

# EMPLOYMENT LAW MATTERS

Latest legal developments and practical guidance for effective HR management

May 2004

Route to:

---



---



---

## In this issue ...

- Strict Attendance Policy Held to Violate FMLA
- A Refresher on Child Labor Rules (Just in Time for Summer Help)
- Senate Votes to Block Overtime Pay Exemption Rules, Again
- New OSHA Alliance Formed in Upstate NY
- Ferrara-Fiorenza Law Firm's Breakfast Briefing Schedule

**Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.** provides comprehensive legal representation and counseling exclusively to public and private sector employers in the areas of employment law and labor relations.

## Strict Attendance Policy Held to Violate FMLA

The federal appellate court recently ruled that a terminated employee could sue his employer for violations of the Family and Medical Leave Act (FMLA) even though he failed to comply with his employer's carefully-drafted leave and attendance personnel policies. *Cavin v. Honda of America Mfg. Inc.*, 346 F.3d 713 (6th Cir. 2003). This decision, in essence, invalidated a seemingly reasonable company policy that Honda had implemented to address attendance problems.

Honda's employee handbook instructed employees to "notify either **Plant Security**, their department, or Administration prior to the beginning of their scheduled shift, or as soon as reasonable." Employees were also permitted to call Security to report "a one-day absence," or "a one-day sickness." However, the policy stated that when an employee's "absence continues beyond one day away from work ... [s/he] should contact **Administration Leave Coordination**."

On June 21, 1999, Cavin was injured in a motorcycle accident. He was treated in the hospital and released the same day. However, his doctors excused him from work until June 28th. Beginning with the day of his accident, Cavin called and reported his absence to **Plant Security**, and did so every day of the week of June 21-25. Cavin was not scheduled to work

the following week due to a plant shutdown, and he returned to work on the next regular workday, July 6, 1999. On July 6th, Cavin first reported his need for a leave of absence to **Administration Leave Coordination**.

Despite his having the appropriate medical certification stating that his absence was due to his own serious health condition,

Cavin sued Honda in federal court in Ohio, alleging that Honda interfered with his FMLA rights. The Court of Appeals sided with Cavin noting that the FMLA "does not permit an employer to limit [its] employee's FMLA rights by denying them whenever an employee fails to comply with internal procedural requirements that are more strict than those contemplated by the FMLA."

The FMLA regulations require that an employee with a **foreseeable need** for leave must provide "at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave." And concluding that the regulatory notice requirements for **unforeseeable leave** must be more relaxed than those for **foreseeable leave**, the Court held that Honda could not interfere with Cavin's FMLA rights by enforcing its notice requirements to deny leave that was otherwise FMLA-qualifying.

Having invalidated Honda's notice policy as conflicting with the FMLA, the Court noted that employees "need only comply with the requirements of the [FMLA] to invoke its protections." "An employee gives his employer sufficient notice that he is requesting leave for an FMLA-qualifying condition when he gives the employer enough information for the employer to reasonably conclude that an [unforeseeable] event ... has occurred," the Court concluded.

### The bottom line is ...

*The FMLA does not permit an employer to deny its employees FMLA leave whenever they fail to comply with company policies that are more strict than those contemplated by the FMLA.*

Cavin was disciplined and informed that any subsequent violation of Honda policies would result in termination. Honda also partially denied him FMLA leave for failing to notify Leave Coordination within 3 consecutive workdays of his first day of leave as required by the Handbook. Honda disallowed the leave for June 21-23 but approved it for June 24-25 since those days were within three consecutive workdays of his July 6th request to **Administration Leave Coordination**. Later that year, Cavin failed to comply with Honda's medical certification requirements for a another leave request, and was discharged.

## A Refresher on Child Labor Rules (Just in Time for Summer Help)

Every year, millions of teens work in part-time or summer jobs that provide great opportunities for learning important life skills and acquiring hands-on experience. But all employers should be aware that there are Federal and State rules limiting the hours teens can work and the types of jobs that teens can work.

The federal child labor rules that apply to non-agricultural employment depend on the age of the worker and the kind of job to be performed. Fourteen years old is the minimum age for non-agricultural employment covered by the Fair Labor Standards Act (FLSA). In addition to restrictions on hours, the Department of Labor has designated certain jobs as too hazardous for anyone under 18 years of age to perform. There are additional restrictions on where and in what jobs 14- and 15-year-olds can work. Generally speaking, the following rules apply:

- A youth 18 years or older may perform any job, whether hazardous or not.
- A youth 16 or 17 years old may perform any non-hazardous job. (See the list of hazardous occupations below.)
- A youth 14 and 15 years old may not work in the manufacturing or mining industries, or in any hazardous job. (See the list of hazardous occupations below.) In addition, a 14- or 15-year-old may not work in the following occupations:
  - Communications or public utilities jobs;
  - Construction or repair jobs;
  - Driving a motor vehicle or helping a driver;
  - Manufacturing and mining occupations;

- Power-driven machinery or hoisting apparatus other than typical office machines;
- Processing occupations;
- Public messenger jobs;
- Transporting of persons or property;
- Workrooms where products are manufactured, mined or processed;
- Warehousing and storage.

A 14- or 15-year-old may work in retail stores, food service establishments and gasoline service stations. However, a 14- or 15-year-old may not perform the following jobs in the retail and service industries:

- Baking;
- Boiler or engine room work, whether in or about;
- Cooking, except at soda fountains, lunch counters, snack bars, and cafeteria serving counters;
- Freezers or meat coolers work;
- Loading or unloading goods on or off trucks, railcars or conveyors;
- Meat processing area work;
- Maintenance or repair of a building or its equipment;
- Operating, setting up, adjusting, cleaning, oiling, or repairing power-driven food slicers, grinders, choppers or cutters and bakery mixers;
- Outside window washing, or work standing on a window sill, ladder, scaffold or similar equipment;
- Warehouse work, except office and clerical work.

The jobs a 14- or 15-year-old may do in the retail and service industries include:

- Bagging and carrying out customer's orders;
- Cashiering, selling, modeling, art work, advertising, window trimming, or comparative shopping;
- Cleaning fruits and vegetables;
- Clean-up work and grounds maintenance - The young worker may use vacuums and floor waxers, but he or she cannot use power-driven mowers, cutters, and trimmers;
- Delivery work by foot, bicycle, or public transportation;
- Kitchen and other work in preparing and serving food and drinks, but not cooking or baking;
- Office and clerical work;
- Pricing and tagging goods, assembling orders, packing, or shelving;
- Pumping gas, cleaning and polishing cars and trucks (but the young worker cannot repair cars, use garage lifting rack, or work in pits);
- Wrapping, weighing, pricing, stocking any goods as long as the young worker does not work where meat is being prepared and does not work in freezers or meat coolers.

### Hazardous Occupations

Eighteen is the minimum age for employment in non-agricultural occupations declared hazardous by the Secretary of Labor. The rules prohibiting working in hazardous occupations (HO) apply either on an industry basis, or on an occupational basis no matter what industry the job is in. Parents em-

*Continued on next page*

## A Refresher on Child Labor Rules (Just in Time for Summer Help) (continued)

ploying their own children are subject to these same rules.

Generally, these rules prohibit work in, or with the following:

- Manufacturing and storing of explosives.
- Driving a motor vehicle and being an outside helper on a motor vehicle.
- Coal mining.
- Logging and sawmilling.
- Power-driven woodworking machines.
- Exposure to radioactive substances.
- Power-driven hoisting apparatus.
- Power-driven metal-forming, punching, and shearing machines.
- Mining, other than coal mining.

- Meat packing or processing (including the use of power-driven meat slicing machines).
- Power-driven bakery machines.
- Power-driven paper-product machines.
- Manufacturing brick, tile, and related products.
- Power-driven circular saws, band saws, and guillotine shears.
- Wrecking, demolition, and shipbreaking operations.
- Roofing operations.
- Excavation operations.

If you have any questions on federal or state child labor rules, please contact our office at 315-437-7600.

### New OSHA Alliance Formed in Upstate NY

The Occupational Safety and Health Administration (OSHA), the Manufacturers Association of Central New York (MACNY), and the New York State Department of Labor's On-Site Consultation Program (NYS Consultation) have joined together to create an OSHA alliance. The purpose of the alliance is to provide employers with information, guidance and access to training resources for recognizing and eliminating hazards. A particular emphasis is placed on helping businesses develop their own workplace safety/health programs.

The alliance signatories will work together to deliver training on how to develop and put into practice comprehensive safety and health management systems, especially for small businesses. They will also promote related training and educational programs through outreach and communication efforts. For more information, contact your local OSHA office.

## Senate Votes to Block Overtime Pay Exemption Rules, Again

We reported in last month's *Employment Law Matters*, that the Department of Labor ("DOL") submitted its proposed changes to the federal overtime pay exemption rules to the federal Office of Management and Budget ("OMB") for further review. While the OMB had up to 3 months to review the regulations, it completed its review within a few days and the DOL immediately issued its final regulations. However, on May 4, 2004, the U.S.

Senate voted to block the implementation of the rules, which critics claim will deny overtime pay to millions of American workers.

The Senate vote does not necessarily mean that the proposed restrictions, scheduled to start in August, are dead. The Senate still has to vote on a corporate tax bill that includes the amendment blocking the overtime rules. The provision also faces an uncertain fate in

the U.S. House of Representatives. As you may recall, the Bush Administration was able to kill a similar effort to overturn the proposed rules last year.

We will keep you informed regarding the progress of the DOL proposed regulations.

EMPLOYMENT LAW MATTERS is published monthly by Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., 5010 Campuswood Drive, East Syracuse, New York, 13057, 315-437-7600, [www.ferrarafirm.com](http://www.ferrarafirm.com). Copyright 2004 by Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., all rights reserved. Photocopying or reproducing this newsletter in any form in whole or in part is a violation of federal copyright law and strictly prohibited without the express written consent of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. The information contained in this newsletter is intended for information purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. Readers should not act upon any information contained herein without seeking professional counsel.

## Ferrara-Fiorenza Law Firm's Breakfast Briefing Schedule

The following workshops, presented to the public at no charge, will be held from 7:45 AM to 9 AM at the Wyndham Hotel, 6301 Route 298, East Syracuse, New York (location subject to change). Call 315-437-7600 to make reservations today!

| DATE              | TOPIC   |
|-------------------|---|
| June 9, 2004      | Investigating Employee Misconduct: Hidden Trap Doors                      |
| July 8, 2004      | Doctor's Notes, Work Restrictions and the Absent Employee: Know the Rules |
| September 9, 2004 | "Red Flag Audit": Common Employment Law Mistakes. Are You Making Them?    |
| October 14, 2004  | What You Don't Know About Employee Documentation                          |
| December 9, 2004  | Employment Law: The Year in Review  |

### HR ADMINISTRATION AND TRAINING SERVICES

The Ferrara-Fiorenza Law Firm provides a full range of HR administration consulting services, including, in part:

- A comprehensive audit of your HR policies, practices and procedures.
- Advice for complying with employment laws.
- More effective, more efficient HR policies, practices and procedures, along with implementation strategies and assistance.

The Firm also works with employers to tailor training on a variety of personnel issues for managers/supervisors, including:

- Minimizing the Risk of Employment Litigation
- Preventing Workplace Harassment
- Leadership and Influence
- Managing Non-Performing Employees

For more information on the services Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. can provide to you, contact us at 315-437-7600.

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.  
5010 Campuswood Drive  
East Syracuse, New York 13057