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North Dakota
EMPLOYMENT LAW LETTER

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TERMINATION

Risky business: the discharge decision

After law students in an employment discrimination class discuss the facts of a case, the professor routinely asks, "And then what happened?" Meaning, what led to the lawsuit? The class quickly responds, "The employee was fired." Why? Because terminating an employee is one of the riskiest decisions employers face.

Most employment law claims arise from the beginning or the end of the employment relationship—failing to hire someone or discharging an employee. Because of the risk, it pays to use special care and be thoughtful and intentional before making the discharge decision. Read on for more.

Legit nondiscriminatory and nonretaliatory reason

Unless your employees are subject to a collective bargaining agreement or an individual employment contract that requires just cause for discharge, they will be considered "at-will employees," meaning you or your employees have the right to end the employment relationship for any reason or no reason—as long as it isn't an illegal reason.

However, based on the way discrimination and wrongful discharge law has developed, if you discharge an employee, you need to be able to articulate a legitimate reason for the discharge that is nondiscriminatory and nonretaliatory. Otherwise, you could quickly find yourself in a difficult position when faced with a lawsuit over that decision.

Being able to articulate a legitimate reason will assist your lawyer's request to have the case dismissed. Additionally, if your case goes to trial, the jury will want to hear the reason why you discharged the employee. Simply relying on the at-will-employment doctrine won't be enough. In other words, a jury won't like the explanation that the employee was an at-will employee and that you had the right to discharge him on an at-will basis. Because losing a job can be devastating, the jury will want to know the reason why you made that decision.

As a result, be prepared to give the reason for the discharge and have evidence that supports that reason. Your evidence should clearly show that the reason you are articulating for discharge is a legitimate reason and not one that was created after the fact or gives the appearance that it's false.

Inconsistent treatment

When determining the reason why you're discharging an employee, it's important to examine other discharge decisions that you've made in the past. If you want to discharge an employee for a certain type of misconduct, double-check to make sure there are no other employees who have engaged in the same kind of misconduct who weren't discharged for doing so.

If you discharge an employee for engaging in a certain type of misconduct but haven't discharged other employees

AGENCY ACTION

H-2B cap reached for first half of 2018. U.S. Citizenship and Immigration Services (USCIS) announced on December 21, 2017, that it had reached the congressionally mandated H-2B cap for the first half of fiscal year 2018. December 15, 2017, was the final receipt date for new H-2B worker petitions requesting an employment start date before April 1. USCIS continues to accept H-2B petitions that are exempt from the congressionally mandated cap. USCIS also was accepting cap-subject petitions for the second half of fiscal year 2018 for employment start dates on or after April 1. U.S. businesses use the H-2B program to employ foreign workers for temporary nonagricultural jobs. Currently, Congress has set the H-2B cap at 66,000 per fiscal year, with 33,000 for workers who begin employment in the first half of the fiscal year (October 1 through March 31) and 33,000 for workers who begin employment in the second half of the fiscal year (April 1 through September 30).

DOL proposes health plan for small businesses. The U.S. Department of Labor (DOL) announced on January 4, 2018, a Notice of Proposed Rulemaking to expand the opportunity to offer employment-based health insurance to small businesses through Small Business Health Plans, also known as Association Health Plans. Under the proposal, small businesses and sole proprietors would have more freedom to band together to provide health insurance for employees, the DOL statement said. The proposed rule, which applies only to employer-sponsored health insurance, would allow employers to join together as a single group to purchase insurance in the large group market.

Kaplan appointed chair of NLRB. President Donald Trump named National Labor Relations Board (NLRB) member Marvin E. Kaplan chairman of the NLRB on December 22, 2017. Kaplan joined the Board on August 10, 2017, for a term ending on August 27, 2020. He succeeded former Chairman Philip A. Miscimarra, whose term expired on December 16, 2017. The NLRB currently includes members Mark Gaston Pearce, whose term expires on August 27, 2018; Lauren McFerran, whose term expires on December 16, 2019; and William J. Emanuel, whose term expires on August 27, 2021. One seat was vacant when the Kaplan appointment was made.

401(k) missing participants program expanded. The Pension Benefit Guaranty Corporation (PBGC) announced in December that it is expanding its Missing Participants Program to terminated 401(k) and other plans. The expanded program is voluntary for defined contribution and small professional service plans and will be available for plans that terminated on or after January 1, 2018. Before the expansion, the program was open only to terminated PBGC-insured single-employer defined benefit plans. ✤

for engaging in that same type of misconduct, it creates a good argument that your reason for discharging this particular employee isn't legitimate. Treating employees in an inconsistent manner supports an argument that the real reason for treating them differently may be discriminatory or based on a desire to retaliate against them for some type of protected activity.

Documentation

Proper documentation is a critical aspect in employment law. Documentation can be crucial in helping you determine whether you are treating an employee as other employees have been treated. For example, if you have proper documentation regarding past discharge decisions, you will have a record that will allow you to determine whether your current discharge decision is consistent with past discharge decisions.

In addition, proper documentation of the reason why you are discharging the employee will help in a subsequent lawsuit. Typically, an employee may have up to two years to file a lawsuit after a discharge decision is made. It then may be another year before the case actually goes to trial. As a result, your employees may be forced to testify about decisions that were made two to three years earlier. Proper documentation helps to refresh the employees' recollections and to make sure that accurate testimony is provided regarding the reason for why this employee was discharged.

Furthermore, because of the length of time that may exist between when the discharge decision was made and when you have to explain that decision in litigation, there's always a possibility that the individual or individuals who made the discharge decision may no longer be with your company. Proper documentation will help to provide information for why the discharge decision was made and will enable the organization to provide testimony regarding that decision.

Performance evaluations

If your reason for discharging an employee is based on bad work performance, it's critical that you check existing performance evaluations to determine if your stated reason is consistent with the information contained in the evaluations. Very often employers find themselves in a situation where they want to discharge an employee for poor work performance, but the yearly performance evaluations reflect that the employee actually performed well. If your employee consistently received a good evaluation every year, then it may become difficult for you to argue that you are discharging her for poor work performance.

Protected activity/whistleblowing

When making the decision to discharge an employee, you should also conduct an analysis of whether she has engaged in any kind of protected activity or whistleblowing activity. In other words, has she ever complained about issues that would advance a substantial public policy? Has she complained about safety issues in the workplace? Has she complained about violations of wage and hour issues? Has she filed a workers'

compensation claim? Has she complained about discrimination or harassment in the workplace?

These are just some of the types of protected activity or whistleblower activity that an employee may engage in that could offer her some protection. You need to be aware of this potential issue and conduct an analysis of whether the employee you want to discharge may have recently engaged in some type of protected activity or whistleblower activity so you can decide how to proceed with the discharge decision.

Bottom line

Sometimes you have no choice but to discharge an employee for poor performance or misconduct. Anytime you do, however, it will be risky because it could lead to a lawsuit. Lawsuits are expensive and potentially disruptive to your place of employment. As a result, you want to put yourself in the best possible position to defend any kind of discharge decision. By being aware of the issues discussed in this article, you can be prepared if the time comes. ✤

DRUG USE

Opioids in your workplace? Tips for prevention and response

These days, it seems impossible to tune into the news without hearing about the opioid crisis. In addition to tragic reports of overdose deaths and heartbreaking addiction stories, most of the news focuses on the rapid rise of opioid use over the past 10 to 15 years and what—if anything—can be done to turn the tide.

The statistics are alarming indeed. The number of drug overdose deaths in the United States nearly doubled between 2006 and 2016. But death isn't the only risk. According to the Centers for Disease Control and Prevention (CDC), more than 1,000 people per day seek emergency room treatment for misusing prescription opioids, and more than two million suffer from addiction to prescription pain medication.

For most employers, there are any number of legitimate business reasons for you to take a proactive approach to preventing and responding to addiction in your workplace. They could include anything from meeting your obligations to keep employees (and others) safe to the desire to reduce absenteeism and optimize productivity and performance.

Here are just a few ideas to get you started.

Assess the risks in your workplace

Some workplaces are at higher risk for opioid addiction than others. Conduct a frank appraisal of your risks, which may include geographic location, the demographics of your workforce (white men between the ages of 25 and 54 years are at the highest risk), and the nature of work performed.

This assessment isn't so much about determining whether there are risks (there are) but the degree and nature of those risks.

Develop drug-use policy

Historically, many employers have forgone a drug policy for a number of reasons. For example, maybe they thought they were too small to need a drug policy or their employees didn't do the type of work where drug use could present safety concerns.

While those are legitimate considerations when deciding *how strict* you want your drug policy to be, they don't mean you shouldn't have such a policy at all. At a minimum, most employers should have a policy that:

- Prohibits employees from being under the influence of drugs (and/or alcohol) at work;
- Explains any process you may have to detect prohibited drug use (such as random testing, screening after an accident or based on a reasonable suspicion of drug use, and so on);
- Explains any employee obligations to notify you that they are using a drug or medication that could pose a safety risk; and
- Spells out the potential ramifications of any violations of the policy.

Investigate treatment controls

Another proactive approach is to become familiar with any obstacles to opioid addiction that may be built into your group health policy. For example, most policies are implementing tighter controls for potentially addictive pain medications, including:

- Step treatment (requiring a patient to try nonaddictive or less addictive pain medications first);
- Dosage limits (as to milligrams, number of pills provided in a single prescription, number of refills allowed, and other similar restrictions); and
- Preauthorization requirements.

While these types of controls aren't uncommon, there is still significant variance from one carrier to the next. In addition, if you are self-insured, you have more leeway to develop an even more creative plan designed to prevent and respond to opioid abuses.

In any event, it's good to know what types of safeguards are already in place and do some digging on what other options or programs the carriers (or third-party administrators or pharmacy benefits managers, if you're self-insured) may be developing. Depending on the risk presented by your particular employee population, it may even be worthwhile to take this into consideration when choosing your health plan.

Don't overlook employee education

Finally, don't underestimate the importance of simple communication. The tragedy of the current crisis is that so many addicts started out just like you and me, just looking for a solution to a health problem. Most people who become addicted weren't particularly irresponsible in their use of prescribed medications. They simply needed something to control pain, and it got out of their control.

That's why education is so important. Again, depending on the level of risk in your organization, you may want to provide training (or at least educational materials) about:

- The importance of adhering strictly to the prescription when using pain medications;
- The medications that present the greatest risk of addiction;
- The dangers of overutilization;
- Responsible storage and disposal of medications; and
- Any other resources you offer that could help, such as an employee assistance program, health coaching/disease management, and other similar programs.

Final words

If you haven't had to deal with opioid addiction in your workplace, it's tempting to think it's a problem you don't need to worry about. That type of thinking is shortsighted at best. The truth is, employers that are willing to do so can make a positive impact on the incidence of and damage done by opioid use and addiction. The fact that doing so can also have a positive impact on your bottom line makes it a win-win for you and your employees. ✤

WAGE AND HOUR LAW

WHD reinstates Bush-era opinion letters

The U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) recently reissued 17 opinion letters that had been withdrawn by the Obama administration for "further review" but never ruled upon. The letters had been issued mere days before former President George W. Bush left office in January 2009.

Most of the "new" opinion letters provide additional guidance regarding application of various principles under the Fair Labor Standards Act (FLSA).

Some background

You may recall that for many years, the DOL frequently provided guidance on narrow regulatory issues by publishing opinion letters in which it responded to factual scenarios submitted by employers. For example, employers frequently asked for opinions from the WHD regarding whether particular categories of employees were entitled to overtime, leave under the Family and Medical Leave Act (FMLA), and other issues.

Starting in 2009, the Obama administration discontinued the practice of issuing opinion letters and replaced them with "administrator interpretations," which provide informal guidance on broader and more general topics and don't respond to specific factual situations. During Obama's eight years in office, the WHD issued only 11 administrator interpretations.

Topics addressed

The opinion letters can be broken down into three categories:

- Whether particular types of employees are exempt from overtime requirements;
- What types of compensation need to be included in calculating the amount of overtime owed; and

- What activities qualify as "work time" for which compensation must be paid.

All of the opinion letters provide valuable insight and are well worth a read. But in the meantime, let's take a quick look at the topics addressed and the conclusions reached by the WHD.

Exempt status

Most of the opinion letters consider whether specific types of employees are exempt from minimum wage and overtime requirements, and most were found to be exempt. Categories of employees that *were found to meet an exemption* include:

- Plumbing sales/service techs (exemption for retail or service establishments);
- Commercial and residential construction supervisors/managers (administrative exemption);
- "Adjunct" or community coaches (teacher exemption);
- Client service managers at insurance companies (administrative exemption);
- Various medical professionals, coordinators, and consultants (administrative exemption);
- Some (but not all) fraud/theft analysts (administrative exemption); and
- Product demonstration coordinators (administrative exemption)

On the other hand, helicopter pilots (and pilots in general) don't meet the requirements of any exemption. However, the WHD has taken a "position of nonenforcement" under the FLSA with regard to most pilots.

Calculating overtime

The remaining opinion letters primarily examine two common concerns about how to properly compute an employee's overtime: (1) what hours need to be compensated and (2) what types of compensation need to be included in calculating the regular rate of pay and, by extension, the overtime rate. The most interesting of the remaining letters reached the following conclusions:

- Ambulance workers' activities during their on-call time weren't so restricted as to make such time compensable.
- Firefighters who wanted to volunteer to perform extra duties couldn't do so without being paid for the extra time because the volunteer work was too similar to the paid duties.
- Under the salary-basis test, if employees work a different number of hours from one day to the next, their compensation may be reduced by the number of hours missed as long as they are absent for a full day.
- Two different opinion letters examined whether bonuses needed to be included in calculating the regular rate of pay (one concluded they did; the other concluded they didn't).

Finally, it's too complicated to summarize easily, but one of the opinion letters provided a detailed discussion of how

WORKPLACE TRENDS

Survey shows employers offering more health, wellness programs. Two-thirds of HR managers responding to a survey from staffing firm OfficeTeam reported their organizations have expanded health and wellness offerings in the past five years. The survey, reported in January 2018, also found that 89% of workers said their company is supportive of their wellness goals. The OfficeTeam results contrast with a survey from Willis Towers Watson reported in December that found a disconnect between employers and employees on the effectiveness of programs. Fifty-six percent of employers in that survey said they believe their current health and well-being programs encourage employees to live a healthier lifestyle, but just 32% of employees agreed.

CareerBuilder forecast identifies hiring trends for 2018. A new poll from CareerBuilder has identified employer hiring trends to watch in 2018. The poll, conducted by The Harris Poll from November 28 to December 20, 2017, found that employers will start courting college students early, with 64% planning to hire recent college graduates in 2018. Employers also will be looking to import talent, with 23% planning to hire workers from other countries to work in the United States. The survey also found that employers will increase outreach to past employees, with 39% planning to hire former employees in 2018. Sixty-six percent of employers surveyed said they will train and hire workers who may not have all the skills they need but have potential. Also, 44% of employers said they plan to train low-skill workers who don't have experience in their field and hire them for higher-skill jobs. The poll also found that employers plan to increase starting salaries.

Survey pinpoints executives' top networking mistakes. Even top executives make mistakes in their networking efforts, according to CFOs polled in a recent Robert Half Management Resources survey. CFOs were asked, "Which one of the following is the greatest networking mistake executives make?" Their responses: not asking for help (30%), failing to keep in touch or reaching out only when they need something (23%), failing to connect with the right people (19%), not thanking contacts when they provide help (14%), and not helping others (14%). "Business is changing so rapidly, no one has all the answers or expects others to," Tim Hird, executive director of Robert Half Management Resources, said. "Executives need a robust network, including mentors, peer staff-level contacts, and experts from within and outside the company, to stay on top of trends, best practices, and opportunities." ✤

to calculate the regular rate for certain emergency response workers.

What's next?

The Trump DOL appears to have reissued the short-lived Bush-era opinion letters in response to employer requests. There was no accompanying announcement regarding the agency's intent to consider new requests for opinion letters or issue administrator interpretations going forward. It will be interesting to see whether opinion letters once again become a common practice, as they have historically provided valuable insight into the WHD's perspective on a variety of topics that aren't directly answered by the regulations.

The full text of the new opinion letters can be found at www.dol.gov/whd/opinion/flsa.htm. ✤

EMPLOYER LIABILITY

Communication is key: lessons from a $1.1 million disability lawsuit

by Jo Ellen Whitney
Davis Brown Law Firm

Any lawsuit that generates more than a million dollars in damages will create some interest for employers and attorneys who want to avoid whatever resulted in the expensive verdict. Such is the case with the recent $1.1 million in damages awarded to John Vetter, a former employee of the Iowa Department of Natural Resources (DNR).

On January 9, 2018, the state of Iowa made the final payments on a lawsuit that wound its way through trial court and the Iowa Court of Appeals. The case involved Vetter's claim of disability discrimination with regard to the DNR's termination of his employment in 2013. When the case was tried in 2015, a jury awarded him $600,000 in back pay and emotional distress damages (interest and attorneys' fees eventually increased the total). The DNR appealed the verdict to the court of appeals, which affirmed the award. The Iowa Supreme Court declined to hear the case, so no further appeals are available.

Background

Vetter began working at the DNR as a natural resources technician in 1976. Thirty-five years later, in 2011, he sustained a work-related injury, which led to spinal surgery later that year. In 2012, he underwent a functional capacity evaluation (FCE) for his job and was placed under certain limitations on some of his job functions, including walking, climbing, and bending.

The DNR subsequently engaged in an accommodation assessment process, including speaking with outside consultants about potential accommodations. Some of the accommodations that were suggested included rotating Vetter's job duties every 2½ hours and purchasing a specialized tractor for him to use. However, the evaluators, including Vetter's supervisors, didn't speak directly to him about his job duties or his essential functions. (Note: Whether you're assessing reasonable accommodations, determining essential functions, or classifying jobs for wage and hour purposes, always talk to the employee who actually performs the job.)

Moreover, the DNR didn't work through the accommodation process with Vetter directly, deciding without his input that his accommodations "would have a detrimental impact on the business needs of the DNR and that such accommodations would result in undue burden on the DNR and the State of Iowa." Instead of being accommodated, he was summarily terminated from his employment.

Vetter disagreed about the nature and type of accommodations the DNR explored. In addition, he didn't believe the accommodations were necessary. As a result, he sued the DNR, alleging disability discrimination, discrimination based on a perceived disability, and failure to reasonably accommodate under the Iowa Civil Rights Act.

Court's decision

Vetter alleged that he was subjected to disparate treatment based on a disability or a perceived disability. Both the Iowa Civil Rights Commission and the courts assess such claims by examining whether the person has a disability, whether he was qualified to perform his job with or without an accommodation, and whether he suffered an adverse employment decision because of his disability. In this case, it was clear that Vetter has a disability based on the permanent physical restrictions on his ability to lift, stand, squat, and walk.

The second prong of the legal and factual assessment is whether the employee was qualified for the position. If the employee has held his job for a significant period of time and demonstrates that prior to his need for accommodation, he could perform the essential functions of the job, he will be deemed qualified for the position. At the time of his termination, Vetter had worked for the DNR for more than 30 years and presumably performed his job satisfactorily.

It's interesting to note that the state argued that Vetter didn't have a physical impairment, relying on testimony from his coworkers that he was able to perform his job duties. Further, Vetter stated at the time of his discharge that he wasn't disabled. While the jury didn't address the issue of perceived disability, the court of appeals stated,

"The perception of others is not relevant to the question of whether a person has a disability. The determination of disability is impairment of major life activities, which is separate, unrelated to [coworkers'] perceptions."

The final question is whether the employee suffered a detrimental employment action based on disability. Vetter alleged that the DNR failed to accommodate him and subsequently terminated him because of his disability. To prove that allegation, he cited the DNR's termination letter, which stated he was being terminated because the accommodations he needed were unduly burdensome. That was adequate proof that he was terminated because of his disability.

With regard to the failure-to-accommodate claim, the court noted that the DNR took significant steps to assess whether it could accommodate Vetter's restrictions by obtaining the advice of outside consultants, its own legal department, and various managerial employees. However, the court focused on the interactive process, in which the employee and the employer work together to achieve a reasonable accommodation. The key to this case was that no interactive process occurred because the DNR never reached out to Vetter when it was mulling accommodations.

One judge dissented from the majority's opinion. Although Judge McDonald didn't agree with some of the majority's legal analysis, he opened his dissent by stating:

> The [DNR] incompetently managed Vetter's work restrictions and callously terminated Vetter's employment. The jury was angry, it punished the [employer]. I am tempted to concur in the majority opinion on the ground [that the DNR] received [its] just desserts, [and] karmic justice was achieved, except karmic justice is not a legal reason.

In other words, Vetter was a long-term employee, he was injured on the job, and the jury, at least in Judge McDonald's opinion, wanted to punish the DNR for treating him badly after his injury. *Vetter v. State of Iowa, Iowa Department of Natural Resources, et al.,* Iowa Court of Appeals No. 16-0209 May 17, 2017.

Communication—when an interactive process isn't 'interactive'

Although this case involved an Iowa employer under state disability law, it offers a number of lessons for North Dakota employers struggling with disability accommodation issues under the Americans with Disabilities Act (ADA) or the North Dakota Human Rights Act. This case came down to the issue of communication. The DNR failed to engage in an interactive discussion with Vetter about what, if any, reasonable accommodations he needed and how the accommodations would be implemented.

Although it argued that accommodation was an undue hardship, at no point did the DNR take the simple step of sitting down with the employee to discuss possible accommodation. The ADA has been interpreted by the Equal Employment Opportunity Commission (EEOC), the agency responsible for its enforcement, as requiring an "interactive" process to determine an accommodation for an employee like Vetter who can no longer perform essential job functions due to disability. "Interactive" means, at minimum, documenting discussions directly with the employee about potential accommodations and the reasons any suggestions were rejected. The DNR failed to do so, and it cost the agency dearly.

To make things worse, when it terminated Vetter, a long-time employee, the employer communicated its decision poorly, increasing the potential for a lawsuit—and a claim for emotional distress damages. Employers frequently find themselves trying to implement business decisions critical for the survival and efficiency of the organization that unfortunately may have an emotional impact for the affected employees.

In this case, a number of comments a supervisor made about Vetter's termination appeared callous. For example, Vetter claimed that he asked the supervisor who walked him to his car after the termination whether the DNR considered the impact of his firing on his department. The supervisor allegedly responded, "Nobody cares."

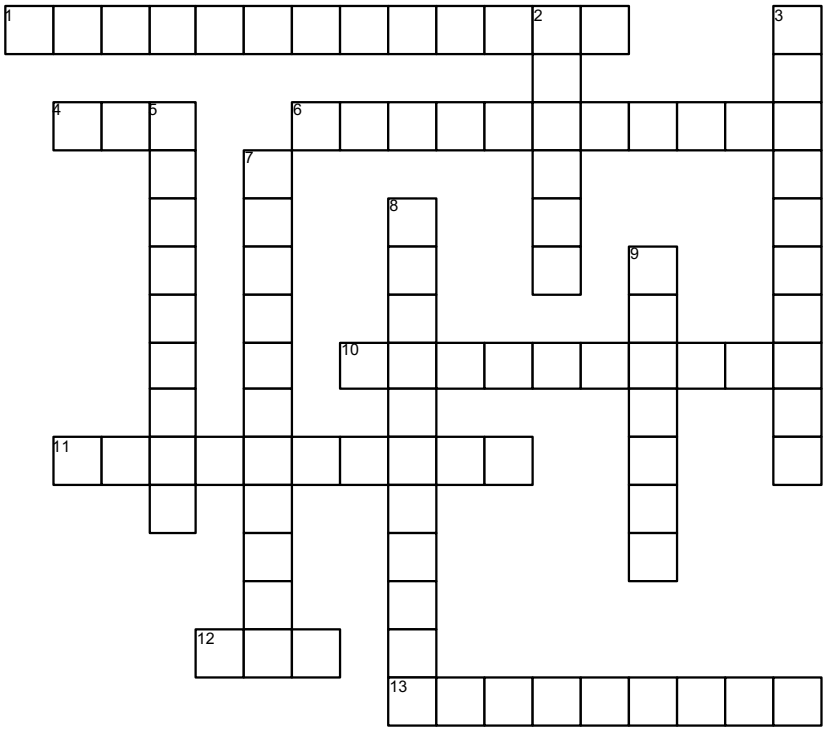
It can be difficult to lessen the impact of a termination, but you should carefully choose the people who will be involved in the process and plan the termination session. Make sure that all individuals involved in communicating a termination decision are prepared to firmly but humanely deliver the termination information, briefly answer the employee's questions, and understand the importance of avoiding negative or thoughtless remarks and especially any comments that could suggest bias.

Good communication from start to finish is key to minimizing the litigation risks of your employment decisions. You can never go wrong by taking the time to create an effective communication plan.

This article originally appeared in the February 2018 issue of Iowa Employment Law Letter. The author can be reached at joellenwhitney@davisbrownlaw.com. ✤

JUST FOR FUN

Mindteaser of the month



ACROSS

1 _____ is the key to risk reduction in employment discharge.

4 ___ is short for the DOL dollars and sense division.

6 Targeting employees based on protected activity is called _____.

10 The amount an employee must pay before group insurance covers a service is known as a _____.

11 Even in "at-will" states such as North Dakota, you should document a _____ reason for discharge.

12 A _____ is a portable, tax-preferred account to co-cover health expenses.

13 _____ is an important part of addressing addiction in the workplace.

DOWN

2 _____ addiction has risen dramatically in recent years.

3 Employers can reduce discharge risks by documenting _____ decisions.

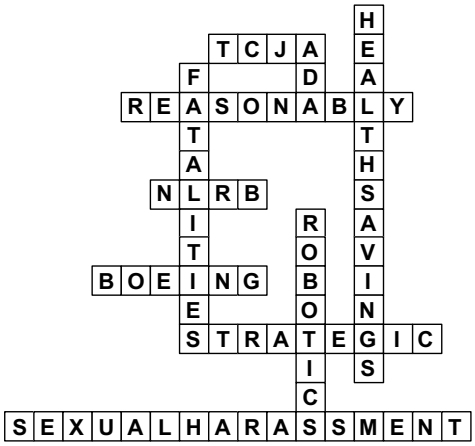
5 The _____ decision is risky business for employers.

7 Before making the discharge decision, be sure to review _____ for consistency.

8 Engage in an _____ process with an employee to determine an accommodation.

9 _____ letters, providing helpful guidance to employers on wage and hour issues, have been reinstated after being discontinued under President Obama.

Solution for February's puzzle



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