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COMPENSATION

Second Circuit rules 'factor other than sex' need not be job-related under EPA

by Charles H. Kaplan, Hodgson Russ LLP

On October 17, 2023, the U.S. Court of Appeals for the Second Circuit (which includes New York state) rendered a decision in a case that presented questions of what an employer must prove to establish affirmative defenses to pay discrimination claims under federal and state laws.

Facts

Anita Eisenhauer, a professor at the Culinary Institute of America, argued her employer violated the federal Equal Pay Act (EPA) and New York Labor Law (NYLL) § 194(1) by compensating her less than a male colleague. The institute countered that a "factor other than sex"—its sex-neutral compensation plan, which incorporates a collective bargaining agreement—justifies the pay disparity.

Eisenhauer then contended the compensation plan cannot qualify as a "factor other than sex" because it creates a pay disparity unconnected to differences between her job and her colleague's job.

The Institute pays Eisenhauer and Robert Perillo—a male professor carrying a similar course load—according to a compensation plan that follows the sex-neutral terms of a collective bargaining unit and employee handbook. The plan requires fixed pay increases triggered by time, promotion, and degree completion. It doesn't provide for "equity" adjustments.

Each year, in accordance with the compensation plan, all faculty members receive the same percentage increase in their salaries. The pay disparity between Eisenhauer and Perillo exists because their salaries differed when they were hired and have formulaically increased over time.

When the Institute hired Eisenhauer and Perillo as learning instructors—at starting salaries of $50,000 in 2002 and $70,000 in 2008, respectively—they had different experience and education levels. Eisenhauer had 15 years of culinary experience and had served as the executive chef in two New York City restaurants. Perillo had 23 years of culinary experience, previous teaching experience, and an associate's degree. He had also received higher scores on the cooking- and lecture-demonstration components of his job application. Eisenhauer didn't contend that her starting salary was the product of sex-based pay discrimination.

Appeals court's ruling

The Second Circuit ruled Eisenhauer's argument that the EPA requires a "factor other than sex" to be job-related is incorrect. It reasoned that the plain meaning of the Act indicates the opposite. It held that to establish the Act's "factor other than sex" defense, an employer must prove only that the pay disparity in question results from a differential based on any factor except for sex.

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However, the court found Eisenhauer's position is correct under NYLL § 194(1). A recent amendment to § 194(1) explicitly added a job-relatedness requirement. Accordingly, the Second Circuit held that to establish § 194(1)'s "factor other than sex" or "status" defense, an employer must prove the pay disparity in question results from a differential based on a job-related factor.

Because the U.S. District Court for the Southern District of New York—which had granted summary judgment (dismissal without a trial) in favor of the Institute—didn't consider the divergent requirements imposed by the EPA and § 194(1) when assessing Eisenhauer's claims and the Institute's defense, the Second Circuit vacated the summary judgment for the § 194(1) claim and sent that part of the case back to the district court to reconsider. *Eisenhauer v. Culinary Institute of America.*

Bottom line

In *Eisenhauer*, the Second Circuit made it clear that "factor other than sex" defenses under the EPA don't contain any job-relatedness requirement. Accordingly, even if the Institute's sex-neutral compensation plan weren't job-related, it's a defense a court must recognize under the EPA.

However, the district court must now decide if the sex-neutral compensation plan is job-related under the NYLL. Further, it found Eisenhauer demonstrated a *prima facie* (minimally sufficient) case of wage discrimination because she had identified one male comparator who earned more than she did, even though there were female employees who earned more than she did and other male employees who earned less than she did. In these circumstances, the district court must "determine whether a single male comparator is sufficient to establish a *prima facie* case under [the NYLL]."

In sum, even though the Second Circuit ruled that the EPA doesn't have any job-relatedness requirement, the job-relatedness requirement in the NYLL means that New York employers will need to show a factor other than sex, on which they rely as an affirmative defense to a pay discrimination claim, is job-related.

If you have any questions about pay discrimination under the EPA and the NYLL, please contact Charles H. Kaplan (646-218-7513) or any other member of Hodgson Russ LLP's labor and employment practice. ■

EXEMPT EMPLOYEES

Don't count the hours: Second Circuit reinstates FLSA overtime pay claims

by Charles H. Kaplan, Hodgson Russ LLP

On October 16, 2022, the U.S. Court of Appeals for the Second Circuit (which covers New York) reinstated an overtime pay claim by former employees of a high-end fashion retailer in New York. The employees alleged their regularly scheduled workweek included more than 40 hours per week of work. They claimed they were entitled to overtime pay under the federal Fair Labor Standards Act (FLSA) and the New York Labor Law (NYLL) because their employer misclassified them as managerial employees even though their actual job duties were not managerial.

Exemption requirements

The executive exemptions from the FLSA and the NYLL require that all of the following tests be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less per week than that set forth in federal and state regulations.
- Their primary duty must be managing the enterprise or managing a customarily recognized department or subdivision of the enterprise.
- They must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent.
- They must have the authority to hire or fire other employees, or their suggestions and recommendations about the hiring, firing, advancement, promotion, or any other change of status of other employees must be given particular weight.

Level of specificity

The U.S. District Court for the Southern District of New York had dismissed the workers' FLSA claims for failure to allege the specific number of hours they worked. The Second Circuit ruled their complaint adequately stated a claim under the FLSA because it alleged their regularly scheduled workweek exceeded 40 hours and they were denied overtime as a result of being misclassified as managers.

The employer argued the employees needed to list specific weeks during which they worked more than 40 hours. In other words, it contended a complaint must identify each week they worked their regular schedule. For example, one employee would need to list each and every one of the more than 100 weeks they worked their regular schedule.

The Second Circuit found the level of specificity the employer demanded went too far. It would generate voluminous, tedious complaints and compel employees to record their work schedules with a level of precision and care at odds with the court's admonition that employees in FLSA cases aren't obligated "to keep careful records and plead their hours with mathematical precision."

Instead, the Second Circuit explained its precedents require only that employees "sufficiently allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours." This pleading standard is unmet, the court explained, if all that employees allege is that at some undefined period in their employment, they worked more than 40 hours in a single week. Such an allegation, the Second Circuit reasoned, would be far too vague and unhelpful for putting a defendant on notice of the alleged violation.

The pleading standard is satisfied, however, if employees allege their regularly scheduled workweek for a given period included more than 40 hours of work so that they were eligible for overtime during every week in which they worked their regular schedule. In that case, the court observed, an employee need only allege the period during which they were employed. Accordingly, the Second Circuit concluded the employees' overtime claims were sufficiently specific to move forward. *Abbott v. Comme Des Garcons, Ltd.*

Bottom line

Simply giving an employee the title of store manager or assistant manager doesn't satisfy the executive exemption. The Second Circuit's ruling in *Abbott* is a reminder that employers need to convert lower-level managers, who aren't executives under the FLSA, to nonexempt status to avoid costly overtime claims.

If you have any questions about the executive, administrative, and professional exemptions from overtime pay under the FLSA and the NYLL, please contact Charles H. Kaplan (646-218-7513) or any other member of Hodgson Russ LLP's labor and employment practice. ■

HARASSMENT

Proposed harassment guidance broadens employers' obligations under EEO law

by Allison Hawkins and Amy Wilkes, Burr & Forman LLP

On October 2, 2023, the U.S. Equal Employment Opportunity Commission (EEOC) published in the Federal Register its notice of proposed guidance on "Enforcement Guidance of Harassment in the Workplace." The guidance incorporates updates reflecting current case law governing workplace harassment and addresses the proliferation of digital technology and how social media postings and other off-work conduct could contribute to a hostile work environment. It further illustrates a wide range of scenarios showcasing actionable harassment.

Covered basis

The guidance makes clear that federal equal employment opportunity (EEO) statutes only protect against harassment if it's based on an employee's legally protected characteristics, such as race, color, national origin, religion, sex, age, physical and mental disability, and genetic information.

Building in part on case law over the past 25 years and in part on positions taken by the commission, it goes on to provide that "sex-based" discrimination includes harassment based on pregnancy, childbirth, and other related medical conditions such as a worker's "reproductive decisions," including "contraception or abortion," and that "sex-based" discrimination incorporates protections for LGBTQ+ workers against harassment based on sexual orientation and gender identity. It also provides protections for "sex-based" stereotyping.

Notably, under the proposed guidance, the EEOC would recognize claims for perceptional-based harassment, whereby harassment is based on the perception that an individual has a particular protected characteristic, even if that perception turns out to be incorrect. Moreover, the EEOC would recognize claims under federal EEO law for "association harassment," whereby a complainant associates with someone in a different protected class or suffers harassment because they associate with someone in the same protected class.

Causation

The guidance reaffirms that a causation determination of whether hostile workplace harassment is based on a protected characteristic will depend on the totality of the circumstances. It provides numerous examples that reflect a wide range of scenarios wherein causation may or may not be established.

The scenarios reflect findings where the conduct involved alleges facially discriminatory conduct, stereotyping, situational context evaluations, close timing, and comparator evidence.

Narrowing the objective standard

To establish a hostile work environment, an employee must show there's conduct that is both subjectively and objectively hostile. Notably, the guidance states that whether conduct is objectively hostile "should be made from the perspective of a reasonable person of the complainant's protected class."

The traditional "reasonable person" standard wasn't so limited. In the EEOC's view, "personal or situational characteristics," such as age differential or undocumented worker status, also affect both the objective and the subjective reasonableness assessment—a position not shared by all the courts.

Conduct not directed at the employee

The guidance provides that an individual who hasn't personally been subjected to unlawful harassment based on their protected status may be able to file an EEOC charge and a lawsuit alleging they have been harmed by unlawful harassment of a third party.

For example, an employee who is forced to engage in unlawful harassment of another employee may have their own claim under the law, even though they weren't personally subjected to unlawful harassment.

Conduct outside the workplace

The guidance broadly considers conduct occurring in a non-work-related context as part of a hostile work environment. The EEOC provides several examples where an employer may have an obligation to take action against conduct that occurs in a non-work-related context.

In the commission's view, an employer may be liable for harassment if the conduct simply "impacts the workplace." Here are two examples that illustrate this:

- If "a Black employee is subjected to racist slurs and physically assaulted by white coworkers who encounter him on a city street, the presence of those same coworkers in the Black employee's workplace can result in a hostile work environment."
- If "an Arab-American employee is the subject of ethnic epithets that a coworker posts on a personal social media page, and either the employee learns about the post directly, or other coworkers see the comment and discuss it at work, then the social media posting can contribute to a racially hostile work environment."

The guidance significantly stretches current case law, which typically only considers outside-of-work conduct when it's carried out by an employee with direct supervisory authority, occurs at a work-related event, or occurs between coworkers who constantly work with and see each other inside the workplace. The guidance notes that the EEOC's broadened stance is in light of the proliferation of digital technology, such as electronic communications using private phones, computers, or social media accounts, that often bleeds into the workplace.

Framework of liability

Consistent with governing case law, the guidance sets forth several frameworks under which harassment claims will be analyzed. Which framework is applicable depends on the relationship of the harasser to the employer and the nature of the hostile work environment. Once the status of the harasser is determined, the appropriate standard will be applied to assess employer liability for a hostile work environment.

Automatic liability. An employer is always liable if a supervisor's harassment creates a hostile work environment that includes a tangible employment action.

Vicarious liability. If harassment by a supervisor creates a hostile work environment that doesn't include a tangible employment action, the employer can raise an affirmative defense to liability or damages.

Negligence. If harassment comes from a nonsupervisory employee or nonemployee, the negligence standard is principally applied.

Expansion of liability standards that apply in harassment cases

The guidance also expands on the circumstances in which an employer may be subject to automatic liability. Since the Supreme Court's *Faragher/Ellerth* rulings, the "supervisor" designation often becomes a key issue in determining an employer's liability.

In the EEOC's view, a coworker is a supervisor if the complainant reasonably believed the coworker had the power to recommend or influence tangible employment actions (e.g., hiring, firing, and demotions) against them. This "reasonable belief" approach would allow a coworker to be considered a supervisor even if the coworker had no power to take or influence tangible employment actions against a complainant.

This guidance appears to contradict the Supreme Court's instruction to limit the supervisor's inquiry into whether the harasser actually was empowered by the employer to take tangible employment actions against the complainant.

Employer's reporting mechanism not required

An employer has an affirmative defense to hostile work environment harassment when it can show both that it took reasonable steps to prevent and correct harassment and that the employee unreasonably failed to take advantage of those opportunities or take other steps to avoid the harassment.

The guidance provides that, even if the employee didn't use the employer's reporting mechanism to complain of harassment, other actions—such as filing a grievance with a union—may mean the employer has been notified of the concern, and the affirmative defense cannot be used.

Bottom line

The public is invited to submit comments and view the document via the federal e-regulation website until November 1.

Notably, EEOC guidance doesn't have the force of law, but it provides insight into how the EEOC will interpret and seek to enforce the federal EEO laws.

Regardless of changes, management and HR executives will need to continue antiharassment efforts that have been put into place over the last 25 years. Maintain clear and robust antiharassment policies, provide training, thoroughly investigate complaints of harassment, and take appropriate corrective action when an investigation indicates inappropriate conduct. Burr and Forman attorneys are well versed in antiharassment efforts and are available to assist in this important area. ■

EXEMPT EMPLOYEES

Is it 2019 or 2016? DOL proposes FLSA exempt salary threshold increase

by John David Gardiner, Bodman PLC

On August 30, 2023, the U.S. Department of Labor (DOL) announced a much-anticipated notice of proposed rulemaking (NPRM) that, if implemented, would increase the minimum salary for exemption under the Fair Labor Standards Act (FLSA) by over 50% to $1,059 per week (the equivalent of $55,068 per year). The agency is also proposing adding an automatic updating mechanism to the regulations. Because the salary threshold amount referenced in the NPRM is based on 2022 data (which isn't yet finalized), it's likely that the annual salary threshold will be as high as $60,000 by the time a final rule is issued.

Current proposal

This is what we can glean now from the DOL's NPRM:

- It would increase the standard salary level to the 35th percentile of earnings of full-time salaried workers in the lowest-wage census region (currently the South), which would be $1,059 per week ($55,068 annually) based on current data.
- It would apply the standard salary level to Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands and increase the special salary levels for American Samoa and the motion picture industry.
- It would increase the highly compensated employee (HCE) total annual compensation requirement to the annualized weekly earnings of the 85th percentile of full-time salaried employees nationally, which would be $143,988 per year based on current data.
- It would automatically update the earnings thresholds every three years with current wage data to maintain their effectiveness.

Under the FLSA, an employer may elect to treat an otherwise exempt employee as nonexempt. Keep in mind that you may not go the other way and elect to treat a nonexempt employee as exempt.

Nonexempt employees must be paid an hourly wage at or above the minimum wage and time-and-one-half base hourly pay for time worked in excess of 40 hours in a given workweek. Such an election by an employer is both cumbersome and often unwelcome by existing exempt employees, however.

Past proposals

The DOL last updated the executive, administrative, and professional (EAP) exemption regulations in 2019. That update—which included setting the standard salary level test at its current amount of $684 per week (equivalent to a $35,568 annual salary)—has been in effect since January 1, 2020. In 2016, the DOL attempted to increase the salary threshold, but that initiative was initially blocked at the end of 2017 and subsequently tackled in courts.

The department is not proposing changes to the standard duties test—consistent with its approach in both the 2016 and the 2019 rules.

Public comments

The DOL welcomes public comments regarding the NPRM within 60 days from the publication date in the *Federal Register*, or on or before November 7, 2023, unless the public comment period is extended.

The exact timeline for the DOL's publication of a final rule, or when a final rule might go into effect, is murky. In 2019, the proposed rule and final rule took approximately 10 months. If this rulemaking process follows a similar route, the final rule could be in effect by the second half of 2024.

The DOL also has an acting secretary rather than a permanent, confirmed secretary of labor, which some have indicated violates the Senate's constitutional Advice and Consent powers. It's a virtual certainty that any final rule will be challenged in various courts.

Legal challenges

The current DOL proposal includes a severability provision, which if enforced would have the operative effect of keeping most parts of the rule in place if one piece of the rule is eventually invalidated in court.

Two legal rulings loom large as far as prospective challenges to the DOL's proposed salary-based changes to overtime exemptions under the FLSA:

- In 2017, a Texas-based U.S. district court struck down an attempt by the Obama administration to raise the salary threshold to $47,476. By focusing too heavily on the amount of money workers make instead of their job duties, the Obama DOL expanded overtime protections to workers Congress sought to exclude, Judge Amos Mazzant said in that ruling. Judge Mazzant—an Obama appointee backed by Texas's Republican senators—is still a sitting judge in the Eastern District of Texas.
- From the U.S. Supreme Court, Justice Brett Kavanaugh has recently implied that overtime laws shouldn't consider pay at all. In his dissent in *Helix Energy Solutions Group, Inc. v. Hewitt*, Kavanaugh wrote, "The [FLSA] focuses on whether the employee performs executive duties, not how much an employee is paid or how an employee is paid. So, it is questionable whether the [DOL's] regulations—which look not only at an employee's duties but also at how much an employee is paid and how an employee is paid—will survive if and when the regulations are challenged as inconsistent with the Act."

The question now is whether the current proposal will share a fate with the 2016 proposal or the 2019 proposal. Keep the DeLorean at the ready; we are in for an interesting start to 2024—and beyond. ■

HIRING

Using social media to screen job candidates? Know the legal, ethical concerns

by Tammy Binford

Checking job candidates' social media posts has become common practice. Even if an employer enlists a separate company to conduct a formal background check, a hiring manager or an HR professional may take a quick look at the candidate's Internet presence. That practice may seem to be a fast, easy way to get to know a potential employee early in the hiring process, but it also presents legal and ethical challenges.

What employers are doing

In June, ResumeBuilder.com surveyed 1,013 hiring managers and found that most check job candidates' social media accounts at least some of the time.

The survey found that 31% said they always look at candidates' social media, 44% said they sometimes do, and 13% said they rarely do. Just 12% said they never look at candidates' social media as part of the hiring process.

The survey also found that 41% of the survey respondents said checking social media is definitely acceptable at their organization, and 36% think it is.

The survey found 14% of respondents were unsure if checking candidates' social media is an acceptable practice at their company, 6% didn't believe it's acceptable at their employer, and 2% were sure it's not acceptable.

Most of the hiring managers who use social media as part of the candidate evaluation process (57%) said they check before the interview, and 43% said they typically view social media after the interview.

The survey found that Facebook was the most viewed social media, but smaller numbers cited Instagram, Twitter (now known as X), and TikTok. The survey didn't ask about employers' use of LinkedIn.

Dubious practices

The ResumeBuilder.com survey also turned up some risky moves employers make. Sixty-eight percent of the hiring managers responding to the survey admitted they use social media to find answers to illegal interview questions.

Federal, state, and local antidiscrimination laws prohibit employers from considering certain characteristics when making employment decisions. For example, on the federal level, Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, national origin, sex, and religion.

The Americans with Disabilities Act (ADA) prohibits discrimination against qualified individuals with a disability, and the Age Discrimination in Employment Act (ADEA) prohibits discrimination based on age over 40. The Genetic Information Nondiscrimination Act (GINA) prohibits discrimination based on an applicant's or employee's genetic information.

Despite those legal protections for candidates and employees, some employers try to use social media to learn about protected characteristics. The ResumeBuilder.com survey found that, in order of frequency, hiring managers admitted to passing up candidates after learning their age, politics, race/ethnicity, sexual orientation, gender identity, marital status, disability status, pregnancy status, and religion.

Why check social media?

ResumeBuilder.com's survey asked hiring managers why they check social media. Signs of unprofessional behavior and illegal activity were the most likely reasons hiring managers cited for rejecting candidates.

But employers cited other reasons for checking social media posts, including to satisfy curiosity and to see if candidates are invested in their careers.

One common reason cited was to ensure a good cultural fit. That can be risky because employers may cite "fit" as a justification to reject candidates for unlawful reasons.

Such legal risks lead some employers to rely on companies that offer expertise and software designed to find information on candidates in legally sound ways.

One background check company, Accurate, says its product finds and analyzes over a dozen risk categories in social media posts, including insults and bullying, toxic language, and threats of violence. Its technology searches the top social media platforms for negative text and images, and human analysts review the results.

Employers aren't just checking social media as part of the hiring process. They also sometimes look at their current employees' activity. Staffing firm Express Employment Professionals in January released a poll it commissioned from The Harris Poll showing 88% of the managers included in the survey would consider firing employees for content found in workers' posts.

The survey showed that offenses considered grounds for firing include publishing content damaging to the company's reputation, revealing confidential company information, showcasing and/or mentioning illegal drug use, violating the company's social media use policy or contract, and showcasing and/or mentioning underage drinking. ■

EMERGENCY PREPAREDNESS

Facing the storm: Natural disasters trigger need for employer preparation

by Tammy Binford

Extreme natural disasters—fires, floods, hurricanes, and more—increasingly dominate news coverage. But the full effect of such tragedies outlasts the headlines. And it's not just fires and storms. Extreme heat events also threaten the health and safety of people all around the world.

Employers are certainly not immune. In fact, the increasing number and severity of natural disasters make it more essential for employers to develop plans that will get them back in business and enable them to help employees recover when disaster strikes.

Making plans

Dangerous weather and other natural disasters often shut down operations, but even after reopening, businesses can expect absenteeism and turnover because employees will continue to suffer a disaster's effects. Also, when employees do manage to return to work, they often will be less productive because of worries about their future.

Employers can cope with the possibility of natural disasters by developing business continuity plans. Writing for *Forbes* in September 2022, Holly Welch Stubbing—CEO of E4E Relief, a company helping businesses respond to crises—advised creating a people-focused plan that includes evacuation planning, data storage and security, internal crisis communications, organizational recovery, and a return-to-work strategy.

Stubbing advised creating a team made up of key stakeholder groups of the organization, including IT and operations. The team should be able to conduct a risk assessment and business impact analysis that will provide the information and insight needed to develop plans for recovery.

Stubbing emphasized the importance of understanding the long-term effects for employees. They may not be able to return to work quickly, and they likely will suffer the effects of unexpected expenses and losses not easily overcome.

"HR leaders are crucial in sustaining the values of the organization and optimizing adaptability for unexpected conditions," Stubbing wrote. "While we can't predict when and where disasters will strike, we can ensure we stand ready to provide a compassionate response to our most important asset—our people."

Legal obligations

Employers also must be aware of legal obligations related to disasters, including some federal laws that are implicated.

Fair Labor Standards Act (FLSA). Even if a business is closed for a time, employees classified exempt under the FLSA must be paid their full salary if the business is closed for less than a full workweek. But the employer can require exempt employees to use accrued leave for that time.

Employees classified nonexempt under the FLSA are required to be paid only for hours they work and, therefore, aren't required to be paid if the employer can't provide work because of a natural disaster.

However, nonexempt employees who work fluctuating workweeks and receive fixed salaries must be paid their full weekly salary for any week in which any work was performed.

Worker Adjustment and Retraining Notification (WARN) Act. The WARN Act requires employers with at least 100 employees to give at least 60 days' notice of plant closings and/or mass layoffs.

An exception exists when the closing or layoff is a direct result of a natural disaster, but the law still requires employers to give as much notice as is "practicable." If an employer gives less than 60 days' notice, it must prove the exception is justified.

Occupational Safety and Health Act (OSH Act). Because natural disasters can create workplace hazards, the Occupational Safety and Health Administration (OSHA) provides a number of resources outlining emergency preparedness and responses related to weather and other natural disasters. (See osha.gov/emergency-preparedness.)

Far-reaching effects

The effects of disasters go beyond the local level and reach around the world. The United Nations Development Programme—a U.N. agency focused on overcoming poverty and achieving sustainable economic growth and development—published a report in April 2016 titled "Climate Change and Labour: Impacts of Heat in the Workplace."

Among the key findings:

- Excessive workplace heat is an occupational health and productivity danger. High temperatures and dehydration cause heat exhaustion, heat stroke, and even death. Letting workers slow down work and limiting their hours can protect them from heat danger, but those steps also reduce productivity, economic output, and income.
- The southern United States is among the areas around the world identified as a highly exposed zone.
- Future climate change will increase losses.
- Heat extremes affect the habitability of regions, especially in the long term, and may already constitute an important driver of migration internally and internationally.
- Actions are needed to protect workers and employers now and in the future, including low-cost measures such as assured access to drinking water in workplaces, frequent rest breaks, and management of output targets. ■

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