

Employment Law Update: Ten Hot Employment Topics!

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NOTICE!!!!!!

- This material is designed and intended for general informational purposes only, and is not intended, nor should it be construed or relied upon, as legal advice. Please consult your attorney if specific legal advice is desired.

Topic #1: New Iowa Minimum Wage Law

- Beginning Jan. 1, 2008 - \$7.25 per hour
- Recall it went up to \$6.20 per hour on April 1, 2007

#1 Iowa Minimum Wage

- Who must comply?
- Those employers doing at least \$300,000 in gross sales/business a year.
- **HOWEVER**, certain “named enterprises” must comply with the law regardless of how much business they do

#1 Iowa Minimum Wage

- “Named Enterprises” who must comply with minimum wage law regardless of sales:
- All schools, including pre-school, daycares (Exception for certain “in home” daycares with fewer than 5 children and only 1 employee)
- All public agencies

#1 Iowa Minimum Wage

- “Named enterprises” that must comply with law regardless of sales, (cont.):
- Hospitals, residential care facilities for sick, elderly, handicapped
- Construction
- Laundry and dry cleaning
- All forms of public transportation if the carrier is subject to state, federal regulations

#1 Iowa Minimum Wage

- How does federal minimum wage law work with new Iowa minimum wage?
- If employer is covered under both laws, must meet both laws. Do not get to choose. If Iowa law says pay more, you pay more. Iowa law “trumps” federal law.
- Federal minimum wage changed too! Effective July 24, 2008 new federal wage went up to \$6.55; July 24, 2009 will be \$7.25.

#1 Iowa Minimum Wage Law

- What else is in Iowa law?
- “Initial employment wage” means that for the first 90 days of new hire’s employment, you can pay \$6.35 per hour (as of Jan. 1, 2008).
- CAREFUL: What if you are an employer who must follow federal minimum wage? Then initial employment wage must be at least \$6.55 an hour. Exception – federal youth wage for workers less than 20, only 90 days - \$6.35 is okay.
- How do I count 90 days? May encompass more than one hiring period; but when hit 91, must pay full minimum wage.

#1 Iowa Minimum Wage

- What happens if you don't pay the new Iowa minimum wage?
- If you get caught, pay the back wages owed, plus attorneys fees, interest, court costs. Did not have to pay "liquidated damages" for a period from April 1 through July 1, 2007. After that, you will be charged "liquidated damages," generally meaning back pay times 2.

#1 Iowa Minimum Wage

- If an employee believes he/she has not been paid Iowa minimum wage, what can he/she do?
- File a claim against the employer with the Iowa Division of Labor, which is part of Iowa Workforce Development. Download a form from IWD web site. Or the employee may sue in court.

#1 Iowa Minimum Wage

- Do I need to change my poster since the Iowa Minimum Wage Law changed?
- Yes. You need to change your poster. Can get a FREE poster from IWD. Contact local IWD office for posters. Check our web site at www.iowaworkforce.org for listing of contact information.

#1 Iowa Minimum Wage

- Questions:
- How to count the \$300,000?
- Application of the law to “seasonal” workers?

#2 Missed Breaks

- Pennsylvania class action jury verdict for \$78.5 million to some 170,000 Wal-Mart, Sam's Club employees for failure to pay for missed rest breaks, work-off-the-clock
- Employee lawyers say estimated \$76 million for lost rest breaks, \$2.5 million for off-the-clock work

Topic #2 Missed Breaks

- Judge just granted an additional \$62 million in liquidated damages (company willful, denied breaks in bad faith)
- In addition, Wal-Mart must pay plaintiffs' attorneys fees (asked for \$46 million)

#2 Missed Breaks

- Wal-Mart is appealing.
- Covered time period March 1998 through May 2006
- Jury found that Wal-Mart did not make employees miss meal breaks (which were unpaid)
- Of \$78 million, payments of \$50, up to several thousand dollars to individual plaintiff/employees

#2 Missed Breaks

- Plaintiff Employees argued: employees forced to work through breaks to maximize profits

#2 Missed Breaks

- Defendant Wal-Mart argued: many times workers took breaks, but forgot to swipe I.D. card to show they were on break; although company strongly discourages it, many employees wanted to keep working; company installed automatic systems to make sure employees take breaks and do not work off-the-clock

#2 Missed Breaks

- The Law:
- Federal Fair Labor Standards Act (FLSA)
- Covers most employers

#2 Missed Breaks

- FLSA:
- 1) Must pay employees for time spent working
- (2) Meal Breaks: no obligation to give; no obligation to pay so long as more than 20 minutes and not interrupted for work; employers commonly give 15-min. breaks for every 3-4 hours, and 30-minute unpaid meal break for longer shift
- (3) Rest Breaks: no obligation to give with limited exceptions; must pay if 20 minutes or less

#2 Missed Breaks

- Iowa Wage Payment Collection Act
- Covers “employers,” defined as “person who ... employs for wages a natural person”

#2 Missed Breaks

- Iowa Wage Law
- (1) Must pay employees for time spent working
- (2) Meal Breaks: no obligation to give; no obligation to pay; employers commonly give 30-minute unpaid meal break

#2 Missed Breaks

- Iowa Wage Law (continued)
- (3) Rest Breaks: no obligation to give; commonly give 15-minute breaks for every 3-4 hours
- Child Labor Exception: Under age 16, must give 30-min. break if work at least 5 hours

#2 Missed Breaks

- Key to Iowa Law -- MUST FOLLOW YOUR POLICY/PAST PRACTICE regarding breaks!

#2 Missed Breaks

- What happened at Wal-Mart?
- Company policy of giving one paid 15-minute break during a shift of at least 3 hours and two 15-minute paid breaks, plus a 30-minute unpaid meal break if working a 6-hour work period.

#2 Missed Breaks

- Interesting evidence:
- Plaintiff employees' lawyers showed sometimes employees logged in at cash register, but they were not on the clock
- Plaintiff employees' lawyers showed Wal-Mart computers were programmed to dock workers for every minute they signed in late for work, claimed the minutes of lost pay saved Wal-Mart stores in Penn. \$26 million a year

#2 Missed Breaks

- Other similar cases:
- California jury ruled Wal-Mart owes \$172 million to 116,000 workers for denying meal breaks required under California state law
- Other Wal-Mart class actions attempted, pending in 17 other states

#2 Missed Breaks

- What does the law allow a plaintiff employee to collect?
- Under FLSA: missed wages for 2 years, possibly 3 (willful); liquidated damages (times 2); and employer pays plaintiff employee's attorneys' fees
- Iowa Law: missed wages; liquidated damages (formula, up to equal missed wages); and attorneys' fees

#2 Missed Breaks, Other Wage Issues

- Settlement of \$87 million to 20,000 UPS drivers in California who claimed company improperly deducted a standard 30-minute meal break when their schedule was so tight they couldn't take a break, and did not provide rest breaks as promised
- Settlement of \$3.88 million for Menards' workers in Illinois for denying accrued vacation pay upon termination

#2 Missed Breaks

What is the point?

#3 Mailing Paychecks

- Change in Iowa's wage law related to mailing of actual paychecks took effect July 1, 2008
- Applies to mailing of actual checks, not pay stubs (not affect direct deposit law)
- Employer must have written request from employee before wages can be sent to employee via mail
- Relevant web site is <http://www.iowaworkforce.org/labor/wage.htm>

Topic #4 - Overtime

- New overtime regulations that took effect August 2004
- Revisions to executive, administrative, professional, outside sales, computer exemptions
- What has happened since then?

#4 Overtime

- Federal Dept. of Labor issued some opinion letters this fall emphasizing the importance of “education, independent judgment, management responsibilities” in determining whether an employee is exempt from overtime because they are “executive” or “administrative” employees.

#4 Overtime

- Opinion letters focus on specific jobs:
- (1) Mortgage loan officers
- (2) Loss prevention managers
- (3) Service station managers
- (4) Corporate legal analysts
- (5) Respiratory therapists

#4 Overtime

- Other overtime exemption DOL opinion letters/court decisions:
- Store managers need not be physically present to satisfy executive exemption (Oct. 30, 2006 opinion letter)
- 9th Circuit court finds insurance claims adjusters are exempt from overtime, overturning a \$52 million verdict

#4 Overtime

- One major hardware retailer recently reached confidential settlement about overtime relating to 75,000 current or former employees
- Another class action involving another hardware retailer is proceeding on behalf of “thousands” of assistant sales managers who claim they were wrongfully denied overtime

#4 Overtime

- IBM agrees to pay \$65 million to settle allegations it failed to pay overtime to technical services and information technology employees (some 32,000 current/former systems administrators, network technicians, other technical staff)
- Wells Fargo agrees to pay \$12.8 million to allegedly misclassified business analysts and business consultants

#4 Overtime

- What is the point? Get your classifications right!
- Check DOL web site at www.dol.gov for new overtime fact sheets, wage/hour opinion letters.
- Call DOL at (515) 284-4625

Topic #5 – “Ready to Go” Pay

- Issue: When does the compensable workday begin and end?
- Another federal Fair Labor Standards Act case (IBP v. Alvarez - Nov. 2005)
- Before this case, U.S. Supreme Court ruled employees must be paid for time spent “donning and doffing” (putting on, taking off) specialized protective gear
- Key to those in meat processing plants

#5 – “Ready to Go” Pay

- IBP v. Alvarez raised questions about whether employees who “don and doff” must be paid at four other times. Here is what U.S. Supreme Court said:

#5 “Ready to Go” Pay

- (1) Pre-don waiting time: if employer requires employee to get to work at a specific time, requires them to wait before “donning,” that is paid time; but if employee gets to work earlier than they have to, and then waits – that is not compensable

#5 “Ready to Go” Pay

- (2) Post-donning walking time: time from locker room to production floor should be paid; Ct said workday begins upon the donning of the safety equipment

#5 “Ready to Go” Pay

- (3) Pre-doffing walking time: time from production floor to locker room should be paid

#5 “Ready to Go” Pay

- (4) Pre-doffing waiting time: if the employee is required to wait until removing safety equipment, that must be paid
- NOTE: Decision does not apply to employees who only wear “light” safety equipment, such as safety glasses, hardhats, ear plugs

#5 “Ready to Go” Pay

- What is impact of this “ready to go” pay decision in other employment settings?
- Telemarketing: employees are told to be “ready to go” at 9 a.m., which means having computer turned on, programs called up; may mean “logging” on at 8:50 to be “ready to go”

#5 “Ready to Go” Pay

- Operating Room Technicians: must have the instruments carts ready before surgery starts
- Housekeepers: must get carts stocked and “ready to go” at a certain time

#5 “Ready to Go” Pay

- What is the point?

Topic #6- References and Defamation

- What can you say about that fired employee?

#6 – References & Defamation

- Proceed with caution.
- Iowa Code Chapter 91B passed almost 10 years ago provides protection to employers when giving references. Law says immune from liability so long as they:
(a) provided work-related information about current/former employee: (b) to someone they believe in good faith to be a prospective employer

#6 – References & Defamation

Iowa Code 91B: **BUT** an employer can lose that protection from liability if employer:

- (1) Acts “unreasonably” (violation of civil rights); or
- (2) Knowingly provides information to someone who has no legitimate or employment-related interest in the work-related information; or
- (3) Provides irrelevant information due to malice or they have no good faith belief the information is true

#6 – References & Defamation

- Hlubek v. Pelecky (Iowa Supreme Court)
- Court upheld immunity for employer and employer's supervisors

#6 References and Defamation

- Give reference to someone believed to be prospective employer
- Shaver v. Independent Stave Co. d/b/a Salem Wood Products
- Focus on what was said and to whom?
- Set up case

#6 References & Defamation

- Stephenson v. Wellmark, Inc.
- Terminated employees sued four alleged “talking” managers and the company for not adequately controlling the “talking managers”
- Employer said “talking managers” acted “outside the scope of their employment”
- Ct agreed. “Talking managers” at risk.
- What is the point?

#6 References and Defamation

- Iowa's Blacklisting Law – intentional interference with prospective business relationship

References and Defamation

- Immunity protection, but do it right!
- (1) Who is giving out information?
- (2) To whom is it being given?
- (3) What is the information based upon – documents in file, witnesses?
- (4) Is the information related to employment?
- (5) Was it provided in good faith, no malice?

#6 References, Defamation, Privacy

- Iowa Machine Shed Case
- Personnel information about 80 employees inadvertently printed on back of menus; company destroyed them
- Employee complained, told menus tossed
- Two weeks later, customer complaint came in about the employee; were previous complaints

#6 Privacy

- Employee terminated
- She sues, alleging wrongful discharge, claims she was fired because she complained about release of information on menus; claimed public policy violation
- Ct disagreed, ruled against her, said she did not define “public policy” that allegedly was violated; some states notification laws
- Ct said “identify theft” is a criminal violation

Topic #7 – Age Discrimination

- Predictions of labor shortage
- Aging workforce
- Federal and state discrimination laws forbidding discrimination in employment practices on the basis of age

#7 Age Discrimination - Hiring

- Federal Age Discrimination in Employment Act (ADEA) applies to all private employers with 20 or more employees, state and local govts., schools, others; protected class age 40 and over
- Iowa Civil Rights Act applies to employers with 4 or more employees

#7 Age Discrimination - Hiring

- Agencies advise employers not to ask for age on applications, or date of graduation, etc.
- Iowa Civil Rights Act regulations currently state at 161-8.15(216): “Help wanted notices or advertisements shall not contain terms and phrases such as “young,” “boy,” “girl,” “college student,” “recent college graduate,” “retired person,” or others of a similar nature...”.

#7 Age Discrimination - Hiring

- Along come baby boomers, labor shortage and U.S. Supreme Court decision in *General Dynamics Land Systems, Inc. v. Cline*

#7 Age Discrimination - Hiring

- Cline: Court held that the ADEA does not prohibit favoring the older over the young, even when the “young” are over age 40 and thus in the protected class
- EEOC issued new ADEA regulations on July 6, 2007 related to hiring; new regulations reflect the “graying of American”

#7 Age Discrimination - Hiring

- New EEOC regulations: “Help wanted notices or advertisements may not contain terms that limit or deter the employment of older individuals. Notices or advertisements that contain terms such as *age 25 to 35, young, college student, boy, girl*, or others ..violate the Act unless one of the statutory exceptions applies. Employers may post help wanted notices or advertisements expressing a **preference** for older individuals with terms such as *over age 60, retirees, or supplement your pension.*”

#7 Age Discrimination - Hiring

- EEOC still advises that employers do not ask for age; while asking for age, birth date by itself it is not a violation, may deter older individuals from applying. Agency says it will “closely scrutinize” such applications to assure it is for “permissible purpose.” **NOTE: IOWA LAW NOT CHANGED!!!!**

Topic #8 – Retaliation

- New U.S. Supreme Court Case
- Burlington Northern v. White
- Seen as blow to employers

#8 Retaliation

- Previous proof: show that in retaliation for making a “protected” complaint, employee was subjected to a negative “ultimate employment decision” (demoted, fired, etc.)

#8 Retaliation

- New Law: employer's actions are "retaliatory" if:
- (1) they would have been *materially adverse* to a reasonable employee or applicant;
- (2) they could well dissuade a *reasonable worker* from making or supporting a charge of discrimination

#8 Retaliation

- Examples of what is considered retaliation:
- Obvious – refuse to hire, cut pay, demote, terminate

#8 Retaliation

- Others – assigned to a “dirtier,” tougher job even with same classification and pay;
- Suspended, even with pay

#8 Retaliation

- Schedule change for a young mother with kids
- Refusal to invite an employee to lunch if it is a training lunch
- What is the point? **TRAINING!!!!!!**

Topic #9 Drug Testing

- Recent Iowa Supreme Court case: once again, if you do it, do it right!

Topic #10 – 5 Ten More!

- (1) Jury Trial Allowed Under Civil Rights Act: Important!
- (2) Old Employee Handbooks: They Can Haunt You!
- (3) Revised FMLA Regulations: Haven't Received Final Regulations (Fall?)
- (4) Privacy: Ouch, I Lost the Company Laptop!
- (5) Cell Phone Use & Blogging Policies