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SOCIETY FOR HUMAN RESOURCE MANAGEMENT

JULY 2011

Legal Report

A Publication of the **Society for Human Resource Management**

Reasonable Break Time For Nursing Mothers Clarified

By Kate Kleba and Leah Snyder Batchis

A little-discussed provision of the health care reform law—the 2010 Patient Protection and Affordable Care Act—amended the Fair Labor Standards Act (FLSA) to require employers to provide "reasonable break time" for nursing mothers to express breast milk at work. The rule became effective in March 2010. Although clear guidance on all aspects of implementation has yet to be provided by the Department of Labor (DOL), employers should act now to ensure compliance with the rule. This article describes the DOL's preliminary interpretation of and guidance for the reasonable break time rule and suggests precautionary measures employers can take to guard against claims of noncompliance.

The law requires employers to "provide a reasonable break time for an employee to express breast milk for her nursing child for one year after the child's birth each time such employee has need to express milk." Moreover, employers must "provide a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public" for nursing employees.

After announcement of the reasonable break time rule in March 2010, employers and other stakeholders raised questions about the new requirements and the obligations imposed on employers. Although the rule was already in effect, no guidance was issued until December 2010 when the DOL's Wage and Hour Division issued a single-page fact sheet providing general information on the reasonable break time rule. In late December 2010, in response to requests

continued on page 2 ➤

MORE IN THIS ISSUE

continued from page 1

for guidance, the DOL issued a notice in the *Federal Register* providing its "preliminary interpretations" of the new rule. Unfortunately, this may be the only guidance employers get from the DOL, as it has stated it does not intend to issue formal regulations implementing the reasonable break time rule. In the absence of additional guidance, employers would be wise to consider the fact sheet and preliminary interpretations when establishing policies for nursing employees.

Relationship to the FLSA

Because the reasonable break time rule was inserted into Section 7 of the FLSA, which sets forth the FLSA's overtime pay requirements, the rule does not apply to all employees. Rather, the rule covers only employees who are entitled to overtime pay under the FLSA.

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Also not covered by the reasonable break time rule: movie theater employees; certain agricultural and amusement park employees; qualifying administrative, executive, professional or outside sales employees; and other employees exempt from overtime rules under Section 213 of the FLSA. Employees who are solely governed by other federal laws, such as railway workers, similarly are not covered by the reasonable break time rule. Therefore, unless an employer is otherwise obligated to provide breaks to nursing mothers under state or local law, an employer need not provide reasonable break time to overtime-exempt employees under the rule. However, Arkansas, California, Colorado, Connecticut, the District of Columbia, Georgia, Hawaii, Illinois, Indiana, Maine, Minnesota, Mississippi, Montana, New Mexico, New York, North Dakota, Oklahoma, Oregon, Puerto Rico, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington and Wyoming have laws regarding breast-feeding at work.

Although the reasonable break time rule specifically states that employers are not required to compensate nursing mothers for breaks, if an employer customarily provides its employees with paid breaks of 20 minutes or less, it must permit nursing mothers to use those paid breaks to express milk. Any additional time used beyond the authorized paid break time need not be compensated. As with other unpaid break periods under the FLSA, an employee must be completely relieved from duty during the break if the break is to be uncompensated.

Frequency and Length of Breaks

The reasonable break time rule requires employers to provide breaks "each time such employee has the need to express milk." Informed by guidance provided by public health officials, the DOL "expects that nursing mothers typically will need breaks to express milk two to three times during an eight-hour shift."

With respect to the length of each break, the DOL cautions that the length of time necessary will vary from woman to woman. Therefore, employers should consider various factors in determining how much time will be needed by their employees, such as:

- The time it takes to walk to and from the provided break space.
- Whether the employee has to retrieve and return the pump, other supplies and expressed milk from where they are stored during the workday.
- How long it takes to set up the pump.
- The efficiency of the pump and whether there is a nearby sink and running water to allow the employee to properly clean the pump after use.

The DOL warns that "it will consider all the steps reasonably necessary to express breast milk, not merely the time required to express the milk itself" when assessing the reasonableness of the break time provided.

Facility Requirements

The rule requires employers to provide "a place, other than a bathroom, that is shielded from view and free from intrusions by co-workers and the public" to allow employees to express milk. Employers are "not obligated to maintain a permanent, dedicated space for nursing mothers" under this provision; rather, a temporary space that has been created or converted to meet the privacy requirements of the law will suffice. At a minimum, the space provided "must contain a place for the nursing mother to sit, and a flat surface, other than the floor, on which to place the pump." Echoing its comments on the length and frequency of breaks, the DOL emphasizes that all

continued on page 3 ➤

continued from page 2

of the circumstances will be taken into account in assessing compliance. The DOL notes that "where the designated space is so far from the employee's work area as to make it impractical for the employee to take breaks to express milk, or where the number of nursing employees needing to use the space either prevents an employee from taking breaks or necessitates prolonged waiting time," it will consider the employer out of compliance. Although the DOL "interprets an employee's right to express milk for a nursing child to include the ability to safely store the milk for her child," employers are not required to provide nursing mothers with refrigeration options to store expressed milk. However, employers must permit nursing mothers to bring to work an insulated food container for storing the milk and must ensure that there is a place where pumping supplies and expressed milk can be stored without being disturbed or contaminated.

Finally, it is the DOL's opinion that an employer has a statutory obligation to comply with the requirements of the new rule regardless of where the employee is physically located. As such, employers are required to ensure that their employees have access to an acceptable space even when working off-site, such as at a client worksite. Given the DOL's position, employers that routinely send nonexempt employees to client worksites should be mindful of this obligation when making arrangements for off-site work.

In recognition of the challenges that these rules will pose for employers with space limitations and those who employ workers in non-fixed locations, the DOL requested public comment and advice about how employers can creatively solve these kinds of issues. Hopefully, additional guidance on these difficult issues will be forthcoming.

Undue Hardship

The rule provides an exemption for employers with fewer than 50 employees if compliance with the rule would "impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature or structure of the employer's business." The DOL will not grant prospective undue hardship exemptions and expects that employers will be able to successfully invoke the exemption "only in limited circumstances."

Significantly, unlike the Family and Medical Leave Act (FMLA), this new rule does not exclude employers with fewer than 50 employees within 75 miles of a particular worksite. Rather, all employers with 50 or more employees—counting all full- and part-time employees across all worksites—must comply with the law regardless of difficulty or expense. The DOL intends to use the FLSA workweek standard for the purpose of determining

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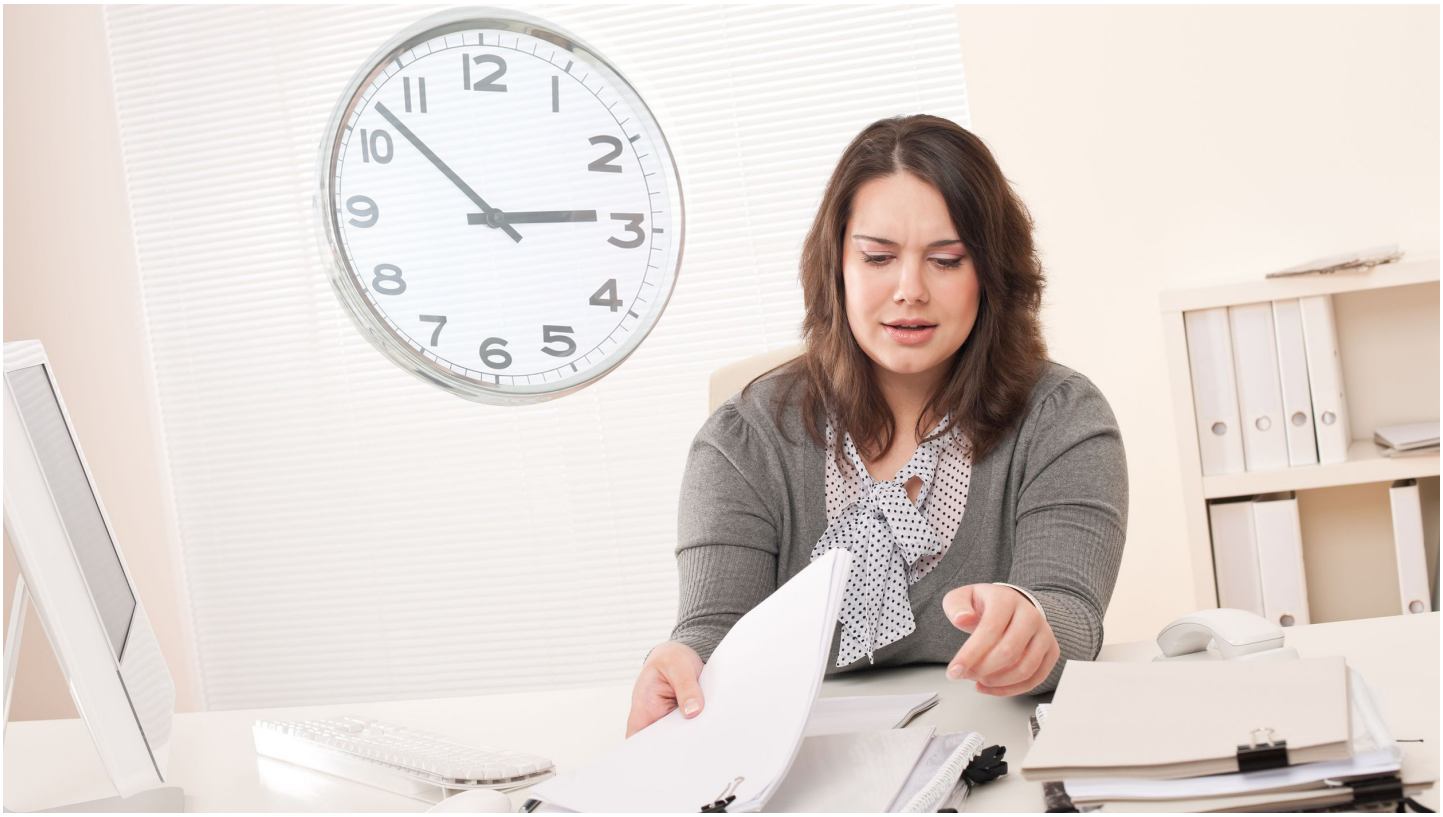

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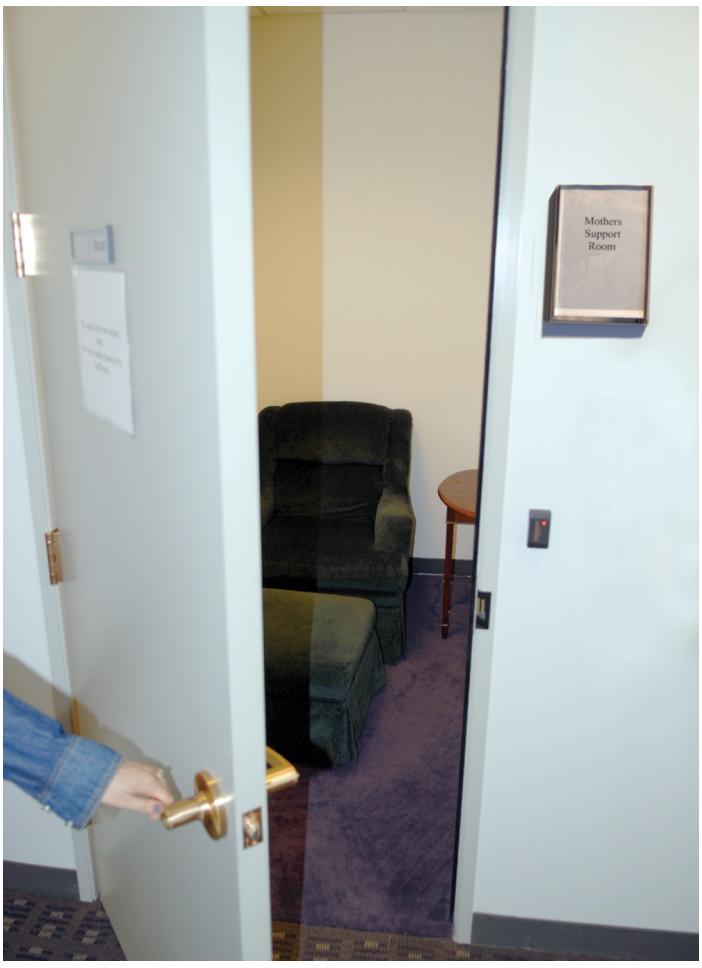
whether an employer has 50 employees. Although the DOL "believes it is necessary to fix the workweek at which the number of employees are counted," it is still considering what that measuring point should be and has requested comments from the public to inform its decision-making. Additionally, the DOL requested comments on whether "undue hardship" under this provision should be interpreted the same way this term is interpreted under the Americans with Disabilities Act. It is likely that the DOL will issue additional guidance on both of these aspects of the reasonable break time rule in the future.

Relationship to the FMLA

Breaks taken to express milk should not be considered FMLA leave or counted against an employee's FMLA leave entitlement. Although the FMLA entitles employees to take unpaid, job-protected leave in order to care for a newborn child, the DOL's view is that expressing milk at work does not constitute bonding with or caring for a newborn child. Nor does the DOL believe that expressing milk will "typically be associated with a serious health condition" under the FMLA.



FMLA leave does not apply to leave taken for reasons not covered by the FMLA and thus does not include breaks taken pursuant to the reasonable break time rule.

Suggestions to Help Ensure Compliance

In light of the DOL's lack of definitive guidance, employers should take proactive steps to ensure compliance. Employers

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should draft a formal reasonable break time policy outlining who is covered, what employees should do if they expect to need reasonable break time, whom to notify about arranging for reasonable break time, and rules and procedures for taking breaks. Employers that maintain an employee handbook should incorporate the reasonable break time policy into the handbook.

To guard against claims of noncompliance, employers should take into account the guidance provided by the DOL in establishing a space for reasonable break time. Moreover, employers should initiate early conversations with employees about the potential need for reasonable break time. The DOL specifically notes that employers are permitted to ask pregnant employees if they intend to take breaks to pump milk when they return to work. Employers should consider documenting such conversations to protect against later disputes about an employer's efforts to comply with the reasonable break time rule. Additionally, employers should notify managers about the reasonable break time rule and provide training to all supervisory-level employees to ensure that they understand the company's compliance obligations. Finally, because the DOL solicited public comment on specific aspects of the rule, employers should be alert for additional DOL guidance.

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Dealing with Workplace Bullies

By Margaret Hart Edwards

Tom Stagg works as a telecommunications technician. He is big and strong, hunts for sport, has a shotgun in his pickup truck, and prides himself on not taking grief from anyone. When his boss corrects him, Tom aggressively says the supervisor is wrong and Tom can prove it, and threatens, "Don't mess with me." When a co-worker tells Tom that he's not doing his share, Tom swears at the co-worker, says he knows where the person lives and warns the individual to shut up. When his employer decides to give away some old office furniture to employees, Tom arrives with his pickup truck, shoves other employees aside and announces that he is taking the first pick. When Tom is given a warning for inaccurate time sheet entries, he threatens to sue the HR manager personally for defamation. After another manager criticizes his behavior, the manager finds his car has been keyed in the company lot. Tom is a bully.

Judith Short is VP of operations. When a subordinate presents a report, she glances at it, labels it "trash" and tells the subordinate in front of a co-worker, "You just don't get it." After the subordinate goes to HR in tears, the HR manager meets with Judith to coach her about communications. Judith tells the HR manager that she, Judith, is not "politically correct" and that she is "tough and proud of it, as a woman has to be tough." Judith also tells the HR manager that he obviously doesn't understand the needs of the business, and that he'd better "get a clue" about how things work or he won't last long. Judith announces that the subordinate will be put on a 30-day performance improvement plan, which will be a "short runway" out of the company. Judith is a bully.

There are many types of bullying behaviors, but some of the most common examples, according to the Workplace Bullying Institute, are:

- Falsely accusing the person of errors made or insubordination.
- Staring, glaring or other nonverbal demonstrations of hostility.

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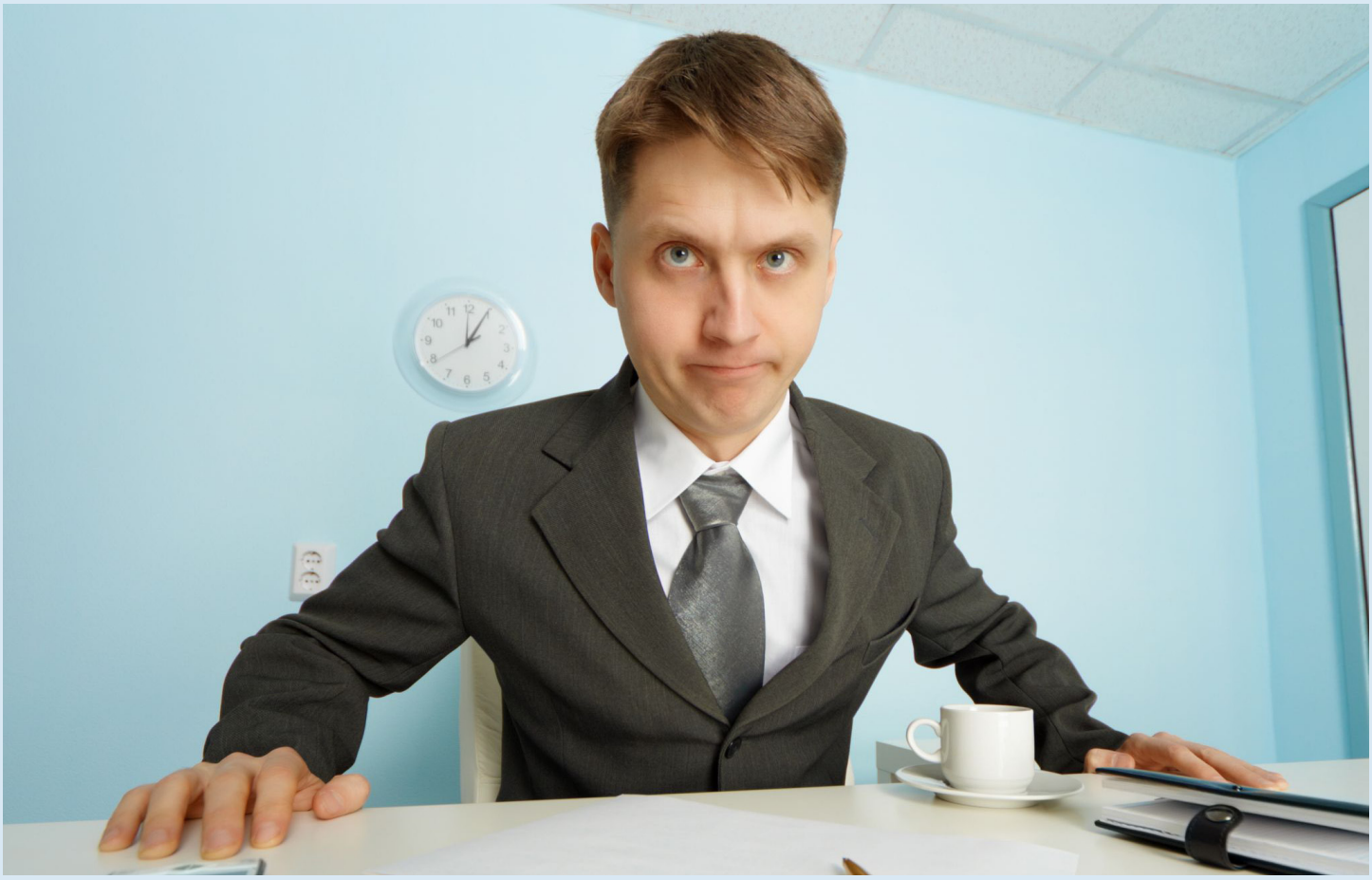

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- Excluding a person by refusing to communicate with them or leaving them out of activities.
- Yelling, screaming or humiliating the target, often in front of others.
- Making up arbitrary standards that the bully does not follow or that do not apply to others.
- Encouraging others to turn against the target.
- Stealing credit for work.
- Retaliating after a complaint is filed.
- Imposing unrealistic demands/deadlines.
- Sabotaging the target's work.

The workplace has always had bullies, and they are not always bosses. According to a survey sponsored by the Workplace Bullying Institute in 2010, 35 percent of U.S. workers have experienced or witnessed bullying. The survey also found that 62 percent of bullies are men; 38 percent are women. Women make up 58 percent of the targets; men make up 42 percent. However, men bully men more frequently than they bully women (55.5 percent), and women usually bully other women (80 percent). Workers ages 30 to 49 are the most frequent targets.

A 2010 survey in Australia produced even more startling statistics, finding that 94.5 percent of survey respondents had been bullied, with the bully usually a woman (*Survey Report: Extent and Effects of Workplace Bullying*, 30 May 2010 by Knowbull! to support Workplace Bullying Awareness Month, available at www.know-bull.com).

In the last few years, much has been written about bullying at work, and there have been stories about high-profile bullies. The costs of bullying alone, which continue to be studied, are a call to action for employers because bullies are very expensive. Loss of productivity is one immediate consequence. Also, victims of bullying are more likely to suffer from anxiety, depression, burnout and even symptoms of post-traumatic stress disorder (see Loraleigh Keashly and Joel H. Neuman, "Bullying in the Workplace: Its Impact and Management," 8 Empl. Rts & Employ. Pol'y J. 335 (2004)). Other illnesses associated with bullying are anxiety disorders, including panic attacks; sleep disturbances; digestion problems; and possibly fibromyalgia (Washington State, Department of Labor and Industries, *Workplace Bullying: What Everyone Needs to Know*, Report #87-2-2008 (April 2008)). Absenteeism, a predictable consequence of workplace stress, costs U.S. employers about $300 billion annually (see University of Massachusetts Lowell, www.uml.edu/centers/cph-new/job-stress/financial-costs.html).

Studies of bullying outside the United States have also revealed high costs to business (see, e.g., Helge Hoel, Kate Sparks and Cary Cooper, *The cost of violence and bullying at work*, International Labour Organisation).

A Stanford University professor has created a checklist that HR professionals can use to identify the damage caused by bullies (Robert I. Sutton, *The No Asshole Rule: Building a Civilized Workplace and Surviving One That Isn't*, 49-51 (Warner Business Books, 2007)).

Prohibitions Abroad

Bullying is against the law in countries where bullying behaviors have been identified as contrary to the idea of dignity at work (Gabrielle S. Friedman & James Q. Whitman, "The European Transformation of Harassment Law: Discrimination Versus Dignity," 9 Colum. J. Eur. L 241, 249 (2003)). The Charter of Fundamental Rights of the European Union (EU) provides that "every worker has the right to working conditions which respect his or her health, safety and dignity" (2000 O.J. (C 364) 15). Several European countries have created legal theories to make

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bullying at work illegal. In 1993, Sweden was the first country in the EU to define bullying as "victimization at work" posing a threat to occupational safety and health.

In 2002, the European Parliament passed a resolution calling on the EU countries to develop anti-bullying legislation. France adopted a law against "moral harassment." Belgium also passed a law prohibiting bullying, as a form of forbidden harassment, and the United Kingdom courts ruled that "mobbing" is prohibited under general anti-harassment law. Germany developed a common law theory.

The state of South Australia, New Zealand, and the provinces of Quebec, Saskatchewan and Ontario in Canada have also adopted laws.

continued on page 7 ➤

continued from page 6

While there is no convention on workplace bullying from the International Labour Organisation, the United Nations agency has issued a code of practice for workplace violence that attempts to address the issue.

U.S. Interest in Bullying

Scholars studying workplace bullying abroad have suggested that bullying should be addressed in the United States (see, e.g., David C. Yamada, "The Phenomenon of 'Workplace Bullying' and the Need for Status-Blind Hostile Work Environment Protection," 88 Georgetown L. J. 475 (2000)). In the last several years, the Workplace Bullying Institute has advocated for laws against workplace bullying in 18 U.S. states, but none of the states has passed a law. Chambers of commerce have labeled the laws "job killers," and there is a deep concern that law and etiquette are two separate things–and that bullying is a matter of bad manners.

U.S. courts have repeatedly ruled that anti-discrimination laws are not laws of etiquette, and that rude behavior is not the province of the courts (see *Oncale v. Sundowner Offshore Services Inc.*, 523 U.S. 75, 80 (1998), where the U.S. Supreme Court said that Title VII is not a general civility code for the workplace and does not prohibit all employment-related verbal or physical harassment).

Defining bullying is a big part of the challenge in creating any law against it. The definition often used by advocates for legislation is broad indeed–"repeated health-harming mistreatment ... that takes one or more of the following forms: verbal abuse, offensive conduct/behaviors ... which are threatening, humiliating or intimidating," or sabotage that interferes with work (see Workplace Bullying Institute, www.workplacebullying.org/targets/problem/definition.html. For a narrower definition proposed by David C. Yamada, see "Crafting a Legislative Response to Workplace Bullying," 8 Empl. Rts & Employ. Pol'y J. 475 (2004)).

Legislatures have been concerned that bullying cases would flood the courts. While this has not happened in countries with anti-bullying laws, the countries' procedures for litigating employment claims do not offer the same potential rewards for filing suit as in the U.S.

U.K. Case

If suits for workplace bullying were allowed in the United States, a case from London provides a vivid picture of what the facts and litigation might look like. In *Helen Green v. DB Group Services (UK) Limited*, 2006 EWHC 1898 (Q.B.), the High Court of Justice, Queen's Bench Division in London, heard a bullying case over an 11-day period. The court took testimony from more than a dozen witnesses on the details of workplace interactions involving Green and the persons she accused of bullying her. In a 191-paragraph opinion, the court recounted the evidence about how Green, who was psychologically vulnerable to abuse because of abuse as a child, had worked her way through school and achieved a position of company secretary assistant. In this position, she received good reviews for her work and was well-compensated.

Green claimed that she was continually harassed by three lower-level female office staff members who stared at her, excluded her from conversations, waited until she walked by and then burst out laughing, removed her name from distribution lists, hid her mail, moved things on her desk, made raspberry noises when she walked by, and engaged in other childish behaviors. Green also complained about the conduct of an ambitious male co-worker who used vulgar language with her, took credit for her work, seized assignments that would get him attention, and answered calls intended for her, telling callers he would have "her get right on it," thereby giving the impression he was her supervisor.

She also said an older, higher-ranking male co-worker shouted at her, insulting her work. When Green complained to HR, she was told the man would apologize. Instead of apologizing, he told her she should watch who she was talking to, and that he would write a letter to have her removed if she didn't drop her complaint. Green became clinically depressed, was hospitalized for a period and was never able to return to work at the firm. Instead, she took a lower-paying academic position. She won her case and was awarded approximately $1.6 million.

The facts of this case illustrate some fundamental dilemmas in workplace bullying: determining who has the responsibility to make it stop, and what measure of "fault" the victim of bullying may bear. The case also demonstrates the reality that victims of bullying may become seriously ill. If the duty to provide a safe place to work includes the duty to protect employees against bullying, then the allocation of responsibility to the employer makes sense. Similarly, if bullying is conceived as a form of illegal harassment, allocation of responsibility to the employer to prevent workplace harassment makes sense.

Limited Redress in U.S.

Right now, being a workplace bully is not against the law in the United States, unless:

- The bullying behaviors happen to also be illegal

continued on page 8 ➤

continued from page 7

discrimination or harassment based on sex, race, age, disability or the like;

- The behavior meets the legal definition of assault; or
- The behavior is so serious as to be intentional infliction of emotional distress not pre-empted by state workers' compensation law.

Thus, victims of bullying must rely on existing legal theories for redress, which can include workers' compensation claims for stress, or even violations of state anti-stalking laws where these laws are sufficiently broad.

For example, Michigan's anti-stalking law prohibits a "willful course of conduct involving repeated or continuing harassment of another that would cause a reasonable person to feel terrorized, intimidated, threatened, harassed or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested." The law defines "harassment" as conduct directed toward the victim that is repeated or continuing that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress, but is not constitutionally protected conduct or conduct that serves a legitimate purpose (Mich. Comp. Laws §750.411h(1) (2007)).

An Indiana case provides an example of how bullying cases can work under existing law. A hospital operating room perfusionist, who operated the heart/lung machine during surgeries, sued a cardiovascular surgeon for intentional infliction of emotional distress and assault after a verbal altercation in which the surgeon advanced on the perfusionist with clenched fists, a beet-red face and popping veins, swearing and screaming. The perfusionist backed against a wall and put his hands up to protect himself, believing he was about to be hit. The surgeon then stopped and told the perfusionist, "You're finished, you're history." The perfusionist became ill and was unable to return to work at the hospital.

The Indiana Supreme Court upheld the award of $325,000 to the perfusionist on the assault claim, which was the only claim to survive the trial. At trial, there was expert testimony that the incident was an example of workplace bullying. The court found that the admission of the testimony was not erroneous, as workplace bullying is a general concept that could be part of a claim for assault or intentional infliction of emotional distress (*Raess v. Doescher*, 883 N.E.2d 790 (Ind. Supreme Ct. 2008)).

An example of a bullying case based on conventional discrimination theory involved a female quality assurance manager who was bullied by three men working in the engineering department who did not report to her. They were rude, made offensive remarks related to her gender, stared at her, laughed at her, gave her dirty looks, smirked at her, tampered with her computer, bumped into her repeatedly, stapled her business cards together, drew a mustache on a picture of her grandson in her cubicle, put shredded paper in her desk, and falsely accused her of giving obsolete specs to a co-worker. The manager made a claim of gender harassment, alleging a hostile working environment.

The court declined to dismiss the claim, relying on a number of previous cases where courts had found that non-sexual conduct could be illegal sex-based harassment where it can be shown that but for the employee's sex, she would not have been the subject of harassment (*Pappas v. J.S.B. Holdings Inc.*, 392 F. Supp. 2d 1095 (D. Ariz. 2005)).

Another case applying sex discrimination law to address a workplace bully is *EEOC v. National Education Association*, 422 F.3d 840 (9th Cir. 2005), where the court found that a

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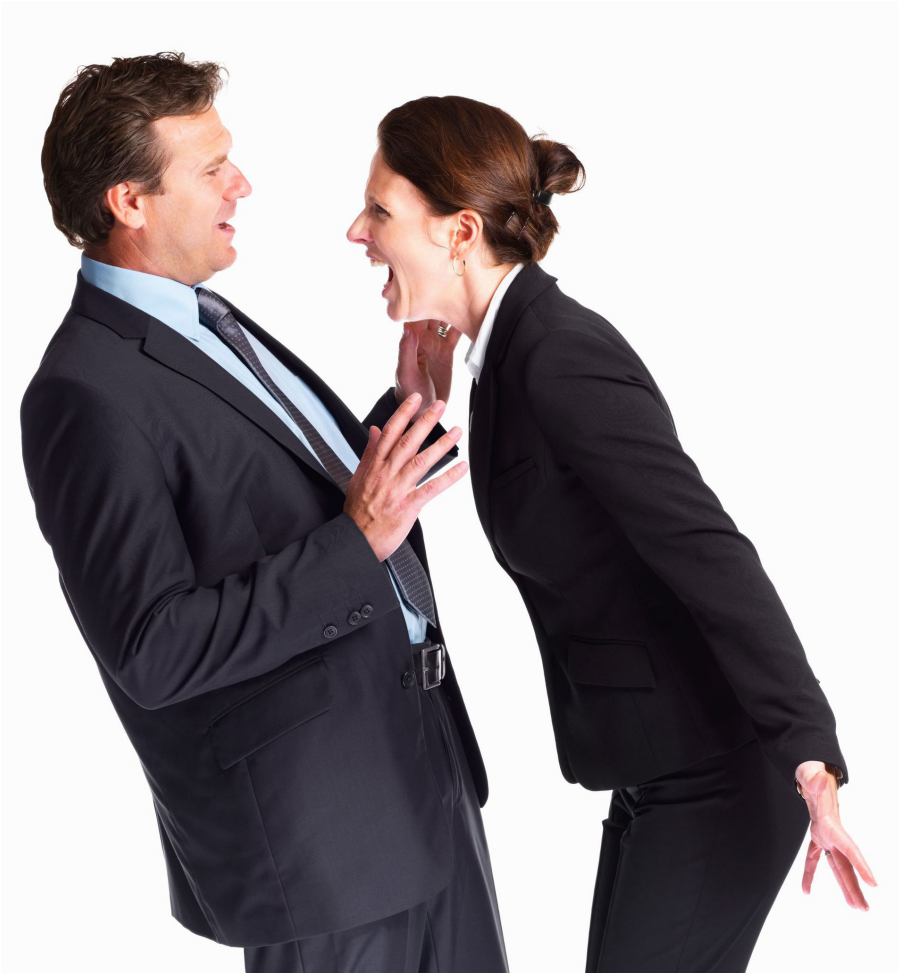

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male workplace bully, who used profanity, shouted and shook his fist at employees of both sexes, engaged in sex harassment. The court found that the subjective effects of the behavior were more severe for female victims, and that there was some evidence that the bully engaged in more-severe forms of intimidation with women and did so more frequently than he did with men. Notably, there were more women than men in the workplace available as targets for the bully.

Senior Executives

Employers should be prepared to address the bully at work. This is often hard to do, as the bully at work frequently intimidates managers and even HR professionals. If the bully is a senior executive, addressing the behavior may be complex. A 2005 study by British psychologists who administered personality tests to high-level British executives and compared their profiles to those of criminal psychiatric patients at a U.K. hospital concluded that the following personality disorders were more common among the executives than the criminals:

- Histrionic personality disorder, where the person is superficially charming, insincere, egocentric and manipulative.
- Narcissistic personality disorder, where the person is grandiose, has a lack of empathy for others and is exploitative.
- Obsessive-compulsive personality disorder, where the person is a perfectionist, rigid, dictatorial and excessively devoted to work.

(B.J. Board and Katarina F. Fritzon, "Disordered Personalities at Work," 11 Psychology, Crime and Law 17 (2005)). If bullies do have personality disorders (and it seems unlikely that they all do), it is important to remember that personality disorders may be covered by the definition of disability under the Americans with Disabilities Act. This means, as a practical matter, that the employer may have to engage in reasonable accommodation. Whether such accommodation would include tolerating bullying behavior may be a subject of controversy, as some case law suggests that troublesome behavior that is the result of a disability may have to be the focus of reasonable accommodation efforts, if the behavior is not otherwise illegal (see, e.g., *Gambini v. Total Renal Care*, 486 F.3d 1087 (9th Cir. 2007); *McKenzie v. Dovala*, 242 F.3d 967 (10th Cir. 2001); *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128 (9th Cir. 2001)).

Of course, there is the need to distinguish bullies from corporate leaders, sometimes described as "the great intimidators," who achieve great success with a highly abrasive style that pushes others to accomplish a goal (rather than tears others down to make themselves feel good) (Roderick M. Kramer, "The Great Intimidators," 84 Harv. Bus. Rev. 88 (2006)).

Seven Steps

Employers should look at bullying as a hazard to health and a potential form of illegal harassment. Thus, as a legal defense, they should be able to show that they took all reasonable steps to prevent bullying and offered avenues of redress that employees unreasonably failed to use. The following are seven basic steps employers should consider taking to prevent and address workplace bullying:

- Adopt a policy prohibiting bullying behaviors, listing examples of the types of behaviors that should not occur at work. If there is a policy regarding workplace violence, the bullying policy should be added to this policy. Publicize the policy to employees.
- Add a ban against bullying behavior to the code of conduct. Make sure all employees see the code of conduct.
- Provide a written reporting process for incidents of bullying that offers multiple avenues for reporting bullying behavior. Make sure employees are aware of this process.
- Make sure that reported incidents are investigated and that follow-up remedial action is taken. The investigations and follow-up should mirror the process for sexual harassment and discrimination claims.
- Make sure employees who complain about bullying are protected from retaliation. This means that the person accused of bullying must be counseled specifically to avoid engaging in behaviors that would be reasonably perceived as retaliatory. There should also be follow-up with the victim to make sure unreported retaliation is not occurring.
- Discipline bullies; if appropriate, terminate them.
- Train HR professionals and managers to recognize bullying behaviors and to develop techniques to address bullying. Notably, studies of workplace bullying emphasize that poorly informed HR professionals and managers have made bullying worse by appearing to excuse the conduct or by minimizing its importance.

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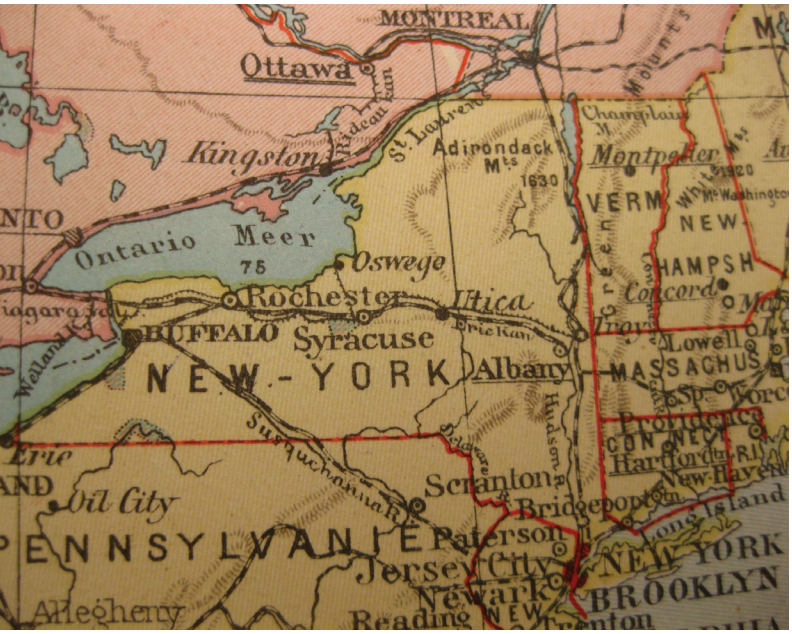
New York Takes Significant Steps to Ensure Employee Awareness Regarding Wages

By James R. Hays, Eric Raphan and Maranda W. Rosenthal

In recent months, New York has taken significant steps to ensure that employees are aware of the amount of their wages and the methods through which such wages are calculated and paid. Specifically, the New York legislature has twice amended the New York Labor Law, and the New York State Department of Labor (NYSDOL) has issued new guidelines and a new Hospitality Wage Order. These changes provide New York-based employees with a number of enhanced protections. Many important aspects of these new provisions are discussed below.



Section 195 Amended

Effective Oct. 26, 2009, New York's legislature amended New York Labor Law Section 195.1 to require employers to notify employees, in writing at the time that they are hired, of their rate of pay and their regular payday. Further, if the employee is classified as nonexempt and, thus, entitled to overtime pay for hours worked in excess of 40 hours per week, then the notice must also inform such employee of his or her overtime rate.

Wage Theft Prevention Act Enacted

In a further effort to reform the wage payment laws, and with the stated intention of providing employees with enhanced protections, on Dec. 13, 2010, New York enacted the Wage Theft Prevention Act (WTPA). The WTPA, which took effect in April 2011, further amends portions of the New York Labor Law including Section 195. Primarily, the WTPA created additional requirements for the wage notices discussed above, enhanced employers' recordkeeping requirements with respect to wage statements and payroll records, and adopted more-severe penalties for noncompliance.

Specifically, the WTPA requires employers to provide the wage notices in English and in the language identified by each employee as his or her primary language. In addition to the existing notice requirements, the WTPA dictates that the wage notice state whether the employee is paid by the hour, shift, day, week, salary, piece, commission or otherwise and whether the employer will claim any allowances as part of the minimum wage (e.g., tip, meal or lodging allowances). The WTPA also requires that this notice include the employer's name, physical address or principal place of business, and telephone number.

The WTPA further requires employers to provide the wage notice at the time the employee is hired and on or before Feb. 1 of each subsequent year of the employee's employment. The employer must obtain a signed acknowledgment for each issuance of the wage notice. Moreover, the acknowledgment must include an affirmation by the employee that the notice provided by the employer was in the employee's designated primary language. The acknowledgment must be maintained for a six-year period.

Finally, the WTPA requires that an employee's wage statements now include the following information:

- Dates of work covered by the wage payment.
- Employee's name.
- Employer's name.
- Employer's address and phone number.
- Employee's rate of pay.
- Basis of pay (i.e., by the hour, shift, day, week, salary, piece, commission or other).
- Gross wages.
- Deductions.
- Allowances, if any, claimed as part of the minimum wage.
- Net wages.

continued on page 11 ➤

continued from page 10

For nonexempt employees, the wage statement must also include the employee's overtime pay rate and the number of regular and overtime hours worked by the employee. The WTPA also requires that, upon an employee's request, the employer provide an explanation, in writing, regarding how such wages were calculated.

Employers must also now establish, maintain and preserve contemporaneous payroll records for each employee, for each week worked, reflecting the above information for a period of no less than six years. The WTPA further expands the definition of covered employers to include partnerships and limited liability corporations.

In an attempt to provide further clarification regarding the WTPA's requirements, the NYSDOL issued model notices, guidelines, instructions and frequently asked questions (FAQs) for employers to consider when attempting to comply with the WTPA. The NYSDOL does not require employers to use the model notices, and an employer is free to develop its own notice as long as the employer's notice provides employees with the requisite information. The FAQs also attempt to clarify certain issues that remained unclear following the initial amendment to Section 195 in October 2009 and the passage of the WTPA. For example, the FAQs now make it clear that an employer is not required to identify the specific exemption that is being applied to workers deemed exempt from overtime pay. In addition, the FAQs explain that employers can provide employees with the requisite notice electronically as long as the employer has a system in place that allows the employee to acknowledge receipt of the notice and print out a copy of the notice.

> Employers that fail to comply with the WTPA's new requirements may be subject to a series of enhanced civil, criminal and other penalties.

Employers that fail to comply with the WTPA's new requirements may be subject to a series of enhanced civil, criminal and other penalties. With respect to civil penalties, if an employer fails to provide an employee with the wage notice within 10 business days of his or her first day of employment, then the employee may recover $50 for each workweek during which the violation occurred, up to a maximum of $2,500, together with attorneys' fees and costs. Furthermore, if an employer fails to maintain proper payroll records as required by the WTPA, then the employee may recover $100 for each workweek during which the violation occurred, up to a maximum of $2,500, together with attorneys' fees and costs.

In addition to the above civil penalties, employers that fail to comply with the WTPA may also be subject to criminal penalties. Specifically, employers that fail to pay employees minimum wage or overtime compensation shall be guilty of a class B misdemeanor and upon conviction shall be fined an amount between $500 and $20,000 or imprisoned for up to one year. If the employer is convicted of a subsequent offense within six years of the prior offense, then such employer shall be guilty of a felony and upon conviction shall be fined an amount between $500 and $20,000 and/or imprisoned for up to one year and one day.

Moreover, employers found to have violated the WTPA may be required to post a notice of the violation for up to one year in an area visible to employees. If the employer's violation is deemed to have been willful, then the employer must post the notice in an area that is visible to the general public for up to 90 days.

As a further protective measure, the WTPA also contains an anti-retaliation provision. This provision provides that if an employer is found to have retaliated against an employee because the employee complained about the employer's conduct that the employee, reasonably and in good faith, believed violated any provision of the New York Labor Law, then the employee may be entitled to reinstatement, back pay and front pay. The employee also may recover up to $10,000 in liquidated damages.

NYSDOL's New Hospitality Wage Order

Finally, the NYSDOL issued a new Hospitality Wage Order, which took effect March 1, 2011. The new Hospitality Wage Order combines and replaces the prior restaurant industry and hotel industry wage orders and significantly revises the regulations to deter excessively long hours and to encourage greater compliance with overtime pay laws within the hospitality industry.

Notably, the new Hospitality Wage Order requires employers to pay nonexempt hotel and restaurant employees on an hourly basis. In other words, employers are no longer permitted to pay such employees salaries, weekly rates, day rates or piece rates.

The new Hospitality Wage Order also regulates the payment of gratuities and makes clear that the sharing and pooling of tips among employees, both voluntarily and employer-mandated, is permissible. However, the Hospitality Wage Order requires that employers provide written notice to employees of the

continued on page 12 ➤

continued from page 11

establishment's tip policies. If the employer mandates tip sharing or tip pooling, or adds charges to customer bills for tips, the employer must now keep records of the tips received and ultimately distributed. Such information must be provided to employees upon request.

The new Hospitality Wage Order also attempts to address a hotly contested issue in New York: whether "service charges," or other similar mandatory charges assessed to customers, are gratuities that must be distributed in full to service employees. In an attempt to codify the distinction between a charge that is purported to be a gratuity and a charge for the administration of a banquet, special function or package (such as an "administrative fee"), the new Hospitality Wage Order provides that there shall be a rebuttable presumption that any service charge, in addition to charges for food, beverage, lodging and other specified materials or services, whether labeled as a "service charge" or not, shall be a charge purported to be a gratuity that must be distributed in full to service employees. If an employer wishes to charge a fee for the administration of an event and prevent that charge from being deemed a gratuity, the employer must clearly identify the charge as an administrative fee and effectively communicate to customers that the charge is not a gratuity or a tip.

Conclusion

New York has taken numerous steps to provide employees with significant additional protections with respect to the calculation, payment and recording of their wages. These actions will place employers under greater scrutiny. We anticipate that this new legislation will lead to an increased amount of both individual and class-action lawsuits brought by plaintiffs' counsel as well as increased enforcement activity by the NYSDOL. Accordingly, it is imperative that New York employers review these new laws and regulations and ensure that their practices and policies are in compliance so that they can successfully defend against any potential claims.

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11-0361