The Legal Intelligencer

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10 Questions You May Be Asked At Your Next Social Gathering

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'Tis the season of football games, holiday parties and family gatherings. Whether you are huddled around the TV or a fireplace, you just might find yourself stuck in a conversation or two with family members or friends who want to pick your brain about employment issues. Nevermind the fact that employment law may not be your area of expertise.

To them, you are a lawyer and so you must know the answers to their questions. Here, then, is a handy little primer of the top 10 questions you may be asked along with some helpful responses. Obviously, the responses are truncated for the sake of brevity and the information should not be considered complete legal advice.

• I am helping to care for my mom with Alzheimer's and am having trouble balancing work and family. What should I do?

First things first. The Family and Medical Leave Act was passed in 1992 to allow eligible employees of covered employers to take 12 weeks of job-protected unpaid leave for one of several enumerated reasons, including the birth and care of the employee's child, the placement of a foster or adoptive child, the employee's own serious health condition, to care for a family member with a serious health condition and any qualifying exigency arising out of a call to active duty.

The leave usually can be taken all at once or on an intermittent or reduced-leave schedule. This individual should contact his or her benefits department to determine whether the employer is required to provide FMLA leave and whether the employee is eligible for leave. The employee may well be able to use FMLA leave to care for his or her parent during this difficult time without having to worry about the stability of his or her job.

• I want to work a few extra hours this month so that I don't have to take a vacation day next month to cover a doctor's appointment. Why won't my employer let me do that? My husband, who works for the government, can do that.

The Fair Labor Standards Act is often misunderstood by both employers and employees alike. The bottom line is that private employers generally may not allow non-exempt employees to use compensatory time off in lieu of paying overtime. Employers are required to pay covered non-exempt employees one-and-a-half times their regular hourly rate of pay for all hours worked more than 40 in a work week.

This overtime requirement may not be waived by agreement between the employer and employee and the requirement cannot be met through the use of compensatory time off except under special circumstances applicable only to certain government employees. Therefore, if your family member is a non-exempt employee (usually meaning that she is typically, but not always, paid hourly, and is eligible to be paid overtime), she may not work extra hours now in order to gain compensatory hours to use at a later time.

• I own a small family-run business and am now thinking about hiring my first nonfamily member. In addition to a criminal background check, I want to Google the applicants. Do you see any problems?

In short, yes. The increase in popularity of social networking sites such as Facebook, Myspace and Twitter, and the ease in researching individuals on the Internet through search engines such as Google has led to a potential landmine for both employers and employees. It is all too easy for employers to Google an applicant or view his or her social networking page/profile, and in the process, learn information relevant to the applicant's protected status.

For example, an employer may discover that the applicant belongs to a protected category, aligns him or herself with particular political viewpoints, or engages in unprofessional conduct. In such cases, even if that employer chooses not to employ the applicant for legitimate reasons, the mere fact that the employer performed the searches and viewed the results may be enough to cast doubt on the employer's legitimate reasons. This concern is heightened when the person who conducts the Internet search is the same person who make the hiring decision. Moreover, more states are passing legislation aimed at prohibiting employers from requiring job applicants to disclose their personal social media passwords.

• I just ran a criminal background check on a job applicant and discovered that he was convicted of sexual assault 15 years ago. We are a small company and we work in close quarters. It makes me nervous to hire someone with a conviction record. Can't I just turn him down?

It is not so simple. Most states have laws that specify when and how criminal history information may be used in employment settings. Most states prohibit employers from considering arrest information in employment decisions. Moreover, blanket policies excluding those with criminal convictions are problematic and may run afoul of federal or state anti-discrimination laws.

Before making any decisions with respect to criminal convictions, employers should consult applicable federal and state law. At the very least, before making a decision, employers should evaluate: the nature of the crime, the time elapsed since the offense was committed, and the nature of the job for which the applicant is applying. The EEOC recently updated its enforcement guidance on this issue.

• My cousin owns a small business that is not doing well. He may not be able to pay his employees their wages next week. He has offered his employees the use of his beach house in exchange for delaying their paychecks by a month.

This is unfortunate and the cousin should be informed of the risks and consequences in failing to pay wages that are owed. Most state wage payment and collection laws specify the timing and frequency of wage payments to employees. These same statutes also set forth penalties for noncompliance and many of these statutes impose individual liability, even jail time, on officers and directors. For example, Pennsylvania's Wage Payment and Collection Law allows employees to pursue legal action in court t[illegible] and allows for the imposition of liquidated damages in the amount of 25 percent of the wages due, if wages remain unpaid for 30 days after payday. Moreover, Pennsylvania employees from waiving their rights under the law so employees cannot legally waive on time. Thus, the cousin's employees cannot legally agree to waive their right to the

use of the beach house.

• I own a restaurant and my employees frequently quit with no notice and fail to return their uniforms. No matter how many times I call, asking them to return their uniforms, they never do. I have decided to deduct the cost of the uniforms from their final paychecks.

Despite a misinformed belief that this is OK, most state wage payment statutes prohibit employers from making any deductions from an employee's final pay, absent certain circumstances. Some states forbid any deductions other than those specifically enumerated by statute. Others allow for deductions if agreed to in advance by the employee. Your friend should consult with the applicable state wage payment and collection laws before making any deductions from an employee's pay.

• My uncle owns a bar frequented mostly by male patrons and he wants to hire only female servers. That's allowed, right?

This certainly is an interesting issue. Your relative may be thinking about the bona fide occupational qualification (BFOQ) defense, which allows employers to defend against a discrimination claim by asserting that the hiring practice was based upon a bona fide occupational qualification (in this case, gender).

You may be familiar with this concept as at least one national restaurant chain — Hooters — has relied upon it during its multi-year battle with the EEOC. According to the EEOC, the refusal to hire an individual based on stereotyped characterizations of the sexes will not warrant the application of the BFOQ exception.

Moreover, customer preferences for one gender over another will not excuse an employer's use of sex as an explicit criteria. Rather, the BFOQ defense is very narrow and requires an employer to demonstrate that failure to hire women for this position would undermine the essence of the business operation. Therefore, the uncle should be encouraged to hire all qualified applicants, regardless of gender.

• My employee keeps telling clients to "have a blessed day" when she ends calls and her voicemail message and outgoing email signature contain the same statement. What can I do?

Religious accommodation issues are always sensitive. An employer is required to reasonably accommodate the sincerely held religious beliefs and practices of an employee unless doing so would cause the employer undue hardship. An accommodation might cause undue hardship if it is costly, compromises workplace safety, decreases workplace efficiency or infringes on the rights of other employees. In some cases, a company may be required to modify its stated policies to reasonably accommodate an employee's religious practice (i.e., make an exception to policies against head coverings in the workplace or other dress/grooming).

In other cases, an employer may need to allow schedule changes or leave time for religious observances, voluntary shift substitutions or job reassignments. Allowing an employee to say "have a blessed day" may qualify as a reasonable accommodation, depending on the circumstances. Your friend should engage in a dialogue with the employee before taking any action.

• My co-worker reeks of smoke and it is bothering me. Can my employer force her to stop smoking during the work day?

The issue of smoking in the workplace has become a hot topic recently. More and more employers are considering banning all smoking in the workplace or going so far as to ban smokers from employment. In many cases, the issue of smoking in the workplace depends on state laws regarding off-duty conduct. Some states prohibit employers from interfering with an employee's lawful off-duty conduct and other states prohibit employers from discriminating against smokers.

In this case, your friend/family member would best be served by speaking with her human resources department. If the lingering smoke odor is triggering a medical problem, the employer may be able to simply

switch the employee's work station or work with the employee to find another accommodation.

And the number one question you might be asked:

• My daughter really wants to be a lawyer when she grows up. Can she intern at your company during her high school summer vacation? You don't have to pay her anything.

The answer, more likely than not, is a resounding no. The issue of unpaid internships is a hot topic these days, with an increasing number of "interns" claiming that they performed "real work" during their internships and thus should have been paid minimum wage and even overtime. The Fair Labor Standards Act (FLSA) generally requires employers to pay their employees at least minimum wage for all hours worked, as well as overtime for all hours worked more than 40 in a week. Internships and training programs are excluded from this requirement only in limited circumstances. The Department of Labor looks at six criteria in determining whether an individual truly is an intern or more likely, is an employee:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment.

2. The internship experience is for the benefit of the intern.

3. The intern does not displace regular employees, but works under close supervision of existing staff.

4. The employer that provides the training derives no immediate advantage from the activities of the intern and on occasion its operations may actually be impeded.

5. The intern is not necessarily entitled to a job at the conclusion of the internship.

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

So, unless your friend's daughter is simply shadowing you around the office during the summer and performing no real work, chances are slim that she would be considered an intern. If she performs any work that otherwise would have been done by a regular employee, then she is not an intern. Hiring her as such might place your employer at risk for an unwanted wage-and-hour lawsuit. •

Carrie B. Rosen *is a member of Cozen O'Connor who practices in the labor and employment group. She concentrates her practice in the representation of management (small and large) in all aspects of employment law. She focuses her counseling and litigation practice on preventing and defending discrimination claims, designing and providing advice on workplace policies, and drafting and enforcing employment and separation/severance agreements.*
