Ask the Attorney: Shredding I-9s, employee leave pay and more

One of our most trusted advisors on all things employment law, Nancy Delogu, answers readers questions about when (and if) it's safe to shred I-9 forms, salaried versus hourly paid leave and discussing medial information of a non-employee.

Must we keep physical I-9s even if they're stored digitally?

Q: "We are switching to an HRIS system. If we e-Verify our new hires, and record the e-Verify system's case number in the new HRIS system, can we safely shred the original document and use that case number? How can we digitize this function, if we cannot do that? – *Kary, Florida*

A: No, you should definitely retain copies of I-9 records, for the simple reason that the U.S Government systematically purges e-Verify records more than 10 years old.

According to my colleague, Jorge Lopez, an immigration law guru, E-Verify recommends that employers write the E-Verify case verification number on the corresponding Form I-9, Employment Eligibility Verification, and retain the historic record with the corresponding I-9. These forms should be retained indefinitely, but can be purged automatically, if you so choose, either one year after the employee was terminated or three years after the date of hire, whichever is later. You may wish to consult with counsel as to whether it makes sense to implement such a rule or to err on the side of retaining information on terminated employees longer.

Did we pay these workers correctly when they had kids in the hospital?

Q: "We have two employees. One is salaried and the other is hourly. Both are considered full-time employees. Both had children in the hospital for a short span of time. The salaried employee was not required to turn in a form for the time he was way from work. The hourly employee *was* required to turn in a form for the amount of time he was away from his work, which was subtracted from his annual PTO time. Is that legal? – *Marchia, Oklahoma*

A: The answer is that treating these two similarly situated employees differently because of their status as salaried/overtime exempt and hourly/overtime eligible was not only legal but possibly required.

Why? The answer is the "salary pay" requirement of the Fair Labor Standards Act (FLSA). Hourly workers are, of course, paid based on their hours worked, and are eligible for overtime pay at a rate of time and one-half of their base salary in any week they work more than 40 hours. Salaried exempt workers are paid on a salaried basis and although they may have a fairly regular workweek, they are paid the same amount regardless of hours worked—they may work 70 hours in one week and 30 in the next, but in either case, they receive no overtime pay and no cut in wages. An employer who "docks" an exempt worker's pay for missing work hours violates the salary pay requirement and essentially converts the worker to an hourly worker in the eyes of the Department of Labor's regulators, triggering all sorts of recordkeeping and wage payment obligations.

There is an exception: Salaried workers who miss an entire day of work can be docked a full day's wages without violating the salary pay requirements. This can be tough to get right in today's world, however, because salaried workers often perform some work on days when they are out of the office—taking a phone call or reviewing email on a phone, for example—and when they do this, they are working.

Another exception allows employers to count exempt workers' hours missed when tracking Family and Medical Leave, even if that leave is intermittent or for less than a full day of work. You don't say whether the FMLA was implicated for either worker here, however.

Is it unlawful to reveal the medical information of non-employees?

Q: "If an employee has a death in the family and persons of authority tell multiple people the circumstances of the death, can the employee sue the company? If not, what recourse would the employee have?" – *Patty, Wyoming*

A: Generally speaking, employers do not have a legal obligation to maintain as private medical information of non-employees, although it may be kinder to respect the grieving employee's privacy. You don't provide any detail, so I assume the communications were accurate and not defamatory, and I can't say whether the circumstances of the death were newsworthy and reported in local media, either, which might have influenced whether and what the employer communicated.

If the information communicated involved an employee's genetic information—for example, if the communications made it clear that the employee may have a certain genetic predisposition toward illness—the employee might be able to bring a claim against an employer, although such claims are rare.

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