

THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER
HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES
PREPARED BY ATTORNEYS BETTY BECHTEL AND MICHAEL SANTO

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THE MYSTERY OF COLORADO'S MINIMUM WAGE INCREASE

On November 7, 2006, Colorado voters passed Amendment 42 to the Colorado Constitution, increasing the minimum wage from \$5.15 to \$6.85 per hour. This new minimum wage becomes effective January 1, 2007 and will be adjusted automatically each year for inflation, as measured by the "Consumer Price Index used for Colorado" (CPI). The Amendment further provides that no more than \$3.02 per hour in tip income may be used to offset the minimum wage of employees who regularly receive tips.

Many employers will not see a significant increase in their wage obligation for 2007 because they are already paying more than \$6.85 per hour. But employers who are paying minimum wage, or relying on minimum wage exceptions under the Fair Labor Standards Act (FLSA) and Colorado's Minimum Wage Order #22 to pay less than minimum wage, will feel an immediate impact. Under certain conditions, disabled workers, unemancipated minors, and tipped employees currently may be paid less than minimum wage. The Amendment addresses only one of these situations: tipped employees. Whether the other

exceptions to minimum wage are still legal in Colorado is a mystery.

A "tipped employee" is an employee engaged in an occupation in which he or she customarily and regularly receives more than \$30.00 a month in tips. Before Amendment 42, employers could pay cash wages of as little as \$2.13 per hour to tipped employees, so long as this amount plus the employee's tips came to at least \$5.15 per hour. As of January 1, the wages that must be paid by the employer will increase to \$3.83 per hour, because the tip credit of \$3.02 does not increase. For each full-time tipped employee, this is a potential increase of \$3,536.00 for 2007. We may all feel the effects of Amendment 42 through increased menu prices at our favorite restaurants.

By tying minimum wage to an automatic annual CPI increase, employers won't know what the minimum wage will be for the next calendar year until the State advises them. Historically, the CPI has increased nationally approximately 3 percent per year, but it has been as high as 14 percent. It remains a mystery how the State will advise employers before January 1 each year of the new minimum so that wage adjustments can be implemented in a timely manner.

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Another mystery is whether Colorado's minimum wage will decrease if the CPI goes down. Amendment 42 refers only to adjusting annually "for inflation." "Deflation" is not a concept recognized by the Amendment.

Because Colorado's new CPI adjustment requirement is in the state constitution, state legislators will be virtually powerless to make adjustments during bad economic times. But surely, there will never be bad economic times in Colorado. Right?

NO NEW IMMIGRATION FORM REQUIRED, AFTER ALL

HB 1017 requires Colorado employers to "affirm" for any employees hired after January 1, 2007, that the employer has examined the legal work status of such newly-hired employee, has retained file copies of the new hire's identification documents, has not altered or falsified the employee's identification documents, and has not knowingly hired an unauthorized alien. We have been anticipating, impatiently, an affirmation form from the Colorado Department of Labor and Employment (CDLE) for employers to use in complying with this new immigration law. But, apparently there will be no form. CDLE has just issued a 7-page memorandum interpreting HB 1017 (also interpreting HB 1343 regarding verification requirements for employers who contract with public entities). CDLE concludes that HB 1017 does not require a separate form, and that completing the I-9, plus keeping copies of the documents produced by the employee for I-9 purposes, is sufficient documentation.

This is great news, but there is a hitch. The CDLE memo states that unlike Federal I-9 law, the Colorado law does not permit a good faith defense

for employers who accept the employee's documents on their face without "verification." CDLE interprets the new law as requiring employers to verify the documents presented. It suggests that this can be done by utilizing two free online databases to check on the validity of new hires' social security numbers. One is the Federal Basic Pilot Program, the other is the Social Security Administration's verification service (www.socialsecurity.gov/employer/ssnv.htm). CDLE recommends printing the results screen from your visit to this cite and placing it in the I-9 file so that you can prove you verified.

If an employer discovers a mismatch between the employee's information and the Social Security Administration's information during this verification, the CDLE memo lists 6 steps to take. They are:

- 1) Compare the failed Social Security number to your employment records to see if you made a typographical error. Resend only the correct data (not the entire submission).
- 2) If your employment records match what you submitted, ask your employee to check his/her Social Security card and inform you of any name or Social Security number difference between your records and his/her card. If your employment records and the name and Social Security number shown on the Social Security card match, ask the employee to check with any local Social Security Office to determine and resolve the issue. Tell the employee that once he/she has visited the Social Security Office, he/she should inform you of any changes. You should correct your records accordingly.
- 3) If the employee is unable to provide a valid Social Security number, document your efforts to

obtain the corrected information. Retain your documentation for a period of three years.

4) If the employee no longer works for you, try to get the correct information from the employee and correct your records.

5) If you are unable to contact the employee, document your efforts.

6) Conform closely with the time limits found in the I-9 instructions.

The CDLE memo states that an employee can continue to work “during the verification process and corresponding time limits” if their Social Security number comes back as invalid. However, the 6-steps listed specify no time limits. The Basic Pilot Program’s process has specific time limits on the verification process. And under the Basic Pilot Program, once nonconfirmation of the Social Security number is final, if the employer does not terminate, it must inform the Department of Homeland Security of this fact. Continued employment creates a presumption that the employer is knowingly employing an illegal alien.

CDLE’s interpretation of the verification requirements is confusing because it does not adequately distinguish between the Basic Pilot Program verification procedure required for contractors with public entities under HB 1343, and the Social Security Administration’s verification procedure, which is not mentioned in either HB 1343 or HB 1017. Yet the two processes are very different. However, based on the CDLE memo, it appears that an employer’s failure to use at least one of the two on-line verification services may expose the employer who accepts fraudulent documents to a \$5,000 fine for the first offense and \$25,000 fine for any subsequent offenses.

CDLE’s memorandum is not law. It is only an interpretation of the new laws by the agency responsible for policing compliance. Ultimately, it is up to the courts to decide what the laws require of employers. Now, isn’t that comforting?

DISABILITY DOES NOT EXCUSE UNPROFESSIONAL CONDUCT

Ever had an employee you thought was crazy, but you were afraid to ask? Well, here’s the true-life story of an employer who asked.

Ms. May Nunn had been with the company 39 years when she began displaying strange behavior at work. Coworkers saw her rocking in her seat, weeping and sobbing at her workspace, skipping around cubicles in her work area while chanting, moaning, crying out, stamping her feet, and running through the office with her hands shaking in the air proclaiming, “Praise Jesus.” She was also observed standing in the corner of the room with eyes closed while chanting. May’s coworkers were freaking out, and complained to human resources that they were concerned for their safety.

The employer, the Illinois State Board of Education (ISBE), determined to get to the bottom of Nunn’s strangeness. ISBE arranged for Nunn to undergo an independent medical evaluation with a psychiatrist. The psychiatrist diagnosed her as suffering from “bipolar affective disorder manic type with severe psychosis,” and recommended that she not be allowed to remain in the workplace because her condition would likely worsen and result in greater workplace disruption.

With this information in hand, ISBE told Nunn that she would not be able to return to work until she received medical clearance. She could

use her paid time off and unpaid leave, if needed. When Nunn refused to take leave or get treatment, she was fired for her unprofessional behavior.

“Ask and ye shall be sued,” the old saying should go. Nunn sued ISBE under the Americans with Disabilities Act, claiming she was discriminated against because of her disability. The court dismissed her case on summary judgment, ruling that she was disabled, but not qualified for the job. It ruled that, “Although not stated in Nunn’s job description, it was necessary for Nunn to conduct herself in a professional manner. Professional conduct is an inherent duty of any worker. Nunn could not meet this most basic requirement.” Her inability to behave in a professional manner and the numerous disruptions she caused prevented her from establishing that she was a “qualified individual with a disability.” Being qualified is a requirement under the ADA.

She was also “unqualified” for the job because she did nothing to control her bipolar disorder. The court ruled that “a plaintiff cannot recover under the ADA if through plaintiff’s own fault plaintiff fails to control an otherwise controllable illness.” The court cited a case where the employee’s failure to monitor and control his diabetes barred recovery under the ADA. The medical evidence showed that Nunn’s bipolar disorder was a treatable condition. Her refusal of treatment barred recovery under the ADA.

Finally, the court stated that, even if Nunn had established that she was qualified, ISBE offered a legitimate, nondiscriminatory reason for her termination when it stated that it fired Nunn because of her disruptive, unprofessional behavior. Nunn offered no evidence to show that ISBE’s proffered reason for termination was pretextual. *Nunn v. Illinois State Bd. of Educ.*, 448 F.Supp.2d 997 (C.D.Ill. 2006).

Key Points: This case illustrates that even disabled employees must behave professionally in the workplace. ISBE did an admirable job of dealing with a difficult situation, but the court’s ruling indicates that ISBE could have fired Nunn for her conduct without requiring a psychological analysis of why she was acting so bizarre. ISBE may have avoided a claim under the ADA altogether if it had fired Nunn for unprofessional conduct at work, before gaining knowledge that she had a disability.

EXCESSIVE ABSENCES DISQUALIFIES EMPLOYEE UNDER THE ADA

Unprofessional conduct is not the only thing that can cause a disabled employee to lose an ADA claim. Reliable attendance is generally considered an essential job function, and excessive absenteeism can render an employee unqualified for the job even though the employee is disabled.

Take the case of Robert Barclay. Barclay was a locomotive engineer for Amtrak when he was fired for having 28 unexcused absences in a four month period. Barclay suffered from irritable bowel syndrome (IBS). The condition was a disability. But the evidence showed the absences came during a time when Barclay was medically cleared to operate a locomotive. Barclay, nevertheless, contended that he could not work at any job at the time he was terminated due to his IBS. The court pointed out the Catch-22 for Barclay on his disability claim: If he could not perform any job at the time of his termination from Amtrak, then he was not qualified and had no ADA protection. If, on the other hand, a fact-finder accepted the physician’s evidence that Barclay could work without restrictions, then Barclay had no explanation for the unexcused absences that

resulted in his termination. The court dismissed the ADA discrimination claim.

Barclay also claimed that Amtrak should have accommodated his disability by transferring him to another position that he could perform. The court explained that for an employee to win a claim based on failure to reasonably accommodate by transferring the employee to a vacant position, the employee must show: (1) that there were vacant, funded positions available; (2) that these positions were at or below the level of his former job; and (3) that he was qualified to perform the essential duties of one or more of these jobs with or without reasonable accommodation.

The court dismissed the reasonable accommodation claim because there was no evidence that, during the relevant time period, there were open positions at Amtrak that Barclay was capable of performing.

Finally, Barclay claimed that Amtrak subjected him to a hostile work environment on the basis of his disability. Barclay claimed that his road foreman, Carmine Palumbo, harassed him by repeatedly asking for doctor's notes from Barclay to explain his absences; wanting Barclay to obtain his permission before using sick time; putting Barclay on speaker phone and allowing other employees to listen when Barclay called in sick; performing frequent safety and speed checks on Barclay and his locomotive that were not done with other engineers; and conducting an investigation regarding a rumor that Barclay was using his sick time to operate a side-business.

Barclay's claim for hostile work environment also failed because Barclay could not show that this harassing conduct was based on his disability or his request for accommodation, or that it was sufficiently severe or pervasive to alter the conditions of his employment. The court found that Barclay's treatment by his supervisors, particularly Palumbo, "ranged from insensitive to

downright obnoxious." Nevertheless, it found no unlawful harassment, explaining that the ADA does not make all harassment, or every unpleasant working environment, actionable under the law. Rather, to constitute a hostile work environment under the ADA, the harassing conduct must be because of the employee's disability. A personality conflict doesn't ripen into an ADA claim simply because one of the parties has a disability.

The evidence established that Palumbo was hostile to Barclay not because of Barclay's IBS disability, but because he felt Barclay was taking too many days off, irrespective of his disability. Of course, one could argue that any time a supervisor harasses an employee for absences that are caused by a disability, it constitutes harassment because of the employee's disability. The court rejected this broad view. The testimony indicated that, far from harassing Barclay because of his IBS, Palumbo was indifferent to the possible medical reasons for his absences. Palumbo's behavior reflected his suspicions that Barclay was taking days off when he had a hangover from drinking, and was operating a side-business during his sick leave. Also, Palumbo just didn't like Barclay. None of these motivations for harassment are a violation of the ADA. Case dismissed! *Barclay v. Amtrak*, 435 F.Supp.2d 438 (E.D.Pa.2006).

Lesson: When an employee claims that he is absent because of a disability, the employer has the right to require medical verification. If the physician releases the employee to work, the employee must show up and do his job, or face the consequences. If the physician agrees that the employee can't work because of the disability, the employer should allow the employee to take any leaves to which he is entitled, and offer any vacancies of the same or lower level for which the employee is qualified before terminating employment.

Q & A

Q. *Can an employee volunteer for no pay to do the same kind of work he is hired to do for pay by the same employer?*

A. No, unless the employee is exempt from the FLSA's minimum wage and overtime requirements. The FLSA requires that non-exempt employees be paid at least minimum wage for time worked and overtime after 40 hours in a work week. It does not generally allow employees to work for free doing the same types of activities that they are hired to perform, even if the employer is a non-profit organization.

Q. *We told employees in January of this year that if the company's net income reached \$1 million by December, they would each get a \$1,000 Christmas bonus. We reached our goal. Are there any complications with paying out these bonuses?*

A. The bonus is wages and subject to tax withholdings, and employer's taxes, the same as any other wages. The bonus is also non-discretionary because you promised it ahead of time. A non-discretionary bonus is considered part of the employee's regular rate of pay for purposes of computing overtime. Thus, the bonus increases the regular rate of pay, which, in turn, increases the overtime rate of pay for the year. This means that for each non-exempt employee who receives the bonus and who also worked overtime during the year, you owe an additional overtime premium because of the \$1,000 bonus. The amount owed is equal to $\$1,000 / \text{total hours worked this year} \times .5 \times \text{overtime hours worked during the year}$. Make sure the additional overtime pay is designated overtime premium and not bonus.

Q. *If we close down because of snow, must we pay employees who show up for work and are immediately sent home? What about employees who don't make it to work because of snow? Must they be paid?*

A. Your obligation to pay for a snow day depends on whether the employee is exempt or non-exempt from the FLSA, and whether you have made any promises to employees regarding pay for snow days. You must comply with your own promises. But assuming you have made no promises to pay for snow days or for showing up when there is no work, the FLSA does not require that you pay non-exempt hourly employees for time not worked. On the other hand, exempt salaried employees can not have their salaries reduced because there is no work available for them when they arrive. If the exempt employee chooses to take a full day off because of snow rather than come to work, and would have been allowed to work had he shown up, then the equivalent of a full-day's pay can be deducted from his salary for taking the day off. But if the exempt employee performs work from home or works any part of the snow day, there can be no deduction from the salary.

EMPLOYER'S ADVISORY SEMINAR: Colorado's New Immigration Laws, and Common Sense Misconceptions about Employment Laws.

This half-day seminar will review Colorado's new immigration laws affecting employers and cover the most common errors employers make when dealing with everyday issues in the work place. January 25, 2007, from 9:30 a.m. to 12:30 p.m., Home Loan Building, 205 N. 4th Street, Grand Junction, CO. Cost \$75 each. Go to www.bechtelsanto.com for a sign-up form.