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RESTRICTIVE COVENANTS

Florida court's decision shows value of trade secrets and noncompetes

by Jeffrey Slanker
Sniffen & Spellman, P.A.

Employers across the country have a vested interest in making sure their secrets and proprietary information are not disclosed by departing employees. Indeed, trade secret lawsuits continue to be a contentious area of litigation. A recent decision from a Florida appellate court provides insight on when courts will find that an employee has violated a noncompete provision and misused trade secrets.

Facts

The case involved Smart Pharmacy, former employee Damian Viccari, and Viccari's new employer, Pensacola Apothecary. Shortly after Viccari left, Smart Pharmacy filed a lawsuit against him and Pensacola Apothecary. The pharmacy sought damages and injunctive relief, claiming that Viccari breached his noncompete agreement and that he and Pensacola Apothecary misused its trade secrets. The trial court denied Smart Pharmacy's request for a temporary injunction (an order to cease the activity that violated the noncompete agreement and led to the misuse of the pharmacy's trade secrets). The pharmacy appealed.

Court's decision

The Florida Court of Appeals reversed the trial court's decision and sent the case back to the lower court. The appellate court held that the trial court improperly concluded there was not a substantial likelihood that Smart Pharmacy would prevail on the merits of its arguments. That essentially means Smart Pharmacy presented a good enough case to require Viccari and Pensacola Apothecary to cease their conduct immediately.

Indeed, the appeals court found that Viccari violated his noncompete agreement after joining Pensacola Apothecary by soliciting some of the same physicians he solicited while working for Smart Pharmacy. The court also found that Pensacola Apothecary was complicit in Viccari's violation of the noncompete and that it benefitted from his actions.

The appeals court found that the trial court was wrong when it denied Smart Pharmacy immediate relief from Viccari's and Pensacola Apothecary's actions. Indeed, the appellate court noted that Smart Pharmacy lost business to Pensacola Apothecary because of Viccari's actions. Relief had to be granted to protect Smart Pharmacy's business and referral sources. *Smart Pharmacy, Inc. v. Viccari and Pensacola Apothecary* (Florida 5/31/2016).

Special note on the DTSA

Interestingly, employers now have another weapon in their litigation arsenal to fight the improper disclosure of

trade secrets: the recently enacted federal Defend Trade Secrets Act (DTSA). The statute allows employers to sue employees for misappropriating trade secrets in certain circumstances and provides a federal claim to police trade secret use. It does not preempt state laws on trade secrets.

Takeaway for Florida employers

Employers that give employees access to sensitive information that strikes at the heart of their business should consider requiring employees to enter into noncompete agreements and agreements concerning the use of trade secrets. Employers must be prepared to take legal action against offending employees to enforce the agreements and prevent the misuse of trade secrets. A properly crafted noncompete agreement with trade secret provisions can be crucial in making sure your business continues to thrive.

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WAGE AND HOUR LAW

Employee or trainee? Tampa car dealership learns the difference and escapes liability

by Tom Harper
The Law and Mediation Offices
of G. Thomas Harper, LLC

Imagine you have a worker who is nearing retirement. His son agrees to learn the position in anticipation of taking over when his father retires. You don't pay the worker's son, even though he performs some work for you. Is the worker's son your employee? Read on to find out.

Background

Michael Axel was a successful automobile wholesale manager at Fields Motorcars, a Tampa car dealership. Michael's son Scott had some personal problems and needed a job. In 2010, Scott was arrested for driving while intoxicated. The next year, Scott was hired by Enterprise Rent-A-Car, but he was later fired for unsatisfactory attendance. Scott had a drug problem at the time and went to rehab for eight months. In December 2012, he applied for a job at Fields Motorcars, but he was not offered the position.

In January 2013, Michael asked Gary Gordon, the general manager of Fields Motorcars, to hire Scott. Gordon knew about Scott's history and told Michael that the dealership was not hiring at the time. However, Gordon told Michael that Scott could begin learning Michael's job in anticipation of his retirement. Michael asked Gordon if the dealership would split his compensation with Scott. Gordon said no but stated that Michael could pay Scott himself.

Thereafter, Scott started showing up to "work" at the dealership every day, even though Michael did not pay him for his work. Instead, Michael allowed Scott to live in his home and provided him with financial support. Scott began to "shadow" Michael at the dealership. For more than a year, Scott located and researched cars, analyzed their condition, attended auctions, transported cars between dealerships, and signed between 60 and 150 purchase/sales agreements on behalf of Fields Motorcars. Since he was at the dealership daily, Scott began helping the used car manager by posting cars for sale on Craigslist, eBay, and TradeRev.

Scott was told he would take over Michael's position when his father retired, and Scott began to inform employees. Scott testified that Gordon told him that the dealership would "try to ease [him] in" if he learned his father's job and that there was a good chance he would take over his father's position when he retired. However, Michael did not retire. Instead, Michael was fired by Fields Motorcars in May 2014, and—you guessed it—Scott stopped working for the dealership.

Scott sued, claiming Fields Motorcars failed to pay him minimum wage under the Fair Labor Standards Act (FLSA) and the Florida Minimum Wage Act and overtime under the FLSA. Scott also asserted state-law claims for *quantum meruit* and unjust enrichment. *Quantum meruit* and unjust enrichment are legal theories recognized in Florida. The theories could have allowed Scott to receive compensation based on his claim that he provided services of value to Fields Motorcars without payment and was owed money as a result.

Court's decision

After Scott filed suit, discovery (pretrial fact-finding) began, and Fields Motorcars asked the court to dismiss the lawsuit based on the fact that Scott was not an "employee," meaning the dealership was not responsible for paying him wages. The court noted that the case was unusual because Scott "worked" at the dealership with a promise he would replace his father when he retired. Indeed, the court described the case as a situation in which an employee asks to bring his son to work to learn his job so the son can take over the job one day. In that situation, is the son considered an employee?

The court looked to other courts' decisions and found that most cases like this one have been analyzed as "employee vs. independent contractor" or "employer vs. joint employer" situations. But neither of those relationships seemed to fit Scott's situation. Instead, the court looked to the "employee vs. trainee" determination and

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ASK ANDY

When your top performer refuses to sign a noncompete

by Andy Rodman
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.

Q *I am the HR director for a midsize medical device company in Florida. The company is rolling out a new noncompetition and nonsolicitation agreement for its regional sales associates. Under the agreement, for two years following separation of employment, regional sales associates can't solicit or call customers with whom they have conducted business for our company for the purpose of selling a competing product. All our sales associates have signed the new agreement except one, who happens to be our top performer. What are our options?*

A In Florida, a noncompetition and nonsolicitation agreement is enforceable as long as it is (1) reasonable in time, geographic scope, and line of business and (2) necessary to protect a legitimate business interest. To enforce a noncompetition or nonsolicitation agreement, a court can issue an injunction, which is essentially an order directing compliance with the agreement's terms.

The party seeking to enforce the agreement bears the burden of proving that it is reasonable and supported by a legitimate business interest. Florida law defines "legitimate business interest" to include things such as trade secrets, confidential business or professional information, customer relationships, specific prospective customers, goodwill, and extraordinary or specialized training. Courts generally will presume that restrictions of six months or less are reasonable and that restrictions of more than two years are unreasonable.

Florida law goes so far as to state that courts may not consider the economic hardship that may be experienced by the person against whom enforcement is sought. That is one reason Florida is regarded as an "employer-friendly" state when it comes to noncompetition and nonsolicitation agreements.

In May 2016, a Florida appellate court enforced a noncompetition and nonsolicitation agreement that prohibited a pharmacy sales representative from competing in the Jacksonville area for two years. The restrictions were necessary to protect the former employer's physician referral sources and information about physicians' prescribing patterns. (For more information on the case, see this month's lead article on pg. 1.)

So what can you do if a current employee refuses to sign a noncompetition agreement? Unfortunately, your options are limited. You can condition employment on execution of a noncompetition and nonsolicitation agreement, so you could simply tell the employee, "If you don't sign this document, your employment will be terminated." That may not go over very well, and it may prompt the employee to resign (without signing the agreement) and seek employment with a competitor.

Another option is to sit down with the employee and determine whether a "compromise" can be reached. Perhaps the employee will agree to a one-year restriction instead of a two-year restriction. He may agree to sign the contract if it applies only to a "for cause" termination or voluntary resignation. Perhaps he will agree to sign if the covered customer base is narrowed to include only customers called on during the last six months of his employment. Whether you decide to seek a compromise really depends on if you believe it's better to have some type of agreement in place rather than no agreement at all.

When dealing with an employee who refuses to sign a noncompetition or nonsolicitation agreement, keep in mind that if you give in and continue to employ the individual without requiring him to execute the agreement, it could come back to bite you. How? If you attempt to enforce the agreement against *another employee,* that employee could try to undermine your reasons by arguing that if you really had a legitimate business interest, you would have required all sales associates to execute the agreement.

Also, beware that word may spread if you don't terminate an employee who refuses to sign the agreement. Suddenly, a group of employees may refuse to sign. Then what? Are you going to terminate everybody? Probably not. If that happens, it's probably time to reconsider the restrictions you are seeking to impose.

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found that analysis to be the best fit. The court looked to a decision from the federal appeals court that covers Florida. The appeals court identified seven factors used to decide whether an individual is an employee or a trainee/intern:

(1) Whether the intern or trainee and the employer understand that there is no expectation of compensation;

(2) Whether the internship provides training that is similar to instruction that is given in an educational setting, including "clinical" and "hands-on" training provided by educational institutions;

(3) Whether the internship is tied to the intern's formal education program by coursework or the receipt of academic credit;

(4) Whether the internship accommodates the intern's academic requirements by corresponding to an academic calendar;

(5) Whether the internship's duration is limited to the period in which it provides the intern with beneficial learning;

(6) Whether the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits; and

(7) Whether the intern and the employer understand that the intern is not entitled to a job at the conclusion of the internship.

Regarding the first factor, the appeals court stated, "Any promise of compensation, express or implied, suggests that the intern is an employee." If the intern/trainee does the work of an employee, the sixth factor points to the individual being an employee.

Using the factors, the court's goal is to determine the true beneficiary of the relationship—the employer or the trainee/intern. No one factor is determinative. Instead, the factors are used to determine the economic reality of the relationship. The factors allow a court to decide whether the manner in which the employer implements the training takes advantage of the trainee/intern or "is otherwise abusive towards the [individual]."

In examining the factors, the court noted that Scott benefitted from the relationship because he was allowed to learn the automobile wholesale business and gain valuable experience by "shadowing" Michael. The court stated: "Given [Scott's] past drug problems, which caused him to be fired from his last job, this training with his father gave [him] an opportunity to prove himself to future employers." Also, some of the work Scott performed (e.g., transporting cars between dealerships and posting cars for sale online) was not part of his father's job. Although Fields Motorcars benefitted from Scott's work, it did not benefit more than he did. Weighing all the evidence, the court concluded that the benefits provided to Fields Motorcars were not enough to make Scott an employee.

The court dismissed Scott's FLSA minimum wage and overtime claims and his claim under the Florida Minimum Wage Act. However, the court didn't dismiss his state-law *quantum meruit* and unjust enrichment claims. If the case isn't settled, those claims may be decided by a jury. *Axel v. Fields Motorcars of Florida, Inc.*, Case No. 8:15-cv-76-T-24 TGW (M.D. Fla., May 24, 2016).

Takeaway

Summertime is here, and you may have students and trainees working for your business. Wage issues are not the only concerns employers have regarding students and trainees. You can also be held liable for injuries and accidents. Be careful with casual workplace relationships that you could be held responsible for.

You may contact the author at tom@employmentlawflorida.com. ✤

HIRING

Offer letters: the definitive top 10 list for employers

by Lisa Berg
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.

Employers frequently use letters to extend or confirm employment offers to applicants. Although offer letters aren't legally required, extending job offers in writing can help avoid misunderstandings regarding the terms of employment. Offer letters also provide new hires certainty and give them the ability to give resignation notices to their current employer. In addition, if drafted carefully, offer letters may help employers in the event of litigation.

Best practices

Here are 10 do's and don'ts for extending offer letters:

(1) **State the correct legal entity.** Ensure that the offer letter correctly states the correct legal entity for which the applicant will work. It's problematic if an offer letter mentions the wrong legal entity (e.g., a parent company or related entity) because the company will likely be dragged into court if the employee decides to pursue a lawsuit. A good rule of thumb is to ensure that any template letter is reviewed by HR and/or legal counsel prior to being adopted as a "form offer letter."

(2) **Provide an expiration date.** Include language that states how much time the applicant has to consider the offer and who can be contacted with questions.

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GUEST COLUMN

#OrlandoStrong: helping employees in crisis

by Marilyn G. Moran
FordHarrison LLP

The 70th annual Tony Awards were held on Sunday, June 12, 2016, to recognize achievements in Broadway productions over the past year. The excitement and enthusiasm of the occasion were dampened, however, as many presenters and award recipients gave words of tribute to the victims of the mass shooting that occurred in Orlando earlier that day. I live and work in Orlando, not far from where the massacre occurred, and my heart is heavy. In light of such a horrific event, what can I possibly say about employment law? What dramatic workplace insights can I offer in such a time as this? There aren't any. But as I watched the Tony Awards, I was reminded of the theater world's mantra: Even in times of turmoil and upheaval, the show must go on.

Unfortunately, all of us must deal with a crisis at some point in our lives, whether it occurs in the form of a national tragedy or more personal issues such as medical problems, financial distress, or the loss of a loved one or relationship. Although you can't prevent these issues from affecting your employees, you can help them through a crisis in a way that will keep your business on track.

In an Inc.com article titled "Helping Your Employees in a Time of Crisis," HR professional Suzanne Lucas suggests several ways managers can assist employees in the midst of a life crisis, including showing empathy, referring workers to an employee assistance program (EAP), and complying with employment laws that protect employees.

Show empathy and compassion

First, it should go without saying, but the most important thing you can do as an HR professional or manager to help an employee who is grappling with a major life problem is to show empathy and compassion. If you know an employee's attendance or performance is being negatively affected by a personal crisis, you should first try talking to the employee to find out what he needs to bring his performance back up to an acceptable level. Using threats of discipline or discharge will serve only to alienate the employee and cause his performance to deteriorate further.

Of course, there may come a point when it's necessary to discipline an employee for violating company policy, but that shouldn't be your initial knee-jerk reaction for dealing with an individual in the throes of a crisis.

Refer employee to EAP

Second, if you know or suspect that an employee is having problems, you should refer the individual to an EAP. Many employers have EAPs that offer counseling and legal services 24 hours a day to struggling employees. By making a referral to the EAP, you can assist the employee in seeking help in a confidential manner while protecting your company from the legal risks associated with becoming too involved in the details of the employee's personal life.

Follow the law

Third, when you are interacting with an employee who is going through a major life problem, such as a divorce or medical diagnosis, you must follow the law. Depending on the size of your company, an employee may be entitled to take medical, family, or disability leave under the Family and Medical Leave Act (FMLA) or the Americans with Disabilities Act (ADA) to obtain medical treatment or counseling, deal with episodes of depression or anxiety, or help a loved one who is suffering from a serious medical condition. Also, even if an employee's situation doesn't fall within the parameters of the FMLA or the ADA, you should consider using other methods, such as bereavement or personal leave, to enable her to survive the crisis without forfeiting her job.

Bottom line

At work, as on stage, the show must go on. By following these steps, you can help your employees navigate a time of crisis without disrupting your business.

Marilyn G. Moran is an employment law attorney in the Orlando office of FordHarrison LLP. She is a regular contributor to the firm's "EntertainHR" blog, where this column first appeared the day after the Pulse nightclub shooting. She can be reached at mmoran@fordharrison.com. ✤

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For example, "This conditional offer will remain open until [insert date]. Any acceptance postmarked after that date will be considered invalid."

(3) **State the job title.** State only the job title and direct reporting arrangement at the time of hire, and refer to job duties and obligations in general terms. Also, include language indicating that the job duties and requirements may change from time to time as determined by the company. In addition, indicate whether the position is classified as exempt or nonexempt for wage and hour purposes.

(4) **Avoid stating compensation as an annual amount.** Stating compensation as an annual amount could imply that a one-year employment agreement exists. Instead, explain compensation in terms of payroll periods. For example, for an exempt position, you could say, "Employee shall be paid $1,000 per week, which is equivalent to $52,000 on an annualized basis (before the deduction of applicable taxes and withholdings)." For a nonexempt employee, state the position's hourly rate (e.g., $15 per hour).

(5) **Explain benefits.** Describe eligibility for benefits (often detailed in a separate policy or plan), but specify that benefits are subject to exclusions and limitations. The offer letter should indicate that you "reserve the right to amend, modify, or terminate (in whole or in part) any benefit program at any time."

(6) **Explain at-will relationship.** Expressly state that employment is at will. Here is an example:

> Nothing in this offer letter or any other oral or written representation is intended to create a fixed term of employment with the company. Your employment with the company is at will, meaning that the company is free to terminate your employment at any time, with or without cause, and that you are free to resign from your employment with the company at any time.

In addition, avoid statements regarding what may constitute "cause" for termination.

(7) **Provide a starting date.** If employment is at will, include only the employee's starting date, and do not include a "term" (e.g., one year), which could conflict with the concept of at-will employment. Avoid oral or written assurances of employment security, and don't use words such as "guaranteed." If employment is not on an at-will basis, consider using a more comprehensive employment agreement describing the term and basis for termination.

(8) **Ask about restrictive covenants.** To avoid potential claims of tortious (wrongful) interference with contractual relations, confirm that prospective employees are not bound by agreements with current or former employers that restrict their ability to accept your offer. For example, consider including: "In accepting employment with the company, you represent that you are not under any contractual restrictions, express or implied, with respect to any of your previous positions that will affect your ability to fully meet the needs of this or future positions with the company."

(9) **Explain conditions and contingencies.** Advise the prospective employee that the offer is conditional until certain requirements are met. For example, if you require new hires to complete background and reference checks, submit to drug tests, and execute confidentiality agreements or restrictive covenants, the offer letter should state that. In addition, the letter should state that as a condition of employment, the new hire must complete a Form I-9 and present proof of her identity and employment eligibility.

Extending job offers in writing can help avoid misunderstandings regarding the terms of employment.

(10) **Clarify that the offer is intended as written.** To avoid ambiguity if the applicant signs the offer letter and includes handwritten comments or corrections, include a statement that the applicant "acknowledges that this conditional offer is intended as written and that no marginal or other revisions to this letter are binding on the company."

Plus one more!

(11) **Obtain an acknowledgment of the offer.** Ask the new hire to sign an acknowledgment of the offer letter's stated terms, and reiterate that employment is at will. For example:

> My signature below indicates that I accept this offer of employment, conditioned upon the terms discussed above, and acknowledge that my employment with the company will be on an at-will basis. I understand that the terms of this offer letter supersede any prior representations or terms, whether expressed orally or in writing.
>
> Accepted: _____
>
> Date:_____

Employer takeaway

Employers are well-advised to put the terms of employment offers in writing. If carefully drafted, an offer letter may provide the best defense in litigation concerning the terms of employment.

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OVERTIME

DOL's overtime regs bring challenges to all employers

The U.S. Department of Labor (DOL) released the final overtime regulations in May 2016, and they more than double the minimum salary threshold for the "white-collar" exemptions (executive, professional, and administrative) under the Fair Labor Standards Act (FLSA). To be classified as exempt—in addition to meeting the duties test for the executive, professional, or administrative exemptions—employees will have to be paid a salary of at least $913 per week. The DOL also raised the salary thresholds for the "highly compensated employee" exemption and the "computer" exemption.

The other major change is that the minimum salary thresholds will be automatically updated every three years—the last update occurred in 2004. The good news is that the DOL didn't make any changes to the existing duties tests for the white-collar exemptions.

Effective date

The overtime changes are effective December 1, 2016, giving you some time to make any necessary changes in salaries and overtime policies. Under the proposed rules, you would have had only 60 days to get compliant with the new rule.

The later effective date means you will be able to plan for the cost of implementing changes that will have the largest impact on budgets for 2017. The impact on costs for 2016 will be minimal because the effective date is so late in the year.

How will these FLSA changes affect your organization? The answer depends on the number of employees who fall close to the margins under the new salary thresholds. You will need to conduct workforce assessments to ensure that employees are correctly classified under the FLSA's rules.

Employee concerns. Employees will likely have a variety of concerns over the new standards for exemption. If they are going to be reclassified as nonexempt, they may wonder if the change is a demotion since they worked hard to achieve an exempt-level position. They also may be concerned about a loss of flexibility and the need to "punch a time clock."

Communicating the change to employees

To minimize morale issues in your company and avoid paying overtime for time worked that you didn't approve, it's important to set the standards for newly nonexempt employees in a way that they understand and accept without feeling they have been demoted or punished. Here are some things you can do:

- **Train your managers.** It's important that supervisors and managers take the time and make a concerted effort to understand and familiarize themselves with the FLSA and its changes. They need to understand why these changes are occurring in the workplace. Supervisors will be on the front line in communicating changes to employees, thereby setting the tone for the changes to come.

AGENCY ACTION

New OSHA rule makes more injury, illness reports public. The Occupational Safety and Health Administration (OSHA) issued a final rule on May 11, 2016, aimed at making more injury and illness information public. OSHA requires many employers to keep a record of injuries and illnesses to help employers and employees identify hazards, fix problems, and prevent additional injuries and illnesses. Currently, little or no information about worker injuries and illnesses at individual employers is made public or available to OSHA. Under the new rule—set to take effect August 10—employers in high-hazard industries will send OSHA injury and illness data that they are already required to collect for posting on the agency's website.

EEOC issues resource on leave and disability. The Equal Employment Opportunity Commission (EEOC) in May issued a resource document that addresses the rights of employees with disabilities who seek leave as a reasonable accommodation under the Americans with Disabilities Act (ADA). "Employer-Provided Leave and the Americans with Disabilities Act" is available at www.eeoc.gov/eeoc/publications/ada-leave.cfm. The EEOC said it has identified a trend of employers having policies that deny or unlawfully restrict the use of leave as a reasonable accommodation. The EEOC said such policies may lead to the termination of workers who otherwise could have returned to work after obtaining needed leave without undue hardship to the employer. The document creates no new agency policy, but it explains how existing EEOC policies and guidance apply to specific situations.

Agency explores ways to promote diversity in tech sector. The EEOC has released a report on patterns in the high-tech industry showing the challenges that remain in advancing opportunities for women, workers over 40, and other groups in the sector. The report, "Diversity in High Tech," is available at www.eeoc.gov/eeoc/statistics/reports/hightech/. It shows that in most job categories, women, African Americans, and Hispanics are less represented in the tech industry than in the overall workforce. Also, representation for women, Asian Americans, African Americans, and Latinos diminishes at higher levels in the organization, such as executives and managers, as compared to professionals and technicians. "The high tech sector has been an innovation leader, transforming how we live our lives today and driving solutions to some of our greatest societal challenges," EEOC Chair Jenny R. Yang said. "Let's harness that creative thinking and entrepreneurship to ensure that the talents of all Americans are fully utilized in this vital industry." ✤

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- **Explain why the change is taking place.** Discuss the fact that these standards are set by the federal government. The change is not based on the discretion of the company, and it is not a reflection of how the company views the employee. It is not a performance issue. If employees understand that these are objective rather than subjective standards, they will likely feel less offended by the change.
- **Pay for every hour worked.** This is one of the major benefits of nonexempt status—getting paid for every hour worked above 40 hours each week. Managers need to make sure they communicate this point to newly nonexempt employees. No more endless evenings and weekends of work as an exempt employee, feeling like you aren't being adequately compensated. You can now directly tie your pay back to the hours you are working.
- **Explain the new timekeeping procedures.** One of the most difficult adjustments for the newly nonexempt is being required to track their time down to the minute or few minutes. You need to explain that this is the result of federal regulations and not a discretionary company decision. You are bound by law to keep track of the time nonexempt employees work.
- **Communicate with your workers.** Regular communication will make employees feel that their concerns have been heard. Give employees an opportunity to ask questions, voice their concerns, and have an open dialogue to learn more about the regulatory changes.
- **Appoint someone other than the employee's manager as a point person for communication.** For some people, complaining to a direct manager is very uncomfortable. It is helpful if employees have an outlet for communication who isn't responsible for writing their performance reviews. This can be a person in HR, but it should be someone who communicates well and has a good understanding of overtime law and its classifications.
- **Be proactive.** It's difficult to change habits you may have had for years, such as working through lunch, checking work e-mails after work, or taking evening work-related phone calls. Supervisors should make it a point to walk around the facility daily and check time cards to be sure nonexempt employees aren't working through meal periods or staying late. ✤

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