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FMLA RIGHTS

Loose lips: FL county faces FMLA claims after sharing worker's PHI

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

A federal court in Ft. Myers has issued a decision that broadens interference and retaliation claims under the Family and Medical Leave Act (FMLA) to include the release of an employee's confidential medical information. In the case before the court, an employee developed health problems and asked his employer for medical leave under the FMLA. As part of his leave request, he disclosed "sensitive and detailed medical information" about a very personal health issue. The employer granted the FMLA leave request. However, the details of the employee's personal health issue soon became widely known at work.

The employee sued, claiming interference and retaliation under the FMLA based on the employer's breach of his right to confidentiality. The employer argued that the case should be dismissed because it didn't deny the employee's FMLA leave request. The U.S. District Court for the Middle District of Florida disagreed, finding that a supervisor's disclosure of the employee's personal health information (PHI) constituted unlawful interference and retaliation in violation of his FMLA rights. Here are more details on what happened.

Employer shares too much information

Scott Holtrey has worked for the Collier County Board of Commissioners for the past 10 years as a full-time aquatics field supervisor. In June 2015, he developed a chronic and serious health condition related to his genitourinary system. He was treated by a physician and applied for leave under the FMLA. In support of his request for leave, he revealed the details of his medical condition to his employer. The board of commissioners approved his request for leave.

Holtrey claimed that after he submitted his PHI to the board of commissioners, a management-level employee disclosed his medical condition to his coworkers and subordinates at a staff meeting when he wasn't present and without his knowledge or approval. He claimed that after he returned to work, his supervisor immediately began quizzing him about why he took FMLA leave and what was wrong with him. The conversation with his supervisor occurred behind closed doors, and he communicated the details of his medical condition only so his supervisor would be aware that he might need intermittent medical leave and some accommodations while he was working.

According to Holtrey, about eight of his coworkers and subordinates learned about his condition. He claimed that his coworkers began inquiring about his condition and making fun of him, and some of them even made jokes and

AGENCY ACTION

New EEOC publication explains rights related to mental health conditions. The Equal Employment Opportunity Commission (EEOC) in December 2016 issued a resource document that explains workplace rights for individuals with mental health conditions under the Americans with Disabilities Act (ADA). The document, titled "Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights," explains that applicants and employees with mental health conditions are protected from employment discrimination and harassment based on their conditions. They also may have a right to reasonable accommodations at work. The document answers questions about how to get an accommodation, describes some types of accommodations, and addresses restrictions on employer access to medical information, confidentiality, and the EEOC's role in enforcing the rights of people with disabilities.

OSHA announces practices to promote safety in construction. The Occupational Safety and Health Administration (OSHA) has issued a document titled "Recommended Practices for Safety and Health Programs in Construction" aimed at helping employers develop proactive programs to keep their workplaces safe. The agency said the recommendations may be particularly helpful to small and medium-sized contractors that lack safety and health specialists on staff. The recommendations are advisory only and do not create any new legal obligations or alter existing obligations created by OSHA standards or regulations.

Final rule updates apprenticeship EEO requirements. The U.S. Department of Labor (DOL) in December issued a final rule updating equal employment opportunity (EEO) requirements for registered apprenticeship programs. The rule amends existing requirements last updated in 1978 and extends current protections against discrimination to include disability, age (40 years or older), genetic information, and sexual orientation. The final rule aligns with the $90 million funding strategy to grow and diversify apprenticeship announced last April.

Fatal occupational injuries increased slightly in 2015. The U.S. Bureau of Labor Statistics (BLS) in December announced that 4,836 fatal work injuries were recorded in the United States in 2015. That figure is up slightly from 4,821 reported in 2014. The annual total of fatal workplace injuries in 2015 was the highest since 5,214 fatal injuries were recorded in 2008. The overall rate of fatal work injuries for workers in 2015, at 3.38 per 100,000 full-time equivalent workers, was lower than the 2014 rate of 3.43. The number of fatal work injuries involving transportation incidents, the incident leading to the most fatal work injuries, increased in 2015. Roadway incidents were up nine percent to 1,264 and accounted for 26 percent of all fatal work injuries. ✤

obscene gestures about his condition in front of him. He felt that their conduct altered the terms and conditions of his employment. Moreover, he believed that the release of his PHI to managers and employees subjected him to a hostile work environment based on the joking and gestures. He complained to management and asked the board of commissioners to remedy the situation, but the county failed to take action.

Is confidentiality a right under the FMLA?

It's settled law that the FMLA authorizes only two types of claims: interference and retaliation. After Holtrey filed suit, the board of commissioners asked the court to dismiss his claims, pointing out it had granted the leave he requested and he therefore didn't have a valid interference claim. The issue for the court was whether confidentiality is a right under the FMLA and whether the county interfered with that right by releasing Holtrey's PHI.

Holtrey argued that the release of his medical information violated the FMLA even though the board allowed him to take the medical leave he requested. He based his argument on the fact that the FMLA regulations require that records and documents related to medical certifications be maintained as confidential medical records separate from an employee's personnel file. In a reasoned decision, U.S. District Judge Sherri Polster Chappell agreed, finding that the disclosure of his PHI was enough to establish a claim of FMLA interference.

In reaching that decision, the court pointed out that courts do not agree on whether the release of PHI gives an employee the right to file a lawsuit. In this case, the court was persuaded by Holtrey's argument that the FMLA regulations require confidentiality for medical records related to medical certifications. As a result, the county's motion to dismiss his interference claim was denied.

Was disclosure of PHI a materially adverse action?

The court then turned to the retaliation claim. To establish an FMLA retaliation claim, an employee must show that (1) he engaged in activity protected by the FMLA, (2) he was subjected to an adverse employment action, and (3) the adverse action was causally related to his protected activity. The court relied on the language in the FMLA prohibiting an employer from "discharg[ing] or in any other manner discriminat[ing] against any individual" for asserting his rights under the FMLA.

Judge Chappell found that the repeated and frequent jokes and obscene gestures by Holtrey's coworkers were sufficient to show that he suffered a materially adverse employment action. In determining that the conduct was materially adverse, the court looked at whether it might have dissuaded a reasonable worker from making or supporting a claim under the FMLA. According to the court, "At this early stage of litigation, [we are] hard-pressed to find that disclosing confidential medical information about an individual's [genitourinary] system to [his]

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ANDY'S IN-BOX

Supreme Court will settle the score on class action waivers

by Andy Rodman
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It's about time! The U.S. Supreme Court will finally decide whether an employer may enforce a mandatory arbitration agreement that contains a class action or collective action waiver.

Three cases consolidated by SCOTUS

On January 13, 2017, the Supreme Court agreed to hear three cases stemming from the National Labor Relations Board's (NLRB) 2012 decision in *D.R. Horton*, in which the Board held that class action waivers violate employees' right under Section 7 of the National Labor Relations Act (NLRA) to engage in protected concerted activity. Although the 5th Circuit ultimately disagreed with the NLRB's decision, *D.R. Horton* (and other NLRB cases) created uncertainty about whether an employer may force an employee, through a mandatory arbitration agreement, to waive his right to pursue class arbitration of, for example, minimum wage or overtime claims, or discrimination claims under Title VII of the Civil Rights Act of 1964.

The three cases consolidated by the Supreme Court are *NLRB v. Murphy Oil* (in which the 5th Circuit held that mandatory class action waivers do not violate the NLRA), *Epic Systems v. Lewis* (in which the 7th Circuit held that mandatory class action waivers do impinge on employees' Section 7 rights), and *Ernst & Young LLP v. Morris* (in which the 9th Circuit held that mandatory class action waivers impinge on employees' Section 7 rights). The 2nd and 8th Circuits have followed 5th Circuit precedent by enforcing mandatory arbitration agreements that require employees to proceed to arbitration on an individual (nonclass) basis.

The Supreme Court has already upheld the general enforceability of arbitration agreements under the Federal Arbitration Act (FAA) and has even upheld the enforceability of class action waivers in the context of consumer agreements. But now the Court will tackle the enforceability of class action waivers in the employment context for the first time—specifically, whether such waivers conflict with Section 7 of the NLRA.

Some things to ponder

At this point, we'll just have to sit back and wait for the Supreme Court to issue its decision, likely later this year. But even if the Court upholds the enforceability of class action waivers in the employment context, arbitration agreements and class action waivers may not be a good fit for every employer. In terms of pros and cons, here's a little food for thought as we wait for the Court's decision:

- An arbitrator typically is selected by the parties' mutual agreement, while a judge typically is randomly appointed.
- Arbitration often is quicker than litigation in court and may reach its conclusion within six to nine months.
- Arbitration is confidential; court proceedings are public.
- Arbitration can be less expensive than litigation, but that isn't always true, particularly because the parties pay for the arbitrator by the hour. A judge, on the other hand, is "free" (or, more precisely, paid for by your tax dollars).
- Discovery (the exchange of relevant evidence) typically is limited in arbitration (which could be a pro or a con).
- Enforcement of a class action waiver could result in several (a handful, dozens, or even hundreds) individual simultaneous arbitrations, making the process incredibly expensive.
- The right to appeal is very limited in arbitration (which could be a pro or a con).

Bottom line

If you already have an arbitration agreement that contains a class action waiver, you'll want to keep an eye out for the Supreme Court's decision. But even if you don't currently have an arbitration agreement in place (or if your arbitration agreement doesn't contain a class action waiver), you may want to consult with your employment counsel to discuss the pros and cons of mandatory arbitration for your company.

Andy Rodman is a shareholder and director at the Miami office of Stearns Weaver Miller. If you have a question or issue that you would like Andy to address, e-mail arodman@stearnsweaver.com or call him at 305-789-3255.

Your identity will not be disclosed in any response. This column isn't intended to provide legal advice. Answers to personnel-related inquiries are highly fact-dependent and often vary state by state, so you should consult with employment law counsel before making personnel decisions. ✤

continued from pg. 2

coworkers and subordinates does not materially affect his working conditions." As a result, it allowed his retaliation claim to proceed.

Holtrey's lawsuit will continue in federal court in Ft. Myers. His attorney Benjamin H. Yormak, of Yormak Employment and Disability Law in Bonita Springs, stated: "We are pleased that the Court recognized the serious damage that can be done to an employee when his PHI is disclosed about the office. The [FMLA regulations] were put in place to specifically prevent the intra-office disclosure alleged to have happened in this case." *Scott Holtrey v. Collier County Board of County Commissioners,* Case No. 2:16-cv-00034-SPC-CM (M.D. Fla., January 12, 2017).

Takeaway

This is the first case in which a Florida court has found that an employer's disclosure of PHI constitutes interference and retaliation under the FMLA. Holtrey's case is still in discovery (the pretrial fact-finding stage) and may eventually go to trial. It's also possible that the county will appeal the district court's ruling to the U.S. 11th Circuit Court of Appeals in Atlanta (whose rulings apply to all Florida employers). In any event, employers should implement procedures to ensure that PHI is kept confidential and supervisors are trained on employees' FMLA rights.

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EMPLOYEE RIGHTS

Under the radar: Are you aware of your duties under FL's Domestic Violence Leave Act?

by Jeffrey D. Slanker
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The news is regularly filled with stories about major verdicts in labor and employment cases involving mostly discrimination, constitutional law, or wage and hour claims. However, there are some lesser-known statutes and regulations that might apply to your business and carry an equal danger of potential exposure. This article covers one of those statutes, the Florida Domestic Violence Leave Act.

What is the Florida Domestic Violence Leave Act?

The Florida Domestic Violence Leave Act took effect on July 1, 2007. The statute, set forth at Florida Statutes § 741.313, provides certain protections for employees (or their family or household members) who are victimized by domestic violence or sexual violence. Principally, the statute requires that covered employers provide eligible employees up to three working days of leave in a 12-month period. Notably, the statute applies only to Florida employers with 50 or more employees and covers employees who have worked for their employer for three months or longer.

The Act permits an employee to take leave for certain activities, including:

- To seek an injunction for protection against domestic violence or an injunction for protection in cases of repeat violence, dating violence, or sexual violence;
- To obtain medical care, mental health counseling, or both for herself or a family or household member to address physical or psychological injuries resulting from an act of domestic violence or sexual violence;
- To obtain services from a victim services organization, including a domestic violence shelter or program or a rape crisis center, after an act of domestic violence or sexual violence;
- To make her home secure from a perpetrator of domestic violence or sexual violence or to seek new housing to escape the perpetrator; or
- To seek legal assistance in addressing issues arising from an act of domestic violence or sexual violence or to prepare for and attend court-related proceedings arising from an act of domestic violence or sexual violence.

How do we administer the leave?

The statute addresses many of the finer practical points on how the leave must be administered. First, the leave can be paid or unpaid at the employer's discretion. Second, the employer can require an employee to exhaust all of her available annual time off or vacation leave, personal leave, and sick leave before taking leave under the statute.

An employee must provide appropriate advance notice of her need for the leave as required by the employer's leave policy, unless there's a threat of imminent danger to her health or safety, or to the health or safety of a family or household member. Such notice includes sufficient documentation of the act of domestic violence or sexual violence as required by the employer. That information, and any other information related to the leave, must be kept confidential.

What are the consequences of failing to comply with the Act?

Employers are prohibited from interfering with, restraining, and denying an employee's exercise or attempt to exercise the rights provided under the statute. The law similarly forbids employers from discriminating or retaliating against an employee for exercising her rights under the statute.

The statute permits an employee to bring a civil suit for damages and equitable relief (such as nonmonetary damages like reinstatement) based on violations of the statute. Recoverable damages include all wages and benefits that would have been owed to the employee had the prohibited act not occurred, other than wages and benefits that would have accrued or been owed during the three-day leave allowed under the statute.

Bottom line

This statute is one of many that don't get the press the major federal and state labor and employment laws get, but it's nonetheless very important. Employers should be cognizant of the statute and its requirements and make sure your leave policies are consistent with its requirements.

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DISABILITY DISCRIMINATION

11th Circuit emphasizes importance of determining essential job functions

by Lisa Berg
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To be a qualified individual with a disability under the Americans with Disabilities Act (ADA), an employee or a job applicant must be able to perform the essential functions of her job with or without reasonable accommodations. In considering which accommodations are reasonable, an employer may have to eliminate marginal functions, but it doesn't have to eliminate essential functions. Thus, it's critical to clearly articulate an employee's essential job functions. In a recent unpublished opinion, the 11th Circuit gave great deference to an employer's job description when it held that the employee wasn't a qualified individual with a disability.

Does being listed in job description make duties 'essential'?

Katrina Bagwell, a park groundskeeper in Morgan County, Alabama, sued her employer, the Morgan County Commission, alleging she was wrongfully terminated in violation of the ADA. The district court dismissed her case in favor of the county. On appeal to the 11th Circuit, Bagwell alleged, among other things, that the district court erred when it found that the essential functions of her groundskeeper job included all the duties listed in the county's job description. She also argued that she could perform the essential functions of the groundskeeper position with or without reasonable accommodations.

The 11th Circuit rejected Bagwell's argument that the park groundskeeper position had far fewer essential functions than were listed in the job description. Her argument was premised on the fact—not disputed by the county—that some functions were performed infrequently and therefore couldn't be "essential."

In analyzing the case, the 11th Circuit first determined the essential functions of Bagwell's position by reiterating the test set forth in the Equal Employment Opportunity Commission's (EEOC) regulations interpreting the ADA. Specifically, a function may be essential because the job exists to perform the function, a limited number of employees can perform the function, or the function is highly specialized and requires expertise. In determining if a task is an essential function, relevant evidence may include:

(1) The employer's judgment as to which functions are essential;

(2) A written job description;

(3) The amount of time spent on the job performing the function;

(4) The consequences of not requiring the employee to perform the function;

(5) The terms of a collective bargaining agreement;

(6) The work experience of past employees in the position; and

(7) The current work experience of employees in similar jobs.

In this case, the court gave substantial weight to the employer's judgment about which functions were essential. Notably, in reviewing the factors listed above, the appellate court found that although Bagwell's job was mainly focused on cleaning and removing trash, it was clear that the county expected the person performing the job to be capable of performing any

number of tasks when necessary, including all the tasks listed in the job description.

Employer doesn't have to fundamentally alter job

Similarly, the 11th Circuit found that even if Bagwell was granted all the accommodations she suggested, she still couldn't perform the essential functions of her position. Her job required that she traverse uneven and wet surfaces by standing or walking, which she couldn't do safely or consistently, even if she used an ATV. Moreover, she was able to walk or stand for only one-third of the day.

Although rotating standing and walking between shifts increased Bagwell's tolerance, the court found that the nature of the position required the groundskeeper's duties to shift based on the county's specific needs in the park. Therefore, it wouldn't be reasonable to require the county to ensure that Bagwell rotate between those duties every day.

According to the court, an employer may be required to restructure a particular job by altering or eliminating marginal functions, but it "is not required to transform a position into another one by eliminating essential functions." *Bagwell v. Morgan County Commission,* No. 15-15274 (11th Cir., January 18, 2017).

Takeaway

A well-prepared and accurate job description can allow you to effectively defend against disability discrimination claims under the ADA. Because the 11th Circuit gave great deference in this case to the employer's determination of which functions were essential based on its business needs, you are well-advised to dust off your old job descriptions and ensure that they are updated and accurately reflect employees' essential job functions.

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EMPLOYMENT LAW

2017 will bring proemployer changes to employment law landscape

Employment law has been pretty stable for the past several decades, with the trend firmly moving in a single direction—toward expanded employee rights. 2017 offers a very different national picture.

Draining the employment law swamp

President Donald Trump's promise to "drain the swamp" may mean a lot in the employment field, where the swamp is deepest. Government regulation is under attack, and nowhere are the rules more prevalent than in the area of labor and employment law. If Trump wants to woo employers that are considering moving their workforces offshore, he can entice them with the promise to lift a heap of federal rules off their backs. His first choice for secretary of labor was Andrew Puzder, a vocal critic of U.S. Department of Labor (DOL) regulations. Even though Puzder withdrew his name from consideration, expect the next labor secretary to streamline DOL regs. You can bank on it.

The DOL isn't the only location where the swamp bottom may be reached. President Barack Obama's National Labor Relations Board (NLRB) has been active in expanding its reach to nonunion employers. On Election Day, the NLRB declared unlawful a personnel policy at Component Bar Products that prohibited "insubordination, other disrespectful conduct and boisterous or disruptive activity in the workforce." Why? Because the policy might be interpreted to block employees' complaints about supervisors or working conditions. Look for the new NLRB to develop a more commonsense approach to policies that appear reasonable on their face, avoiding the tortured reading of such policies by the NLRB in recent years.

The U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) have gotten into the act, too, issuing written guidelines restricting "no-poaching" agreements between companies. Silicon Valley tech giants and Los Angeles animation studios have already settled eight-figure lawsuits over such agreements, and the DOJ and FTC have declared that no-poaching arrangements violate antitrust laws. We can expect the next group of antitrust regulators to be less concerned about such arrangements.

Moreover, a series of federal rules that were scheduled to take effect January 1, 2017, have been backburnered. The regulations in question cover Obamacare, wellness program limitations, executive compensation disclosures, paid sick leave and minimum wage

requirements for government contractors, and new occupational safety rules and reporting requirements. Under the new administration, many new directives will not see the light of day.

There is nothing unique about this change in trend between administrations. Bill Clinton's administrators reversed course on many employment policies enacted by George H.W. Bush, and after George W. Bush pulled back from eight years of Clinton policies, Obama did the same to his predecessor's policies. And so it always goes—but perhaps without the unabashedly probusiness, antiregulation zeal of the new president. A new wind will blow from Washington in 2017 and beyond.

Bottom line

At a minimum, the 2016 election has shown that we can't simply rely on employment as usual and assume that old patterns will apply. Too many things are threatening the status quo—a new administration in Washington, new technology that's changing the nature of work, and new understandings between workers and companies about what jobs should look like.

Look for these new trends to continue. Telecommuting and robotic colleagues might be small factors compared to the major staff retraining that's being discussed inside many corporations, whose entire modes of operation are changing. In other words, if you thought 2016 was a year of change, you ain't seen nothin' yet. ✤

DOCUMENTATION

What employers need to know about the new I-9

At long last, the revised Form I-9 is here, and it's time to familiarize yourself with the new version. The most prominent changes to the new form are its "smart" features, but there are a few other subtle yet important details.

Variety of changes

The new Form I-9 makes several small but important changes to the previous form:

- The form itself has expanded to three pages, with the section for reverification now appearing on its own page.
- Just as the form has expanded, so have the instructions (from nine pages to 15 pages). Of additional significance is the fact that the instructions are now in a separate document from the form itself. This is important because employers are required to make a copy of the instructions available to employees during completion of Section 1 of the I-9. Fortunately, the instructions can simply be made available electronically, but if you provide I-9s solely in paper format, you will need to be sure to include the instructions, too.
- A few of the individual fields on the form have changed to help eliminate confusion. For example, date fields have been changed to read, "Today's Date." This change helps highlight the fact that I-9s should never be backdated.
- Section 2 of the form now includes a block for "Additional Information," which employers may use to record termination and document retention dates, E-Verify notes, postaudit comments and corrections, and any other details that were previously crammed in the margins or on separate pages.

With great power comes great responsibility

Despite its apparent simplicity, the I-9 has long been a compliance nightmare for employers. Let's consider the facts:

- The I-9 requires input from both employees and employers, which introduces twice the opportunity for error.
- The window for compliant completion—all during that hectic first week of work—is very narrow.
- The completed form isn't submitted to the government for review and feedback, which means errors and mistakes not only can go unnoticed but also can continue happening on new forms for years to come.
- It can be easy to overlook some of the requirements—including the signature and date—on the form.
- If audited by U.S. Immigration and Customs Enforcement (ICE), even minor mistakes can add up quickly. After recent increases in August 2016, fines can range from $216 to $2,156 *per I-9*.

The new I-9 addresses a few of these issues via its "smart" features. For example, if a required field is left blank, the new I-9 will alert the employer of the missing

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3-22 HR Recordkeeping Update: What to Keep and What to Toss in 2017

3-23 Difficult Conversations: How to Address Thorny HR Issues While Preserving Employees' Dignity and Minimizing Legal Risks ✤

data and will prevent the form from being saved. The form also includes drop-down menus, "tooltips" that provide help and guidance on individual fields, and smart filters that will autofill or remove options that don't correspond with the details provided by the employee in Section 1.

It's 'smart,' but it's not 'electronic'

The integrated "smart" features of the new I-9 encourage employers and employees to fill out the form in its digital PDF format. Yet the form still isn't an "electronic" form per government standards. That means that despite the form's numerous improvements, the U.S. Citizenship and Immigration Services (USCIS) version still isn't equipped to be completed *entirely* in digital/electronic format.

The problem is that this new form can't be *signed*. Specifically, for an I-9 to be completed electronically, the attestations must be made using a compliant electronic signature protocol. This electronic signature method must:

- Require the person signing to acknowledge that he read the attestation;
- At the time of the transaction, attach the electronic signature to (or associate it with) a completed Form I-9; and
- Create and preserve a record verifying the identity of the persons signing the form and then provide a printed confirmation of the transaction.

The new Form I-9 (as provided by USCIS) doesn't comply with those requirements.

Employers wishing to move to a fully wwwww I-9 process generally must use a third-party vendor to meet these requirements. Those currently using such a vendor or service may continue to do so, but they will need to ensure that the service provider has updated its forms to a compliant version of the new I-9.

Otherwise, employers and employees may fill out the new I-9 via the digital form, but when it comes time to *sign* the form, the otherwise completed form will still need to be printed and signed manually. Once signed, this physical copy may be scanned and stored digitally. If it is scanned and stored according to applicable electronic retention standards, then it will fulfill I-9 retention requirements just as if it were the original paper.

Bottom line

You should become familiar with the updated Form I-9 and take advantage of the new features, which are designed to help alleviate user errors and could potentially result in fewer fines for Form I-9 violations. ✤

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