

In this issue:

- New Minimum Wage
- Employee Conduct and the ADA
- Acceptable I-9 Documents
- OSHA Issues Third Largest Fine in History
- Wal-Mart to Pay \$250,000 for Disability Bias

New Minimum Wage

Effective July 24, 2008, the federal minimum wage for covered non-exempt employees rose from \$5.85 to \$6.55 per hour. The Fair Minimum Wage Act of 2007, which amended the Fair Labor Standards Act (FLSA), provides for phased-in increases ultimately reaching \$7.25 per hour effective July 24, 2009. A separate provision of the bill brings about phased increases to the minimum wage in American Samoa and the Commonwealth of the Northern Mariana Islands.

Effective January 1, 2008, the Oregon minimum wage increased by 15 cents to \$7.95 per hour. Each year BOLI calculates an annual adjustment to the minimum wage for the following calendar year. The annual adjustment is based on any increase during the previous 12 months in the U.S. City Average Consumer Price Index for All Urban Consumers for All Items.

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COMPLIANCE HIGHLIGHT

Employee Conduct and the ADA

Typically, most employees with disabilities can maintain acceptable conduct in the workplace. However, on occasion, some employees with disabilities may exhibit unacceptable conduct at work. These situations leave employers with concerns about discipline, accommodations, and the ADA.

While it may seem challenging to identify accommodations to help manage employee conduct, following some simple guidelines can help resolve these workplace issues quickly.

First, create a workplace policy with particular reference to conduct. Provide clear explanations of expected behavior and prohibited behavior. Some specific behaviors to address might be: destruction of property, using profanity at work, insubordination, or leaving one's work area. Vague statements such as "employees must act professionally" may be interpreted many ways, and it may be difficult to determine whether or not an employee's behavior complies with such a statement. Precise wording of your policy can help ensure that employees understand the policy. Provide your policy to employees and provide training and periodic reviews to ensure compliance with your policy.

The ADA does not require employers to withhold or rescind disciplinary actions from employees with disabilities, nor to lower conduct standard.

Next, train managers and supervisors to apply your policy in a consistent and reliable manner to all employees. Applying a policy often means "counseling" employees on conduct issues, using "performance plans" or disciplining employees for conduct violations. The ADA does not require employers to withhold or rescind disciplinary actions from employees with disabilities, nor to lower conduct standard. Furthermore, the ADA does not prevent employers from maintaining safe workplaces (free from violence or threats of violence). Therefore, it is good practice to require managers and supervisors to apply your policy equally to all employees.

Then, encourage employees with disabilities to request job accommodations to ensure compliance with your conduct policy. Job accommodations can help minimize the likelihood of employees with disabilities violating your conduct policy, such as attendance rules or computer use guidelines.

Some examples of job accommodations that help employees with disabilities comply with conduct policies follow.

(Continued on page 2)

ENFORCEMENT UPDATE

Acceptable I-9 Documents

Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because of a future expiration date of such document(s) may also constitute illegal discrimination.

How do I know if a document is genuine or false?

An employer is not required to know with absolute certainty whether a document is genuine or false. The law merely requires that an employer examine the original of the document (not a photocopy) and make a good-faith determination that the document:

- Appears to relate to the employee;
- Appears to be genuine; and

- Is listed as an acceptable document on the back of the Form I-9.

Please note that the rejection of a document that later proves to be genuine could result in a violation of the anti-discrimination provisions of immigration law.

Employers' Responsibility under the Law – Document Review Standard

The standard for review of documents in the employment eligibility verification process is that of reasonableness. An I-9 List document is acceptable if it reasonably appears on its face (1) to be genuine and (2) to relate to the individual who presents it.

(Continued on page 2)

Employee Conduct and the ADA (con't)

- A sales manager with anxiety is required to participate in staff meetings by sharing one thought or idea with the group. Due to her disability, she has difficulty speaking in front of groups. The employer allows her to submit her idea or thought via email soon after the staff meeting.
- Due to chronic pain, a retail employee experiences irritability during long work shifts when medications wear off. Thus, it becomes difficult to maintain satisfactory customer service. As a job accommodation, the employer shortened the employee's work shift, which helped manage pain, created less irritability, and improved the employee's customer service.
- An employee with depression enjoyed reading inspirational phrases on various websites to help her manage her mood at work. However, using office computers to surf the internet violated company policy. The employer suggested bringing inspirational books to work, and allowing her to read short portions throughout the day.

Finally, if job accommodations do not prevent conduct violations, or if employment separation is imminent due to the severity of the conduct violation, proceed with termination. Be prepared to show that the conduct standard was job-related and consistent with business necessity. According to the EEOC's Guidance on ADA and Psychiatric Impairments, some conduct standards may not be job-related for a specific position, and if not, imposing discipline or termination could violate the ADA.

① For more information visit EEOC's Web site.
(<http://www.eeoc.gov/policy/docs/psych.html>)

OSHA Issues Third Largest Fine in History

The Occupational Safety and Health Administration (OSHA) recently issued citations proposing penalties totaling \$8,777,500 against the Imperial Sugar Co. and its two affiliates alleging violations at their plants in Port Wentworth, Ga., and Gramercy, La. OSHA initiated the inspections following an explosion and fire on Feb. 7, 2008, at the Port Wentworth refinery that claimed the lives of 13 employees and hospitalized 40 others. The proposed penalties against Imperial Sugar represent the third largest fine in the history of OSHA.

OSHA's inspections of both facilities found that there were large accumulations of combustible sugar dust in workrooms, on electrical motors and on other equipment. The investigation also determined that officials at the company were well aware of these conditions, but they took no action reasonably directed at reducing the obvious hazards.

OSHA proposed \$5,062,000 in penalties for safety violations at the Port Wentworth refinery and \$3,715,500 for safety violations found at the Gramercy refinery. The citations include 108 instances of willful violations related to the combustible dust hazard, including the failure to clean up dust and not using appropriate equipment or safeguards where combustible dust is present. OSHA also has issued 10 citations for other willful violations, 100 citations for serious violations and four citations for other-than-serious safety and health violations.

Acceptable I-9 Documents (con't)

In other words, an employer or employer's agent who signs Section 2 of the Form I-9 is not attesting to the legitimacy of the status of the person who presents the document but, rather, to the fact that he or she has reviewed the original document and that it reasonably appears to him or her, upon reasonable inspection of its features and the information it contains, to be genuine and to relate to the employee who has presented it for employment eligibility verification purposes. (Employers are not required to be document experts). In reviewing genuineness of the documents presented by employees, employers are held to a reasonableness standard. Since no employer that is not participating in one of the employment verification pilots has access to receive confirmation of information contained in a document presented by an employee to demonstrate employment eligibility, it may happen that an employer will accept a document that is not in fact genuine – or is genuine but does not belong to the person who presented it. Such an employer will not be held responsible if the document reasonably appeared to be genuine or to relate to the person presenting it. An employer who receives a document that appears not to be genuine may request assistance from the nearest Immigration Field Office or contact the Office of Business Liaison.

If an employer can demonstrate compliance with Form I-9 requirements, a good faith defense with respect to a charge of knowingly hiring an unauthorized alien will have been established unless the government can prove otherwise.

Wal-Mart to Pay \$250,000 for Disability Bias

Wal-Mart will pay \$250,000 and furnish significant injunctive relief to settle a disability discrimination lawsuit filed by the EEOC, the agency announced recently. The EEOC had charged that Wal-Mart failed to accommodate and then fired a long-time pharmacy technician who suffered a disability resulting from a gunshot wound.

Glenda D. Allen had been employed as a pharmacy technician. As a result of a gunshot wound sustained during the course of a robbery at a different employer in 1994, Allen suffered permanent damage to her spinal cord and other medical issues, including an abnormal gait requiring the use of a cane as an assistive device.

The agency charged that despite Allen's successful job performance, Wal-Mart declared her incapable of performing her position with or without a reasonable accommodation, denied her a reasonable accommodation, and then unlawfully fired her because of her disability. The lawsuit settled shortly after the court denied Wal-Mart's motion for summary judgment on March 10, and partially granted the EEOC's cross-motion for summary judgment finding that Wal-Mart had no undue hardship defense.

This is the EEOC's second settlement this year with Wal-Mart concerning the ADA. In April 2008, the EEOC settled a lawsuit concerning Wal-Mart's failure to hire an individual with cerebral palsy in Richmond, Mo., (EEOC v. Wal-Mart Stores, Inc.) for \$300,000 and injunctive relief.

During Fiscal Year 2007, disability discrimination charges filed with the EEOC under the ADA increased 14% to 17,734 – the highest level in a decade. Approximately one out of every five private sector charge filings with the EEOC contains an allegation of disability discrimination.