LEHR MIDDLEBROOKS
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Your Workplace Is Our Work®

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New Year's Resolutions for HR

It is the time of the year to make resolutions for the new year. Often, these resolutions involve either exercising more, eating less, or a combination of both. We offer the following ten resolutions for business leaders with HR responsibilities to adopt for 2020:

1. Resolve to harmonize and coordinate obligations under the FMLA, ADA, and workers' compensation when providing leave.

    a. Train managers to know that the employee does not have to request "FML" by name for FMLA to apply. Train managers to recognize and report to HR situations where an employee has a workplace injury, medical condition, or other life circumstance where the FMLA may be applicable.

    b. Timely issue notices of eligibility, rights and responsibilities, certification forms, and designation notices as required by the FMLA in all circumstances, even where the employee is receiving benefits under workers' compensation or short term disability.

    c. Once FML expires, neither workers' comp nor the ADA requires a guarantee of reemployment to the same or equivalent position. The employer has the right to tell the employee if the employee will not return in a timely manner (subject to the below) that the employee's job will be filled and, if and when the employee is able to return to work, the employer at that time will consider what position, if any, is available.

    d. Eliminate or substantially revise all written policies or unwritten practices calling for automatic termination of employees unable to return after FMLA or any other grant of leave. When FML expires and an employee is unable to perform his/her job, an employer is <u>not</u> free to terminate. The ADA may require a reasonable extension of unpaid leave for a defined period of time as an accommodation. However, requests for indefinite extensions of leave are not reasonable.

    e. Eliminate or substantially revise all written policies or unwritten practices requiring an employee to be able to return to work without restriction before being returned from FML, a work-related injury, or other extended leave. Under the ADA, the employer has the obligation to provide reasonable accommodation and cannot require any employee to prove they are "100% healed."

2. Resolve to discipline employees consistently, but contextually. Not all employees have to be treated the same, but the employer has to have business reasons for treating people differently, and be consistent in the application of those reasons.

3. Resolve to train supervisors in employee engagement and positive disciplinary approaches to improve employee attitude, attendance, performance, or behavior.

4. Resolve that employees should receive fair, final, and documented warnings that their jobs are at stake prior to termination in most circumstances (with obvious exceptions for circumstances like theft, dishonesty, violence, etc., where immediate termination is the only acceptable and safe outcome). Don't be afraid to ask the employee if they want to stay with the company. You may also want to give employees who do not want to remain or who do not believe they can meet expectations the opportunity to look for other jobs while still employed.

5. Resolve to work diligently with new employees, but to sever the relationship early if that effort is not reciprocated. Other than during the recruitment process, an employee will never give you a better effort than during the first 90 days, whether or not you have a formal probationary period. This is particularly true for attendance, behavior, and attitude.

6. Resolve to apply and document reasonable accommodation procedures. In some respects, reasonable accommodation is "form over substance." The form is the process of engaging with the employee to understand the limitations and brainstorm possible accommodations. It is ultimately up to the employer to determine what reasonable accommodation, if any, will address employee needs. Don't presume that no accommodation exists just because an employee's requested accommodation is unreasonable. Often ADA charges arise where an employer refuses a requested accommodation and does not clearly make a substitute proposal or other effort to engage. And while on the subject, remember that no fault attendance policies are not a basis for failing to accommodate an employee who may need extended time off. (See Resolution 1).

7. Resolve to review exempt status under state and federal wage and hour laws. The salary threshold under federal law rises to $684/week on January 1, 2020. Additionally, several states have a higher salary threshold for an individual to be considered exempt as an administrative, professional or executive employee. Titles have little bearing on the ultimate question of whether or not an individual is exempt. If your organization has had restructuring or anticipates restructuring, consider whether those who are exempt today will meet the exemption status tomorrow. Remember there is no penalty for misclassifying someone who could be exempt as non-exempt (i.e., paying at least the minimum hourly wage and overtime rates).

8. Resolve to evaluate the scope of mental health resources your organization provides and to promote that to the workforce. Where employees are willing, provide connections and the resource of time off so that the employee may have an opportunity to improve.

9. Resolve to review your organization's drug testing policies and protocols, especially regarding marijuana. Most states that have decriminalized marijuana still permit employers to make business related decisions due to an employee's use of marijuana. Marijuana is illegal under federal law and its use does not have to be accommodated under the federal ADA (state laws vary). Based upon the labor market shortage, more employers are scaling back testing for marijuana and consequences if an employee or applicant tests positive for marijuana.

10. Resolve to review and/or establish restrictive covenants to protect your organization's interests. General noncompete agreements are sometimes facially unenforceable under a particular state's law or they may not be enforced by particular courts in particular circumstances. However, in most states, employers have the right to enforce agreements where employees do not solicit employer customers or employees. Some states have prohibited them

altogether for lower paid employees. If your organization has such agreements, be sure to have them reviewed on a regular basis. If your organization does not have such agreements, you should consider establishing them.

NLRB General Counsel: Broad Nondisparagement Language May Violate the Law

On November 14, 2019, NLRB General Counsel Peter Robb issued an advice memo regarding when an employer's nondisparagement provisions violate the National Labor Relations Act. The advice memo addressed the conduct of a law firm known as the Stange (no "r") law firm. The firm required its attorneys to sign the following provision after they were hired:

> [D]uring and after Employee's employment or association with Law Firm ends, for any reason, Employee will not in any way criticize, ridicule, disparage, libel, or slander Law Firm, its owners, its partners, or any Law Firm employees, either orally or in writing. However, nothing in this Section 3.2 shall be deemed to limit or prohibit Employee from engaging in concerted group activity and communications with co-employees to try to improve his or her working conditions, as provided under Section 7 of the National Labor Relations Act.

The law firm sued a former employee and alleged that the employee violated this language with the employee's posts to social media sites, including Glassdoor, Indeed, Yelp, and Yahoo Business. Employees then sued the law firm, claiming that the nondisparagement language was overly broad and interfered with employee rights under Section 7 of the NLRA.

The General Counsel stated that, first, the "savings clause" that the employer's policy is not intended to interfere with employee Section 7 rights does not protect the rest of the language if that language is improper. In concluding that the remaining language was improper, General Counsel Robb stated that prohibiting employees from "criticiz[ing], ridicul[ing], or disparage[ing]" Stange is an unlawful restriction on employee Section 7 activity. However, General Counsel Robb also stated that the employer's lawsuit against the former employees did not violate their Section 7 rights, because the employee postings were done as individuals and not as part of overall concerted activity.

Calling Employer "Stupid" Protected Under NLRA

The case of *Roseburg v. Forest Products Company and Carpenters Industrial Council Local Union No. 2949* (NLRB Nov. 29, 2019), involved the scope of an employee's protected activity when criticizing the company on the union's Facebook page. Employee Miller was a saw operator at the company's mill from November 3, 2003, until his termination on September 8, 2017. Miller was a member of the local union and participated in the union's Facebook page. Only those who were permitted to have access to the page could participate. Days prior to Miller's termination, forest fires occurred which caused smoke at the company's plant. The plant is not a sealed facility so it was difficult for the company to continue production and maintain air quality. The company closed windows and doors in order to try to limit the smoke, but to no avail. Miller posted on the union's Facebook page: "Apparently closing all of the doors and windows will help keep the smoke out of the plant. Even though the plant isn't sealed and there isn't a filtration system. This is the level of stupidity that our management team has elevated to." Eighteen other employees responded with "likes" or a smiling face emoji. Another employee replied, "Close all the windows and doors, but forget about all the holes and cracks in the walls." Miller responded: "My point exactly." Miller added "There is no way to keep the smoke out because it's already in there. There are huge fans sucking in air from outside and closing the doors won't help. It will only turn it into a sweat shop." Another employee took a screenshot of Miller's post and brought it to the company's attention, resulting in Miller's termination.

The company terminated Miller for violation of its *Company Loyalty Policy*. The ALJ concluded that the termination violated Miller's Section 7 rights and he should be reinstated with back pay, which the NLRB upheld.

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Government Contractors: Time to Review Disability Affirmative Action Programs

Section 503 of the Rehabilitation Act requires affirmative action by federal contractors in the hiring, promotion and retention of disabled individuals. On November 8, 2019, OFCCP announced that it has begun to identify contractors who will be selected for an OFCCP focused review of disability affirmative action requirements. The focused reviews include interviews with managers, visits to employer's location, a review of employer plans and policies regarding affirmative action and accommodation of those with disabilities, and how the contractors have treated accommodation requests or incidents.

Snow Days, Weather Delays, and Employee Pay

It's the time of year to consider an employer's obligations to pay exempt and non-exempt employees when reporting to work is delayed or the employer is closed due to weather issues. The following summary is intended to give employers a general overview of how to address these matters:

1. Exempt employees when the business is closed. When the workplace is closed, the employer may not dock the lost time from an exempt employee's pay. The employee is prepared and willing to work but may not do so because the employer has made the decision to close. Only if the business is closed for a full workweek may the business be excused from paying an exempt employee in this circumstance.

2. The business is open but exempt employees cannot get to work. If the business is open but the exempt employee cannot attend work that day, the Fair Labor Standards Act permits the employer to dock the employee for a full day absence. If the exempt employee reports to work or works remotely for any portion of the day, the employer may not deduct any of the exempt employee's pay.

3. Exempt employees – working from home. Let's assume that the business is closed for the day, but exempt employees make calls and respond to emails from home. In that situation, the employee is working and the employer may not dock the employee's pay.

4. Non-exempt employees – business is closed. In that situation, the employer may refrain from paying the employee for that day. Employers may choose to let employees use that day as a vacation or PTO, but pay is not required.

5. Non-exempt employee shows up to work and then the business closes. Under the FLSA, the employer is only responsible for paying the employee for actual time worked. However, from an employee relations perspective, employers may choose to pay an employee for the full day or at least a half day if the employee is sent home shortly after reporting to work.

6. Standby on the premises/on-call. If an employee is asked to remain on the premises yet not work, remaining on the premises at the employer's request is considered compensable. If the employee is asked to be available for a call-out but the employee is not restricted, such as required to remain at home, generally, on-call pay is not compensable.

7. State and local law. There are some jurisdictions where non-exempt "reporting pay" is required. There are very few jurisdictions with this requirement, but it is something to consider. If reporting pay is not required, still consider it from an employer relations perspective.

Family Medical Leave Act and Americans with Disabilities Act

This article was prepared by JW Furman, EEO Consultant Investigator, Mediator and Arbitrator for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Ms. Furman was a Mediator and Investigator for 17 years with the Birmingham District Office of the U.S. Equal Employment Opportunity Commission (EEOC). Ms. Furman has also served as an Arbitrator and Hearing Officer in labor and employment matters. Ms. Furman can be reached at 205.323.9275.

As noted in resolutions 1 and 6 in this ELB's lead article, managing employees at the intersection of the FMLA and ADA remains a challenge, especially for mid-sized employers without large Human Resources Departments. We frequently speak with employers who have managed an employee through twelve weeks of FMLA, oftentimes generously interpreting policies and making alternative scheduling arrangements to minimize the need to use leave, with the hope the employee will be able to resume normal duties. Unfortunately, this is not always the case, and, sometimes, after the exhaustion of all personal leave and FMLA leave, an employee still needs time off for treatment and side effects. Again, even when the employer has been exceptionally generous, the employer often feels relief to have exhausted the FMLA obligation and feels ready to begin looking for someone who can perform the work predictably.

Unfortunately, an employer's obligations to provide leave do not terminate as soon as FMLA leave concludes. Any time an employee asks for a change in any condition of work because of a physical or mental impairment, even if the request is and has been covered by an event-specific law like FMLA, company protocols for ADA accommodations need to be automatically initiated. Every employer needs to have a policy in place detailing how requests for ADA accommodations are handled. Employers must train supervisors to recognize such requests, especially since an employee is not required to specifically utilize terms like "ADA" or "accommodation." It is up to the employer to know when ADA protections for employees begin and initiate the required processes.

Interactive processes and individualized assessments are of utmost importance at every step in the ADA accommodation process. Too often, employers flatly reject a request for leave if the FMLA is no longer applicable or they fail to explore with the employee how his continued absences would enable him to remain productive in his position. Employers should create a record of their evaluation of the reasonableness of the request or what hardships the request might impose in the workplace, as well as alternative accommodations and the employee's reactions to those. It is also sometimes appropriate to seek information from third parties, like the employee's physician (via the employee or with his release) or disability experts.

This is not to say that employers have to provide substantial job-protected leave beyond what the FMLA requires or that an employer can never terminate an employee after FMLA leave, especially when the employee does not have a realistic plan of return. However, employers cannot lose sight of the ADA and its obligations even after running the gauntlet of FMLA compliance.

Compliance with the ADA requires employers (not employees) to know its protections, know when and how it applies, and act accordingly. Employers are best positioned to defend against a charge of failing to accommodate where their records substantiate their participation in the interactive process of accommodation consideration and evaluation with the employee.

White Collar Exemptions

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act. Mr. Erwin can be reached at 205.323.9272.

New Regulations Effective January 1, 2020

After many delays the Department issued new white collar exemption regulations on September 24 with an effective date of January 1, 2020. The major change increases the minimum salary for these exemptions to $684.00 per week

(equivalent to $35,568 per year) or $2,942 per month. Other changes include raising the "highly compensated" test from $100,000 to $147,414 per year. In addition, the regulations allow up to 10% of the salary requirements to be satisfied by payment of non-discretionary bonuses, incentives and/or commissions that are paid annually or more frequently. The new regulations also specifically allow for the payment of extra compensation(for example extra pay for working extra hours) above the guaranteed salary as well as allowing the employee's pay to be computed on an hourly, daily, or shift basis as long as the employee receives the guaranteed minimum of $684.00 per week.

Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $$684 per week effective January 1. Under the current regulations there is a separate duty test for "highly compensated employees" that is established at $100,000 annually which will increase to $147,414 effective with the new regulations.

Even though the salary requirements may be the primary issue, employers must remember the application of the exemption is not dependent on job titles but on an employee's specific job duties as well as his salary. In order to qualify for an exemption, the employee must meet **all** the requirements of the regulations.

Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $684 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

This exemption is typically applicable to managers and supervisors that are in charge of a business or a recognized department within the business such as a construction foreman, warehouse supervisor, retail department head, or office manager.

Administrative Exemption

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $684 per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

This exemption may be applicable to certain management staff positions such as safety directors, human resources managers and purchasing managers. Of the exemptions discussed in this article the administrative exemption is the most difficult to apply correctly due to application of the "discretion and independent judgment" criteria with respect to matters of significance. Additionally, there remain a substantial number of administrative assistants who are improperly classified as exempt under this exemption.

Professional Exemption

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $684 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Examples of employees that could qualify for the exemption include engineers, doctors, lawyers, and teachers. The minimum salary requirement does not apply to doctors, lawyers and teachers.

To qualify for the creative professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $684 per week;
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Typically, this exemption can apply to artists and musicians.

Computer Employee Exemption

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than $684 per week or at an hourly rate not less than $27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duty must consist of:
    1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
    2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
    3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
    4. A combination of the aforementioned duties, the performance of which requires the same level of skills.

This exemption does not apply to employees who maintain and install computer hardware.

Outside Sales Exemption

To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of

facilities for which a consideration will be paid by the client or customer; and

- The employee must be customarily and regularly engaged away from the employer's place or places of business.

You will note that this exemption is the only one in this group that does not have a specific salary or hourly pay requirement. Thus, the exemption may be claimed for outside sales employees that are paid solely on a commission basis.

The application of each of these exemptions depends on the duties actually performed by the individual employee rather on what is shown in a job description plus the employee must meet each of the requirements listed for a particular exemption in order for it to apply. Further, the employer has the burden of proving that the individual employee meets all of the requirements for an exemption. Therefore, it is imperative that the employer review each claimed exemption on a continuing basis to ensure that he does not unknowingly incur a back-wage liability.

I am sure there will additional information forthcoming during the coming weeks that could help clarify changes. In the meantime, if I can be of assistance in reviewing your positions, please do not hesitate to contact me.

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