



HUMAN RESOURCES POTPOURRI

It was recently reported that three years after the new Fair Labor Standards Act (FLSA) white-collar exemption regulations were implemented, “a sleeping giant was awakened . . .” and the door to new areas of wage and hour litigation were opened. Litigation under the Act’s duties test have “gone way up,” while the white-collar exemption analysis requires the employer to look at the employee’s duties not the job title. “The courts are all over the place when it comes to the duties test.” The cases seem to indicate that the administrative exemption, unlike the executive and professional exemptions, does involve true administrative work and is not intended to be a general white-collar exemption.

Source: Daily Labor Report, November 2007



A lawn care business properly terminated a worker with bipolar disorder because the condition could affect his ability to perform essential functions of the job that caused him to miss work (*Denman v. Davey Tree Expert Co.*; unpublished opinion, 6th Cir. COA, Dec. 2007)

The Court, in finding that attendance was an essential function of the job, stated, “. . . the bipolar disorder could affect his ability to perform the essential functions of his job, since it had just caused him to miss work” and the inability to attend work could “fundamentally alter” a position that required attendance to perform the regularly assigned tasks.



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UNIONS BY THE NUMBER: THE SCOREBOARD

If you are keeping score, and you should be, or if you think unions are on their way out, here are some of the latest numbers:

- Number of union members rose in 2007 by 311,000, the largest single year increase since 1979.
- While overall union membership has declined almost continually in the past 25 years, 10.1% in 1983 to 12.1% in 2007, 2007 has shown an increase in union organization percentages.
- Private sector union membership in 2007, 7.5% vs. 7.4% in 2006, while in the public sector it was 35.9% in 2007 vs. 36.2% in 2006.
- Largest increase in union membership in the private sector—health services, 7% to 7.9%; construction industry increased from 13% in 2006 to 13.9% in 2007. In manufacturing, unions lost 93,000 members falling from 11.7% in 2006 to 11.3% in 2007.
- Unions won 55.7% of private sector elections in the first half of 2007 vs. 60.8% in same period of 2006.
- Decertification elections were down from 175 in first half of 2007 vs. 194 in same period of 2006.
- AFL-CIO won 56.6% of its elections in first half of 2007 vs. 60.1% in same period of 2006.

Most active unions in first half of 2007:

1. International Brotherhood of Teamsters with 214 NLRB elections, winning 48.6%.
2. Service Employees International Union, 59 elections, winning 79.7%.
3. United Auto Workers, 23 elections, winning 56.5% (more than doubled the number organized in 2006).
4. United Food & Commercial Workers, 44 elections, winning 52.3%.

Employers Beware: The fight is far from over and the belief exists among unions “. . . working people are pushing to form and join unions in order to improve their lives . . .” A persistent union effort combined with a possible change in administrations and the law (Employee Free Choice Act) makes the employer’s road ahead a bumpy one. When union issues arise in your workplace, contact with experienced labor counsel is highly recommended.

FMLA IN THE NEWS AGAIN!

On January 28, 2008, President Bush signed into law the first ever expansion of the Family & Medical Leave Act (FMLA). This bill, The National Defense Authorization Act, provides additional FMLA leave for military families (Indiana enacted its own version of the Military Family Leave Act effective on July 1, 2007. (See the December 2007 edition of *Veritas* for specifics about this law.)

Under the new law, FMLA-eligible employees will now be entitled to the following:

- **Family Leave Due to a Call to Active Duty**
Provides 12 weeks of FMLA leave to a spouse, son, daughter or parent being on active duty or having been notified of an impending call or order to active duty in the armed forces. Leave may be used for any “qualifying exigency” arising out of the service member’s current tour of active duty or because the service member is notified of an impending call to duty in support of a contingency operation.
- **Caregiver Leave for an Injured Service Member**
Provides 26 weeks of FMLA leave during a single 12-month period for a spouse, son, daughter, parent, or nearest blood relative caring for a recovering service member (RSM). RSM is defined as a member of the armed forces who suffered an injury or illness while on active duty that may render the person unable to perform the duties of the member’s office, grade, rank or rating.

Most other provisions of the FMLA will remain unchanged and will apply to these new leaves, i.e., employer coverage, employee eligibility requirements, health insurance continuation, and reinstatement rights. Qualifying employees will also be able to utilize the leave on an incremental basis or in the smallest increment that the employer’s payroll system tracks under both new leave requirements. In conjunction with these expanded leaves, the DOL has released a guidance that indicates the caregiver provision of the law which will be effective on January 20, 2008, but the call to active duty provision will not be effective until the Secretary of Labor issues final regulations defining “any qualifying exigency.” However, the DOL encourages providing this type of leave to qualifying employees.

As we always recommend, questions regarding the FMLA should be referred to experienced employment counsel.

Source: Society For Human Resource Management, January 2008

Things I Have Learned:

- That even when I have pains, I don't have to be one.
- That life sometimes gives you a second chance.
- That you shouldn't go through life with a catcher's mitt on both hands. You need to be able to throw some-thing back.
- That it's easier to keep up than to catch up.
- That children follow example, not advice.
- That you should never try to ride your bicycle over a basketball.
- That I don't make many mistakes with my mouth shut.

Interesting But Useless Information

Half of all identity thieves are relatives, friends or neighbors of the victims.

The first cell phone was invented in 1924.

About 1 in 30 people in the U.S. are in jail, on probation, or on parole.

The average horse jockey earns about \$9 per hour.

90% of us who walk into department stores immediately turn right.

Microsoft Windows will not allow you to create a new folder named "con."

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E-DISCOVERY SANCTIONS PACK A PUNCH

Your daily deluge of e-mail may have consequences far more severe than frazzled nerves. One of the current, hot trends in litigation is the increasing recognition by the courts and the litigants of the importance of evidence in the form of Electronically Stored Information (or "ESI"). Those ubiquitous laptops, servers, PDAs, thumb drives, e-mail accounts, and voicemail systems are potential goldmines of discoverable information, and they are often the subject of extensive subpoenas and document requests. This has created increased inconvenience and cost to all parties in the litigation process.

Courts have begun imposing significant penalties for parties who, knowingly or unwittingly, delete or discard information relating to the claims at issue. Recent cases have included the exclusion of key evidence, unfavorable jury instructions, multi-million dollar sanctions, and even default judgments against parties who have failed to produce relevant ESI. The courts have put litigants on notice: **it is the duty of the parties and their attorneys to preserve ESI, and ignorance and carelessness are no excuse.**

In this process, all parties are required to begin extensive procedures to "hold" ESI as soon as the prospect of litigation becomes reasonably likely. In such cases, swift and thorough action must be taken by the potential litigants to preserve ESI that is relevant or reasonably calculated to lead to the discovery of admissible evidence on all devices and in all forms.

Early, decisive action and continual compliance are the duties which the courts have imposed on litigants and lawyers alike. Unlike paper documents, ESI can be destroyed or modified in an instant, often automatically; therefore, all data that is likely to fall within the scope of the litigation must be immediately identified and quarantined. This can be an extremely daunting task; it is therefore essential that the potential litigation involve legal counsel early in the process to appropriately define the nature and extent of the document hold. Failure to do so can be fatal to your case.

Businesses can save substantial costs and time by proactively developing document retention policies that address ESI, by developing e-discovery protocols, and by training key employees. These proactive steps will make the implementation of litigation holds more efficient and will help minimize the chances of destruction of relevant ESI.

When e-discovery issues arise, contact with experienced employment counsel is highly recommended. The E-Discovery Team at May Oberfell Lorber is ready to help. Please contact us to learn more about this expanding area of the law.

FMLA—REPORTING THE NEED FOR LEAVE

The Family and Medical Leave Act remains in the news and continues to be a law impacted by rapid change. These changes create constant challenges for those who are called upon to interpret its meaning and application. One thing is certain: employers cannot interfere with an individual's effort to exercise his or her FMLA rights. When an employer creates such interference, bad things usually happen. This is what occurred in *Sarnowski v. Air Brooke Limousine Inc.*, a case decided by the Third Circuit Court of Appeals on December 12, 2007.

In this case, the Court found that the plaintiff provided sufficient notice to the employer of his intent to take medical leave to bar the company from interfering with his FMLA rights. The plaintiff, who previously had missed six weeks of work following his first heart surgery, told his supervisor that he needed to take six more weeks off for a second coronary artery bypass surgery. The employer fired the plaintiff eight days after the notification was given.

The Court noted that to proceed with a claim for interference with an attempt to exercise FMLA rights, the employee "must show that he was entitled to benefits under the FMLA and that his employer illegitimately prevented him from obtaining those benefits.

In examining the DOL regulations, the Court also noted there existed no clear mandate for a formal written request (for leave); to the contrary, an employee only needed to "provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA qualifying leave, and the anticipated timing and duration of the leave" (29 C.F.R. §825.302 (c)). In regard to such notice, the Fifth and Sixth Circuit Courts have held that the test is whether the information that the employee communicated to the employer was reasonably adequate to apprise it of the employee's intention to take leave for a serious health condition. Equally noteworthy is the Eighth Circuit's position that "an employee must provide his employer with enough information to show that he may need FMLA leave." According to the Court, the above approach is sensible because "it benefits employers if employees are encouraged to apprise their supervisors of an anticipated need for leave."

Employers Beware: It does not take much for you to have notice of an employee's need for FMLA leave, and the penalty for missing that notice may be very costly. Questions involving the FMLA should always be referred to experienced employment counsel.

Source: BNA Daily Labor Report, December 2007

QUOTES OF THE MONTH

"Tell me and I forget; show me and I may remember; involve me and I'll understand." *Chinese Proverb*

"In the middle of difficulty lies opportunity." *Albert Einstein*

"Success usually comes to those who are too busy to be looking for it." *Henry David Thoreau*

"Opportunity is missed by most people because it is dressed in overalls and looks like work." *Thomas Alva Edison*

"A loyal friend laughs at your jokes when they're not so good, and sympathizes with your problems when they're not so bad." *Arnold H. Glasow*

"It is never too late to be what you might have been." *George Eliot*

"The music is nothing if the audience is deaf." *Walter Lippmann*

