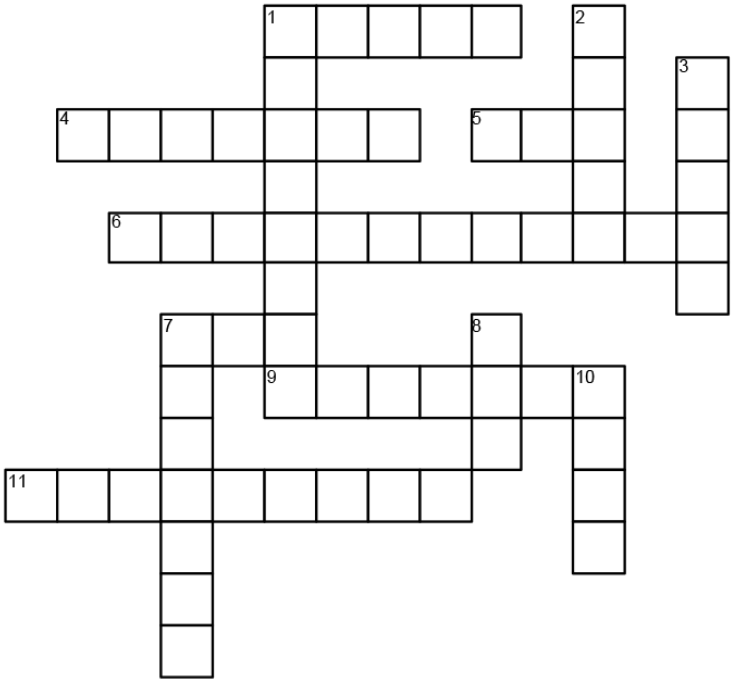
But what if you have multiple positions for which the disabled employee is qualified? You are free to choose the reassignment that will be offered as long as it's a reasonable accommodation. As a result, you may choose the least expensive accommodation or the accommodation that's easier to provide.

Bottom line

Turning back to our original question, must you reassign an employee who can no longer perform the essential functions of his job? If the employee is unable to perform his job with or without an accommodation, there's a vacant position that you can reassign him to, and you can do it without undue hardship, you should reassign the employee. If you have questions about how to accommodate an employee's disability, you should consider consulting with your legal counsel. ✤

JUST FOR FUN

Mindteaser of the month



ACROSS

1 _____ is the law that protects the privacy of individuals' health information (acronym).

4 The most important element for determining independent contractor status centers around _____.

5 ___ stands for summary plan description.

6 _____ to another job is a potential accommodation for an employee with a disability.

7 North Dakota's workers' compensation agency is commonly known as ___.

9 See 8 Down.

11 Workers' comp benefits typically provide an _____ remedy for employees.

DOWN

1 See 2 Down.

2 Any accommodation provided for an employee's disability under the ADA may not pose an _____ _____ (two words). See 1 Down

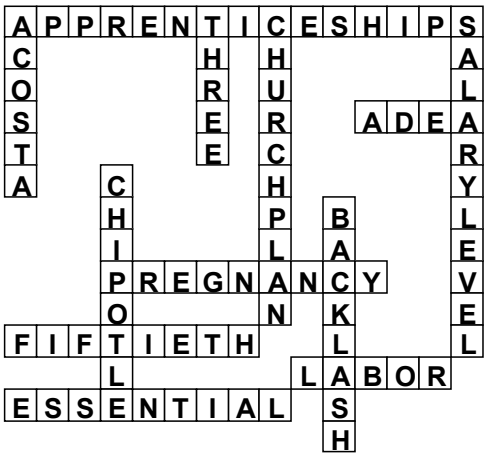
3 See 10 Down.

7 A _____ violation of the law may result in harsher penalties.

8 The current regulations likely to be rolled back by the Trump administration include the gratuity-sharing arrangement known as ___ _____ (two words). See 9 Across.

10 An employer's ____ _____ may not be enough to defend against employee classification mistakes (two words). See 3 Down.

Solution for August's puzzle



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