



In The Trenches

By Mark Wagner, Esq.

Practical Answers to Your HR Questions

Q I was recently completing an Employment Eligibility Verification (I-9) form for a recently hired employee, when he presented me with an “Employment Authorization Document,” which says that it is “INS Form I-766.” I have not seen this document before, and it is not listed in the “List of Acceptable Documents” on page three of the I-9 form. The employee is adamant, however, that it is a proper “List A” document, and that he does not need to provide me with any other documents. Is he correct?

A Yes. The I-9 form is seriously out of date, even as to the most recent version available on the official government website (U.S. Department of Homeland Security, Bureau of Citizen and Immigration Services, at <http://uscis.gov/graphics/formsfee/forms/i-9.htm>). Indeed, if you accept a document identified as a “List A” document on page 3 of the current I-9 form, there is a 50% chance you have accepted an unacceptable document. The List of Acceptable Documents (“List”) attached as page three of the I-9 form identifies 10 different “List A” documents that new employees may present to employers to prove their identity and employment eligibility. A “Special Instructions” section of the website, however, reports that five of those documents have been removed from List A, meaning employers cannot accept them to complete I-9s. The removed documents are:

- Certificate of U.S. Citizenship (INS Form N-560 pr N-561) (List A, document #2);
- Certificate of Naturalization (INS Form N-550 pr N-570) (List A, document #3);
- Permanent Resident Card (INS Form I-151) (List A, first document #5);
- Unexpired Reentry Permit (INS Form I-327) (List A, document #8); and
- Unexpired Refugee Travel Document (INS Form I-766) (List A, document #9).

Separately, the Special Instructions section also reports that new hires may show one other document not included on the

current List A – the Employment Authorization Document (INS Form I-766) – which is the very document that was presented to you by your new employee.

Q Two of our salespeople have asked to attend the “Matt Foley Achieve Your Wildest Dreams” Motivational Seminar. This highly regarded, and entertaining, seminar promises to improve individual performance in all aspects of life, both on and off the job.

Because we believe this would be a positive experience for all of our salespeople, we have encouraged each of them to attend at the company’s expense. It is a one-day seminar held Fridays and Saturdays. Must we pay our employees for attending the seminar and, if so, must we count those hours for overtime purposes?

A Probably, but the precise answer depends on various facts not stated in your question. Under the federal Fair Labor Standards Act (FLSA), hours spent attending training programs *do not* count as “hours worked” if each of the following four criteria are met: (a) attendance is outside regular working hours, (b) attendance is in fact voluntary, (c) the program is not related to the employee’s job, and (d) the employee does not perform any productive work during the training program.

Starting with the criterion that most often trips up employers, the first question is whether attendance is truly voluntary. Although only two employees asked to attend, the company has gone the extra step of “encouraging” all of its salespeople to attend. The point at which “encouragement” becomes a directive is, of course, a matter of degree. Federal law provides that attendance is *not* voluntary if an employee is led to believe that her present working conditions or employment would be ad-

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versely affected by nonattendance. The company, therefore, may offer incentives for attendance, but should not penalize its employees for nonattendance. The company should also be careful to avoid more subtle activity that would signal to employees that attendance is in fact, required. Indeed, it would be well advised to clearly communicate in writing to all employees that attendance is entirely voluntary.

The second question is whether the seminar is related, either directly or indirectly, to the employee's job. If so, then criterion (c) is not met—unless the training received in the seminar corresponds to courses offered by independent bona fide institutions of higher learning, which is an expressly recognized "special situation" under federal law. More facts are needed to make this determination.

The third question is whether the seminar occurs outside of each employee's regular working hours. This question must be answered on a case-by-case basis as to each employee. If, for

example, the seminar is held during the evening, after an employee's regular work day, then this element will be satisfied.

Fourth, the company must consider whether employees will perform any productive work during attendance. If, for example, an employee is required, or even permitted, to respond during the seminar to a continuous sequence of e-mail messages using Blackberry devices, the employee likely is performing productive work during attendance, and criterion (d) will not be met.

Finally, to the extent hours spent attending the seminar count as "hours worked" under federal law, they will also count for overtime compensation purposes. ■


This section is provided courtesy of the Labor and Employment Law Group of VanCott, Bagley, Cornwall & McCarthy, P.C., and is co-authored this month by Mark A. Wagner and Sam Meziani. Mr. Wagner serves as chair of VanCott's Labor and Employment Law Group and as a member of Salt Lake SHRM's Board of Directors. Mr. Meziani is a litigation attorney at VanCott and a member VanCott's Labor and Employment Law Group. You can reach either Mr. Wagner or Mr. Meziani at 801.532.3333. If you have questions you would like considered for publication in future issues of *HR Views*, please send them to execdirector@slshrm.org.

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