



# Human Resource and Management Services

June 2009

## HUMAN RESOURCE EXCHANGE

Human resource issues and topics impacting employers

### ◆ FROM TCUL EMPLOYMENT LAW SEMINAR ◆

Next training seminar is on "The Basics of Employment Law" and is scheduled for 6/11/09, from 9am-4pm at generations federal credit union's 6000 NW Loop 410 branch location.

(See attached for more details)

### ◆ FROM HR HERO ◆

#### "When are chiropractors 'health care providers' under the FMLA?"

... If an employee wants to take FMLA leave for "continuing treatment," a "health care provider" is defined as a doctor or "any other person determined by the [secretary of labor] to be capable of providing health care services." The secretary of labor has concluded that "other person[s] . . . capable of providing health care services" include chiropractors "limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."

A chiropractor who isn't engaging in treatment to manually manipulate the spine to correct a subluxation demonstrated by x-ray isn't a health care provider, so the treatment doesn't qualify as "continuing treatment by a health care provider." Consequently, unless the chiropractor meets the x-ray and diagnosis requirements, chiropractic treatment isn't covered by the FMLA.

### ◆ FROM PERSONNEL LEGAL ALERT ◆

#### "We couldn't make this up if we tried"

He doesn't work hard for his money. A man walked into an Omaha Subway restaurant and asked for a job application. He began filling it out, but then he robbed the restaurant at knifepoint and fled.

### ◆ FROM TEXAS EMPLOYMENT LAW LETTER ◆

#### "FMLA covers non-covered employer"

Amy McFadden ... became ill. She contacted the bank's HR department and asked for FMLA leave. HR instructed her to notify the department in writing of her FMLA request. After she did, it was granted.

McFadden eventually returned from leave and wanted her old job back, as required by the FMLA. The bank said "no way, but we'll make you a Teller instead"...

Why did the bank take that position? It argued that the FMLA applies only to employers with 50 or more employees working within a 75-mile radius of each other. It claimed that because it had fewer employees, it had no FMLA obligations.

According to the bank, it used the term "FMLA" only for internal convenience.

... McFadden sued. First, even though the bank wasn't covered by the Act, it made itself a covered employer by leading McFadden to believe it would provide FMLA leave.... "if you act as if you're FMLA-covered, you'll be treated as if you're FMLA-covered, and the FMLA says you must return the employee to the same job she held before taking leave."

### ◆ FROM WORKFORCE MANAGEMENT ◆

#### "Department of Labor seeking more funding for workplace safety enforcement"

The first Department of Labor budget of the Obama administration places an emphasis on workplace safety enforcement and other worker protections.

In a detailed proposal announced May 7, the agency asks Congress for \$1.7 billion in funding for programs designed to ensure that employees are kept safe on the job and are paid all the wages and benefits they are due. The request represents a 10 percent increase over the previous fiscal year.

The Occupational Safety and Health Administration would receive a \$51 million increase in funding and hire 160 new officers. The Wage and Hour Division would get a \$35 million budget increase and add 200 investigators...Overall, 670 people will be added to the enforcement staff

The Protecting America's Workers Act would extend OSHA coverage to more workers, increase civil penalties for safety violations and index them to inflation. In addition, the measure would allow felony prosecution of employers and their corporate officers who commit willful violations that result in worker death or serious injury.

### ◆ FROM HR SPECIALIST EMPLOYMENT LAW ◆

#### "Job bias claims report from EEOC"

Type	Claims in 2008	Increase from 2006
Race	33,937	↑ 24%
Retaliation	32,690	↑ 45%
Sex	28,372	↑ 22%
Age	24,582	↑ 48%
Disability	19,453	↑ 25%
National Origin	10,601	↑ 27%
Religion	3,273	↑ 29%
Equal Pay Act	954	↑ 11%

Total	95,402	↑ 26%
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◆ **FROM SHRM** ◆  
“Question and Answer”

**Question:** We are considering implementing an internship program. Are we legally required to pay students hired as interns?

**Answer:** In determining whether an intern is a trainee rather than an employee, the Department of Labor (DOL) has applied the following six-criteria test, derived from a U.S. Supreme Court decision *Walling v. Portland Terminal Co.*:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school.
2. The training is for the benefit of the trainee.
3. The trainees do not displace regular employees and work under close observation.
4. The employer that provides the training derives no immediate advantage from the activities of the trainees, and on occasion, the employer's operations may actually be impeded.
5. The trainees are not necessarily entitled to a job at the completion of the training period.
6. The employer and the trainee understand that the trainee is not entitled to wages for the time spent in training.

In addition, in a 1983 Opinion Letter, the DOL determined that student interns would not be considered employees if they receive college credit for an internship... However an academic credit requirement does not necessarily mean that a company is absolved of any requirement to pay the interns; the DOL's six criteria still apply.

◆ **A REAL LIFE SITUATION** ◆

The US Department of Labor has issued Wage & Hour Opinion Letters addressing a variety of wage & hour issues.

**At-home classes.** Time spent by employees taking web-based pre-requisite classes at home in preparation for a voluntary job-related training class was compensable.

**Mandatory time off.** An employer's application of a "mandatory time off" policy for absences of less than a week would adversely affect its employees' exempt status, where a reduction in hours worked due to low patient census resulted from the "operating requirements of the business".

**Compressed workweek schedule.** An employer's use of a nine-day, compressed workweek schedule was in compliance with the FLSA, where the workweeks were fixed, consisted of 168-hour periods and employees were paid for any hours they worked over forty in the specified period.

**Paid time off.** An employee would not be considered to be paid "on a salary basis," if deductions from the salary were made for full or partial day absences caused by the operating requirements of the business.

**Insurance agents.** Insurance agents whose primary duty was sales would meet the requirements for the outside sales exemption where they "customarily and regularly" met clients

face-to-face outside of their offices and engaged in inside sales activity only in conjunction with qualifying outside sales activity.

**Lump-sum payments.** A residential contractor's pay plan failed to satisfy overtime requirements during workweeks when employees worked between 40 and 55 hours, where those employees were paid a fixed lump sum regardless of hours actually worked, and so failed to accurately calculate the employees' regular rate.

**FEATURED SERVICE**  
**Wage and Hour Concerns**

HR&M can provide you with the answers you need when dealing with:

- Recordkeeping requirements
- Calculating overtime
- Mistakes that can result in audits, fines, and back pay issues
- Minimum legal requirements for benefits, vacation, breaks, etc.
- Classifying employees – identifying those employees that may be exempt from overtime and minimum wage.
- Definitions of FLSA terms

Many companies do not have a full understanding of the FLSA guidelines, and court cases have contributed to the concern of correctly classifying an employee. As a result, employers are having a tougher time making these determinations.

HR&M can help making these important decisions.

◆ **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**

# THE • BASICS • OF EMPLOYMENT LAW

June 11, 2009 • San Antonio, Texas



## SEMINAR LOCATION:

**generations federal credit union**  
6000 NW Loop 410  
San Antonio, TX 78238

## TIME:

**9:00 AM - 4:00 PM**

## PRESENTER

**Paul Montoya, PHR**  
President, Human Resources and  
Management Services



**Credit Union  
Employment Resources™**  
A Service of Credit Union Resources, Inc.

This session is one in a continuing series of educational opportunities that CUER will be offering on Human Resources issues throughout Texas in 2009. Check out [www.cuer.coop](http://www.cuer.coop) for other HR Training dates.

## EDUCATIONAL OPPORTUNITY

As a part of Credit Union Employment Resource's (CUER's) commitment to excellence and continuing education in Human Resources, we are offering a 6-hour training session to encompass the Fundamentals of Human Resources Management. This session will increase your awareness and understanding of the basic regulations that affect employers.

## TRAINING TOPICS

- Wage and Hour
- Family and Medical Leave Act
- Fair Credit Reporting Act
- Civil Rights Act, Title VII
- Americans with Disabilities Act
- Workers Compensation
- Texas Payday Law
- And more

## WHO SHOULD ATTEND?

Presidents, CEOs, Managers, Human Resources Managers and/or anyone responsible for the Human Resources function in your credit union.

## COST:

**\$189**, Fee includes: session, handouts, continental breakfast and lunch

*\*\*Dress attire is business casual.*

## Send Registration Form and Fee to:

Credit Union Employment Resources  
Attn: Susan Looney  
4455 LBJ Freeway, Suite 1100  
Farmers Branch, TX 75244

**Phone:** 1-800-442-5762 ext. 6431  
(469) 385-6431

**Fax:** (469) 385-6530

**Email:** [slooney@tcul.coop](mailto:slooney@tcul.coop)

Name \_\_\_\_\_ Title \_\_\_\_\_

Credit Union \_\_\_\_\_

Address \_\_\_\_\_

City/State/Zip \_\_\_\_\_

Phone \_\_\_\_\_ Email \_\_\_\_\_

Please be aware of our policy: payments must be received before registration is confirmed. Cancellations are accepted prior to June 5, afterwards substitutions are welcome.