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Fitbits may be helpful tool in employment cases, but reliability concerns still an issue

Wearable technology has exploded in popularity over the past few years as a way of monitoring fitness, athletic performance, health and alertness. Fitbits can track things like calories burned, your heart rate at different times, the steps you've taken over the course of a day or a week, your blood sugar levels and even your sleep patterns.

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This is useful information for people to monitor their own wellness metrics, but it could also potentially be useful evidence in legal disputes. Data from Fitbits and other wearable devices has already been used in personal injury cases in Canada. In one case, an injured woman used a Fitbit to show how much less active she was now than before the accident in question. Fitbit data also helped authorities in Pennsylvania support criminal charges against a woman who falsely reported that a man broke into her house while she was sleeping and raped her. The data showed that she was actually awake and out of bed at the time of the alleged home invasion.

There are plausible scenarios where Fitbit data could help resolve legal disagreements arising in the workplace by boosting a worker's claim of mistreatment or undercutting such an accusation.

For example, let's say a worker sues for handicap discrimination claiming the employer refused to reasonably accommodate the employee's disability by denying a more flexible schedule, a more convenient work location or scaled-down job requirements. If the

continued on page 3

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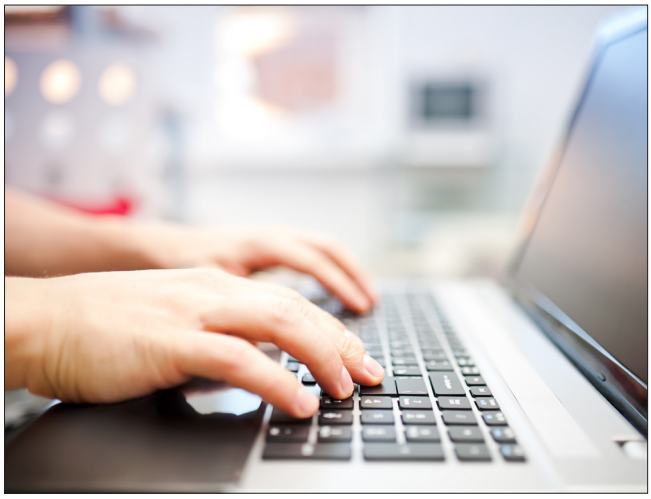
Employees can take CVS to court over unpaid online training time

A class action lawsuit brought by pharmacy technicians in federal court against the CVS drugstore chain highlights the risks employers take by "nickel-and-diming" their workers.



According to the lawsuit, which was filed by technicians in Pennsylvania and New Jersey on behalf of themselves and other CVS pharmacy technicians, the company violated state and federal wage laws and breached their contracts by failing to pay them for time they spent taking a mandatory online training course.

The technicians claim that while CVS let them do some of the coursework during work hours, they had to finish the courses at home on their own time. One of the technicians named in the suit said she was told she'd be paid for this time, but was never given proper timesheets to fill out. Another technician claimed that after repeated inquiries as to how he'd be paid for the training, the CVS pharmacist he worked for said he wouldn't be paid at all.

CVS tried to get the class action thrown out of court, arguing that there was never any agreement that technicians would be paid for the online training time.

But the judge hearing the cases found that CVS's own corporate policy suggested the trainees had to be compensated for the time completing the training.

The technicians still need to win in court. But surviving a motion to dismiss is a pretty high hurdle and CVS is now going to need to spend time and money fighting these claims. Even if the company wins at trial or settles before that point, it could end up costing far more than it would have to simply pay the technicians what they allegedly were entitled to in the first place.

If you are requiring your employees to undergo any sort of mandatory training that takes them off the clock, it's important to talk to an employment attorney and make sure you're not running afoul of any wage laws or contractual provisions that could ultimately ensnare you in a legal case.

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Arbitration agreement enforceable even though worker signed two months after starting her new job

An employee could be forced to arbitrate a gender harassment claim against her employer even though she didn't sign the arbitration agreement until two months after she started her job, a federal judge in North Carolina recently ruled.

Employer Ross Stores hired the employee in question, Amy Lesneski, to work as a second-shift supervisor at its distribution center in Rock Hill, North Carolina, in October 2014. Two months later, she signed a "dispute resolution agreement" in which she agreed that she wouldn't be able to take her employer to court over any potential disputes that might arise. Instead, any claim would be decided by a private arbitrator.

Six months later, Lesneski quit her job and sued the employer in federal court for gender harassment.

When the employer demanded the case be dismissed and ordered into arbitration, Lesneski argued that the agreement shouldn't be enforced. According to Lesneski, the employer presented her with the agreement two months after starting her job and told her that if she didn't sign it, she'd have to resign. This, she argued, made the agreement "unconscionable" and therefore void.

But the judge disagreed, finding that the agreement and the circumstances surrounding it weren't one-sided enough to "shock" the average person's conscience. Therefore, the agreement was enforceable under North Carolina's "strong public policy" favoring arbitration.

Lots of states have a similar policy favoring arbitration, as do the federal courts. Still, employers shouldn't read this decision as a go-ahead to spring any kind of agreement on their employees at any time, particularly one that impacts important rights. They should still talk to an employment lawyer about the law in their own state.

Fitbits may be helpful tool in employment cases

continued from page 1

court ordered the employee to produce wearable device data showing his heart rate (which might be relevant to allegations of emotional distress), steps taken during the alleged period of disability (perhaps the worker claims he has walking limitations), or sleep patterns (maybe the worker claims he suffers from a sleep disorder that is impacting his ability to sleep), this could help the employer disprove the claim. From the employee's perspective, such data could boost his case if the employer is disputing that the disability is real.

This doesn't mean that there aren't potential roadblocks to the use of wearable device data in employment cases. The technology is pretty new, and as with any new technology courts might be reluctant to admit it into evidence because they don't trust the reliability of the data. But the potential use of Fitbit data is an issue worth keeping an eye out for, and it's worth making a call to you labor and employment lawyer if you think it might have implications for your case.

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Miscalculating worker's FMLA leave costly to employer

Under the federal Family and Medical Leave Act, employers of a certain size must allow workers to take up to 12 weeks of unpaid leave in a year to deal with personal illness or care for sick family members. If the worker fails to come back when the leave is exhausted, he or she can be considered to have "voluntarily resigned" and the employer no longer has to keep the job open.

But a recent case from Virginia shows that employers must be very careful to calculate leave time accurately and make sure they're acting in good faith when they decide an employee has voluntarily resigned.

In that case Lisa Perry, a county employee, injured her shoulder in a fall on a sailboat in the spring of 2014. Her doctor recommended she take 30 days leave from work and return for a follow-up appointment with him on July 31 — the day before her employer determined that she was due back at the office.

At the appointment the doctor recommended that Perry not return to work until August 4. But when she failed to return on August 1, her employer sent a termination letter. When she did return on August 4 as the doctor recommended, she was told she had voluntarily resigned her job.

A recent case from Virginia shows that employers must be very careful to calculate leave time accurately and make sure they're acting in good faith when they decide an employee has voluntarily resigned.

Perry sued for violation of the FMLA, complaining that HR personnel barely waited one business day after her leave was set to end before terminating her.

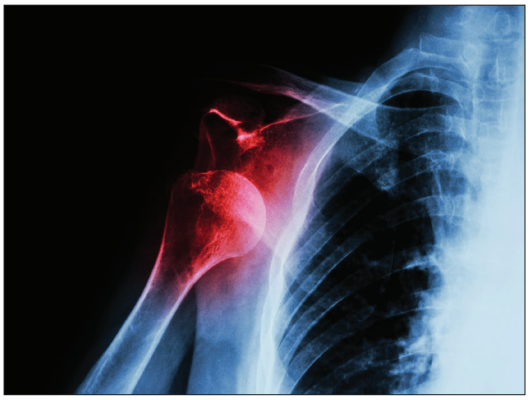
This amounted to bad faith, according to Perry.

A federal judge agreed, while acknowledging that Perry didn't show up on the end date indicated on her leave request and didn't communicate about the delay with her employer.

Specifically, the judge found that under both FMLA rules and the employee handbook, Perry had four business days to notify the county about any changed circumstances that might cause a delay, and that she had satisfied this deadline by returning to work on August 4.

The judge also found that the HR director knew about Perry's doctor's appointment and was aware that the doctor might extend her leave, but still rushed to fire her.

As a result of this bad faith, the county was ordered to pay $750,000 in lost wages and bad faith damages.



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Fast-food workers can't publicly trash employer in name of organizing

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Under the National Labor Relations Act, employers can't interfere with their workers' right to engage in "protected concerted activity" — in other words, their right to organize and as a group push for better pay and working conditions. Employers who fail to abide by this law risk fines and other punishment.

However, a recent decision from a federal appeals court draws a line between protected concerted activity and disloyalty that an employer isn't required to tolerate.

In that case, the owner of a group of Jimmy John's sandwich shop franchises in greater Minneapolis fired six employees and disciplined three other workers for staging a public relations campaign to call attention to the company's lack of paid sick leave for employees.

As part of the campaign, posters were posted on store bulletin boards depicting side-by-side pictures of identical sandwiches, one supposedly made by a healthy worker and the other by a sick one. The caption read, "Can't Tell The Difference? That's Too Bad Because Jimmy John's Workers Don't Get Paid Sick Days."

The workers filed a charge under the NLRA and both an administrative judge and the National Labor Relations Board found that the punishment was, in fact, illegal.

But the federal appeals court concluded that the employer was justified. According to the court, evidence showed that the information on the poster was "materially false and misleading" and accusing a restaurant of selling unhealthy food was the "equivalent of a nuclear bomb" in a labor dispute. These kinds of attacks on an employer's reputation and products are not protected by the NLRA, the court ruled.

It's worth noting that another court might see the issue differently. So while the decision shows that the NLRA doesn't give employees free rein to trash their employer in the name of organizing, the law in this area is obviously tricky. That's why it's important to consult with a labor and employment attorney before taking action against workers for anything that might be considered organizing activity.