page 2
New York case highlights risk of AI as a job-screening tool

Court OKs employee lawsuit over 'rounded-off' time

page 3
School district held liable for FMLA retaliation

page 4
Department of Labor proposes rule extending overtime to salaried workers

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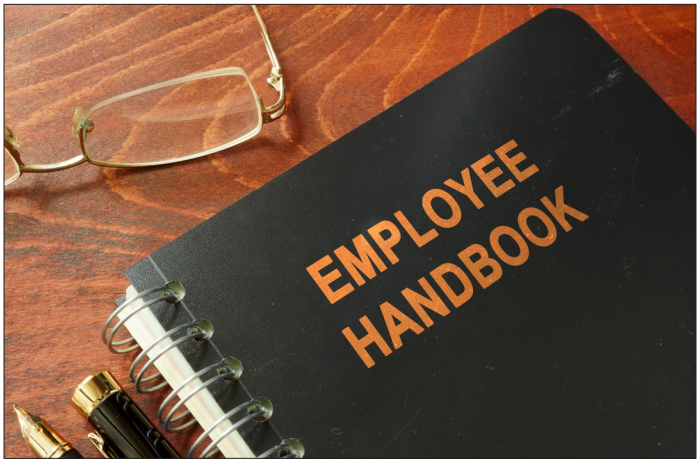
Employers must review handbooks, policies in wake of NLRB ruling

The National Labor Relations Board is charged with enforcing federal labor laws that protect the right of workers to organize for better pay and working conditions.

In this role, the NLRB investigates and prosecutes private sector employers accused of violating these laws and interfering with the rights of workers to organize. The NLRB also holds hearings to determine if an employer has committed an unfair labor practice and determines the consequences. Meanwhile, its rulings provide guidance to employers on matters that can get them in hot water.

One such ruling that all employers should be aware of is *Stericycle*, issued last summer. In this ruling, the NLRB adopted a new standard for determining whether employer work rules unlawfully "chill" (or discourage) employees from exercising their organizing rights. Every employer should meet with an employment attorney to go over their handbooks and employment polices to make sure they're not running afoul of the law in light if this new decision, which tilts the balance toward workers.

In a nutshell, the NLRB announced in *Stericyle* that any employer policy or rule regarding "concerted" employee activity — such as openly discussing salary, wages and benefits; collectively refusing to work in unsafe conditions; joining together to talk directly to the employer, the media or governmental regulators about workplace issues; or distributing a petition seeking shorter hours — will be evaluated from the worker's point of view, regardless of the employer's intention in adopting the rule.



In other words, if employees could reasonably view the rule as discouraging them from, or punishing them for, engaging in protected activity, the rule will be presumed illegal, even if it's reasonable to interpret the rule differently.

Given this shift, there are several areas where employers could wade into dangerous waters.

A big area is employer policies that limit employees' use of social media and technology, especially when employers claim the ability to monitor or record employees in certain contexts. One of the major issues in the

continued on page 3

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New York case highlights risk of AI as a job-screening tool

A recent case from New York provides two lessons to employers: that the use of artificial intelligence as a job-screening tool creates liability risk and that age discrimination is taken seriously.

In May 2022, the U.S. Equal Employment Opportunity Commission brought a complaint against iTutorGroup, a provider of online education and tutoring services to students in China, alleging that it violated the federal Age Discrimination in Employment Act, which protects workers 40 and older from job discrimination based on their age.

According to the EEOC, the company programmed its AI-based job application software for prospective tutors automatically to reject female applicants age 55 or older and to reject male applicants 60 or older.

The case arose when an applicant who was initially rejected resubmitted their application with a more recent birthdate and then received an interview. The applicant filed a charge with the EEOC, which then sued iTutorGroup in federal court on that applicant's behalf as well as more than 200 other qualified U.S.-based applicants who were allegedly rejected due to their age.

Though the company denied any wrongdoing, it agreed to settle soon after the EEOC filed suit.

Under the terms of the settlement, iTutorGroup must pay $365,000, to be distributed to applicants who were automatically rejected due to their age.

Additionally, while iTutorGroup stopped hiring tutors in the U.S., if it wishes to resume U.S.-based hiring, it will be required to provide extensive ongoing training to those involved in the hiring process and to issue a robust anti-discrimination policy. It also may no longer request applicants' birthdates.

Should iTutorGroup resume hiring in the U.S., it will be subject to EEOC monitoring for five years, and it will be required to notify and interview those applicants it allegedly rejected due to age.

None of this suggests that employers should stop using AI tools altogether, but any employer using AI as part of its job-screening process should certainly consult with an employment attorney to ensure it's not being deployed in a way that will get the company in hot water.

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Court OKs employee lawsuit over 'rounded-off' time

In order to foster more efficient payroll record-keeping, employers have engaged in the practice of "rounding" hourly employees' time up and down at the beginning and end of shifts for decades, going back to when people physically "punched in" by inserting a timesheet into a time clock.

This is permitted under the Fair Labor Standards Act — or FLSA — but only if the worker's pay "averages out" over a period of time to the amount of time they actually worked.

In this context, a recent ruling from the 8th U.S. Circuit Court of Appeals should signal to employers that it may be time to discuss their rounding-off polices with a wage-and-hour lawyer to ensure compliance with the law.

In the 8th Circuit case, employees at St. Luke's Health System in Kansas City brought a class action against the hospital arguing that its rounding-off policy violated the FLSA. The policy in question rounded clock times within six minutes of a shift's scheduled start or end time, meaning that an employee who punched in at 11:54 for a 12 p.m. shift would have the time rounded up to noon (not getting paid for the extra six minutes worked), and if an employee clocked out at 2:54 for a shift ending at 3 p.m., the time would be rounded up to 3 p.m., paying them for the six minutes not worked.

A lower court tossed out the lawsuit finding that because some of the workers' time was rounded up, and their pay rounded up as a result, workers weren't getting less than they were owed.

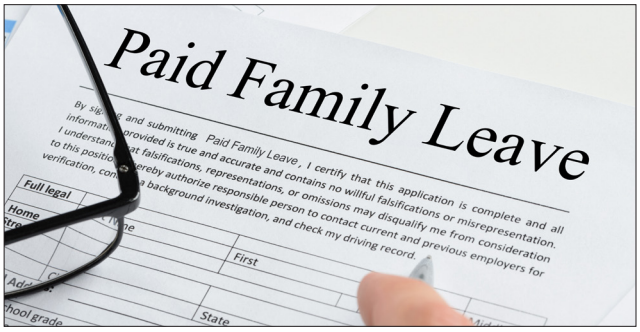
But the 8th Circuit reversed the decision. In doing so, the court examined actual hours and pay data that the hospital provided. The data apparently showed that, in the aggregate, the policy resulted in time getting cut from about half of all shifts, while it was added to about a third of all shifts, with no effect on remaining shifts. This apparently favored the employer by about 74,000 hours over a six-year period.

The court did not, however, enter judgment in the workers' favor; it ruled that the case should be able to proceed to trial. The employer may still win at that stage. However, it should serve as a warning to employers to do regular internal audits to make sure time is actually averaging out and not rounding in the employer's favor.

School district held liable for FMLA retaliation

The federal Family and Medical Leave Act entitles those who work for public employers or companies with at least 50 employees to take up to 12 weeks of unpaid, job-protected leave per year to care for a new child or an immediate family member with a serious health condition, or to take medical leave when unable to work because of a health condition.

FMLA also bars employers from retaliating against employees for seeking to exercise their rights under the law, as a school district in Rhode Island found out recently.



In that case, administrative assistant Colleen Derrick sought and received a transfer to a position as secretary to the director of the district's vocational school. The new role required her to use software and perform tasks she had not previously performed, and within a few months the director contacted HR expressing concerns about her performance. Derrick was soon placed on a performance improvement plan, or PIP.

Soon after, Derrick's physician recommended she be placed on medical leave for chest pain, headaches and panic episodes, and the city approved her request for about six weeks of FMLA leave.

However, the HR director and school superintendent suspected she was faking her symptoms to avoid dealing with the PIP and sought a second opinion examination before approving an extension of Derrick's leave.

Derrick decided to retire instead. She then completed training to become a teacher's assistant and was hired as a substitute TA for two months in a special education class. But when the HR director learned Derrick was doing work for the city, she terminated the assignment and told Derrick she would not be eligible for future assignments because she had not completed her PIP for her prior position.

Derrick brought suit in U.S. District Court alleging that both the request for a second opinion medical exam and her termination constituted illegal retaliation under FMLA.

Though the judge said the request for the second exam may have been permissible, the city could not provide a legitimate, non-retaliatory reason why it fired Derrick from her substitute teaching assistant role, since the firing was unrelated to her performance in that role. The judge also did not buy the HR director's explanation that Derrick's failure to complete the PIP in her prior role showed she wasn't a "team player." Now the city will have to pay damages equal to the wages and benefits Derrick was denied.

Employers must review handbooks, policies in wake of NLRB ruling

continued from page 1

Stericycle case itself was whether the employer, in its response to employees who were discussing their unionization efforts on social media sites, acted in a manner that discouraged employees from exercising their right to speak online and push for changes in the workplace without fear of retaliation by the employer.

Employers also may have "non-disparagement" policies that limit the ability of workers to speak negatively about the employer and confidentiality provisions in employee handbooks that limit the information employees may divulge about a company.

Under the new *Stericycle* standard, if an employee complains that one of these policies is operating in a manner that chills their ability to engage in protected organizing activity, the employer has an uphill battle, because they now have to prove there's a legitimate and significant business need for such a rule or policy and that the employer cannot advance that interest with a more narrowly written rule.

Fortunately for employers, the NLRB has suggested that they can protect themselves to a certain degree by adopting a broad policy explicitly stating that its specific workplace policies and rules should not be understood as restricting employees' rights to engage in organizing activity.

Regardless, this is a complicated area, and if you were to discipline a worker under what the NLRB considers an overly broad workplace rule, you could end up owing that worker back pay and a reinstatement order, in addition to the money you spent and the stress you endured fighting the charges. That's why it's important to consult an employment attorney today.

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Department of Labor proposes rule extending overtime to salaried workers

Employers everywhere should make note of a rule recently proposed by the U.S. Department of Labor that would guarantee overtime pay for millions of relatively low-paid, white-collar salaried workers.

Current rules exempt salaried employees in executive, administrative and professional (EAP) positions from overtime pay if they are paid at least $684 a week or the equivalent of $35,568 annually.

Under the proposed rule, the DOL would bump up the salary level for exempt EAP employees to cover the top 65 percent of full-time salaried workers in the lowest-wage Census Region (currently the South).

This means any EAP worker earning less than $1,059 a week (or $55,068 annually) would be entitled to overtime pay.

Additionally, the new rule would update earnings thresholds every three years using current wage data.

Though this is only a proposed rule, it would be wise to talk to an attorney and review your own policies to ensure you're properly categorizing your employees, paying overtime to all workers entitled to it under the federal Fair Labor Standards Act, and identifying anybody who is currently exempt but would not be under the proposed rule. FLSA violations can be costly — with the employer being ordered to pay fines, back wages, damages, attorneys' fees and court costs — so a bit of foresight can go a long way.