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North Dakota
EMPLOYMENT LAW LETTER

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Lisa Edison-Smith, Vanessa Lystad, and KrisAnn Norby-Jahner, Editors
Vogel Law Firm

Vol. 23, No. 4
May 2018

What's Inside

What's Online

Podcast
Want to improve workplace transparency? Have a strategy
ow.ly/AXL530jr4F0

Wages
DOL addresses travel time for hourly technicians
ow.ly/p6zB30jzmTN

Taxes
Tax law narrows options on sexual harassment settlements
bit.ly/2q6KAxd

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TAX DEDUCTIONS

New tax law creates catch-22 for sexual harassment settlements

One of the primary concerns addressed through the #MeToo movement is that claims of sexual harassment in the workplace are often settled discreetly and without scrutiny. For years, employers have resolved sexual harassment claims with a settlement payout in exchange for a general release of the company from all liability. The terms of the settlement would include a confidentiality or nondisclosure clause barring the employee from discussing the allegations or the settlement with others. In particularly egregious circumstances, this creates a culture of secrecy in which employees are kept in the dark about a supervisor's, owner's, or some other individual's past indiscretions. The recently enacted Tax Cuts and Jobs Act (TCJA) encourages employers not to cloak settlements with a nondisclosure or confidentiality clause.

Deduction narrowed for sexual harassment payments

Congress took note of the #MeToo movement in its sweeping changes to the tax code last year. The TCJA, which largely took effect on January 1, 2018, has eliminated businesses' ability to deduct from their taxable income any settlement payments and attorneys' fees related to a claim for sexual harassment or sexual abuse if the settlement is subject to a nondisclosure or confidentiality clause.

The practical effect of the legislation is that employers must now decide whether to keep sexual harassment settlements confidential or retain the ability to write the settlement off on their taxes. Payments to settle claims and lawsuits ordinarily are deductible business expenses under Section 162 of the Internal Revenue Code. The new law, which adds Subdivision (q) to Section 162, eliminates the deduction for any payment or settlement related to sexual harassment or sexual abuse that is subject to a confidentiality or nondisclosure provision.

The common practice of including a nondisclosure clause in a settlement of sexual harassment claims is strongly discouraged by the new law. Without the benefit of regulations or rulings from the IRS, employers must choose between keeping such settlements confidential without a tax benefit or deducting the settlement and related attorneys' fees as business expenses.

Section 162(q) further eliminates the ability of employers to deduct from their taxable income the payment of attorneys' fees related to a settlement for sexual harassment or sexual abuse if the settlement is subject to a nondisclosure agreement. In other words, neither the settlement payment to the employee nor the attorneys' fees incurred to investigate, negotiate, litigate, and resolve the claim would be deductible.

Broad application

The new law specifies that the business expense deduction is not allowed

AGENCY ACTION

DOJ sues California over immigration. U.S. Attorney General Jeff Sessions announced in March 2018 that the U.S. Department of Justice (DOJ) had filed a lawsuit against California based on the state's enactment of laws seen as creating "sanctuary" jurisdictions. The DOJ says three different state laws "intentionally obstruct and discriminate against the enforcement of federal immigration law." The department contends that the laws are preempted by federal law and "impermissibly target the Federal Government, and therefore violate the Supremacy Clause of the United States Constitution."

McDonald's, NLRB settle joint-employment case. The National Labor Relations Board (NLRB) announced in March that McDonald's USA, LLC, and its franchisees had submitted a proposed settlement of unfair labor practices claims to an administrative law judge. The NLRB had alleged that McDonald's was a joint employer with its franchisees. Under the proposed settlement, McDonald's continues to maintain that it is not a joint employer. The proposed settlement is intended to provide 100 percent of back pay for employees and represents a full remedy for all unfair labor practice cases pending before the administrative law judge, according to a statement from the NLRB.

Acosta announces grants aimed at opioid crisis. U.S. Secretary of Labor Alexander Acosta in March announced a new National Health Emergency Dislocated Worker Demonstration Grant pilot program to help communities fight the opioid crisis. The U.S. Department of Labor (DOL) will initially fund seven to 10 pilot programs with awards totaling $21 million. The grants may be used to help provide new skills to workers, including new entrants to the workforce who have been or are being affected by the opioid crisis. Additionally, funds may be used for workforce development in professions that address or prevent problems related to opioids in American communities, such as addiction treatment service providers, pain management and therapy service providers, and mental health treatment providers.

OSHA announces enforcement of beryllium standard. The Occupational Safety and Health Administration (OSHA) announced in March that it would start enforcement of the final rule on occupational exposure to beryllium in general, construction, and shipyard industries on May 11. The start of enforcement had previously been set for March 12. In January 2017, OSHA issued new comprehensive health standards addressing exposure to beryllium in all industries. In response to feedback from stakeholders, the agency is considering technical updates to the January 2017 general industry standard aimed at clarifying and simplifying compliance with requirements. ✤

for any settlement or payment "related to" sexual harassment or sexual abuse. Clearly articulated sexual and gender harassment claims under state, federal, and local law will fall squarely within the scope of that prohibition. However, the tax implications of inserting a confidentiality clause into a settlement agreement for whistleblower claims that include harassment-based allegations are uncertain.

A difficult situation will arise for employers that wish to confidentially settle a lawsuit, administrative proceeding, or other claim in which sexual harassment is alleged in conjunction with one or more other employment-based claims. Because of the broad language of the prohibition on deductions, the IRS may take the position that the entire action will fall within the purview of the law. Employing tax-efficient resolution strategies is imperative under such conditions.

The IRS likely will take a broad view of the provision, and businesses will need to assess their risk tolerance with respect to tax liability and confidentiality as they structure their settlement agreements. That may be the case even if a separate discrimination or wage claim predominates over ancillary sexual harassment allegations. Accordingly, companies should work with counsel and their tax adviser to structure the settlement of employment claims.

Tax-efficient resolution strategies

Businesses have a number of options to settle claims for sexual harassment or sexual abuse. If a claim isn't based on allegations that reasonably meet the legal standard for sexual harassment or abuse, counsel may meet and confer in an attempt to convince the employee to voluntarily dismiss the claim before settling the lawsuit. Litigants may also ask the court to dismiss or summarily adjudicate the claim.

Another option is for businesses to settle claims in parts, with only the allegations that don't involve sexual harassment or sexual abuse being subject to a nondisclosure agreement or the settlement payment being appropriately attributed to each claim according to its value. For example, if the employee refuses to dismiss a sexual harassment claim or if litigating the case to a motion for dismissal or trial is cost-prohibitive, the parties could apportion the settlement into two agreements so the employer might avail itself of a tax deduction for at least a portion of the total settlement payment.

Importantly, employers must keep in mind that under its "origin of the claim" test and general tax doctrine, the IRS will look at the underlying nature of the claim to determine if expenses and fees were properly apportioned. The true nature of the allegations, which is often apparent on the face of the initial charge or complaint, will likely rule the day.

Of course, the structure of the settlement will depend on the facts and circumstances of the particular case. Companies are advised to consult with counsel and their tax adviser to ensure that the settlement meets their legal and tax-planning goals.

Severance agreements

The law doesn't address whether a severance agreement for a departing employee would fall within the scope of Section 162(q). However, the IRS may take the position that the severance payment is nondeductible if the departure is related in any way to a sexual harassment or sexual abuse allegation.

Unless and until the IRS provides guidance on this and other issues, employers and their counsel and tax adviser will need to make the best decision, considering all possible tax and employment implications in light of the specific facts and circumstances of the situation.

Bottom line

Tax-efficient resolution of the claims is always a major factor in settlement negotiations. The TCJA imposes an additional consideration: whether to settle sexual harassment or sexual abuse claims with a confidentiality clause or deduct the payment and fees at tax time. ✤

WAGE AND HOUR LAW

New DOL program offers self-reporting of wage and hour violations

The U.S. Department of Labor (DOL) announced in March 2018 that it is launching a program to allow employers a chance to self-audit their wage and hour practices—and report any violations they find—in exchange for limited protection from additional liabilities and claims. The program, dubbed the Payroll Audit Independent Determination (or PAID) program, will start as a six-month pilot, after which the DOL will decide whether to offer it on a permanent basis.

The primary appeal of the program is that by voluntarily reporting their errors, employers will receive some protection against liquidated damages and civil monetary penalties, which are typically awarded in successful wage and hour lawsuits. Let's take a quick look at how the PAID program works and some of the other pros (and potential cons) of pursuing a resolution of wage and hour violations through it.

Step 1: self-audit of wage and hour practices

According to the DOL, the first step for an employer that wants to take advantage of the PAID program—even before conducting a self-audit—is to complete a Compliance Assistance Review (CAR) on the DOL website at www.dol.gov/whd/paid/. This is primarily a series of videos and other information about compliance with the Fair Labor Standards Act (FLSA), but the DOL says you will have to provide a certificate of completion and submit it to the agency to participate in the program. Note that when you start the CAR, you will be asked to provide both your name and the name of your organization to the DOL.

After completing the CAR, the next step will be to conduct a comprehensive audit of your wage and hour practices with the intent of uncovering violations of the overtime and/or minimum wage requirements of the FLSA. Ideally, the audit should examine all aspects of your wage and hour practices, including (but not limited to):

- Making sure employees are compensated for all hours worked (some common problem areas include failing to pay employees properly for travel time, job-related training, on-call time, working breaks, "donning and doffing" time, and other similar situations);
- Verifying that all employees you have classified as exempt from the FLSA's minimum wage and overtime requirements are classified correctly (some mistakes include making improper deductions from exempt employees' salaries or, more likely, classifying them as exempt based solely on the fact that they receive a salary without any finding that they also perform the necessary exempt duties); and
- Assessing whether you are calculating the overtime rate correctly (common errors include undercalculation of overtime owed because you failed to include various "extra" types of compensation—such as shift differentials and certain types of bonuses—in calculating the overtime rate).

Step 2: interactions with DOL

Once you have the results of your audit—assuming you discover unpaid back wages—the next step will be to report your findings to the DOL office for your region. The DOL asks that when you call, be prepared to describe the violations you have discovered (including the time frame in which they occurred), identify any

continued on page 5

QUESTION CORNER

If you break it, you pay for it

by Vanessa Lystad

Q *One of our employees was involved in an accident while he was driving a company car. Since the employee was at fault, his manager wants to make him pay for the repairs. We currently don't have a policy covering this type of situation. May we require the employee to cover the cost of the car repairs?*

A You aren't prohibited under North Dakota law from recovering the cost of car repairs from an employee who caused damage to a company vehicle. In fact, North Dakota Century Code § 34-02-16 provides that an employee can be held liable to his employer for negligently causing such damage.

The more important question is how are you going to recoup the costs? Unless an employee voluntarily agrees to pay repair costs out of pocket, an employer will usually consider deducting the cost of repairs from his wages. If you go that route, however, keep in mind that North Dakota has specific rules on wage deductions you must follow. N.D.C.C. § 34-14-04.1 provides:

> Except for those amounts that are required under state or federal law to be withheld from employee compensation or where a court has ordered the employer to withhold compensation, an employer only may withhold from the compensation due employees:
>
> 1. Advances paid to employees, other than undocumented cash.
> 2. A recurring deduction authorized in writing.
> 3. A nonrecurring deduction authorized in writing, when the source of the deduction is cited specifically.
> 4. *A nonrecurring deduction for damage, breakage, shortage, or negligence must be authorized by the employee at the time of the deduction.* [Emphasis added.]

Subsection 4 would apply in your situation because the deduction is for damage the employee caused to a company vehicle. If you're considering deducting the repair costs from his wages, make sure he authorizes the deduction in writing at the time it is made. A general wage deduction authorization signed by the employee at the beginning of his employment simply won't do in North Dakota.

Q *We have exempt employees who accrue paid time off (PTO) each pay period. They would like to be able to donate some of their PTO to coworkers who don't have any more PTO. Does that violate any federal or state laws? Are there any special exceptions or issues we should be aware of?*

A There's no federal or North Dakota law prohibiting you from allowing employees to donate accrued PTO to coworkers. However, the IRS has determined that only two types of leave-sharing programs qualify the donating employees for favorable tax treatment. In other words, if you establish a leave-sharing program that meets IRS requirements, the donating employees won't be taxed for the PTO used by other employees. If you fail to follow the IRS requirements, however, the donating employees will be taxed for their unused donated leave.

The first type of leave-sharing program eligible for favorable tax treatment is for medical emergencies. A "medical emergency" is defined in IRS guidance as a medical condition suffered by an employee or a family member that will require the employee's prolonged absence from duty and result in a substantial loss of income due to the exhaustion of all available paid leave apart from the leave-sharing plan. For this type of program, there should be a leave bank in which employees can deposit their leave and from which workers with personal or family medical emergencies may apply to draw the leave, if approved.

The second type of IRS-approved leave-sharing program is for major disasters. A "major disaster" under IRS guidance must be declared a major disaster or emergency by the president of the United States. A leave-sharing program that's simply available to victims of any type of natural disaster will not qualify as an IRS-eligible leave-sharing program. The IRS has established specific limitations:

- A donor cannot specify a particular recipient.
- Donors may not donate more than the maximum amount of leave they normally accrue.
- The recipient must use the leave for a qualifying major disaster, and PTO must be paid out at his normal rate of pay.
- There must be reasonable limits on the period of time for depositing and using the leave after the major disaster, as well as how much leave each recipient may receive.

- A recipient may not receive cash in lieu of using PTO.
- Any leave deposited under a major disaster leave-sharing plan that isn't used must be returned to the donors within a reasonable period of time unless it's so small that accounting for it is unreasonable or administratively impractical.

Should you decide to establish a leave-sharing program, it's important to carefully draft your policy to clarify any additional requirements and limitations. For instance, make sure employees know the procedure for applying for or donating leave, how much they may donate in a given year, and that the program is entirely voluntary. It may be necessary to work with counsel and tax professionals to ensure you draft and administer your leave-sharing program in a legally compliant manner and in accordance with IRS restrictions.

Vanessa Lystad focuses on employment law in the Fargo office of Vogel Law Firm. She can be reached at vlystad@vogellaw.com or 701-237-6983. ✤

continued from page 3

affected employees, and provide the amount of back wages you believe is owed to each employee. The DOL's Wage and Hour Division (WHD) then will likely:

(1) Request additional information, such as payroll records, job descriptions, and other related information;

(2) Make its own findings and provide you a summary of the amount of unpaid wages owed to each affected employee; and

(3) Provide settlement documents for each employee, which employees may choose to sign if they want to receive payment. Employees who sign the form and accept payment will waive their right to sue for the violations uncovered through the PAID program.

Step 3: payment of back wages owed

Finally, you will be required to (1) pay all back wages due by the end of the next full pay period after receiving the DOL's summary of unpaid wages and (2) provide proof of payment to the WHD expeditiously.

Word of caution

If you're like many employers, voluntarily opening your organization up to scrutiny from a federal agency may sound a bit risky. With a new program such as this one, there's reason to be cautious.

Perhaps the biggest potential pitfall is that there is no guarantee of protection from lawsuits based on the wage and hour problems you voluntarily report to the DOL. None of your employees is required to accept the payment of back wages offered to them. They could choose not to sign a waiver and instead take a very official-looking document showing the amount of back wages you owe them to an attorney. If that happens, there is nothing to prevent them from suing you—not only for the amount of back wages owed but also for liquidated damages and attorneys' fees. This type of situation could also bloom into a class action lawsuit depending on the nature and pervasiveness of the violations found.

If you're interested in participating in the PAID program, a call to your employment attorneys is highly recommended (before you even proceed to Step 1). They can help you examine all the pros and potential cons of the program and reach an informed decision on whether its benefits outweigh any potential risks. ✤

SEX DISCRIMINATION

Handling sexual orientation discrimination in confusing legal landscape

In 1998, the U.S. Supreme Court recognized that sexual harassment could be perpetrated by a man against another man or a woman against another woman. When that decision was issued, many commentators pondered whether discriminating against or harassing someone because of her sexual orientation also violates Title VII of the Civil Rights Act of 1964. Who would have thought that 20 years later, there still wouldn't be a clear answer to that question?

There has been a lot of activity regarding sexual orientation discrimination in the courts recently. While most federal courts of appeals that have considered the question have concluded that Title VII doesn't prohibit sexual orientation

WORKPLACE TRENDS

Survey finds global engagement levels at all-time high. Global employee engagement levels hit an all-time high in 2017, according to research from Aon, a global professional services firm. The 2017 figures follow a dip in engagement levels the previous year. Aon's analysis of more than five million employees at more than 1,000 organizations around the world found that global employee engagement levels reached 65% in 2017, up from 63% in 2016. The percentage of employees who were highly engaged increased from 24% in 2016 to 27% in 2017. Aon research shows that a five-point increase in employee engagement is linked to a three-point increase in revenue growth in the subsequent year.

Research finds promising résumés often disappoint. Research from global staffing firm Robert Half finds that employers impressed by a job candidate's résumé often discover the person isn't such a good match for the job after all. More than six in 10 senior managers (64%) said it's common for an applicant with a promising résumé to not live up to expectations when interviewed. The survey also looked at how much time employers spend assessing job candidates. The research found that on average, managers review 40 résumés per job opening and spend 12 minutes looking at each one. Verifying relevant experience is the top reason employers interview job candidates, followed by assessing soft skills and corporate culture fit and evaluating technical skills.

Research finds 44% of professionals lose sleep over work. Staffing firm Accountemps has released research finding that 44% of professionals often lose sleep over work. Common causes include an overwhelming workload, a looming business problem, and strained coworker relationships. The research found that professionals in Miami, Nashville, and New York most often lose sleep over work-related issues. Survey respondents in Cleveland, Philadelphia, and Minneapolis were least likely to report missing out on rest.

Survey looks at excuses for being late to work. A survey from CareerBuilder released in March looks at unusual excuses employees give for being late for work. When asked about the most outrageous excuses employees have given, employers shared the following: It's too cold to work; I had morning sickness (it was a man); my coffee was too hot and I couldn't leave until it cooled off; an astrologer warned me of a car accident on a major highway, so I took all backroads, making me an hour late; my dog ate my work schedule; I was here but fell asleep in the parking lot; my fake eyelashes were stuck together; and although it's been five years, I forgot I did not work at my former employer's location and drove there by accident. ✤

discrimination, in the past year, both the 2nd and 7th U.S. Circuit Courts of Appeals have overturned their previous rulings to hold that it does. It now seems just a matter of time before the U.S. Supreme Court takes up the issue on appeal.

In the meantime, the laws on sexual orientation discrimination vary from one state to another and, in some cases, even among different cities within the same state or county. Let's take a big-picture look at the laws that could apply to you and the steps we recommend you take while we wait for the Supreme Court to sort things out.

Overview of laws

Even with the confusion over what Title VII does or doesn't prohibit, large numbers of employers are clearly subject to at least one law that prohibits discrimination on the basis of sexual orientation and/or gender identity.

Title VII. If you have 15 or more employees and are located in one of the states that fall under the jurisdiction of the 2nd Circuit (Connecticut, New York, and Vermont) or the 7th Circuit (Illinois, Indiana, and Wisconsin), you should proceed under the assumption that Title VII prohibits you from discriminating on the basis of sexual orientation. The only way that is going to change is if the U.S. Supreme Court decides to consider the issue and rules that Title VII doesn't protect against sexual orientation discrimination.

Executive Order 13672. Federal contractors and subcontractors, regardless of where they are located, are prohibited from discriminating on the basis of sexual orientation or gender identity under an Executive Order issued by President Barack Obama. President Donald Trump has left this Executive Order in place for now. In addition, federal employers such as government agencies have been prohibited from discriminating on the basis of sexual orientation since 1998.

State and local laws. More than 20 states prohibit sexual orientation discrimination by private employers, and an additional 10 to 15 prohibit discrimination by (1) public employers and/or (2) private employers with public contracts. Some of these laws also prohibit gender identity discrimination.

Even in states that are viewed as solidly conservative, individual cities and counties may prohibit LGBT discrimination by some employers (e.g., all private employers, only public employers, or private employers with public contracts).

What to do now

Your first step should be to identify whether any of the laws described above apply to you. For employers that do business in multiple states or municipalities, you will need to get up to speed on the protections offered to LGBT employees under the laws that apply in all locations. Depending on how many different states you do business in and which ones prohibit sexual orientation discrimination, it may be safest and simplest to add sexual orientation to your nondiscrimination

policies for all locations, regardless of the laws that may or may not apply to a specific one.

In addition, because sexual orientation discrimination is a "hot" topic and is being prohibited by more states and municipalities all the time, you need to keep a close eye on any changes that may be in the works at the state or local level.

As for employers that aren't currently subject to any sexual orientation law, we generally recommended that you offer the same protections to LGBT employees as other protected classes unless there is a compelling reason not to. The Equal Employment Opportunity Commission (EEOC) takes the position that Title VII prohibits sexual orientation and gender identity discrimination and will accept charges on those grounds. In other words, you could still get sued for sexual orientation discrimination.

Ultimately, it's your decision whether to prohibit sexual orientation discrimination when there is no clear requirement to do so. However, you should make such a decision only with a firm understanding of the potential risks and liabilities and in consultation with your employment attorney.

One final word

While the law is not yet decided on whether religious beliefs provide a legal justification for excluding sexual orientation from your nondiscrimination protections, there is an argument that churches and religious nonprofits should be allowed to discriminate on the basis of sexual orientation. Religious employers that are located in a jurisdiction that prohibits sexual orientation discrimination should consult their attorney on how to proceed. ✤

UNION ACTIVITY

Unions, graduate workers demand bargaining at universities. Graduate workers along with leaders from four major unions in March 2018 delivered letters to the presidents of Yale, Columbia, Boston College, the University of Chicago, and Loyola of Chicago demanding that the university administrations accept unionization of research and teaching assistants and enter into collective bargaining. The unions—the American Federation of Teachers, the Service Employees International Union, the United Auto Workers (UAW), and UNITE HERE—say the universities are refusing to bargain and instead are trying to put the issue in the hands of the National Labor Relations Board (NLRB).

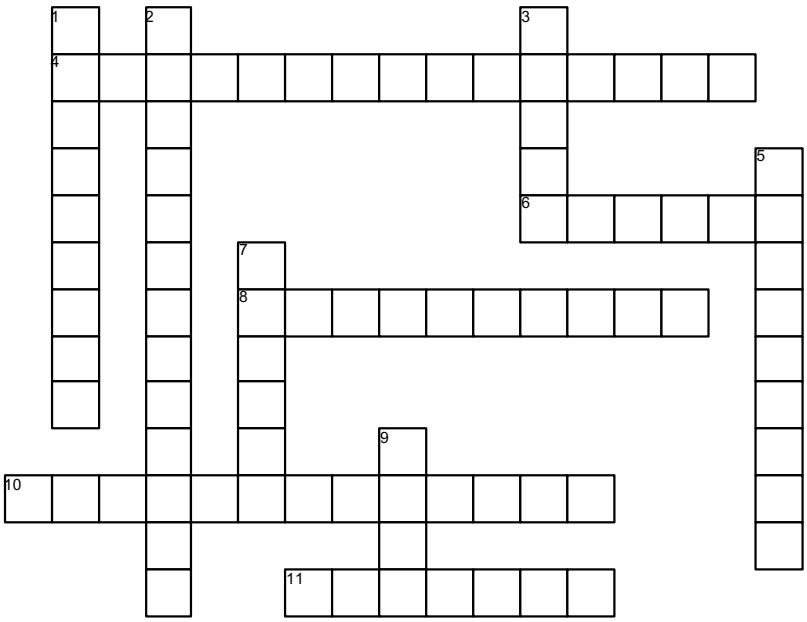
Unions voice support for enforcement actions against China. Union leaders have spoken out in support of President Donald Trump's announcement of enforcement actions against China. "For years, China has employed a variety of strategies to steal our intellectual property and bully its way into acquiring critical U.S. advances in technology," AFL-CIO President Richard Trumka said, adding that tariffs "aren't an end goal, but an important tool to end trade practices that kill American jobs and drive down American pay." Teamsters General President James P. Hoffa also expressed support. "We appreciate that the U.S. government is finally on record condemning the systematic theft of American intellectual property that is part and parcel of the Chinese political and business elites' global business plan," Hoffa said.

Union leaders praise steel tariffs. United Steelworkers International President Leo W. Gerard spoke out in March in support of President Trump's decision to impose tariffs on steel and aluminum imports. Gerard told members of the House Steel Caucus that thousands of laid-off steelworkers would soon be recalled to their jobs as a result of the tariffs. AFL-CIO President Trumka also spoke out in support of the tariffs. "This is a great first step toward addressing trade cheating, and we will continue to work with the administration on rewriting trade rules to benefit working people," Trumka said.

UAW urges release of jailed union leaders in South Korea. The UAW announced in March that a union representative had recently returned from South Korea after trying to secure the release of two key labor leaders jailed for union activity. The UAW International Executive Board passed a resolution calling for the pardon and release of the trade unionists, and UAW President Dennis Williams has raised the issue at high levels of the U.S. and South Korean governments. On the trip, the UAW representative met with the two incarcerated union leaders and pushed for basic labor and human rights. ✤

JUST FOR FUN

Mindteaser of the month



ACROSS

4 The new tax law has consequences for a clause requiring _____ in a sexual harassment settlement agreement.

6 Research finds employers are often disappointed by an applicant's _____.

8 Employee _____ levels were at an all-time high in 2017, according to new research.

10 An employer in North Dakota must receive an employee's _____ before deducting from his wages for negligence.

11 Leave-sharing programs involving a _____ emergency may implicate favorable tax treatment for leave donors.

DOWN

1 The NLRB recently announced a proposed settlement with fast-food giant _____.

2 An employer need not provide accommodations to its dress code if they result in _____ _____ to the company (two words).

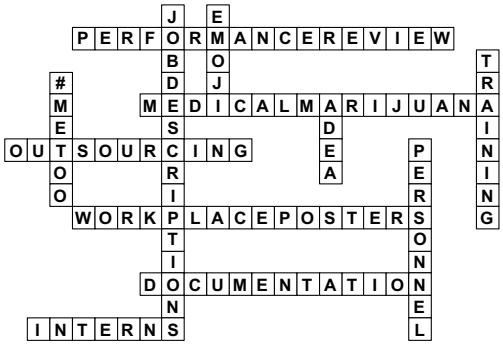
3 There are certain IRS requirements for leave-sharing programs involving _____ disasters.

5 OSHA announced that it will begin enforcing its standard for occupational exposure to _____ in May.

7 Dress codes that differentiate the standards for male and female employees may exhibit _____ bias.

9 The DOL has launched its new ____ program for auditing wage and hour practices.

Solution for April's puzzle



NORTH DAKOTA EMPLOYMENT LAW LETTER (ISSN 1086-2641) is published monthly for $447 per year by **BLR®—Business & Legal Resources,** 100 Winners Circle, Suite 300, P.O. Box 5094, Brentwood, TN 37024-5094.

Editorial inquiries should be directed to the editors at Vogel Law Firm, 218 NP Ave., P.O. Box 1389, Fargo, ND 58107-1389, 701-237-6983; 200 North 3rd St., Ste. 201, P.O. Box 2097, Bismarck, ND 58502-2097, 701-258-7899.

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