



# Human Resource and Management Services

January 2009

## HUMAN RESOURCE EXCHANGE

Human resource issues and topics impacting employers

### ◆ FROM EEOC ◆

#### “Dillard’s sued disability discrimination”

Dillard Store Services, Inc. (Dillard’s), the nationwide chain of department stores, unlawfully discriminates against employees by requiring them to disclose personal and confidential medical information or face disciplinary action including termination, the U.S. Equal Employment Opportunity Commission (EEOC) charges in a class lawsuit filed under the Americans with Disabilities Act (ADA).

The EEOC states in the litigation that the Dillard’s store in El Centro, Calif., requires employees to reveal the specific nature of their medical illness in order to deem necessary sick leave as an excused absence. The EEOC contends this corporate policy, potentially affecting thousands of workers, is an unlawful disability-related inquiry under the ADA and not justified by business necessity.

... In the lawsuit, the EEOC cites a sales associate who was unable to attend work for a few days due to her medical illness. Despite submitting a doctor’s note justifying the need for sick leave, Dillard’s required the sales associate to reveal the specific nature of her illness in order to have these absences deemed excused pursuant to company policy. The sales associate openly objected and refused to reveal the nature of her medical illness, informing Dillard’s that its specific medical inquiry unlawfully invaded her right to privacy. Nevertheless, Dillard’s deemed the sales associate’s absences as unexcused and fired her in retaliation for refusing to disclose the requested medical information.

### ◆ FROM DOL WAGE & HOUR DIVISION ◆

#### “More than \$225,000 in back overtime wages for Hurricane Katrina workers”

ICF Emergency Management LLC, headquartered in Fairfax, Va., and Quadel Housing Services Inc., headquartered in Washington, D.C., has paid a total of \$225,275 in back wages to 399 current and former housing advisors. An investigation by the U.S. Department of Labor’s Wage and Hour Division found that these workers were not properly paid in the wake of Hurricane Katrina as required by the Fair Labor Standards Act (FLSA).

“The employer misclassified the housing advisors as exempt from minimum wage and overtime under the Labor Department’s regulatory administrative exemption. However, these workers did not exercise independent judgment and discretion in the performance of their duties and therefore

were entitled to overtime compensation,” said Cynthia Watson, regional administrator for the Wage and Hour Division’s Southwest Region.

The investigations determined that these private contractors, hired by the state of Louisiana to administer recovery and rebuilding “Road Home” grants to property owners, misclassified the housing advisors and failed to pay the required overtime wages. ICF Emergency Management failed to pay 225 current and former employees \$194,880. Quadel Housing Services failed to pay 174 current and former employees \$30,395. The companies cooperated with the investigation and all back wages have been paid in full.

### ◆ FROM HR SPECIALIST ◆

#### “Ignorance of overtime law leads to double trouble”

A nail salon in New York fired a 16-year old employee after she complained about the lack of meal breaks. She sued under the Fair Labor standards Act (FLSA) for unpaid overtime. A jury awarded her \$175,000.

The court agreed to double the damages because the nail salon hadn’t taken any “active steps” to figure out whether it had to pay overtime. In fact, the owner testified that she “Didn’t have any mind or thought to think about overtime issues,” and assumed that whatever bonuses the employees received was good enough. That was an expensive mistake. (*Kim v. 176 Nail Plaza, No. 05-CV-8560, SD NY, 2008*)

### ◆ FROM HR HERO ◆

#### “Title VII of the Civil Rights Act of 1964”

The proposed federal Fair Pay Restoration Act in Congress says that an unlawful act is committed when a discriminatory compensation decision is adopted, when an employee becomes subject to the decision, or when an individual is affected by the application of the decision, including each time compensation is paid. It allows an aggrieved employee to recover back pay for up to two years preceding the filing of a charge of discrimination. The Fair Pay Restoration Act proposal would amend Title VII, the Age Discrimination in Employment Act and the Americans with Disabilities Act.

#### “USCIS announces revised I-9 form”

On December 12, 2008, the USCIS announced an interim final rule to modify the Employment Eligibility Verification Form I-9. The new form will be effective 45 days from the date of the interim final rule. There are two major changes. The first is to limit the number of acceptable documents for

verifying a new employee's identity. The second is to prohibit accepting expired identification documents. Employers must complete and maintain the form for all employees hired after November 6, 1986. The new form should be available on the USCIS website <http://www.uscis.gov> toward the end of January 2009.

◆ **FROM WORKFORCE MANAGEMENT** ◆  
◆ **“Bush signs pension funding relief measure”** ◆

President George W. Bush signed into law Tuesday, December 23, a measure that relieves certain funding requirements for company pension plans.

The measure, the Worker, Retiree and Employer Recovery Act of 2008, was passed by Congress this month as part of an effort to aid employers facing large pension funding obligations due to the plunge in investment values.

... Under the 2006 law, employers must put enough money in their plans each year so the plans will be fully funded after seven years. That 100% funding target is being phased in, so in 2008, plans have to fund toward a 92% target, while the target is 94% in 2009, 96% in 2010, and 100% in 2011.

... In addition, the law suspends for 2009 requirements that retirees age 70½ or older take a minimum distribution from their defined-contribution plan.

◆ **A REAL LIFE SITUATION** ◆

**Situation:** A manager has a supervisor who is having performance problems. The supervisor is a good, dependable and loyal employee, but continues to have difficulty in effectively performing his duties.

After several discussions and after months of talking with the supervisor, the manager is thinking, rather than lose a good employee, he would simply have the supervisor swap positions with another employee who he feels has the necessary supervisory skills. And, as part of the swap, the supervisor's pay would remain the same even though the swapped position is at a lower pay scale.

The manager called to ask if there were any problems with his idea.

**Observation:** In talking with the manager, there was a sense that perhaps this supervisor had been promoted into a position above his capabilities. At the same time, however, there has been sufficient training and time in position for the supervisor to show improvement in meeting the manager's expectations. Unfortunately, the manager feels that providing guidance and assistance is just not working and that swapping positions is the only other option.

A critical factor the manager overlooked was this “swapping positions” option will be setting precedence for any similar situation in the future. Namely, any employee with performance issues would have to be given the opportunity to “swap positions”, keep their same pay, and remain employed.

After some deliberation, it was determined that in this particular case, remedying a performance issue by “swapping positions” would not be appropriate, especially with the amount of coaching and counseling this individual has already received.

The focus needs to be on the issue of adequately addressing poor performance. An employee, regardless of how good, dependable, and loyal, needs to perform satisfactorily or, in this case, receive discipline. Further, if the employee continues to have performance issues, then the employee will be terminated.

Although there may be some extenuating circumstances that justify a swap, directly addressing the employee's specific problems is the cleanest and the most effective solution. As it turned out, the supervisor was eventually terminated and another employee actually interested in this position was promoted.

**FEATURED SERVICE**  
**2009 Regulatory Changes Training**

The U.S. Department of Labor has released final revised regulations implementing the Family and Medical Leave Act effective on January 16, 2009.

The President signed the Americans with Disabilities Act Amendments Act of 2008 effective January 1, 2009.

These regulatory changes make important changes to definitions, extended eligibility, and/or developed new certification forms.

HR&M has developed a 2-2½ hour training session addressing all of the pertinent changes within FMLA and ADAAA.

Call and book your FMLA and ADAAA training session today.

◆ **REMEMBER! WE CAN HELP!!** ◆

Consulting on performance, attendance, FMLA, Wage & Hour, management accountability, and other unique issues is just one of the areas of our expertise.

We also provide:

- **supervisory/management training**, ranging from brown bag luncheon training to ½ or full day sessions
- employee **handbook** development
- responses to **EEOC discrimination charges** and **TWC unemployment claims**
- **on-line performance review** forms and processes
- **guidance** and consultation on **coaching, counseling, and disciplining** in employee relations matters
- **succession** and **strategic planning** programs
- **consultation** on issues regarding attendance and performance and guidance on terminations
- development of OFCCP compliant **Affirmative Action Plans**