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EMPLOYMENT LAW LETTER

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Vogel Law Firm

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PERSONNEL POLICIES

Get out your checklist: 10 tips for spring cleanup time

by KrisAnn Norby-Jahner

Despite a series of pesky snowstorms that persisted throughout our state in March as we hoped to wrap up another North Dakota winter, many of us are hoping that April finally brings SPRING. As we look forward to sunshine, warmer temperatures, and fresh air coming in through open office windows, here is a top 10 checklist for your organization's spring cleanup.

No. 1: Review your sexual harassment policy

With the #MeToo movement sweeping the nation, now is the time to make sure you have an effective sexual harassment policy. The unlawfulness of sexual harassment isn't a new concept (see Title VII of the Civil Rights Act of 1964), but the flurry of recent sexual harassment allegations and scandals indicates it's time to make sure your organization is "in check." Over the years, the Equal Employment Opportunity Commission (EEOC) has issued numerous directives, compliance manuals, and related publications aimed at preventing and remedying workplace sexual harassment. Those resources can certainly be useful in revising or crafting an effective sexual harassment policy.

A common theme for combating sexual harassment in the workplace

is *prevention*. Sexual harassment policies should (1) identify prohibited behaviors, (2) provide a clear complaint procedure, (3) ensure prompt investigation, (4) provide antiretaliation assurance, (5) provide remedial-action assurance, and (6) provide notification that workplace antiharassment training is expected and will be implemented on an ongoing basis.

In addition, don't forget to address other kinds of harassment that are also unlawful. Sexual harassment policies are often included in general antiharassment policies that prohibit harassment based on any protected class status, which in North Dakota includes:

- Race;
- Color;
- Religion;
- Sex (including pregnancy);
- National origin;
- Age (40 or older);
- Disability;
- Marital status;
- Status with regard to public assistance; and
- Participation in lawful activity off an employer's premises during nonworking hours that isn't in direct conflict with the employer's essential business-related interests.

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No. 2: Review your drug-use and drug-testing policies

On March 16, 2018, the North Dakota Department of Health published a “Medical Marijuana Program Implementation Status Update” announcing that applications for entities interested in becoming a registered manufacturing facility under the North Dakota Medical Marijuana Program are now open. BioTrackTHC has been selected as the information tracking system for the state’s Division of Medical Marijuana, and the North Dakota Administrative Rules for Medical Marijuana (Article 33-44) became effective on April 1, 2018.

What does that mean for employers? Simply put—change is coming. The North Dakota Compassionate Care Act doesn’t prohibit you from disciplining an employee for possessing or consuming medical marijuana in the workplace or for working under the influence of marijuana. In addition, medical marijuana use is still prohibited under federal law, which could lead to federal penalties or the loss of certain federal funding or licensing if you allow the use of medical marijuana in

the workplace. You must continue to meet Occupational Safety and Health Administration (OSHA) and other federal regulations, especially when employees perform potentially dangerous tasks such as operating heavy equipment, machinery, or motor vehicles.

However, North Dakota employers are still left wondering:

- (1) How to conduct drug tests moving forward;
- (2) Whether medical marijuana use *outside* the workplace must be accommodated based on disability; and
- (3) Whether taking adverse action against an employee with a medical marijuana card who tests positive for marijuana would be in violation of the North Dakota Human Rights Act (NDHRA) because an employee cannot be discriminated against based on his participation in a lawful activity off the employer’s premises during nonworking hours that isn’t in direct conflict with its essential business-related interests.

There will be many issues to work through as the Medical Marijuana Program gets under way, and you should work closely with legal counsel to navigate the complexities that may be involved in implementing or revising your organization’s drug-use and -testing policies. As entities begin submitting applications to manufacture medical marijuana for use in our state, now is the time to begin thinking about how to structure policies that ensure both state and federal legal compliance while protecting the essential business-related interests of your organization.

No. 3: Review job descriptions and exempt/nonexempt classifications

Job descriptions should be reviewed *every year* and on an ongoing basis, so it’s important to make this task part of your spring cleaning. Sometimes employers think a job description is complete once it has been written. However, a position’s duties often evolve or change over time, which makes the corresponding job description inaccurate. Having an accurate job description is essential in ensuring employees understand their job duties and expectations, writing accurate performance reviews, identifying essential duties when engaging in the interactive process for disability accommodation requests, and properly classifying employees as exempt or nonexempt. During this spring cleaning task, ask yourself:

- (1) Are all the essential job duties and conditions covered, and has anything changed?
- (2) Is the employee actually performing the identified duties and responsibilities?
- (3) Have we properly classified the employee as exempt or nonexempt based on the salary-basis test, the salary-level test, the duties test, or another qualifying classification under federal regulations?

2018 Vogel Employment Law Update

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- Employment and Labor Law Case Updates
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- Responding to Agency Inquiries and Investigations
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For more information or early registration information, contact Becca Blanshan at rblanshan@vogellaw.com or 701-237-6983.

Seek input from supervisors and employees themselves to ensure that job descriptions are accurate, and encourage all members of your team to submit changes for consideration on an ongoing basis.

No. 4: Review personnel files and record-keeping procedures

Personnel file review is always a good spring cleaning activity. Although North Dakota law requires only public employers to maintain personnel files for employees, many private employers choose to do so as well. Personnel files can be good organizational tools for storing employee information and housing general employment information, hiring information, training records, performance evaluations, performance improvement plans, and disciplinary actions.

If your organization maintains personnel files, then you should take time to ensure that each file doesn't contain documentation or information it shouldn't. For example, I-9 forms, employee medical records, requests for accommodations, documents supporting accommodations, and Family and Medical Leave Act (FMLA) documentation should be kept in separate files.

You should also take time to review your organization's personnel file policy. Be sure to identify who maintains records, who has access to records, whether employees can request and/or make copies of their personnel files, whether employees need to pay for copies, to whom employees should direct requests, and whether employees are allowed to request changes to the information or documents in their personnel files.

No. 5: Review employee documentation

Reviewing personnel files gives you an opportunity to review the effectiveness of documentation that is actually in employee files. Proper, effective documentation sets specific expectations, identifies specific workplace policies and deficiencies that need to be addressed, ensures that follow-ups to verbal conversations are memorialized in writing, and demonstrates that you have provided legitimate nondiscriminatory reasons for actions taken against employees.

Key items to document throughout the year include awards and commendations, absenteeism and tardiness, performance deficiencies, misconduct and work rule violations, discipline notices, accidents, damage to property, and other issues. Spring cleaning document review ensures not only that proper documentation is placed in employee files but also that documentation is timely, accurate, and specific; provides clear expectations; and remains in legal compliance (for example, that it doesn't improperly refer to a protected class status such as disability, sex, or age, which may suggest discrimination for a supervisor's actions). Good documentation:

- Identifies the who, what, when, where, and how;
- Explains the effect of the identified conduct;
- States what disciplinary action (if any) was taken;
- Is signed and dated; and
- Provides the reviewer specific guidance in writing performance reviews at a later date.

No. 6: Plan for performance reviews

Planning for performance reviews goes hand in hand with reviewing employee documentation. Employee performance reviews may be given at mid- or year-end increments, but your management team should review and document employees' performance all year long. As part of your spring cleanup, ensure that your organization has a timeline and plan for the performance review process. Know who is expected to write performance reviews. Know when performance reviews will take place. Know which performance evaluation forms evaluators are expected to use. And be sure that evaluators know the performance evaluation basics:

- Be specific, and support each rating with comments.
- Don't deliver surprises in identified deficiencies; an evaluation shouldn't be the first time an employee learns of an issue.
- Refer to the job description as you write reviews.
- Set specific goals in the evaluation.
- Let the evaluation meeting be a back-and-forth conversation.
- Allow employees to provide comments.
- Seek input and guidance from HR and management as needed.

No. 7: Consider legal compliance training for supervisors

Along with reviewing various employment policies and procedures, take this spring cleaning time to consider providing legal compliance training to supervisors. In the last year, how much training have your supervisors received on handling employees with medical issues, disability accommodation requests, FMLA leaves of absence, harassment complaints, and workplace investigations? How familiar are supervisors with your organization's policies and procedures? Ongoing training, particularly for employees in supervisory roles, is critical in preventing legal claims. Also, when you provide training, be sure to document the training and keep a record of attendees, what the training covered, and when it was held. That type of documentation can prove to be valuable in defending against potential legal claims in the future.

No. 8: Check compliance based on the size of your workforce

Spring cleaning is also a good time to audit the number of individuals your organization employs. Many state and federal laws apply only to employers with a certain minimum number of employees. For example, the Equal Pay Act (EPA) applies to all employers, and the NDHRA applies to all employers with at least one employee. But Title VII and the Americans with Disabilities Act (ADA) apply only to employers with 15 or more employees, and the Age Discrimination in Employment Act (ADEA) applies only to employers with 20 or more employees. If your organization has grown or downsized in the past year, you may have different leave, notice, and antidiscrimination obligations in 2018.

No. 9: Hang up workplace posters and distribute notices

State and federal posting and notice requirements generally mandate that hard copies of certain posters be displayed in the workplace. The U.S. Department of Labor (DOL) has issued guidance stating, “Workplace posters must be displayed or posted in conspicuous places where they are easily visible to all employees—the intended audience.”

Depending on the size and nature of your organization, you may be required to provide employees with posters and/or notices related to:

- OSHA;
- The EEOC;
- The FMLA;
- The Uniformed Services Employment and Reemployment Rights Act (USERRA);
- The National Labor Relations Act (NLRA);
- The Fair Labor Standards Act’s (FLSA) minimum wage and special minimum wage for workers with disabilities;

- Federally financed construction projects under the Davis-Bacon Act;
- Government contracts under the Service Contracts Act;
- The Employee Polygraph Protection Act;
- The Migrants and Seasonal Agricultural Worker Protection Act; and
- Temporary agricultural workers with H-2A visas.

Many employers are also subject to state-required posters and/or notices related to wages and hours, child labor, unemployment benefits, safety, health, and workers’ compensation.

Spring cleaning provides you an opportunity to review resources available through the North Dakota Department of Labor and Human Rights (NDDOL) (www.nd.gov/labor/required-employer-posters) and the federal DOL (webapps.dol.gov/elaws/posters.htm) and to work with legal counsel to ensure state and federal law compliance.

No. 10: Plan for summer interns

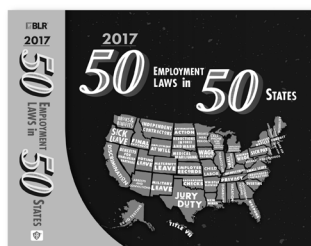
Spring cleanup is a good time to start thinking about summer interns who may join you in a couple of months. In January 2018, the DOL published a new seven-part test for determining whether interns or students you employ are employees under the FLSA and thus must be paid for their work.

If you are considering hiring an *unpaid* intern, be sure to examine the employment relationship and the conversations you have had with the intern. You should consider the extent to which:

- (1) The intern and your organization clearly understand that there is no expectation of compensation (any promise of compensation, express or implied, suggests the intern is an employee—and vice versa);
- (2) The internship provides training that is similar to training that would be given in an educational environment, including clinical and other hands-on training provided by education institutions;
- (3) The internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit;
- (4) The internship accommodates the intern’s academic commitments by corresponding with the academic calendar;
- (5) The internship’s duration is limited to the period in which the internship provides the intern with beneficial learning;
- (6) The intern’s work complements, rather than displaces, the work of paid employees while providing her significant educational benefits; and

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- (7) The intern and your company understand that the internship is conducted without entitlement to a paid job at its conclusion.

No single factor is determinative, and whether an intern must be considered an employee with pay under the FLSA depends on the unique circumstances of each case. If you determine that an intern needs to receive pay based on the above factors, then be prepared to abide by minimum wage and overtime pay regulations.

Bottom line

Spring cleaning is not only an effective organization tool, but it also acts as preventive care in eliminating problems before they arise. Taking time now to review employee policies and procedures, training timelines, performance review processes, documentation, and other issues can have big payoffs in the long run. So get out that dust cloth and get to work!

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WORKPLACE ISSUES

Avoiding employment problems when you decide to outsource

Outsourcing has become common across many industries as a method for companies to reduce costs and gain efficiency. However, the effects on the organization's employees often are overlooked or not timely addressed. There are a number of ways to communicate with and protect employees that you should embrace to facilitate a successful transition and avoid complaints and employment problems.

What is outsourcing?

Outsourcing occurs when you contract out aspects of your business operations (such as payroll or HR services) or business functions (such as facilities management or IT support) to another party. Businesses engage in outsourcing for a variety of reasons, including a desire for more budget flexibility and control.

With outsourcing, you pay only for the business functions and services you need when you need them. Outsourcing also reduces the necessity of hiring and training specialized staff. As management consultant Peter Drucker once said, "Do what you do best and outsource the rest."

Importance of communication

Despite the acknowledged benefits of outsourcing, businesses and organizations must take care in undertaking any outsourcing transaction. Specific planning should start before any formal announcement of an outsourcing service is conveyed to employees. In that regard,

you should take a number of preliminary steps to prevent employment problems and anxiety. For instance, if your workforce is unionized, you should engage in discussions with the union, as necessary, to ensure that you comply with the National Labor Relations Act (NLRA) and any applicable collective bargaining agreement.

Additionally, you should identify and understand the alternative employment opportunities available for employees who will be affected by the outsourcing. Can some employees be redeployed within your organization, or can they transition to the service provider that will be performing the outsourced work? If neither of those options is feasible, will the company provide severance to the employees who are terminated and, if so, how much severance will the company offer (usually in exchange for a release)?

With input from outside counsel, you also must determine when to announce the outsourcing plan. Experience has shown that making the announcement too early can lead to the undesired departure of key employees, but making it too late can lead to negative rumors based on incomplete or inaccurate information.

What should you communicate?

Once you decide to announce the plan, there are a number of communications to your employees that are paramount. First, you should explain the rationale for the outsourcing. You likely will have a number of reasons, such as competitive pressures, advanced technology, customer needs, and financial performance. You should explain why you decided on outsourcing over other options such as mergers, acquisitions, and organizational restructuring. Further, you should describe in detail how the outsourcing will benefit your organization, your customers, and your employees.

Your communications with employees should be open and honest but measured in content and timing. The initial communication generally should occur at a formal meeting that includes, at a minimum, all affected employees and is delivered by both a respected leader

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in your organization and an HR representative. Follow-up communications in smaller, less formal meetings and town-hall-style meetings between employees and management can also be effective.

Effect on employees

Your employees understandably will be concerned and worried about any outsourcing decision you make. Accordingly, you should discuss with employees how outsourcing will affect them. For instance, employees who are being transferred to the service provider should be informed that they are being shifted into a revenue-producing function rather than a noncore function of your organization, and they likely will have more opportunities for recognition, career advancement, and reward programs. Employees being redeployed within your organization should be assured that they will continue to be valued employees and will be given new opportunities and new challenges. Unfortunately, some employees must be informed that they are being let go because there is no position for them with the service provider or within your organization.

Regardless of the option for each employee, you should be mindful that the new employer, new position, or loss of employment is being imposed on the employee, not selected by him. Even though the transition will bring challenges and difficulties, you should accept responsibility and stress to employees that you will endeavor to make the outcome as positive as possible for each of them.

Employee protections

In addition to clearly communicating your plan to your employees, you can enact a number of employee protections to minimize the likelihood of anxiety and employment problems. For instance, your contract with the service provider may specify that any transferred employees will receive salary and benefits comparable to what they earned with your company. Additionally, the contract could guarantee employment for a certain

period of time absent any egregious conduct by the employee. There should be a detailed implementation plan to help the affected employees transition, and HR should stay involved.

You should ensure that employees being redeployed within your organization are properly trained and integrated into their new roles. Finally, it's advisable to offer terminated employees outplacement services and severance packages appropriate to their current positions.

Avoiding joint-employer liability

With the assistance of legal counsel, management should ensure that the transition plan and contract transferring services to the service provider make clear that the transferred employees are under the control of the new company only and are *not* employees of your organization. That can alleviate any joint-employer concerns.

Although North Dakota has some joint-employer liability protections for franchisors and franchisees operating in the state (under NDCC § 51-19-18), there is no similar protection at the state level for companies that choose to outsource certain business operations to other companies. If you retain a measure of control over the service provider's employees, you may find yourself responsible for any employment or labor law violations they commit.

For example, in 2016, Amazon was sued for a contract trucking company's failure to pay overtime to truck drivers. The lawsuit contended that Amazon was jointly liable with the trucking company because it trained the drivers, gave them their daily deliveries and instructions, and had the power to supervise their performance. The truck drivers also drove trucks and wore uniforms branded with the Amazon logo.

To avoid a joint-employer claim like the one faced by Amazon, make sure that control of the employees who perform the outsourced work rests entirely with the service provider, not your organization.

Positive media coverage

Finally, outsourcing often has negative connotations, especially in today's charged political climate. Therefore, with the assistance of corporate management, you should proactively help shape the media coverage of your outsourcing plan. You want to ensure, as much as possible, that there's an accurate and positive perception that the plan is in the best interests of your organization and its employees.

Bottom line

Change is inevitable in most organizations, and outsourcing is often used to address various business and financial challenges. By communicating honestly with your employees and ensuring you've put protections in place for them, you are more likely to not only avoid

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employment problems but also fulfill your inherent responsibility to help your employees deal with the necessary changes.

As with any complex business transaction, it's always advisable to consult with legal counsel to ensure that your outsourcing decision produces positive benefits for your organization and allows you to avoid the many pitfalls that can arise when an outsourcing plan isn't well thought out and appropriately implemented. ❖

ELECTRONIC WORKPLACE

If a picture paints a thousand words, what's wrong with emojis?

What do a pair of scissors and an eggplant have in common? At first glance, the answer would appear to be "nothing." But what if I told you that in combination, they can constitute a threat of bodily harm?

If you're confused, you might want to have a chat with your kids or grandkids. It shouldn't take them long to figure out that the common link between a pair of scissors and an eggplant is that they are both emojis. You know, the cute little pictures you can add to a text or e-mail either in place of words or to clue the reader in on the intent or "tone of voice" of your message. And when you put them together, these two particular emojis could be interpreted as a threat to cut off—well, let's just say the eggplant is commonly used to represent a part of the male anatomy.

Over the past few years, emojis have increasingly become a mainstay of texts, social media posts, and, to a lesser degree, e-mail. As texting and social media have become more prevalent in the workplace, it was only a matter of time before emojis started showing up in harassment claims and other workplace disputes. Let's take a quick look at some of the problems associated with emojis and some possible strategies for preventing them in your workplace.

What's the problem?

Written communications are inherently difficult because it's frequently impossible for the reader to determine the intent of a message. Sarcasm and parody, for example, are notoriously hard to detect in an e-mail or social media post. It can also be challenging to tell when a comment (such as a threat, insult, or sexual advance) is intended to be taken at face value as opposed to a joke. In this respect, emojis can actually serve a valuable purpose by making sure communications are received in the spirit in which they are intended.

For employers, however, problems tend to arise when the content of the message and the emoji are in direct opposition to each other. For example, what would you think if you received a text that said, "I'm going to

hunt you down and kill you," followed by a "big cheesy grin" emoji? Should you feel threatened? These types of issues are already showing up in courts, including one that made it all the way to the U.S. Supreme Court. In that case, a man's conviction for threatening his estranged wife on Facebook was overturned partly because he followed up his (very graphic) threats with the "tongue sticking out" emoji.

Similarly, what if an employee responds to a coworker's lewd comment with a "rolling around laughing" emoji? If the employee later complains about harassment, does her use of the laughing emoji mean her coworker's lewd comments weren't "unwanted," which is required for a hostile work environment to exist?

Another problem is that there is no accepted dictionary for emojis, and many of them have evolved over time to represent a concept or message that may not be readily apparent to everyone. While some are obvious (e.g., using a dog emoji to call someone a bitch), others are not (e.g., using a frog emoji to call someone ugly).

Even worse, the same emoji can mean different things in different contexts. A red rose, for example, could represent either romantic love or democratic socialism! In short, emoji's present ample opportunities for the types of misunderstandings that lead to workplace conflicts and complaints.

What to do about it

So what should you do? There are a wide range of options depending on your workplace, including the following:

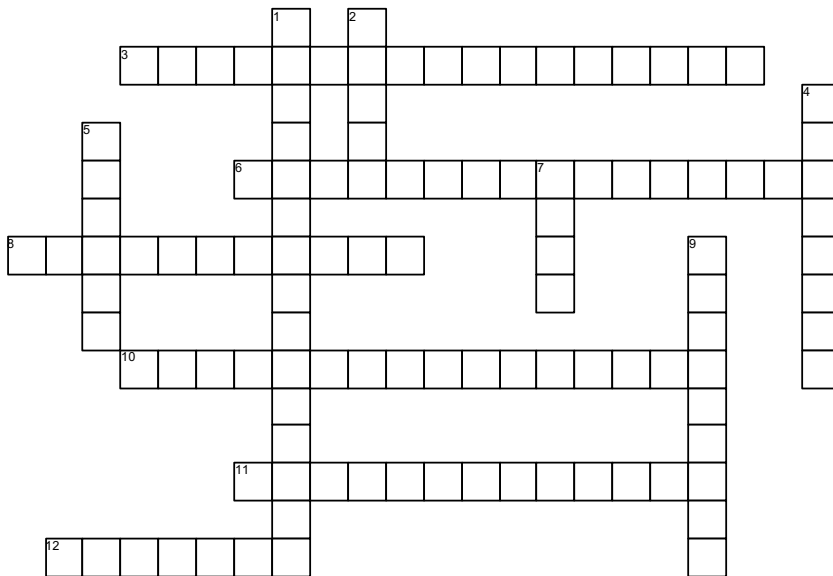
- (1) Prohibit work-related communications by text. This may seem extreme, but emojis are far more likely to be used in a text message than in any other type of work communication.
- (2) Prohibit the use of emojis (or their "ancient" cousin, the emoticon) in all workplace communications. This also may seem a bit extreme, but you could choose some lesser variation, such as prohibiting them only in communications with customers or clients.
- (3) Review your social media/electronic communications policies to make sure they are clear about what is and isn't considered appropriate. In short, they should provide that your discrimination and harassment policies (and other policies regarding workplace behavior) apply to an employee's activities on social media the same as if they were in the same room with another person.
- (4) Provide simple training on how to write a business e-mail, including some training on e-mail etiquette.

Perhaps most important, set a clear expectation of professionalism in all communications, whether internally or with a client. While emojis provide a sort of shorthand for intent, they should never take the place of good, clear writing. ❖

NORTH DAKOTA EMPLOYMENT LAW LETTER

JUST FOR FUN

Mindteaser of the month



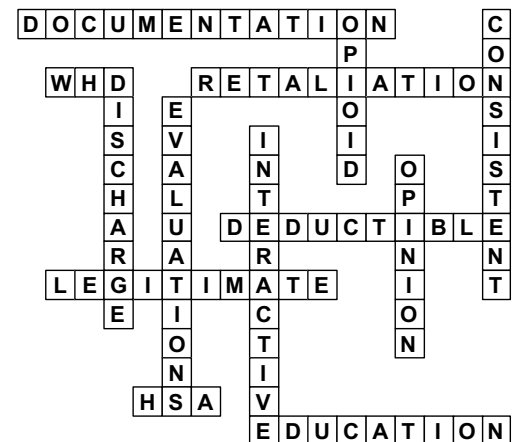
ACROSS

- 3 _____ is an employee's mid- or year-end review (two words).
- 6 _____ is now legalized in North Dakota and soon will be available for use by qualified cardholders (two words).
- 8 _____ occurs when you contract out certain aspects of your business operations or functions.
- 10 _____ need to be placed in the workplace in conspicuous locations where they are easily visible to employees (two words).
- 11 _____ is contained in an employee's personnel file to track performance throughout the year.
- 12 _____ may work for your company this summer and need to be paid under FLSA regulations.

DOWN

- 1 _____ must be reviewed on an ongoing basis to ensure accuracy and proper employee classification (two words).
- 2 An _____ is a mainstay in texts, social media posts, and e-mails that can have different meanings in different contexts.
- 4 Supervisors should be given _____ regularly to ensure legal compliance in the workplace.
- 5 The _____ movement sweeping the nation related to a number of sexual harassment claims.
- 7 The _____ is a federal law that applies only to employers with 20 or more employees.
- 9 _____ files need to be reviewed to ensure certain documentation or information is kept separately.

Solution for March's puzzle



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