# HR COMPLIANCE LIBRARY
## Ideas & Trends

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INSIDE



MEDICAL MARIJUANA

# Navigating medical marijuana in the workplace

Twenty-five states have legalized the use of medical marijuana. That number is only expected to grow as more and more patients turn to this treatment and as marijuana is being approved as a treatment for more and more conditions. For example, marijuana is now an approved treatment for Post Traumatic Stress Disorder (PTSD). Even as more states are legalizing its use, marijuana is still illegal on the federal level.

Wolters Kluwer Law & Business reached out to Rob Wilson, human resources and employment expert and president of Employco USA, to discuss ways in which employers can navigate this issue in the workplace. Wilson summed it all up for employers in the following way, "The federal government still classifies marijuana as a schedule 1 substance, which is the same class as heroin and ecstasy. However, many states now permit the use of marijuana, either medically or recreationally. This leads to very murky waters for employers, especially as some states prohibit the discrimination of employees with a medical marijuana card, while other states do not."

Wilson advised that employers first get familiar with their state's specific legislation. Employee handbooks should be updated to reflect any changes in the law. "Regulations regarding marijuana use are constantly in flux right now," he said, "so it is wise to stay abreast of these changes and have them reflected in your employee handbook. For example, some employers are changing their policy from 'zero tolerance' to 'zero impairment.'"

To clarify, Wilson explained, "Employers with zero tolerance policies prohibit drug use and enforce it through drug tests, which could include pre-employment, random, reasonable suspicion and post-accident. Under a zero tolerance policy, if a drug test comes back positive, the employee will be terminated even though the drug usage may have occurred during non-work hours and may not have impaired the employee during work. Zero impairment policies are only concerned with the illegal drugs affecting employees during work."

Wilson expressed the importance of writing employee handbooks in a way that plainly expresses the company's stance on employee drug use and impairment. Further, he explained that it is imperative that policies be followed and that they be done so consistently. "Employers run into legal issues when they're not consistent and aren't following written policies," Wilson stressed.

The next step is to craft an effective drug testing policy and to communicate it to employees along with a request for a signed acknowledgment form. "A company representative should be trained to spot the signs and symptoms related to drug use," Wilson explained. Symptoms, he said, can include the following:

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- odor on clothes,
- slurred speech,
- erratic behavior,
- enlarged pupils,
- inability to complete routine tasks, and
- unsteady gate.

"Then when impairment is suspected, the company representative—and ideally a concurring witness—can detail their objective observations that warranted the reasonable suspicion," Wilson continued. "The company can then arrange for transportation of the employee to the testing facility."

"Be aware if your employees are part of a collective bargaining unit, drug stipulations may already exist, including specific limits for drug use," Wilson advised. By way of example, Wilson explained how in a recent case, an employee was found to be under the influence while on the job, but he claimed his medical marijuana card gave him permission to use while working. However, a drug test revealed that he was 10 times above his prescribed limit.

For this reason, Wilson stressed that employers should not just rely on the results of a rapid drug test, as these results do not hold well in a court of law. "If you live in a state such as Illinois that does not permit the discrimination of employees who use medical marijuana, then you should definitely send the drug test results out to a lab in order to back up any fears that an employee might be using more than he should," Wilson advised. "However, if you live in a pass/fail state, this won't be necessary."

And, finally, what should do with an employee who is the subject of a drug test while the test is being conducted? Wilson recommends against the employee continuing to work while the test is being processed by a lab. He says, "In situations related to reasonable suspicion, the employer should suspend the employee without pay pending test results. The employee would be paid for missed time if the drug test comes back negative." ■

FAMILY AND MEDICAL LEAVE ACT

## Ten things employers can learn from recent FMLA suits

Even decades after the Family and Medical Leave Act (FMLA) was enacted, employers are still making basic mistakes, such as presuming that an employee who wants FMLA leave has to use the word "FMLA," failing to properly calculate FMLA allotment or use, and disparaging those who take leave. Perhaps managers find some provisions unclear or simply need a refresher. Along those lines, here are 10 "takeaways" from recent court decisions over alleged FMLA mistakes.

**1. When calculating FMLA entitlement, include overtime and "working lunches."** An employee's actual workweek is the basis for determining FMLA leave entitlement. This means overtime and breaks that were spent working must be included when calculating an employee's FMLA entitlement. In one recent case, the Eighth Circuit held that, although a tire manufacturing employee had the choice of whether to put his name down for certain overtime shifts, the overtime became mandatory once he did that and was selected for a shift, so the overtime should have been included in calculating his allotment of FMLA leave for the year. Given that his overtime hours varied from week to week, the employer should have calculated his leave in accordance with 29 C.F.R. §825.205(b)(3). Instead, the overtime hours were not considered at all. His FMLA interference claim would therefore go to trial.

In another case, a corrections department counselor claimed understaffing kept him from eating in the employee lunchroom and he had to eat where inmates congregated. This, ruled a federal court in Illinois, raised a question on whether his lunches were spent predominantly benefitting his employer and should have been included in calculating whether he met the 1,250-hour re-

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quirement. Also at issue was whether the employer knew of his working lunches: 29 C.F.R. §785.11 states that unrequested work is work time if the employer "suffer[s] or permit[s]" the work and "knows or has reason to believe" the employee is working.

**2. In calculating amount of leave used—don't include days an employee is not scheduled.** Be careful in calculating how much FMLA leave has been used—FMLA leave may be taken in periods of weeks, days, hours, and sometimes less than an hour. The employer must allow employees to use FMLA leave in the *smallest* increment it allows for other forms of leave, as long as it is no more than one hour. When calculating the amount of leave used, exclude days an employee would not be working (e.g., weekends, temporary plant closures, holidays).

One employer faces trial for including weekends in calculating an employee's FMLA usage (she worked Monday through Friday) and firing her when it thought her leave was used up. The company thought it was "simple math" that her periods of leave in 2013 totaled 12 weeks (84 days) as of December 15, but a federal court in Tennessee disagreed. Weekends were not to be counted, so the total was 60 days and she had not exhausted her FMLA leave by December 15. Also rejected was the employer's argument that the plant closes for the holidays so she would have soon exhausted her leave anyway. "If the employee is not scheduled to report for work, the time period involved may not be counted as FMLA leave," the court noted, quoting the DOL's response in the Federal Register to a comment.

**3. Neither a medical emergency nor a request using the word "FMLA" is required.** One employee won summary judgment as to her employer's liability for FMLA interference after a federal court in Pennsylvania rejected the employer's argument that FMLA leave is limited to medical emergencies. The court found it undisputed her parents had a serious health condition and she was entitled to family care type leave to make arrangements for their transition in care. It also found that her need for leave was unforeseeable and she was only required to give notice as soon as practicable—it was enough that she said her "dad was ill, and she had to get the house ready for him to come home" from the "hospital." If the employer wanted more information on her parents' health, it could have asked.

As to notice of the employee's own health condition and need for leave, if there is a known history and the employee shows symptoms at work, that could be enough under the FMLA. It is up to the employer to learn more. For example, an employee with a history of migraines avoided summary judgment after a federal court in Missouri found that a sick log stating she was absent for "headache" may have triggered the employer's duty to investigate; instead, it fired her under its attendance policy. In another case, a truck driver receiving treatment for high blood pressure had chest pains and, believing he might be having a heart attack, asked a coworker to tell the manager he was leaving. He was considered a "voluntary quit" since he failed to notify the manager himself, but a federal court in Maryland found triable issues on whether he provided sufficient notice of the need for FMLA leave.

**4. Give employees a chance to provide certification.** Employers may require employees to provide a medical certification of the need for FMLA leave, but lawsuits often arise if the certification is found deficient. The Second Circuit recently revived an employee's FMLA claims against an employer *and* an HR director responsible for a communication breakdown that led to the employee's discharge. The employee provided certification that she needed to care for her son who was hospitalized with diabetes. After he broke his leg, she sent a new FMLA request for leave through July 9 and repeatedly asked if more information was needed. She heard nothing until she received a July 17 letter stating her paperwork did not justify her absences. She sent emails asking what "paperwork" was needed, but the HR director simply sent a DOL brochure and refused to let her return absent proper documentation. She was fired for job abandonment. To the appeals court, a jury could find the employee made good faith efforts and was thus relieved of her duty to provide certification.

In a case out of Illinois, a staffing agency was denied summary judgment on an FMLA interference claim because it fired the employee one day after requesting her medical certification. An employer may deny leave absent timely certification, explained the federal court, but 29 C.F.R. §825.305(b) defines timeliness to be 15 calendar days from the request for certification. It also requires the employer to warn the employee in writing of the consequences of failing to timely return a certification, and that was not done here.

**5. Communicate with employees.** As indicated by the HR director's inadequate responses to an employee's questions in the Second Circuit case above, it is important to keep a dialogue with employees who request information about their FMLA obligations. It is also important to communicate regarding their job status or what they can expect to change due to their absence. For example, a federal court in Arizona held an employer liable for liquidated damages under the FMLA because it failed to answer a pregnant sales rep's questions about how her accounts and commissions would be handled during her maternity leave. By not responding to repeated inquiries over seven months, the company essentially forced her to guess as to the professional consequences she would suffer in terms of lost commissions and trans-

ferred accounts, reflecting a lack of good faith and willful indifference to the FMLA.

**6. You can require the use of customary notice procedures for absences, but with caveats.** Cases regularly crop up where employees have been denied leave or disciplined for not following call-in procedures for potentially FMLA-qualifying absences. Employers need to consider if the need for leave was unforeseeable. If it was unforeseeable, employees need only provide notice of the need for FMLA leave "as soon as practicable," though employers may generally require them to follow normal call-in procedures. In one case, an employee's bipolar medication interfered with sleep and she overslept, failing to call in an absence before her morning shift. In the opinion of a federal court in Kansas, a jury could find that calling in late was "as soon as practicable" and that the employer interfered with FMLA rights by firing her for tardiness and absences.

In other cases, where employees have no excuse for failing to follow call-in procedures, their FMLA claims usually fail. For example, a Michigan welder had his FMLA claim tossed because he had no good reason for not calling in his late arrival. The federal court found that his deposition testimony providing only "conjectural justifications" such as he was probably suffering an anxiety attack at the time, were not enough to avoid summary judgment. The result was the same for a Delta flight attendant based in Utah who was fired for violating airline policy by accepting an assignment and then canceling without sufficient notice.

**7. Avoid derogatory remarks about those who take leave.** If there's one thing that's going to make a plaintiff's case easier in proving unlawful intent, it is a manager's or decisionmaker's derogatory remarks about a statutorily protected activity. In one case from a federal court in Indiana, an employee was previously disciplined for excessive absences and was subject to a last chance agreement, but he still survived summary judgment on his FMLA claims, which were supported by his supervisor's disapproving remarks about his need for leave, including that he was on "thin ice" and was "burying himself." In a federal case out of Illinois, a car salesman who was fired 13 days after returning from FMLA leave for heart surgery won an extra $308,240 in liquidated damages on his FMLA retaliation claim after the employer failed to show it acted in good faith. Significantly, his visible heart pack was treated with open disdain by his supervisor, and he was told "don't die at the desk or I am going to drag you outside and throw you in the ditch." He was also threatened with demotion.

**8. Be consistent in your treatment of employees before and after leave.** A change in the way an employee is treated after FMLA leave may be considered evidence that the leave was a negative factor in any disciplinary action.

In one case, an employee claimed that as she took more FMLA leave, her new supervisor began to "watch her like a hawk," then gave her warnings for allegedly violating attendance and personal phone usage policies, eventually placing her on two performance improvement plans and firing her. This was enough, ruled a federal court in Illinois, to state a plausible FMLA retaliation claim.

In another case, a federal court in Michigan denied summary judgment based largely on evidence that an employee received a positive performance review before her FMLA leave, but afterwards was disciplined and terminated for poor performance, along with evidence that the employer skipped a step in its progressive discipline policy and created an after-the-fact paper trail documenting misconduct that purportedly occurred months earlier.

**9. Adjust goals downward for employees who take FMLA leave.** While it is important to be consistent in how you treat an employee before and after FMLA leave--and as compared to others, it is also important to adjust time-sensitive goals for those who take FMLA leave. For example, evidence offered by an account executive that her company didn't adjust her sales targets to account for her intermittent FMLA absences and then fired her for failing to meet her goals raised an issue for trial on whether she was actually fired for taking FMLA leave, ruled a federal district court in New Hampshire.

Similarly, a court in Tennessee denied summary judgment on FMLA claims by an employee who took intermittent leave to care for her daughter, based in part on evidence that the employer refused to let coworkers help her meet her goals, nitpicked her work, faulted her for missing goals when she took leave, and treated similarly situated employees who missed goals better than it treated the employee.

**10. Not every deviation from what you expect of a seriously ill person suggests FMLA abuse.** It's one thing if an employee posts Facebook pictures of his vacation in St. Martin during FMLA leave—a federal court in Florida held that an employee who did just that failed to show he was fired for taking FMLA leave rather than for his conduct while on leave.

Usually, though, suspected FMLA abuse isn't so clear, so employers must tread carefully. In one case, a kitchen manager told his employer he was ill with blood in his stool and planned to go to the hospital or health department. Instead, he walked to a diner, had coffee, then drove home, contacting the health department the next day (he was diagnosed with colitis and diverticula and was treated for two years). Though he was fired for walking off the job, a federal court in Tennessee found triable questions on whether he gave notice of an FMLA-qualifying condition and triggered a retaliatory action.

In a case out of Maine, a long-time employee approved for intermittent leave due to chronic anxiety told his employer he was taking the rest of the day off. He ran into a coworker and they had lunch. Coworkers notified HR, which had him watched. He was suspended for "possible FMLA fraud" and then fired. The federal court held that he stated a plausible FMLA retaliation claim.

### Other recent developments of note

In terms of case law, a recent ADA case bears mentioning because it highlights the confusion experienced by some employers concerning the potential overlap in their obligations under the ADA and the FMLA when an employee requests medical leave as an accommodation. In particular, it is important to note that an employee who has exhausted his or her FMLA leave may still be entitled to medical leave under the ADA. As explained by a federal court in Florida, granting the full 12 weeks of FMLA leave may not satisfy an employer's independent duty to accommodate an employee's disability under the ADA, such as through additional (though not indefinite) medical leave. Thus, the FMLA does not supplant the ADA when it comes to granting medical leave as an accommodation.

Agency developments should also be noted, including the Department of Labor's announcement of a new FMLA notice poster that employers will be required to post in their workplaces and a new employer guide designed to provide essential information on FMLA obligations. The DOL also recently issued a fact sheet on the joint employment relationship and the corresponding FMLA responsibilities of primary and secondary employers, including both an example and a chart to illustrate specific responsibilities. More information is available on the Department of Labor's website, including posters; e-Tools; and fact sheets on employee notice requirements and how to calculate FMLA leave, rules for military family leave, and other topics.

**Source:** *Article written by Lorene D. Park, J.D. and originally published in the June 15, 2016 edition of Employment Law Daily, a Wolters Kluwer Law & Business publication.* ■

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EQUAL EMPLOYMENT

## EEOC stresses antidiscrimination protections for LGBT workers

The EEOC is once again doubling down on its interpretation of Title VII to extend antidiscrimination protections to LGBT workers. On July 15, the agency sent out a bulletin reminding stakeholders that "discrimination based on one's sex is sex discrimination." The EEOC explained that it interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation, regardless of contrary state or local laws, specifically pointing to its webpage, *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers.*

Via investigation, conciliation, and litigation of charges by individuals against private sector employers, as well as hearings and appeals for federal sector workers, the EEOC has taken the position that existing sex discrimination provisions in Title VII protect lesbian, gay, bisexual, and transgender (LGBT) applicants and employees against employment bias. The Commission said that it has obtained about $6.4 million in monetary relief for individuals, as well as many employer policy changes, through voluntary resolutions of LGBT discrimination charges under Title VII since data collection began in 2013. The agency also pointed to a growing number of court decisions endorsing the Commission's interpretation of Title VII.

**Resources.** The bulletin listed several resources available for stakeholders:

- Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination
- Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII
- Federal Sector Cases Involving LGBT Individuals
- Brochure on Preventing Employment Discrimination Against Lesbian, Gay, Bisexual, or Transgender Employees
- OPM-EEOC-OSC-MSPB Guide: Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment
- Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964
- OPM Guidance on Employment of Transgender Individuals
- Department of Labor/OSHA Guide to Restroom Access for Transgender Workers
- Department of Justice Memorandum on Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964

The Commission also pointed out that federal contractors and sub-contractors are covered by a separate, explicit prohibition on transgender or sexual orientation discrimination in employment under Executive Order 13672 and implementing regulations issued and enforced by the Office of Federal Contract Compliance. Frequently asked questions on the E.O. 13672 final rule provide additional information. ■

HR QUIZ

## Can employees make HSA contributions if they're getting VA benefits?

**Q** *Issue: You have several employees who are veterans and receiving health care benefits from the Department of Veterans Affairs (VA). How does their receipt of VA benefits affect their eligibility to contribute to your company's health savings accounts (HSAs)?*

**A** Answer: The IRS has stated that someone receiving medical benefits from the VA is not disallowed from making HSA contributions if the medical benefits consist solely of:

1) disregarded coverage;
2) preventive care; or
3) hospital care or medical services under any law administered by the VA Secretary for service-connected disability.

The IRS is aware that identifying services provided by the VA specifically for service-connected disabilities is confusing for employers. Therefore, for purposes of administrative simplification with regard to HSA contributions, any hospital care or medical services received from the VA by a veteran who has a disability rating from the VA may effectively be considered to be hospital care or medical services under a law administered by the VA Secretary for service-connected disability.

**Source:** *IRS Notice 2015-87, I.R.B. 2015-52, December 28, 2015.*

LOOKING AHEAD

## Employers expecting more LGBT bias, equal pay, joint-employer claims, continued DOL crackdown

Even as employers continue to grapple with the implications of momentous new legal requirements, they are bracing for even more shifts in the regulatory and enforcement landscape, while at the same time scrambling to keep up with rapidly changing social norms in the workplace, according to Littler Mendelson's 2016 Executive Employer Survey. The fifth annual survey was completed by 844 in-house counsel, HR professionals, and C-suite executives from some of America's largest companies. It examines the key legal, economic, and social issues impacting employers as the 2016 presidential election approaches.

On the regulatory front, the survey revealed that employers are still feeling the impact of key legislation and regulations, particularly the Affordable Care Act (ACA) and enforcement by the EEOC and the DOL. At the same time, employers also expect an uptick in enforcement and litigation stemming from more recent developments, such as the expanded definition of "joint employer" and the revised FLSA overtime rules.

**EEOC enforcement.** The greatest year-over-year change in survey results came in the area of EEOC enforcement, with a dramatic rise in the expectation of discrimination claims over the next year related to the rights of LGBT workers (31 percent in 2015 to 74 percent in 2016) and equal pay (34 percent in 2015 to 61 percent in 2016). Littler said that the Commission has sent a clear signal that LGBT discrimination and equal pay are among its top enforcement priorities, mirroring the Obama administration's key areas of focus, government efforts at the state and federal levels, and increased public attention.

**Labor Department.** Employers also expect a continued crackdown by the Labor Department that Littler said was likely driven in large part by the recently revised FLSA overtime regulations. This year, 31 percent of respondents said they expect DOL enforcement of federal employment laws to have a significant impact on their workplaces, an 18 percent increase over last year. Although they completed the survey in the weeks prior to the release of the final FLSA "white collar" overtime regulations, 65 percent of respondents had already conducted audits to determine impacted employees. But only 28 percent had taken further action, while another 28 percent said they were taking a "wait and see" approach. Littler said that since the reclassification process takes about six months, and the rule is unlikely to be blocked from going into effect on December 1, 2016, employers should move quickly to make sure they are in compliance.

**NLRB's "joint employer" definition.** Turning to the NLRB's expanded definition of a "joint employer," Littler said that survey respondents see it as opening the floodgates for claims against employers based on the actions of subcontractors, staffing agencies, and franchisees. Some 70 percent

of respondents said they expected a rise in such claims over the next year, and about half anticipate rising costs and increased caution in entering into arrangements that might amount to joint employment.

**Affordable Care Act implementation.** The survey also found that ACA implementation continues to affect employers, with 85 percent of respondents expecting the law to have some impact on their workplaces in the next 12 months. That number is unchanged from last year, but it is down from 97 percent in 2012, the first year of the survey and a year before the ACA's major provisions started taking shape. Moreover, 66 percent of respondents do not anticipate that the ACA will be completely repealed under a Republican president, but respondents saw a greater likelihood of changes to individual provisions. About half anticipated that a Republican administration could lead to a repeal of or changes to the Cadillac excise tax (53 percent) or play-or-pay mandate (48 percent). ■

TIME OFF

## Workers waste record-setting 658 million vacation days in 2015

American workers took slightly more vacation in 2015, up to 16.2 days from 16.0 days the year before, according to new research from Project: Time Off. But the meager increase comes as workers received an additional day (21.9 days on average), but used a lower share of vacation time than in 2014. These are some of the findings of Project: Time Off's State of American Vacation 2016 report.

It is commonly assumed that economic trends are driving the decline, but the State of American Vacation found no correlation to unemployment rates or consumer confidence. Rather, America's time off habits closely track technology innovation and adoption trends, suggesting that connectivity has intensified Americans' attachment to work and reduced their ability to break free of the office.

More than half of American workers (55 percent) left vacation time unused in 2015. This adds up to 658 million unused vacation days. It is the highest number Project: Time Off has ever reported, far exceeding the previous 429 million count. The increase highlights the difference between American workers' intent and action.

These unused days cost the U.S. economy $223 billion in total economic impact and 1.6 million jobs. There are significant costs to American workers as well. U.S. workers forfeited 222 million of the 658 million unused vacation days. These days cannot be rolled over, paid out, or banked for any other benefit—they are purely lost. This forgone time results in $61.4 billion in forfeited benefits annually.

**What's stopping us?** The reasons behind work martyrdom have lessened, even if only slightly, since 2014. Workers cite returning to a mountain of work (37% in 2016 vs. 40% in 2014) as the greatest challenge, followed by no one else can do the job (35% vs. 30%) and cannot afford a vacation (33% vs. 30%).

Beyond the pressures workers place on themselves, managers play a key role in vacation habits as employees ranked their boss the most powerful influencer when it comes to taking time off. Further, 80 percent of employees said they would be likely to take more time off if they felt fully supported and encouraged by their boss.

Unfortunately, 58 percent of employees report a lack of support from their boss and more than half (53 percent) report the same from their colleagues. Analysis found a positive correlation between employees who feel strong support from their bosses and colleagues and employee engagement. The more support an employee feels, the more likely they are to report higher levels of happiness with their company and job.

Support, however, is in short supply. Employees face a culture of silence when it comes to vacation time. Nearly two-thirds (65 percent) report that they hear nothing, mixed messages, or discouraging messages about taking time off.

**The power of planning.** The single-most important step workers can take is to plan their time off in advance, as more than half (51 percent) of planners used all their earned vacation time compared to 39 percent of non-planners. Yet less than half (49 percent) of households set aside time to plan their vacation time each year. Further, planners reported greater happiness in every category measured, especially relationships with partners and children.

Additional findings include:

- Employees who take 10 or fewer days of vacation time are less likely to have received a raise or bonus in the last three years than those who took 11 days or more.
- One in three managers (32 percent) never talk about the importance of taking paid time off with their direct reports. Another 11 percent only discuss it once a year.
- Looking at regional usage of paid time off, employees in the Pacific (64 percent), West North Central (58 percent), and New England (58 percent) have the highest populations with unused time off, compared to the national average of 55 percent. ■

HR NOTEBOOK

## CPI for all items increases 0.2% in June

The Consumer Price Index for All Urban Consumers (CPI-U) increased 0.2 percent in June on a seasonally adjusted basis, the U.S. Bureau of Labor Statistics (BLS) reported July 15. Over the last 12 months, the all items index rose 1.0 percent before seasonal adjustment.

For the second consecutive month, increases in the indexes for energy and all items less food and energy more than offset a decline in the food index to result in the seasonally adjusted all items increase. The food index fell 0.1 percent, with the food at home index declining 0.3 percent. The energy index rose 1.3 percent, due mainly to a 3.3-percent increase in the gasoline index; the indexes for natural gas and electricity declined.

The index for all items less food and energy increased 0.2 percent in June. The shelter index rose 0.3 percent, and a broad array of indexes also increased, including medical care, education, airline fares, motor vehicle insurance, and recreation. In contrast, the indexes for used cars and trucks, apparel, communication, and household furnishings and operations all declined in June.

## Real average hourly earnings decrease 0.2% in June

Real average hourly earnings for all employees decreased 0.2 percent from May to June, seasonally adjusted, the (BLS) reported July 15. This result stems from a 0.1-percent increase in average hourly earnings being offset by a 0.2-percent increase in the Consumer Price Index for All Urban Consumers (CPI-U).

Real average weekly earnings decreased 0.1 percent over the month due to the decrease in real average hourly earnings and no change in the average workweek.

## Unemployment climbs to 4.9% in June

Total nonfarm payroll employment increased by 287,000 in June, and the unemployment rate rose by 0.2 percentage point to 4.9 percent, the BLS reported July 8. The number of unemployed persons increased by 347,000 to 7.8 million. These increases largely offset declines in May and brought both measures back in line with levels that had prevailed from August 2015 to April.

In July, job growth occurred in leisure and hospitality (+59,000), health care and social assistance (+58,000), information (+44,000), professional and business services (+38,000), retail trade (+30,000), and financial activities (+16,000). Employment in mining continued its downward trend in June (-6,000).

Employment in other major industries, including construction, manufacturing, wholesale trade, transportation and warehousing, and government, showed little or no change in June.

WORKPLACE DISCRIMINATION

# Landmark *Dukes* case ends in confidential deal with Wal-Mart

The five named plaintiffs in the Supreme Court's landmark *Wal-Mart Stores v. Dukes* decision have reached a confidential agreement settling their claims in the aftermath of the High Court's 2011 ruling that barred a nationwide, 1.5 million-member class-action suit against the retail giant from proceeding. The plaintiffs claimed they were discriminated against based on sex in both pay and promotions, but the Court held the employees provided insufficient evidence of commonality among the class members to satisfy FRCP 23(a) requirements.

The ruling stemmed much of a growing tide of class action litigation and also spawned regional "mini-*Dukes*" class actions when class members were forced to regroup and try a more limited approach to the litigation.

In a joint stipulation filed in the Northern District of California, Wal-Mart Stores, Inc. said that the named plaintiffs "have reached a confidential settlement and stipulate to the dismissal of their claims, with prejudice," without elaboration on the deal that has been struck, other than that each party is responsible for "its own costs, expenses, and attorneys' fees, except as may otherwise be provided in the settlement agreement." In a footnote, Wal-Mart noted that in cases such as this one, where no class has been certified, voluntary dismissal via joint stipulation is proper. ■