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FLORIDA
EMPLOYMENT LAW LETTER

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SAME-SEX MARRIAGE

What employers need to know about same-sex marriage in Florida

by Robert J. Sniffen and Jeff Slanker
Sniffen & Spellman, P.A.

Several Florida courts have struck down the state's voter-approved constitutional amendment defining marriage as a union between members of opposite sexes. Obviously, those rulings mark a decided change in Florida, which does not recognize same-sex marriage, and affect how employers provide benefits to their employees. Although appeals of those decisions are still pending, employers should begin preparing for the changes same-sex marriage will bring to Florida.

In recent years, prohibitions on same-sex marriage have been struck down throughout the country by both federal and state courts. With the U.S. Supreme Court's decision not to hear marriage equality cases during its current term, the number of states recognizing same-sex marriages rose to more than 30, and numerous challenges to same-sex marriage bans continue to make their way through the courts.

Florida's ban on same-sex marriage invalid

Recently, Florida's same-sex marriage ban has been challenged. In 2008, voters approved an amendment to the Florida Constitution that prohibited same-sex marriage. Florida Amendment 2 added Article I, Section 27, to the Florida Constitution. The amendment defines marriage as a union between one man and one woman and excludes marriages and civil unions between members of the same sex. The amendment states, "Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized." The amendment has been in effect since it was approved in November 2008. More than 60 percent of voters approved the amendment.

Several Florida courts have invalidated the electorate-approved ban on same-sex marriage. Indeed, judges in Monroe, Miami-Dade, and Broward Counties have deemed the amendment unconstitutional. Additionally, the U.S. District Court for the Northern District of Florida struck down the ban as unconstitutional. In *Brenner v. Scott*, the district court held that Florida's ban on same-sex marriage violated the Fourteenth Amendment to the U.S. Constitution.

Although courts have struck down the amendment, those decisions are not necessarily in effect at this time. Florida Attorney General Pam Bondi has appealed a number of the decisions and has asked the Florida Supreme Court to review the merits of the decisions to provide finality on the issue. The

AGENCY ACTION

DOL awards $10.2 million to help states fight misclassification. The U.S. Department of Labor (DOL) has awarded $10,225,183 to 19 states to implement or improve worker misclassification detection and enforcement initiatives in unemployment insurance programs. The funds will be used to increase the ability of state unemployment insurance programs to identify instances in which employers improperly classify employees as independent contractors or fail to report the wages paid to workers at all. This is the first year the DOL has awarded grants dedicated to this effort. The states receiving grants are California, Delaware, Florida, Hawaii, Idaho, Indiana, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, Oregon, South Dakota, Tennessee, Texas, Utah, Vermont, and Wisconsin.

OSHA announces new rules on reporting severe injuries. The Occupational Safety and Health Administration (OSHA) has announced a final rule requiring employers to notify the agency when an employee is killed on the job or suffers a work-related hospitalization, amputation, or loss of an eye. The rule also updates the list of employers partially exempt from OSHA record-keeping requirements. It will go into effect January 1, 2015, for workplaces under federal OSHA jurisdiction. The new rule will require employers to notify the agency of work-related fatalities within eight hours. Work-related inpatient hospitalizations, amputations, or losses of an eye must be reported within 24 hours. Previously, OSHA's regulations required an employer to report only work-related fatalities and inpatient hospitalizations of three or more employees. Reporting single hospitalizations or the loss of an eye wasn't required.

$87 million being put toward state unemployment insurance programs. The DOL has announced awards totaling more than $87 million to improve unemployment insurance programs. The funding, awarded to 46 states, Washington, D.C., Puerto Rico, and the Virgin Islands, will allow state agencies "to implement program integrity and system improvement activities, as well as implement or expand reemployment and eligibility assessment programs," according to the DOL.

Federal contractor settles discrimination case for $1.5 million. The Office of Federal Contract Compliance Programs (OFCCP) announced in September that federal contractor Westat Inc. has agreed to settle allegations that it failed to provide equal employment opportunities to 3,651 African-American, Asian-American, Hispanic, and female job applicants at its Rockville, Maryland, headquarters and at field sites in California, Connecticut, Michigan, Mississippi, New York, North Carolina, and Tennessee. ✤

Florida district court stayed (delayed) the implementation of its decision pending the resolution of the appeals.

However, the resolution of the appeals is in question after the U.S. Supreme Court declined to hear several same-sex marriage cases. The Supreme Court's decision not to hear the disputes effectively upheld rulings that overturned same-sex marriage bans in several states. Also, the Court's decision could signal that it will not uphold the bans if a conflict of opinion develops in the federal appellate courts that have yet to review the issue.

After the Supreme Court's decision, the Florida American Civil Liberties Union filed a motion asking the Florida district court to lift the stay in the *Brenner* case. That motion is still pending.

Same-sex marriage and employee benefits

Florida employers would be well served to review technical guidance on providing benefits to same-sex couples. The U.S. Department of Labor (DOL) released guidance on the issue in the wake of the Supreme Court's 2013 decision in *United States v. Windsor.* In that case, the Supreme Court struck down Section 3 of the federal Defense of Marriage Act (DOMA), which was passed by Congress in 1996. Section 3 prevented the federal government from recognizing same-sex marriages for the purposes of federal benefits, laws, or programs, even if same-sex couples were legally married in their state. Section 3 provided that "marriage" meant only marriage between a man and a woman.

The DOL's guidance on the *Windsor* decision answered many employer questions about providing benefits to employees with same-sex spouses. Guidance on how employers can comply with the Employee Retirement Income Security Act (ERISA), a federal law governing the administration of benefit plans such as pension plans, 401(k)s, and health and welfare plans, in light of the *Windsor* ruling provides that "spouse" refers to individuals who are lawfully married under state law. The guidance also provides that "marriage" can refer to same-sex marriages recognized under state law. The guidance requires employers to extend benefits to same-sex couples if they were married in a state that recognizes same-sex marriage.

Employer takeaways

Although appeals of several Florida court rulings striking down the state's ban on same-sex marriage are still pending, those decisions, coupled with the Supreme Court's *Windsor* ruling and the Court's decision not to hear appeals regarding the validity of same-sex marriage bans in other states, may signal that the writing is on the wall. Accordingly, Florida employers would be well served to review their benefit policies now to prepare for the possibility that they may have to provide benefits to employees in same-sex marriages.

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EMPLOYEE NOTICES

FMLA notices by U.S. mail? That may be insufficient

by Lisa Berg
Stearns Weaver Miller
Weissler Alhadeff & Sitterson, P.A.

Most employers send FMLA notices to employees via regular U.S. mail. However, in a game-changing decision, a federal appellate court recently ruled that sending these notices only by U.S. mail (without proof of receipt) may not be sufficient if the employee denies receipt.

Employer notice requirements

The Family and Medical Leave Act (FMLA) requires employers to provide employees with general and individual notices about the Act. To meet the general notice requirements, an employer must post a notice of FMLA rights in a conspicuous place where it can easily be seen by applicants and employees. If an FMLA-covered employer has eligible employees, it also must provide general notice to each employee by including the notice in its employee handbook or other written guidance regarding employee benefits or leave rights.

In addition, U.S. Department of Labor (DOL) regulations require employers to give employees individual

ASK ANDY

FMLA reinstatement rights for 'key' employees

by Andy Rodman
Stearns Weaver Miller
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Q *It's my understanding that certain high-level employees are not entitled to reinstatement at the end of Family and Medical Leave Act (FMLA) leave. Is that correct?*

A As a general rule, FMLA-eligible employees are entitled to be returned to the same or an equivalent position at the end of FMLA leave. There are limited exceptions to that rule, including the "key employee" exception.

A key employee is a salaried FMLA-eligible worker who is among the highest-paid 10 percent of all employees employed by your company within a 75-mile radius. Under very limited circumstances, a key employee may be denied reinstatement at the end of FMLA leave. To deny reinstatement to a key employee, you must:

(1) Determine that reinstatement will cause "substantial and grievous economic injury" to your operations. The focus is on the injury that would be caused by reinstating the employee, not whether the employee's absence would cause harm to your operations. This is a high standard. Minor inconveniences and costs do not rise to the level of "substantial and grievous economic injury."

(2) Give the employee written notice of her status as a key employee and the potential consequences of the key employee designation, including the potential impact on reinstatement rights, when she advises you of her need for FMLA leave (or when leave commences, if earlier).

(3) Advise the employee in writing as soon as you determine that substantial and grievous economic injury would result from reinstatement. The notice must explain the basis of your finding of substantial and grievous economic injury and give the employee reasonable time to return to work. A key employee's rights continue until she provides notice that she does not want to return to work or you deny reinstatement at the conclusion of the leave.

At the end of leave, a key employee is entitled to request reinstatement even if she did not return to work in response to your notice. You must again determine whether substantial and grievous economic injury would result from reinstating the employee. If so, you must advise the employee of your determination in writing.

In short, a key employee may not be entitled to reinstatement at the end of FMLA leave, but the standard for proving substantial and grievous economic injury is very high. Employers must jump through many hoops before denying reinstatement. Always consult your attorney when making decisions about an employee's FMLA reinstatement rights.

If you have a question or issue you would like Andy to address, e-mail arodman@stearnsweaver.com. Your identity will not be disclosed in any responses. This column isn't intended to provide legal advice. Answers to personnel-related inquiries are highly fact-dependent and often vary from state to state, so you should consult employment counsel before making personnel decisions. ✤

written notice that an absence falls under the FMLA. Thus, once you know that an employee is taking FMLA-qualifying leave, you must (1) notify the employee of her eligibility to take FMLA leave within five business days, (2) notify the employee in writing whether the leave will be designated as FMLA leave, (3) provide written notice detailing the employee's obligations under the FMLA and explaining the consequences for failing to meet those obligations, and (4) notify the employee of the amount of leave that will be counted against her FMLA leave entitlement.

The DOL provides forms employers can use to comply with the requirements. The forms, WH-381—Notice of Eligibility and Rights & Responsibilities and WH-382—Designation Notice, and an FMLA poster are available at www.dol.gov/whd/fmla/.

Recent case shows dangers

Lisa Lupyan was hired as an instructor by Corinthian Colleges in 2004. In 2007, she requested personal leave because of depression. Shortly afterward, she provided a complete FMLA medical certification to support her need for leave. Consequently, her employer converted her personal leave to FMLA leave and sent her the appropriate FMLA notices via U.S. mail.

Lupyan was terminated when she failed to return to work after the 12 weeks of leave provided by the FMLA. She filed a lawsuit alleging that Corinthian Colleges failed to give her notice that her leave fell under the FMLA. She denied having knowledge that she was placed on FMLA leave. The district court granted summary judgment (pretrial dismissal) in favor of Corinthian Colleges, and Lupyan appealed.

The U.S. 3rd Circuit Court of Appeals (which covers Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands) ruled that an employer may not rely on the "mailbox" rule to prove that it provided an employee proper notice under the FMLA. Under the "mailbox" rule, if a letter is proven to have been put in the mail (either by way of the post office or by delivery to a postal worker with proper postage), it is presumed that the letter was received by the person to whom it was addressed. However, that is not a conclusive presumption of law. Instead, it is a rebuttable inference of fact. If the presumption of mailing is opposed by evidence that the letter was not received, a jury must determine whether the letter was actually received.

The 3rd Circuit noted that certified mail provides a stronger presumption of receipt because it creates evidence of delivery. Regular mail provides a weaker presumption since no receipt or proof of delivery exists. Thus, the court found that Lupyan's statement that she never received the FMLA notices was enough to create a genuine issue of material fact. The appeals court reversed the district court's order granting summary judgment. The 3rd Circuit noted:

> In this age of computerized communications and handheld devices, it is certainly not expecting too much to require businesses that wish to avoid a material dispute about the receipt of a letter to use some form of mailing that includes verifiable receipt when mailing something as important as a legally mandated notice.

Although the 3rd Circuit does not cover Florida, its decision may foreshadow how the 11th Circuit (whose rulings apply to all Florida employers) may rule on this issue. Unfortunately, the FMLA regulations are silent regarding the preferred method of service. *Lupyan v. Corinthian Colleges Inc.*, 761 F.3d 314 (3rd Cir., 2014).

Bottom line

Simply mailing a letter and placing a copy in your file may not be sufficient proof of receipt if an employee denies receiving the letter. Although the 3rd Circuit's ruling does not apply to Florida employers, it's a wake-up call for employers that send FMLA notices via U.S. mail. Consider sending FMLA notices by traceable means. Although obtaining a signature from certified mail appears to be a safe bet, many employees do not pick up certified mail. Thus, update your policies to inform employees how FMLA notices will be delivered.

Alternatively, it may make sense to send FMLA notices via a delivery service that uses tracking numbers (e.g., overnight or two-day delivery services that require signatures) or use electronic methods with an electronic receipt you can use to prove the notices were delivered. You may want to consider hand delivering FMLA notices, but be sure to get employees' signatures to confirm receipt. Also, keep delivery records to avoid a factual dispute like the one that allowed Lupyan to proceed with her claim. Lastly, Corinthian Colleges made another mistake by failing to communicate with Lupyan while she was on FMLA leave. Don't fall into that trap.

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WAGE AND HOUR LAW

Docking salaried employees' pay

by Tom Harper
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Recently, a client called to ask whether she could dock the pay of an exempt employee who missed work. Because of the consequences of docking exempt employees' pay and the large volume of wage and hour lawsuits in Florida, I thought an overview of my answer would interest employers.

FLSA requirements and DOL regulations

The Fair Labor Standards Act (FLSA), the federal wage and hour law, requires that employees be paid overtime if they work more than 40 hours in a week. However, certain types of employees are exempt from the overtime requirement. For example, an exemption from the overtime pay requirements exists for employees in a bona fide executive, administrative, or professional capacity as defined by regulations of the U.S. Department of Labor (DOL).

The DOL's regulations state that employees are exempt if they (1) are paid a predetermined weekly salary of at least $455 and (2) perform the job duties set forth for a specific exemption in the regulations. Those requirements are commonly referred to as the salary-basis test and the duties test.

Salary-basis test

The FLSA's language says nothing about the salary-basis test. The test was created by the secretary of labor. The U.S. Supreme Court explained, "Because the salary-basis test is a creature of the secretary's own regulations, his interpretation of it is, under [Supreme Court precedent], controlling unless 'plainly erroneous or inconsistent with the regulation.'"

An employee is paid on a salary basis if he receives a predetermined salary of at least $455 per week and his pay is not subject to reduction because of variations in the quality or quantity of work. The DOL's regulations provide that deductions from an exempt employee's salary may be made in certain situations. Specifically, deductions may be made when an exempt employee is absent from work for one or more *full* days for personal reasons other than sickness or disability. The regulations state that an employer that makes improper deductions from an exempt employee's salary may lose the exemption.

Duties test

If you pay an employee a regular salary and he does not meet the duties test, he is considered a salaried nonexempt employee and must be paid for overtime. You are not required to pay for daily overtime, just overtime for all hours worked over 40 in a seven-day period. You can dock a salaried nonexempt employee's pay or not pay him for time he takes off. In short, you must keep accurate time records for and pay overtime to salaried nonexempt employees.

WORKPLACE TRENDS

Analysis shows slowing of trend away from pension plans. An analysis from professional services company Towers Watson shows that fewer U.S. companies last year moved from defined benefit (DB) plans to offering only a defined contribution (DC) plan to new salaried employees than in any other year over the past decade. The analysis also found that the insurance and utilities sectors are bucking the trend from DB to DC plans. More than half the companies in those sectors still offer DB and DC retirement plans to new salaried employees. The analysis found that only 118 Fortune 500 companies (24 percent) offered any type of DB plan to new hires at the end of 2013, down from 299 companies (60 percent) 15 years ago. While the number of Fortune 500 companies with open DB plans reached a record low in 2013, the number of companies (five) that moved away from DB plans last year is the lowest number that shifted to DC plans in more than 10 years.

More labor shortages predicted. A new report from The Conference Board predicts that serious labor shortages in the world's advanced economies will create unprecedented challenges for business leaders and policymakers over the next 15 years. The report, "From Not Enough Jobs to Not Enough Workers," forecasts the impact of the retirement of Baby Boomers. "Mature economies are facing a historical turning point: For the first time since World War II, working-age populations are declining," said Gad Levanon, director of macroeconomic research at The Conference Board and a coauthor of the report. "The global financial crisis and its aftermath—stubbornly high unemployment in many countries—have postponed the onset of this demographic transformation but will not prevent it from taking hold. Companies in the U.S., Europe, and elsewhere must begin planning now for an environment in which difficulties recruiting and retaining workers will make it significantly harder to control labor costs without losing labor quality," he said.

Workplace jargon—"dynamic" or "out of pocket"? Does the thought of a "forward-thinking" and "dynamic" executive trying to "pick your brain" about "employee engagement" send you into a "deep dive"? If so, you share the sentiment of HR managers responding to an Accountemps survey about the most annoying buzzwords and phrases in the workplace. In addition to those overused and worn-out catchphrases, survey participants pointed to "let me get back to you," "out of pocket," and "LOL" as annoying sayings. Those terms join words and phrases cited in similar Accountemps surveys conducted in 2004 and 2009 that identified clichés such as "win-win," "value-added," "think outside the box," "leverage," "at the end of the day," "circle back," and "synergy." ✤

UNION ACTIVITY

Right to Work Foundation fights UAW drive in Alabama. The National Right to Work Foundation has issued a special legal notice on the United Auto Workers' (UAW) effort to unionize Mercedes-Benz workers in Vance, Alabama. The group is telling workers they don't need to join the UAW to discuss wages and working conditions with their employer. The notice also informs workers about what they can do if they oppose the union or change their minds about supporting it. In addition, the notice addresses workers' rights during a card-check unionization campaign.

Machinists union calls in-flight cell phone calls safety risk. The International Association of Machinists and Aerospace Workers (IAM) has written a letter to members of Congress calling a proposal to allow airline passengers to make in-flight cell phone calls "a bad idea that won't go away." The Federal Communications Commission (FCC) has offered a proposal to allow the use of wireless communications devices on commercial flights, and the U.S. Department of Transportation (DOT) is seeking public input into whether allowing in-flight voice calls would be disruptive. IAM President Tom Buffenbarger's letter encourages members of Congress to oppose the change.

Union calls raises for VA doctors good first step. Increasing the pay rates for Veterans Administration (VA) doctors and dentists should help the Department of Veterans Affairs recruit additional providers, but the VA still needs to take action against retention and retaliation problems, according to a statement from the American Federation of Government Employees (AFGE). "VA Secretary Robert McDonald has taken a good first step toward improving veterans' access to care by proposing to update the pay rates for physicians and dentists, who haven't seen an increase since October 2009," AFGE National President J. David Cox Sr. said in September, adding that the VA has more work to do. "While bringing on more physicians could help address some of the frustrations that our doctors experience, the VA needs to review all of the reasons for the high attrition rates and determine what more needs to be done to improve retention," Cox said.

Indiana auto workers ratify deal with Lear. The UAW announced in September that all workers at Lear Corp.'s plant in Hammond, Indiana, will earn more than $21 an hour by the end of a new four-year contract ratified a week after a one-day strike at the plant. Under the deal, wages will start at $16.50 and rise to $21.58 by the end of the agreement, establishing a new industry standard for seating workers across the country. Wages for some workers will rise more than 60 percent, according to the UAW. ✤

Only full-day deductions

You can make full-day deductions from exempt employees' pay for workdays missed for reasons other than illness. (Remember, the burden of proving an employee is exempt is on you.) For example, you may have a written policy that states that exempt employees will not be paid if they choose not to work the day before or the day after a scheduled holiday. We suggest you follow these guidelines:

(1) Make clear that you deduct only for full-day absences and that exempt employees will not have their pay docked in partial-day increments. You cannot make partial-day deductions from an exempt employee's pay.

(2) Deduct missed partial days from employees' paid time off (PTO) accruals. Federal courts and the DOL take the position that under federal law, employers aren't prohibited from making deductions from employees' vacation or PTO banks for partial-day absences. However, this aspect can become confusing when a partial-day absence puts an employee's PTO balance in the negative and results in a pay deduction. We recommend you don't go there.

(3) Encourage exempt employees not to take advantage of their exempt status by charging absences to their PTO bank. Thus, until their PTO is exhausted, they will receive their regular salary, even if they miss work for personal reasons. Charge absences against employees' PTO banks as an incentive not to cut out early on holiday weekends. Also, this practice is unlikely to cause morale problems and will likely be accepted by employees.

    If an employee develops a pattern of absences, address the issue with progressive discipline instead of reducing his pay. From our experience, requiring employees to use PTO is a sufficient penalty, and it is clearly legal. Although Florida courts have said that employers can go further and reduce exempt employees' pay for full-day absences, that practice is more likely to be challenged. In addition, reducing employees' pay when their PTO is exhausted may cause morale problems. However, in *Bell v. Callaway Partners,* the 11th Circuit approved deductions for full-day absences.

(4) Remember that under the salary-basis test, an employee must receive his full salary for any week in which he performs any work. If you want to suspend an exempt employee without pay as discipline, you must suspend him for an entire week.

(5) Your company's written policy should include the statement that "exempt employees will not have their pay docked in partial day increments."

How do you calculate deductions?

In a 1997 opinion letter, the DOL responded to an employer's question about its plan to make deductions from exempt employees' wages if they missed full workdays for personal reasons. The letter stated:

> It is the [DOL's] long-standing position that where there is an understanding that a normal workweek consists

> of five or six workdays, the deduction permissible for a day of absence under [the regulations] must be calculated on the basis of one-fifth of a five-day workweek or one-sixth of a six-day workweek, whatever the case may be.

Bottom line

Check your pay practices. Making improper deductions can destroy the salary-basis requirement for an employee's pay and cost you the exemption. Doing so could be a violation of the record-keeping requirements by failing to have a presumably exempt employee keep time records, and you could wind up owing the employee overtime for all hours worked!

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EMPLOYMENT LAW

Supreme Court takes on pregnancy accommodations, other employment issues

With the opening of the U.S. Supreme Court's new term October 6, employers can expect clarifications related to accommodations for pregnant workers as well as other employment matters. Here's a look at some key cases.

Pregnancy discrimination

The Court is going to decide when the Pregnancy Discrimination Act (PDA) requires an employer that provides accommodations to nonpregnant employees with work limitations to also provide accommodations to pregnant employees who are "similar in their ability or inability to work."

The case, *Young v. United Parcel Service,* stems from a pregnant delivery driver who asked for a light-duty assignment because of lifting restrictions her doctor recommended. When the employer refused her request, she took unpaid leave. She then sued, claiming pregnancy discrimination and that the employer "regarded" her as having a disability in violation of the Americans with Disabilities Act (ADA).

The employer argued that it didn't violate the ADA or the PDA and that it followed provisions of its collective bargaining agreement (CBA) in deciding who was eligible for light-duty assignments. The CBA required accommodations only for workers needing accommodations because of a work-related injury. The lower court sided with the employer.

After the Supreme Court decided to hear the case, the Equal Employment Opportunity Commission (EEOC) issued new guidance on pregnancy discrimination. In fact, the U.S. solicitor general argued that the Supreme Court shouldn't take the case because the EEOC was working on guidance.

The new guidance, released in July, says the 2008 amendments to the ADA apply when an employee has a pregnancy-related disability. Therefore, a pregnancy-related impairment such as morning sickness may be a covered disability under the ADA if it substantially limits a major life activity.

Young v. United Parcel Service is scheduled to be heard December 3.

Security screenings and compensable time

In another employment-related case—*Integrity Staffing Solutions v. Busk*—the Court will decide whether time spent in security screenings is compensable under the Fair Labor Standards Act (FLSA).

The case arose when two former employees working at separate warehouses in Nevada sued Integrity Staffing Solutions, Inc., claiming they should have been compensated for time spent undergoing postshift security checks. Integrity Staffing provided clients with warehouse space and staffing services. The employer required employees to undergo a security check after clocking out to minimize employee theft. Sometimes employees waited as long as 25 minutes to be searched and go through metal detectors.

A pregnancy-related impairment such as morning sickness may be a covered disability under the ADA.

The two former employees filed suit on behalf of all the employees who were subjected to the searches. They claimed the security check was conducted for the employer's benefit, and therefore, they should be paid for the time. The trial court dismissed the case without a trial, but the 9th Circuit reversed the dismissal.

Busk v. Integrity Staffing Solutions, Inc., was scheduled to go before the Supreme Court on October 8.

Retiree health benefits

The Supreme Court also is scheduled to hear *M&G Polymers USA, LLC v. Tackett,* a case centering on how retiree healthcare benefits should be interpreted in CBAs. The case attempts to settle the question of what language is necessary in a CBA to determine whether retiree healthcare benefits should continue indefinitely or whether they can be changed or terminated in future contract negotiations.

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An entry on the Supreme Court of the United States Blog (commonly referred to as SCOTUSblog) explains that the case will settle whether "courts should presume that silence concerning the duration of retiree healthcare benefits means the parties intended those benefits to vest (and therefore continue indefinitely), as the 6th Circuit holds; or should require a clear statement that healthcare benefits are intended to survive the termination of the collective bargaining agreement, as the 3rd Circuit holds; or should require at least some language in the agreement that can reasonably support an interpretation that healthcare benefits should continue indefinitely, as the 2nd and 7th Circuits hold."

M&G Polymers USA, LLC v. Tackett was scheduled for argument on November 10.

Religion and 'look policy'

The Supreme Court also will consider the case of a Muslim woman who sought a job at an Abercrombie & Fitch Abercrombie Kids store in Tulsa, Oklahoma, in 2008. The woman, who was 17 at the time, wore her hijab, a scarf worn by Muslim women for religious reasons, to the interview but didn't specifically request a religious accommodation to the company's "look policy." Among other things, the policy prohibits hats.

The applicant was judged to meet the requirements of employment, but when the store's assistant manager tried to get the OK for the hijab, a supervisor said the scarf didn't comply with the company's policy. Therefore, the applicant wasn't hired. The supervisor maintained that he didn't know the applicant wore the scarf for religious reasons.

The EEOC filed a lawsuit, and a lower court sided with the applicant. The 10th Circuit reversed the ruling by deciding that the company shouldn't be held liable since the applicant didn't overtly notify the company that the scarf was part of her religious practice.

The Supreme Court will take up whether an applicant is required to specifically request a religious accommodation or whether requiring such a request would put too much of a burden on the applicant.

A ruling in *EEOC v. Abercrombie & Fitch* is expected by the end of June 2015. ✤

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