

Welcome to Legal Briefs for HR! This update on issues that matter to employers is provided as a service of the SHRM Texas State Council, which I serve as Co-Director of Legislative Action. Feel free to forward this email to anyone who would benefit . . . all are welcome to join this FREE service with over 2800 subscribers!

Welcome to new subscribers from The HR Net in Ohio (who were referred by the witty and wise Steve Browne at SBrowne@CDS-ASSOC.COM) and attendees at the Dallas Bar Association's North Clinic CLE on employee handbooks. And thanks to everyone who responded to my Plaxo plea and updated their contact information for my address book.

Here's the latest:

1. **Amazing Grace** - The OFCCP is standing firm on the Feb. 6, 2006 effective date for the new Internet Applicant rule, but it will not cite a federal contractor in the 90-day period following that date for purely technical violations of the rule so long as the contractor [a] shows it is taking reasonable steps to update its systems toward compliance, including a projected date of compliance; and [b] continues to collect and maintain records under the "old" rule. See www.dol.gov/esa/regs/compliance/ofccp/faqs/iappfaqs.htm for FAQ on the new Internet Applicant rule.
2. **Walk the Line** - The U.S. Supreme Court's decision in *IBP v. Alvarez* (discussed in Legal Briefs for HR #10 - 2005) provided needed "clarification" which led to a \$4.5 million settlement with 1000 current and former workers at a Toyota plant in KY. The voluntary settlement aims to settle a dispute over "walk time," the approximately eight minutes per day employees spent walking between the place where protective clothing was donned/doffed and their workstations, which had not been compensable in the past. The company is also offering retroactive contributions to each affected employee's 401(k) and pension plans. If you haven't done it already, determine when the "continuous workday" begins and ends for your non-exempt employees and make sure that your compensation practices are in sync with the Supremes' holding.
3. **Watch Your Words** - The U.S. Supreme Court reversed a finding that, as a matter of law, use of "boy" alone, without a modifying racial classification like "black" or "white" is not evidence of discrimination. The Court explained "Insofar as the court of appeals held that modifiers or qualifications are necessary in all instances, to render the disputed term probative of bias, the court's decision is erroneous." *Ash v. Tyson Foods, Inc.* (S. Ct. 2-21-06). This case is a good reminder that your harassment training should go beyond the issue of gender, and encompass the full spectrum of protected categories. My "best practices" clients ask me to do a refresher course periodically, in light of the change in supervisory and management ranks due to growth, turn-over and promotions.

4. **Right to Carry (Not)** - Eight workers (one employee, seven contractors) were fired in 2002 for violating an employer's "no guns" policy, after guns were indicated in their parked vehicles by drug and gun-sniffing dogs. The plaintiffs tried several arguments to no avail. Strike One - the Court found that the Oklahoma Self-Defense Act, which lets property owners ban guns on their premises, is not in conflict with the right to bear arms found in the OK Constitution. Strike Two - A 2004 amendment to the Self-Defense Act, which created an exception that would allow guns kept in locked vehicles on parking lots, did not apply retroactively (to what happened to plaintiffs in 2002) and is currently subject to a temporary restraining order that prevents the State from enforcing the amendment. Strike Three - The Court refused to recognize plaintiff's claim for a wrongful discharge in violation of public policy (based on the same reasoning as above). You're Out! *Bastible v. Weyerhaeuser Co.* (10th Cir. 2-13-06). P.S. The court is considering permanent injunction briefs on the 2004 amendment which, if successful, will preserve employers' right to say "no guns on my premises, including the parking lot" . . . stay tuned!
5. **No Good Deed Goes Unpunished** - Do you offer cash in exchange for unused sick days? Then listen up, because the 8th Circuit thinks that amount must be included in non-exempt employees' "regular rate" for purposes of calculating overtime pay. Columbia, MO firefighters could exercise the buy-back once they accrued more than six months of paid leave. The Court analogized the payment to a non-discretionary bonus that is designed to reward regular attendance and is therefore part of their remuneration for employment. *Acton v. Columbia* (8th Cir. 2-8-06). While much of the overtime litigation focuses on employers' failure to recognize all hours worked, the other half of the equation (calculating the "regular rate" which, in many cases, is not the same as the hourly rate of pay) can cause just as much trouble. Conduct a self-audit of your wage and hour procedures (with help from legal counsel, if you're not sure) before someone does it for you!
6. **Whose House Is It Anyway?** - A Dep't of Labor (DOL) Opinion Letter confirms that employers who provide employee lodging (think on-site managers) can require an employee on FMLA leave to vacate the premises, so long as on-site employees on other types of leave are treated similarly. Also, the employer must allow the employee to return to the lodging if and when the employee returns to work before FMLA rights lapse. You can check out DOL Opinion Letters at www.dol.gov/esa/whd/opinion/opinion.htm.
7. **Women of the World** - Norway has a new law, giving Norse large and publicly-traded companies two years to achieve 40% female representation on their boards of directors.
8. **Today, Fido . . . Tomorrow, You?** - Two employees of CityWatcher.com agreed to have radio frequency identification (RFID) chips implanted in their arms. The microchips are read by scanners that limit access to their employer's

most secure rooms. The chips can also be loaded with the recipient's complete medical history, and are being used in hospital settings with patients who are prone to black-outs or roaming. The glass chips are the size of a grain of rice, can be injected with a needle in a doctor's office and removed like a "large splinter."

9. **Enron Emails: A Cautionary Tale** - Go to www.enronemail.com for thousands of reasons why some folks should be more careful about what they say in their emails. The site is a pitch for a tool that can "flag and group questionable emails" for a fee and their demo database includes more than 515,000 Enron messages collected by the Federal Energy Regulatory Commission during its investigation and then released to the public in 2003. Entries range from "This week is not good. I have a large pile of documents to shred. Next week is better." to "So, you were looking for a one-night stand after all?" Ouch.

10. **Survey Says** - Dallas HR, the North Texas Compensation Association and Deloitte have joined forces to offer the 2006 DFW area salary survey, including info on 226 positions in a variety of industries. Those who participate get a price break on the final results, so go to <https://www.deloittesurveys.com/DFWSurvey2006/> to submit your responses on-line. Questions? Contact Lina Jing at ljing@deloitte.com