



Northeast S.D. Society for Human Resource Management

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## NESD SHRM HEALTHCARE REFORM SERIES

Whether you represent a large or small manufacturer, a small service organization or would like to keep current on the broad range of HealthCare Reform changes, in each of these sessions, you will find the tools and information needed in order to be compliant and abreast of changes.

**Session One: 04/24/2014**  
**Session Two: 06/19/2014**  
**Session Three: 8/21/2014**  
**Session Four: 10/23/2014**

Each session will be held from 3:00 to 5:00pm and will include time for questions and answers.



**Topics of discussion during our first working session are:**

- The employer mandate
- Small business—Pro’s & Con’s of offering health insurance
- Transitional Reinsurance Fee
- Step-by-Step examples of how to track hours of service for variable hour and seasonal employees.
- Health Reimbursement Account (HRA) and Flexible Spending Account (FSA)



Please use the Chapter website to RSVP for each session.  
<http://nesd.shrm.org>  
 Under the “Events & Education” tab

*Training materials will be provided at each session.*

Tom Pruner, Jr. a Partner with Eide Bailly, has more than 30 years of tax experience with an emphasis on providing trust and estate income taxation on retirement plan services. He also serves as one of the firm’s Health Care Reform Champions and has presented on this topic to clients and a variety of organizations.

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**From the President**



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**SHRM Membership Note:**

**Be sure to indicate that you are a member of the NESD SHRM chapter when you renew your SHRM membership so our chapter receives credit!**

**SHRM FOUNDATION NEWS:**



**SHRM Foundation News:**

**SHRM Foundation News:  
Graduate Programs Directory**

Researching HR master's degree programs? Visit the SHRM Foundation's online [Graduate Programs Directory](#).

The SHRM Foundation offers an online, comprehensive directory of close to 200 master's degree programs in human resource management, HRD, I/O psychology, and more. The directory provides information on programs of study, location, curriculum, tuition, student demographics, and more. Full-time, part-time, online and distance learning programs are included.

Access to the online directory is free to SHRM members; visit the SHRM Foundation website ([www.shrm.org/foundation](http://www.shrm.org/foundation)).

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**NESD SHRM MISSION STATEMENT**

NESD SHRM Chapter's purpose is to advance the Human Resource profession by providing educational opportunities, legislative updates, informational programs, and a network to facilitate ideas, as well as promoting and encouraging membership and professional development through Participation in the National SHRM organization.

<http://nesd.shrm.org>

## Court Time for HR ~By Tom Starner, HRHero.com

As usual, the highest court in the land takes on cases that affect HR strategies and policies. And while the decisions may not be earth-shattering, some could have real implications in the HR space.

The United States Supreme Court often decides cases with potential impact on HR policy. The same holds true for 2014. Yet, while there are no blockbusters, there are a handful of cases – decided and yet to be decided - that touch employers.

### ***Burwell v. Hobby Lobby***

In a 5-4 vote, the court decided the Religious Freedom Restoration Act allows for a private, family-owned corporation to deny its employees the health coverage of contraceptives (to which the employees are otherwise entitled under federal law) based on the religious objections of that corporations' owner. The case, of course, gained nationwide publicity. While there is a much broader implication that goes well beyond the HR-related specifics of the case, legal experts say the case will be insignificant for the vast majority of U.S. employers.

"Unless an employer is a religious-based institution, then this will have not much impact," says Keenya Harrold, a labor and employment attorney with Cozen O'Connor in Houston. She adds that in the wake of the Affordable Care Act, however, you may see companies that have issues with healthcare reform file more suits like this one because the law contains provisions that they don't want to fund for a variety of reasons.

Steve Katz, a partner in the Los Angeles office of Reed Smith, adds that Hobby Lobby may be a big case in terms of broader issues about religion in society, but in terms of impact on employers, it is not a very big deal.

"It only applies to a very narrow set of employers," he says. "And most of them would be smaller employers, mom and pop-type companies."

### ***NLRB v. Noel Canning***

The issue here was whether or not President Barack Obama's three appointments to the National Labor Relations Board in January 2012, while the Senate was in recess, were constitutional. More specifically, was the Senate in true "recess" under the Recess Appointments. The D.C. Circuit Court found that since the appointments to the NLRB were done during a three-day recess and not during the recess between the Senate's annual sessions, the appointments were invalid and unconstitutional. In a 9-0 majority, the Supreme Court agreed. The case is significant because it limits the reach of the presidential recess appointment power, according to Cozen O'Conner's Harrold.

"From the HR vantage point, the case is more political than anything else," she says.

Joel Barras, a partner at Reed Smith, agrees that the true takeaway from Canning is that its impact on labor law is now much more minimal than it could have been, adding that after the President and the Senate reached a deal on permanent NLRB membership (same appointees as the recess appointees), the case shifted to a constitutional law issue.

"The NLRB will reissue the same decisions that were overturned with the *Canning* decision," he says. "Any employer that thinks the NLRB laws will change after *Canning* is taking a major leap of faith." In fact, Barras says, when talking about labor and employment law, his advice to employers is to expect no change in any subsequent NLRB decisions or rules.

### ***Sandifer v. U.S. Steel Corp.***

Decided in January by a 9-0 vote, the case had approximately 800 current and former U.S. Steel unionized employees file suit under the Fair Labor Standards Act, seeking back pay for the time spent "changing clothes," counter to their existing union agreement. The Court held that time spent "donning and doffing" protective gear qualified as "changing clothes," and as such was not compensable by the FLSA. The court did say that safety glasses, ear plugs and respirators are "equipment" and not clothes and concluded that if the vast majority of time is spent putting on and off equipment or other non-clothes items, the period is compensable.

According to Reed Smith's Katz, *Sandifer* also will have a very limited impact on the workplace.

"It's a very narrow issue," he says. "Suddenly you see employees trying to rewrite their union contracts in the courts. In this case, a contract is a contract."

### ***Integrity Staffing Solutions, Inc. v. Busk***

In a case related to *Sandifer*, the plaintiffs alleged that Integrity Staffing violated the FLSA and state labor laws by requiring employees to pass through an extensive security clearance at the end of each shift. They want compensation for the time. Employees say they waited up to 25 minutes to be searched, having to remove their wallets, keys and belts, and pass through metal detectors. The Supreme Court will address whether the security screenings are "integral and indispensable" to the workers' principal activities of "fulfilling online purchase orders," in this case.

"The *Sandifer* reasoning may offer some insight into how the court will approach Integrity," Harrold says, noting that Justice Antonin Scalia's reasoning in *Sandifer* could be applied to post-shift security screens as well. She adds that even though many workers must wait in long lines for their security screens, the Court may not find, out of a sense of basic fairness, that the wait is integral to their jobs. Integrity Staffing will strongly advance its own version of a fairness argument, she adds.

"Security screenings have become ubiquitous; the Supreme Court will soon tell us whether the FLSA requires employers to pay their employees to wait in those lines," Harrold says. "The takeaway from *Sandifer* and *Integrated Staffing* is that, if you look at both cases, employers may actually have to start recording from the time employees enter the door to the time they actually leave. That is a scary idea from a cost perspective."

In other words, the added time can become a very expensive proposition for employers that conduct such searches, for good reason, and have a large number of employees.

"The question is, 'Is that time going through any employee's belongings compensable?' " she says. "Depending on how the Court rules, it could get very expensive."

"This could have an impact, a possibly significant impact, on any retailer of any size that requires a security check," says Reed Smith's Katz. "Either way, it's going to impact more employers in a much more direct way than *Sandifer*, though it is dealing with very similar underlying legal issues."

### ***Mortgage Bankers Assn. v. Harris***

In this case, slated to be heard during the fall session, the U.S. Court of Appeals for the D.C. Circuit vacated the Department of Labor's controversial 2010 Administrator's Interpretation, which declared that mortgage loan officers do not qualify for the administrative exemption from the overtime wage provisions of the FLSA. In that 2010 action, the DOL issued its first ever "Administrator's Interpretation," without notice, reversing its prior position on the status of mortgage loan officers as exempt "administrative" employees.

Harrold explains that the action was counter to a letter issued by the Wage and Hour Administrator on September 8, 2006, whereby the DOL had determined that mortgage loan officers generally met the requirements of the administrative exemption to the FLSA's overtime requirements.

According to Harrold, the DOL's abrupt change of its position in its 2010 Administrator's Interpretation puts employers (in this case mortgage lenders) in a very tough spot, as they had relied in good faith on the 2006 opinion letter that mortgage-loan officers qualified for the administrative exemption. But in 2010, the DOL created immediate liability for statutory overtime where none previously existed.

"This case is a scary one in the wake of all the other wage and hour cases we've been seeing," she says.

"Employers have been relying on this, and now they suddenly would be responsible for paying overtime," she says. "The significance is that it's creating liability for employers where it did not previously exist. It's like they moved the goal post."

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## 10 most common legal mistakes HR makes

The Human Resources department has a host of responsibilities. Juggling them is often overwhelming, to say the least. One small misstep could cost the company hundreds, thousands and even millions of dollars. Knowing in which areas of HR's numerous responsibilities the most common pitfalls lurk goes a long way to ensuring that you don't fall into these traps.

### #1: Advertisements, Interviews, and Offer Letters

**Mistake: improper language in job advertisements.** Too many employers still use inappropriate terms — such as “girl,” “boy,” or “young” — in their job advertisements. This is particularly true when managers, rather than HR, write the ads.

**Mistake: unlawful interview inquiries.** Too many hiring managers ask about personal and/or protected characteristics during job interviews, which sets the employer up for a discrimination lawsuit if the applicant is not hired.

**Mistake: inaccurate description of the job.** Some hiring managers work so hard to get top-notch recruits in the door that they fail to be realistic with their description of the job. The unhappy employee will leave, and it will have been a shameful waste of the employer's time and money.

**Mistake: inadvertent creation of contractual promises.** Too many employers include language in their job offer letters that inadvertently creates an employment contract. For instance, mentioning a yearly salary implies a yearly contract.

### #2: Wage and Hour Issues

**Mistake: misclassification of workers.** Exempt vs. non-exempt status: Finding and correcting these mistakes are an Obama administration priority. While there are many factors to consider, you're basically basing your determination on the employee's level of responsibility and/or training, and a salary test.

**Mistake: mandating confidentiality of wage information.** Prohibiting employees from discussing their wages is a violation of the National Labor Relations Act.

### #3: Privacy Assumptions and Violations

**Mistake: permitting an expectation of electronic privacy.** Too many employers fail to advise employees to expect no privacy on their computers. If you asked employees, “Do you think the stuff you put into that computer is private?” you might get some interesting answers.

**Mistake: improper electronic monitoring.** Some states have statutes that require employers to give employees notice if they are being monitored electronically.

**Mistake: inadvertently revealing private employee information.** HR possesses a great deal of sensitive information about individual employees. It is your duty to keep that information confidential.

### #4: Training and Performance

**Mistake: failure to train supervisors.** When supervisors are not trained, they're the ones who get you into trouble. They may say rude, racist, or sexist things, or be unintentionally discriminatory, and because they are in a supervisory position, the entire company is on the hook.

**Mistake: misleading performance evaluations.** If you try to discipline an employee for a performance/behavior problem that was never noted on their evaluation, your hands may be tied.

### #5: Rough Beginnings and Sharp Endings

**Mistake: sloppy start.** Among HR's common errors in this area are: failing to submit the state notice of a new hire; failing to tell the employee the key terms and conditions of employment; and providing the employee with a misleading description of working conditions.

**Mistake: sloppy finish.** Regardless of whether a termination is voluntary or involuntary, always allow the employee to leave with dignity.



## #6: Investigations

**Mistake: failure to oversee supervisory investigations.** As an HR professional, you know that timeliness and thoroughness are important in an investigation. But what about when a supervisor is the one investigating, not HR? It's still HR's responsibility to provide oversight.

## #7: Record-Keeping/I-9 Issues

**Mistake: failure to document past practices.** Courts love to know not only whether the treatment of an employee was against the law or company policy, but whether it was in line with past practices.

**Mistake: failure to comply with Form I-9 requirements.** Failure to complete the I-9 form properly and failure to keep the form in a separate file are common mistakes employers make.

## #8: Breakdowns In Communication

**Mistake: failure to keep employees in the loop.** Forgetting to notify employees about policy/procedure changes, outcomes of investigations/discipline issues, or unsatisfactory behavior or work quality can be a costly slip-up.

## #9: Accommodations

**Mistake: failure to explore accommodations.** "Accommodation" can be defined as "a determination in favor of the employee." Employers should explore accommodation options when an employee: has a disability, is pregnant, is called to active military duty or has a family member called to active military duty, or wants to engage in a religious observance/practice.

## #10: Non-Compete Agreements

**Mistake: unreasonable scope.** Obviously, an agreement prohibiting an employee from working at any position in the same general industry forever and ever isn't going to hold water.

**Mistake: lack of consideration.** Legally, contracts are valid only if both sides give something. If the employee gives up their right to compete, the employer must also give something. Too often, the employer gives nothing, making the non-compete agreement invalid in a court of law.

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## New OSHA Rule Changes Employers' Injury/Illness Reporting Requirements~ *Gregory Dale*

On September 11, 2014, OSHA issued a final rule regarding employers' recordkeeping and reporting of occupational injuries/illnesses. The final rule takes effect on January 1, 2015, and includes a few changes from current requirements:

- OSHA has now adopted the North American Industry Classification System (NAICS) in referencing industry codes for recordkeeping purposes (in place of the prior Standard Industrial Classification (SIC) system).
- The final rule maintains the requirement that employers report occupational fatalities to OSHA within eight hours.
- The final rule changes the requirement for reporting hospitalizations and now requires that employers report to OSHA within 24 hours of the in-patient hospitalization of one or more employees or an employee's amputation, or an employee's loss of any eye from a work-related incident.
- The new rule also provides that the OSHA report can be submitted, as in the past, by telephone to the OSHA toll-free number (+ 1 800 321 OSHA) or to the OSHA area office closest to the site of the incident or through a new method — electronic submission by using the application located on OSHA's website at [www.osha.gov](http://www.osha.gov).