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10 Tricky Questions To Test Your Employment Law Savvy

By **Ben James**

Law360, New York (February 09, 2015, 4:12 PM ET) -- When it comes to employment law savvy, the nation's businesses are a diverse bunch — some stumble over workplace law basics, while others stay keenly attuned to the best practices for navigating even the most-complex dilemmas. Knowing what you can and can't do is the foundation for making smart decisions. If you can correctly answer these 10 questions, you're on the right track.

1. An employer closes up shop for one day due to a heavy snowstorm. Since the business wasn't open, does that mean no one has to be paid for that day?

No. If the closure was for less than a full workweek, Fair Labor Standards Act-exempt employees must be paid, said Duane Morris LLP partner Jonathan Segal.

However, nonexempt employees do not have to be paid under federal law, he said, though there is an exception for workers paid on a fluctuating workweek basis and there may be exceptions under a collective bargaining agreement or other deal or policy providing for payment.

Also, if a nonexempt employee ends up doing work from home, then the obligation to pay kicks in, Segal said.

Inclement weather could get an employer out of the obligation to pay all its employees if the business shuts down for a full workweek and no one does any work, Segal said.

But that might stir up a flurry of resentment, he added.

2. A blizzard translates to a snow day for schoolchildren. Are workers entitled to a day of Family and Medical Leave Act leave to care for kids who would otherwise be at school?

No. A snow day may be inconvenient, but in most cases, it's not going to cut it under the FMLA.

The FMLA does call on employers to permit workers to take time off to care for a child, but only in the event of a recent birth, a child's adoption or placement in foster care, or if a child has a serious health issue.

"The FMLA would be usable, not because of the school closing, but to care for a parent, child or spouse with a serious health condition who may not be able to get the care they need because of the weather," Segal said.

3. In light of the National Labor Relations Board's application of labor law-protected rights to arguably obscene or disparaging social media postings from workers, can employers ever lawfully impose discipline over insulting posts on Facebook or other platforms?

Yes. There are situations in which firing or disciplining a worker is well within an employer's rights.

Under the Obama administration, the NLRB has raised eyebrows with what many management-side lawyers say is an overly broad view of the rights safeguarded by Section 7 of the National Labor Relations Act, which shields workers who engage in concerted activity for their mutual benefit.

Some decisions have gone in favor of employees, but in October, the labor board sided with a youth program provider who let two workers go over a profane Facebook exchange.

A social media rant may not fall under the aegis of Section 7 if it doesn't relate to terms and conditions of employment or implicate shared concerns about the workplace, and even postings that meet the standard for protected, concerted activity can lose the NLRA's protections if they are egregious enough, Miller Canfield Paddock & Stone PLC principal Adam Forman said.

But while they may not be powerless, employers need to avoid reacting too swiftly when they see a social media post that stings, he added.

"It's a very factually intensive analysis," Forman said. "They really need to carefully vet any decision to take action with experienced counsel, because the consequences of betting wrong could be severe."

4. An employee has used up all of his or her FMLA leave but needs more time off. Does this mean the employer can fire and replace the worker?

No, because that worker may be covered by the Americans with Disabilities Act, or applicable state or local laws, and may be entitled to more leave as a reasonable accommodation.

"The ADA comes into play there," Mintz Levin Cohn Ferris Glovsky & Popeo PC member Michael Arnold said. "You may have to accommodate them, whether it's through extended leave or something else."

And while the disability must be known to the employer to trigger the ADA's reasonable accommodation requirement, there are no "magic words" that a worker has to utter, Arnold said. If a worker needs FMLA time off to deal with a health condition, that should alert an employer that a potential disability is in play.

"Don't bury your head in the sand on this one," Arnold said. "That is a poor practice."

5. Can a nationwide employer have a "zero tolerance" policy for employee marijuana use given that medical and recreational use is permitted in some states?

Yes, but it's risky. The fact that marijuana remains illegal at the federal level puts the law on the employer's side, generally. But 23 states and Washington, D.C., have made the drug legal for medicinal

or recreational use, and some states' medical marijuana laws do address employer rights and obligations.

"It's a real dilemma, and I'm getting a lot of questions about that," Crowell & Moring LLP partner Tom Gies said.

Lawyers agree that employers have the right to ban workers from being impaired on the job and fire employees who work while intoxicated. But businesses that take action against workers or even job applicants over off-duty use in pot-friendly jurisdictions are heading into uncharted waters.

Employers in some states where medicinal or recreational use is legal must contend with laws protecting workers engaging in such conduct when they're off-duty. For example, Colorado's highest court is currently mulling an appeal from Brandon Coats, a quadriplegic and state-licensed medical marijuana user whom Dish Network LLC fired from a customer service job after a positive drug test.

"He's lost so far," Gies said of Coats' lawsuit, "but it's pending before the Colorado Supreme Court, and I could just see it going the other way. He's clearly a sympathetic plaintiff."

More than two dozen states have some version of the off-duty conduct statute at issue in the Colorado case, Gies added.

6. Are employees that are paid a weekly salary exempt from overtime pay requirements?

No. The FLSA does have "white collar" exemptions for certain employees that require paying at least $455 per week on a salary basis. But the mere fact that a worker is paid a salary and not by the hour isn't nearly enough to meet the test for those exemptions, which have specific job duty requirements.

That may seem obvious to practicing employment lawyers and more sophisticated employers, but plenty of businesses get this wrong, Arnold said.

"This is one of the most common mistakes that employers make," he said. "It doesn't matter if you pay workers a weekly salary. What really matters is what they do for you."

7. Does an employer have to pay for overtime hours worked without permission?

Yes. This is another common misconception about overtime pay, Arnold said.

An employer can require that workers get permission for overtime hours and take action against them if they don't, but there's no way around paying once the overtime is on the books.

"You can discipline, and you should, but you still have to pay them for any hour worked," Arnold said.

8. An employer has signed agreements with workers explicitly saying they are independent contractors, not employees. Does that mean they are definitely contractors?

No, that's a myth, said Dan McCoy, co-chair of the employment practices group at Fenwick & West LLP. Many people assume that as long as there's a written agreement in place, there is no question as to whether a worker is an independent contractor or an employee covered by the FLSA's minimum wage and overtime protections.

"It's, of course, not even remotely that simple, and it's a significant area of risk for companies, with a lot of pitfalls and exposure," McCoy said.

For FLSA purposes, all facts relevant to the employer-worker relationship must be considered when assessing if independent contractor or employee is the right classification, according to the U.S. Department of Labor, and whether an agreement saying a worker is a contractor has been signed is "immaterial."

Even if an employee demands to work under the label of independent contractor rather than employee, that's not a defense to potential misclassification claims that may come later, McCoy added.

9. An employee discloses a disability for the first time in response to a negative performance evaluation or decision to discipline. Can the employer move forward as planned?

Yes. This isn't an uncommon scenario, and employers have a lot of questions about what their obligations are in a situation like this and what they are allowed to do, Arnold said.

But if an evaluation has already been provided and any decision on disciplinary action has already been communicated by the time of the employee's disclosure, the employer should be on solid ground to move ahead, he said.

"You don't have to then take back your performance evaluation," Arnold said. "The discipline can stay in place."

When a worker discloses a disability, however, the employer's obligation to try to work out a reasonable accommodation kicks in. If lackluster performance continues even with an accommodation in place, then the employer would be legally justified in taking further action, Arnold said.

10. Must an employer fire an employee who makes an inappropriate yet not terribly severe joke or comment with discriminatory implications?

No, Segal said. Truly hateful or egregious comments must be met with termination, like the use of a hate slur or an executive saying the company shouldn't hire people of a particular race, he said, but in more-subtle instances, an employer could discipline the worker or provide education and training.

So-called microaggressions and other offensive statements based on stereotypical assumptions shouldn't be ignored, and employers should make it clear that they won't be tolerated. Such comments could provide ammunition to a would-be bias plaintiff, Segal noted. Independent of the law, tolerating such statements is inconsistent with valuing diversity and maximizing inclusion.

"Even if it doesn't rise to the level of harassment, it may be evidence of discrimination," he said. "Leaders need to understand that, big-time."

--Editing by Katherine Rautenberg and Edrienne Su.