KEEPING YOUR TEAM IN THE GAME

Fourth Annual
Employment Law Conference

Sponsored by:

KRAMER RAYSON LLP

Thursday, September 20, 2007

Club LeConte
800 South Gay Street, 27th Floor
Knoxville, TN 37929

	WHAT HR MANAGERS NEED TO KNOW TO AVOID ERISA PITFALLS As the "baby-boom generation" ages, the number and value of ERISA claims HR managers will be called upon to address will increase dramatically. While HR managers are not generally tasked with administering ERISA plans, HR personnel have inadvertently created liability for employers. Learn when silence is golden and deadly. John C. Burgin Jr.	163
3:45 — 4:30	TRADE SECRET CLAIMS AND COVENANTS NOT TO COMPETE Carefully defining your trade secret(s), how HR departments can help position an effective case, what to do when your employee has breached trade secret non-competition responsibilities, minimizing risk of hiring talent who will be accused of stealing trade secrets, drafting effective and enforceable agreements. John E. Winters	187
4:30	Closing and Grand Prize Drawing.	

DEVELOPMENTS IN EMPLOYMENT LAW

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EMPLOYMENT LAW UPDATE

I. 2006-2007 SUPREME COURT DECISIONS

In 5-4 decision, Supreme Court limits the lifespan of Title VII-based pay discrimination claims. Tennessee employers, however, must be prepared to defend against claims reaching back decades under Tennessee Human Rights Act.

Ledbetter v. Goodyear Tire and Rubber Co., Inc., 127 S. Ct. 2162; 167 L. Ed. 2d 982 (May 29, 2007).

A divided U.S. Supreme Court decided that the pay discrimination claims of Lilly Ledbetter were time barred.

Ledbetter brought suit in part under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-17(as amended), alleging gender discrimination in connection with her pay at Goodyear. Though she initially asserted an Equal Pay Act claim, a Magistrate recommended its dismissal and Ledbetter pursued only her Title VII pay discrimination claim. At trial, Ledbetter prevailed, and a jury awarded her $225,000 in back pay plus $3 million in punitive damages--finding that Goodyear discriminated against her in her pay throughout her entire 19-year career.

Goodyear appealed, and the Eleventh Circuit granted judgment as a matter of law in its favor, concluding that, under Title VII, pay claims like Ledbetter's are properly analyzed as "discrete acts of discrimination" rather than "continuing violations." In the Eleventh Circuit's view, Ledbetter could recover only to the extent she proved intentional discrimination with regard to pay decisions made within the appropriate limitations period (which was 180 days here, since Alabama is a non-deferral state). While the record included evidence that prior decisions had been motivated by discriminatory animus, the Eleventh Circuit found that Ledbetter failed to prove that the pay decision within the 180 day period was discriminatory.

In the Supreme Court, Ledbetter argued that the Court's decisions in *Bazemore v. Friday*, 478 U.S. 385 (1986) and *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), allowed her to sue for the entire 19 year period, arguing that pay discrimination claims were like hostile work environment claims (which by their very nature, continue over time). In *Morgan* the Court held that discrete acts of discrimination are barred if not timely filed. *Bazemore* held that each and every pay check based upon an uncorrected discriminatory practice is, in fact, a new discriminatory act.

The Supreme Court held that each pay setting act (such as an annual raise) is a discrete act and the continuing violation theory does not apply.

Ledbetter asserted a disparate treatment claim, a central element of which is the intent to discriminate. However, Ledbetter alleged that the decisions made during the filing period "carried forward" the unlawful effects of earlier decisions. That argument is almost identical to the one advanced in *United Airlines v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), and which was rejected.

The majority rejected Ledbetter's reading of *Bazemore* on the ground that the disparate pay scales the employer established and allowed to continue (after Title VII was applied to the states) was different from discrete decisions setting an individual's salary for the coming year.

Justice Ginsburg, in oral and written dissent, argued that the majority's reliance on *stare decisis* and its discussion of legislative intent ignored the workplace reality that pay disparities are not written across the foreheads of affected employees.

It is important to remember four things with regard to the impact of *Ledbetter* in Tennessee. First, the case was pursued under Title VII, not the Equal Pay Act, which requires no administrative charge filing, no discriminatory intent, and which incorporates a longer statute of limitations (two to three years). The Court even said the result would have been different had Ledbetter asserted an EPA claim.

Second, Tennessee employers must deal with the reality that the Tennessee Supreme Court adopted the view in *Booker v. Boeing*, 188 S.W.3d 639 (Tenn. 2006), that the one-year limitations period for claims alleging discriminatory pay under the THRA begins when the discriminatory practice ceases - which that Court took to be when the plaintiff's pay was brought in "parity" with her "peers." Translated simply, Tennessee employers have to defend against discrepancies which might have roots (legitimate or not) stretching back as long as the affected employee's tenure.

Third, by late July 2007, H.R. 2831, the "Ledbetter Fair Pay Act of 2007," was introduced but so far its passage (over a veto threat) appears unlikely.

Fourth, *Ledbetter* is not consistent with many Court of Appeals decisions that had held proof of an EPA violation also establishes a per se Title VII violation. *See, e.g., Kovacevich v. Kent State University*, 224 F.3d 806 829 ("In this Circuit, a finding of liability under the Equal Pay Act requires a similar finding of liability under Title VII where both claims present the same conduct and evidence.") The *Ledbetter* majority decision indicates that Title VII liability stands on its own merits and that the lower courts must separately analyze whether the evidence supports a violation of each statute.

Unanimous Court preserves regulatory exclusion of "companionship workers" employed by third parties from overtime requirements.

Long Island Care at Home, Ltd., et al., v. Evelyn Coke, 127 S. Ct. 2339, 168 L. Ed. 2d 54 (June 11, 2007).

This term, Justice Breyer, speaking for a unanimous court, authored an opinion holding that "companionship services" workers employed by third-party agencies (as opposed to being paid by the patient's family) are exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act. At stake was whether the U.S. Department of Labor (DOL) properly promulgated a regulation related to an exclusion of coverage for "companionship services"[1] workers pursuant to a 1974 amendment[2] which had extended protection to vast numbers of workers previously left out in the proverbial cold.

The Department of Labor subsequently issued two relevant regulations. The first, part of a set of "General Regulations," defined the term "domestic employment" as

> services of a household nature performed by an employee in or about a private home …*of the person by whom he or she is employed* … such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, lawndressers, caretakers, handymen, gardeners, footmen, grooms and chauffeurs of automobiles for family use [as well as] babysitters employed on other than a casual basis.

29 C.F.R. § 552.3

The second, set out in the "Interpretations" subsection, explains that exempt companionship workers *include* those

> who are employed by an employer or agency other than the family or household using their services … [whether or not] such an employee [is assigned] to more than one household or family in the same workweek.

29 C.F.R. § 552.109(a).

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[1] Companionship services workers are defined thus: "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary [of labor]." 29 U.S.C. § 213(a)(15).

[2] 29 U.S.C. § 206(f).

As the ranks of companionship workers caring for severely impaired disabled and elderly clients have swelled, the DOL repeatedly debated whether to narrow the exemption to require overtime for workers paid by third parties. Many companionship workers do not receive employment benefits and routinely work in excess of sixty hours a week. Industry representatives and some elder care advocates argued against changing the regulation, concerned that worry about overtime liability would compromise their ability to provide needed around-the-clock care at affordable prices.

Plaintiff Evelyn Coke challenged her employer's failure to pay overtime. The district court rejected her contention that the so called "third-party" regulation was neither controlling nor valid, and dismissed her lawsuit. *Coke v. Long Island Care at Home, Ltd.*, 267 F. Supp.2d 332, 341 (E.D. N.Y 2003). On appeal, the Second Circuit reversed, finding the regulation unenforceable. *Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118, 133, 135 (2d Cir. 2004). Even after the decision was vacated by the Supreme Court and the Second Circuit was instructed to consider a recent DOL Advisory Memorandum explaining and defending the regulation, the Second Circuit was unpersuaded. *Coke v. Long Island Care at Home, Ltd.*, 462 F.3d 48, 50-52 (2d Cir. 2006) (per curiam). To resolve the issue, the Supreme Court accepted certiorari.

Coke asserted that 29 U.S.C. § 213(a)(15), which defines domestic services workers, does not apply to those who provide companionship services at the behest of agencies. First, she pointed to the context of the 1974 amendments themselves, which were intended to expand coverage, and noted that workers employed by certain large entities were already covered prior to their adoption. Second, she relied on statements made by some members of Congress during debates. Third, she pointed to the definition of "domestic service employment" contained in the Social Security statute, which covers domestic work performed "in a private home *of the employer*." 26 U.S.C. § 3510(c)(1).

The Supreme Court was not persuaded. The 1974 FLSA companionship worker amendment refers broadly to "domestic service employment" and expressly delegates authority to the DOL Secretary to flesh out the details. The Social Security Act, by contrast, specifically defines the term.

Coke also argued that the "General Regulation" defining domestic service employment, 29 C.F.R. § 552.3, should control. This regulation includes the same emphasis that the Social Security Act contains on the connection between the client and the employment relationship. The opinion does acknowledge that the two regulations are facially inconsistent, but rejects Coke's assertion that the General Regulation must control.

Judge Bryer pointed out, however, that the sole purpose of 29 C.F.R. § 552.109(a) is to explain the exemption's impact on individuals hired by third parties, whereas the General Regulation's focuses is on describing the kind of work in question. And, while the DOL vacillated over the years about the proper interpretation of the regulations, that

fact alone does not provide separate grounds for disregarding the present interpretation. On a similar note, even though the "Advisory Memorandum" in question was issued in response to the litigation, the Court found no evidence to suggest that it did not actually represent the agency's current fair and considered judgment.

Employers obtained another victory in what has come to be known as the "Roberts Court." This may not, however, be the end of the story. A new pro-employee administration could amend the regulation to extend coverage to employees of third-party agencies, or Congress could act to change the statute's language – a not uncommon result for unpopular Supreme Court employment decisions.

II. THE UPCOMING SUPREME COURT TERM

Three employment law cases are presently on the Supreme Court's docket for the 2007-2008 term. All three cases involve the resolution of significant conflicts among the Circuit Courts of Appeal.

May individual plan participants recover against ERISA fiduciaries for account losses attributable to defined contribution plans, and does Section 502(a)(3) permit participants to bring actions for money relief to compensate for losses directly caused by fiduciary breach (known in pre-merger courts of equity as "surcharges")?

La Rue v. Dewolff, Boberg & Associates, Inc., 450 F.3d 570 on rehearing, 458 F.3d 359 (4th Cir. 2006), *cert. granted*, 127 S.Ct. 2971, 168 L.Ed.2d 157 (June 18, 2007).

David La Rue brought suit under ERISA §§ 502(a)(2) and 502(a)(3), 29 U.S.C. §1132(a)(2) and 1132(a)(3) claiming that DeWolff breached its fiduciary duty by failing to invest his money in a 401(k) plan as he instructed, resulting in losses to his 401(k) account. In one of its early ERISA decisions, the Supreme Court held that in a § 502(a)(2) claim, the relief "inures to the benefit of the plan as a whole." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985). The Court reversed the lower court decision allowing a plaintiff to bring an individual § 502(a)(2) claim seeking compensatory and/or punitive damage when the insurance company waited six months before it approved the plaintiff's disability benefit claim. LaRue poses the same question addressed in *Russell* but the context of a losses sustained by his individual 401(k) account. The question is whether a participant in a 401(k) plan may recover under ERISA § 502(a)(2) when the relief requested is limited to the harm allegedly caused to the individual's account balance rather than to the entire 401(k) plan. The Fourth Circuit upheld the dismissal of LaRue's § 502(a)(2) claim on the ground that he was seeking non-class individual relief and that was not available because § 502(a)(2) limits the relief available to redressing injuries to the entire plan, not to individual accounts. The Third,

Fifth, Sixth[3] and Seventh Circuits have permitted recovery by either individual plaintiffs or classes of individuals under 502(a)(2). The Solicitor General has weighed in on the matter in favor of allowing plaintiffs to recover under § 502(a)(2).

The second question the Supreme Court will tackle is whether, under section 502(a)(3), which permits participants to obtain "appropriate equitable relief" for ERISA fiduciary violations, a participant may obtain "make whole" relief. For years, the Supreme Court has limited the kind of relief available under this section of ERISA to that which was traditionally available in equity prior to the merger of law and equity courts. For example, a party may recover equitable restitution when there is a "specifically identifiable" fund of money being held (wrongly) by another. *Sereboff v. Mid Atl. Med. Servs.*, 126 S. Ct. 1869, 1874 (2006) (allowing "recovery through a constructive trust or equitable lien on a specifically identified fund"). Legal restitution, however, is not permitted. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002). In LaRue, the plaintiff wants to recover for losses he allegedly sustained when his 401(k) funds were not invested as he instructed. Thus, the second question in the LaRue case again asks whether, when Congress authorized the recovery of "appropriate equitable relief", it meant to allow pension plans to be sued by participants seeking to recover what the Court has heretofore (even as late as the 2006 term) characterized as legal, not equitable relief.

The Solicitor General also supports the petitioner on the 502(a)(3) claim arguing that the equitable remedy of "surcharge" (which the solicitor, citing Black's Law Dictionary 1482 (8th ed. 2004), defines as "[t]he amount that a court may charge a fiduciary that has breached its duty"), was permitted in courts of equity prior to the merger. The Sixth Circuit[4], along with the Eighth and Ninth Circuits, have joined the Fourth Circuit in holding that monetary recovery is not permitted under 502(a)(3).

Just what is a "charge" of discrimination for purposes of determining whether a complaint is timely made?

Holowecki v. FedEx., 440 F.3d 558 (2nd Cir. 2006), *cert. granted,* 127 S.Ct. 2914, 168 L. Ed. 2d 242 (June 4, 2007).

In order to file suit under the Age Discrimination in Employment Act (ADEA), plaintiffs first need to file a "charge" with the EEOC. That charge must be filed at least 60 days before a suit is filed and, in deferral states such as Tennessee with their own state

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[3] *Kuper v. Lovenko*, 66 F.3d 1447 (6th Cir. 1995)(participant allowed to recover losses to defined contribution plan caused by fiduciary breaches though his recovery was allocated to his individual account and not to all accounts in the plan).

[4] *Helfrich v. PNC Bank, Kentucky, Inc.,* 267 F.3d 677 (6th Cir. 2001).

laws and agencies, be filed within the earlier of 300 days after the occurrence or 30 days after the complainant receives notice of the end of the state law proceedings. *See* 29 U.S.C. §626(d). And, unlike the Title VII scheme, ADEA claimants only need to wait 60 days after filing the charge to file suit, rather than waiting until they receive a right to sue letter. *Compare* 29 U.S.C. §626(e) with 42 U.S.C. §2000e-5(e)-(f).

Fourteen former FedEx couriers alleged a pattern and practice of age discrimination by their former employer. The Second Circuit permitted eleven of those plaintiffs (the ones who had not previously filed a charge) to "piggyback" on the EEOC "charge" of Patricia Kennedy. The "piggybacking" issue was not the topic of dispute; rather, the question was whether Kennedy's contact with the EEOC should count as a "charge" of discrimination.

Kennedy filled out an EEOC intake questionnaire and a four-page verified affidavit detailing her complaints regarding what she perceived as FedEx's attempts to target older couriers for productivity and disciplinary action. The EEOC, however, never assigned the complaint a case number, never investigated or attempted to resolve the matter, and never notified the employer of the complaint.

The Second Circuit noted that the ADEA does not define the term, "charge," but that its regulations require merely that it be in writing (or reduced to writing by the EEOC) from the person making the charge, that it names the employer and that it generally describe the allegedly discriminatory acts. *See* 29 C.F.R. §§1626.3, 1626.6, 1626.8. It agreed with the approach of the Third Circuit that submissions need to indicate a "manifest intent" for the agency to begin its processes in order to qualify,[5] but concluded that individuals should not be foreclosed from suit because the EEOC fails to follow through on its end of the bargain.

Court will consider whether "Me Too" evidence was improperly excluded in ADEA disparate treatment case.

Mendelsohn v. Sprint/United Management Co., 466 F.3d 1223 (10th Cir. 2006), *cert granted by* 127 S.Ct. 2937, 168 L. Ed. 2d 261 (June 11, 2007).

Ellen Mendelsohn was selected for layoff, along with other Sprint employees. She brought suit under the ADEA. At trial, she sought to introduce the evidence of other older employees who were terminated at the same time who believed that they were selected because of their age. Her goal was to demonstrate a pervasive atmosphere of age discrimination. Sprint in turn sought to exclude all evidence of age discrimination not linked to Mendelsohn's supervisor. The district court agreed, excluding the testimony of

[5] *See Bihler v. Singer Co*, 710 F.2d 96, 99 (3d Cir. 1983) (the so-called "manifest intent" rule is an extra-regulatory requirement).

all Mendelsohn's proposed witnesses on that subject. The jury returned a verdict in favor of Sprint, and Mendelsohn sought a retrial. The Tenth Circuit agreed with Mendelsohn, finding the district court had abused its discretion by applying the "same supervisor" rule to an ADEA RIF case. The dissent argued that the Tenth Circuit erred in concluding that testimony from non-similarly situated employees is admissible where the plaintiff makes no independent showing of a company-wide policy of discrimination.

III. SIXTH CIRCUIT DECISIONS

A. Benefits

Pollett v. Rinker Materials Corp., 477 F.3d 376 (6th Cir. 2007), *rehearing, en banc, den.* 2007 U.S. App. LEXIS 16392 (6th Cir., June 26, 2007).

In February, the Sixth Circuit considered whether an employee who was suspended without pay was "actively at work for the purposes of qualifying for short-term disability benefits." The answer, based on the administrative record, was "no."

William Pollett was suspended without pay for three days during a company investigation of a broken conveyer belt and his response to it. Two days later, his physician declared him incapable of any work due to numerous ailments. He stayed out on leave for about one month. When he returned, he was terminated for plant safety violations, including the most recent incident and one involving the negligent operation of a fork lift a year previous. Pollett applied for short term disability benefits but was denied.

Employees must be "actively at work" when they notify the employer of their disability under the plan. "Actively at work" means they are at work the day immediately preceding an excused leave of absence. Pollett argued that a suspension without pay is an excused leave of absence. The Sixth Circuit disagreed, refusing to equate a unilaterally imposed penalty with an employer's decision to grant requested leave. Pollett's absence from work was not excused. It was imposed upon him, barring him from employment and its attendant privileges.

Administrators must interpret plans in accordance with plain meaning as understood by an ordinary person.[6] Two of the three judges concluded an "excused leave of absence" did not include a suspension without pay. The opinion notes that a more difficult question would be presented where an employee is suspended with pay, but declines to answer that question.

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[6] *Morgan v. SKF USA, Inc.*, 385 F.3d 989, 992 (6th Cir. 2004).

B. Family and Medical Leave Act

Repeated angry comments by supervisor, temporal proximity and factual questions about whether employee's work restrictions were reason for firing result in denial of summary judgment.

Bryson v. Regis Corp., 2007 U.S. App. LEXIS 19481 (August 16, 2007).

Supercuts store manager Karen Bryson was told by her doctor on December 3rd that she needed knee surgery, which was scheduled for December 16. She informed her supervisor on December 6th that she would be absent, and the supervisor told her she would not be permitted leave. Bryson tried to reschedule the surgery, but her physician instructed her that it could not wait.

The supervisor's response was to threaten Bryson with termination and engage in other retaliatory behavior. She alternately described her to other Regis employees as a cripple, a faker, and selfish bitch. Nonetheless, Bryson completed the paperwork, requesting leave between December 16 and January 1. This request was granted by Regis' corporate offices. Curiously, the company explained that it would not count her use of paid leave against her FMLA entitlement.

Bryson developed complications, and timely filed a request for an extension of leave, to which Regis responded with a letter explaining that she needed to return to work by March 10 - - the day her 12 week entitlement expired.

Two days prior to her scheduled return to work, Bryson and her physician completed different parts of her return to work form. Her physician's RTW certificate indicated that Bryson "could not return at this time." Bryson mailed the form on March 8, but it was not received by Regis until March 15, five days after she was terminated.

Bryson called her supervisor on March 8th, leaving a message updating her on her ability to return to work with some restrictions. On March 9th, she called a senior manager who worked closely with Bryson's supervisor and left a similar message. The manager allegedly told Bryson she didn't think "corporate or [the supervisor] would go for that [performing work while seated]. Bryson received the termination letter on March 11.

Without question, Bryson engaged in protected activity by taking leave, and suffered adverse action in the form of termination. The district court, however, concluded she could not show a **causal connection** between the two because she could not come back to work at the expiration of her leave.

The Sixth Circuit disagreed, noting that Bryson's termination, occurring on the precise date she was scheduled to return to work and without the employer's receipt of the doctor's statement was sufficient to constitute evidence of a causal connection.

Moreover, the information that she could not return could have come from the supervisor with the expressed animus toward her leave.

An inability to return to work is a legitimate, non-discriminatory reason to terminate an employee whose FMLA entitlement runs out, and there is no "interference" under those circumstances – – even if the knowledge of inability is gained after termination. For retaliation purposes, however, employers cannot rely on "after acquired evidence" to insulate themselves for decisions made prior to knowledge of an employee's inability to return to work. Put another way, an employer cannot wash away the sin of deciding to fire someone because they took leave by later claiming it does not matter because the employee could not come back to work anyway.

Bryson's termination letter was sent five days prior to the company's receipt of the problematic physician certification statement. Thus, the company had to be acting on some other basis, and there were genuine factual questions about whether the direct supervisor's animus played a role in the decision to terminate.

Lessons here? Never let frustration about difficulties with workload be expressed as personal attacks, and be sensitive to the warning signs of a supervisor who is placing you at risk. If the information about an individual's proposed return to work is not clear, exercise a little extra patience. Had Regis waited to drop the hammer until it was clear that she could not return to work, it would have been in a much stronger position.

Employer not estopped from denying second FMLA request by ineligible employee where it had wrongly approved a previous request.

Mutchler v. Dunlap Mem'l. Hosp., 485 F.3d 854 (6th Cir. 2007).

Carol Mutchler, a registered nurse, requested and was approved for medical leave in order to obtain treatment for bilateral carpal tunnel syndrome - - one surgery at a time. The employer apparently relied upon the verifications of employees as to the number of hours they had worked rather than independently verifying eligibility.

Mutchler's leave request covered the period necessary to recover from surgery on the left hand. While she was out, the human resources manager discovered that Mutchler had actually worked only 1,242.8 hours. The human resources manager told Mutchler while she was recovering from the initial surgery her initial leave would be allowed, but that her second request would not qualify for FMLA protection. Mutchler completed the second surgery, and she was bumped into an alternate position in which she made less money.

Plaintiff argued that though she did not actually work 1,250 hours, her "hours of service" for FMLA purposes included the additional ten hours per week for which she was routinely compensated for under the "Weekender Program." The extra pay Mutchler

received was an incentive designed to entice nurses to be available to work weekend shifts if necessary (i.e., non-compensable waiting time).

The district court rejected Mutchler's argument, concluding that she was not an "eligible employee." The court disregarded the extra pay because it was not "hours worked."

The FMLA regulations, at 29 C.F.R. § 825.110(c), reinforce the district court's conclusion.

> [W]hether an employee has worked the minimum 1,250 hours of service is determined according to principles established under the [FLSA] for determining compensable hours of work (see 29 C.F.R. part 785). The determining factor is the *number of hours an employee has worked* for the employer within the meaning of the FLSA … any accurate accounting of *actual hours* worked under FLSA principles may be used. (Emphasis added.)

Next, Mutchler argued the hospital should be *equitably estopped* from denying her leave pursuant to 29 C.F.R. § 825.110(d) which provides, "If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility." Noting that some other Circuits have found 29 C.F.R. § 825.110(d) invalid, the Sixth Circuit stated that in any event estoppel did not apply to the circumstances of this case. Here, there were two separate requests for leave for finite periods of time, and the employer advised her that the second request would not be covered. Plaintiff's argument that her second request was an extension, rather than a new request, proved unavailing.

Finally, Mutchler asserted a common law estoppel claim. To prevail, she needed to show 1) a representation of a material fact; 2) awareness of the true facts by her employer; 3) either actual or implied intent by her employer that she act upon the represented fact; 4) her own ignorance of the true facts; and 5) detrimental and justifiable reliance. *See Tregoning v. Am. Cmty. Mut. Ins. Co.*, 12 F.3d 79, 83 (6th Cir. 1993) (quoting *Armistead v. Vernitron Corp.* 944 F.2d 1287, 1298 (6th Cir. 1991). Unfortunately for Mutchler, her claim fell apart. As to the first surgery, she could not demonstrate detrimental reliance. As to the second, she chose to move forward with the surgery in spite of being forewarned that the employer had determined she was ineligible.

The Sixth Circuit affirmed the grant of summary judgment to the employer. Ironically, had Mutchler simply submitted and been granted leave based upon a single request for the entire period, the result would likely be different. And, though this employer emerged "victorious," its sloppy leave processing procedures created an expensive legal nightmare, which could have ended very differently. Lesson here? Don't rely on an employee's assertions that he or she qualifies for leave. Take time to

thoroughly review the employee's eligibility at the time of the request and be specific in your written response. If an error is discovered, communicate clearly and quickly and allow the leave request to play itself out before moving the problem forward.

C. Sex Discrimination

Employer could <u>not</u> "reasonably rely" on predetermined and fishy psychiatrist's findings regarding two female police officers.

Denhof v. City of Grand Rapids, 2007 U.S. App. LEXIS 18170 (6th Cir. 2007).

Patricia Denhof and Renee LeClear were part of a 2001 lawsuit filed by nine female police officers, alleging discrimination, harassment and retaliation. A state court judge held an eight day hearing to determine whether to grant injunctive relief to Denhof, who alleged, among other things, that fellow police officers tapped her home phone, attempted to break in to her house and failed to provide requested backup. The judge declined to grant the request, casting doubt upon Denhof's veracity.

Ten days later, the Police Chief sent a letter to the police psychologist, inquiring whether Denhof should undergo a fitness for duty examination. Most problematic were comments made by Denhof to her supervisor to "spread the word that I will kill anyone who comes into my house."

The psychologist, Dr. Peterson, recommended a fitness for duty examination. Before even examining Denhof, Peterson observed in his letter

> Clearly, the tension between Ofc. Denhof and the department has escalated to such a degree that it is difficult to imagine how she could continue to work in this environment . . . We can argue for years about whose fault it is, but at some point we are best off simply separating, for the good of all persons involved.

Denhof was ordered to submit to the examination, was stripped of her badge and weapon, and placed on paid administrative leave. The psychologist administered a battery of tests and found Denhof unfit for duty.

The City held a meeting with Denhof, who submitted reports from a treating psychiatrist and psychologist, but denied her request for a second opinion and never provided the contradictory reports to Peterson. She was later placed on unpaid leave and threatened with termination for failure to follow treatment recommendations. When she pointed out that she'd never received any treatment recommendations, a follow-up meeting was scheduled with the psychologist. It did not go well.

Denhof brought her lawyer to the appointment, and Dr. Peterson declined to see her. He later made written treatment recommendations suggesting that Denhof had a

personality disorder and needed counseling and medication. The plaintiff, in conformity with the treatment recommendations, saw both her psychiatrist and psychologist, who disputed Peterson's conclusions regarding the alleged personality disorder and her fitness for duty. Her treating psychiatrist declined to prescribe medication. Denhof provided her care-givers' opinions to the City.

The City did not respond. Three months later Denhof received a letter stating that her reinstatement was not available because she "refused to follow the treatment recommendations" of the police psychologist.

Renee LeClear, another state court claimant was involved in a 1998 fatal shooting of a suspect. The Chief received a copy of a report prepared by LeClear's psychiatrist and psychologist as part of the discovery process. The report indicated she had symptoms "consistent with Post-traumatic Stress Disorder (PTSD)." The Chief wrote Dr. Peterson inquiring whether a fitness for duty evaluation was warranted. Peterson recommended both immediate referral to a PTSD specialist and an evaluation. One month later, LeClear's badge and firearm were confiscated and she was instructed to see Peterson.

Dr. Peterson declared LeClear unfit for duty, but not because of PTSD. Instead, he concluded she had a personality disorder. No treatment recommendations were made. LeClear's providers declared her fit for duty. The City Manager then wrote back, explaining that, since she'd not been provided treatment options, another meeting with Peterson was scheduled. When LeClear showed up with her lawyer in tow, Peterson cracked open the office door, told her he had no recommendations, and her appointment was canceled.

Notwithstanding, three weeks later, Peterson provided recommendations including group and individual therapy sessions and consultation with her treating doctors. After her physicians disputed Peterson's diagnosis, the City did not respond.

The district court concluded the evidence could only support a finding that Chief Dolan reasonably relied on Dr. Peterson's opinion that the plaintiffs were unfit for duty and his reliance was reasonable. The Sixth Circuit has previously held that where an employer takes an adverse action in the honest belief of information provided by a third party, the plaintiff cannot prevail by showing that the belief was mistaken. To prevail the plaintiff must show that the employer's reliance was unreasonable. *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998). This has been known as the "honest belief" rule.

The Sixth Circuit held that under these circumstances, a reasonable jury could have concluded that Dolan's reliance on Peterson was *unreasonable*. The decision was based on a number of factors including: that Peterson had prejudged Denhof, showing that he was predisposed to declare her unfit; that Dolan waited two months to suspend

Denhof after the injunction hearing, belying his expressed concern that she posed a workplace danger; that Peterson had recommended that LeClear be immediately referred to a specialist but Dolan did not follow that recommendation; that Peterson's behavior during his appointments with the plaintiffs was suspect and he told LeClear that he had no treatment recommendations but then issued recommendations. In short, there was ample evidence that reliance on Peterson was unreasonable and that his decisions were result oriented, which a jury could have concluded was predetermined.

Several lessons can be learned from this case. If an employer is relying on a physician's opinion to take an adverse employment action, it should ensure that it is not too cozy with the physician; if the physician issues recommendations they should be followed (i.e. don't choose the ones you like and ignore the rest); and if the employer makes decisions based on an avowed concern over work-place safety, don't sit on them for weeks or even days – act promptly.

Under Pregnancy Discrimination Act and Title VII, decision to characterize leave as not creditable toward retirement was discrete, time-barred act, though impact was delayed until plaintiff's job was eliminated.

Leffman v. Sprint Corp., 481 F.3d 428 (6th Cir. 2007).

From 1973 until 2000, Linda Leffman worked for Sprint. Prior to the Pregnancy Discrimination Act's passage, she took maternity leave, losing time from creditable service. In 1978, Sprint docked her creditable service again when she had another child. Though she complained to her union representative, she took no other action.

In 1986, in response to an EEOC enforcement action, Sprint restored her 1978 creditable service. She inquired about whether she would receive credit for the earlier leave, but took no action when Sprint informed her that it would not.

In 2000, Leffman's job was eliminated and she was told that she could not receive Special Early Retirement ("SER") benefits under the company's pension plan because she did not meet the minimum established for eligibility. If the 1976 leave period counted, Leffman would have been eligible for benefits. She filed a discrimination charge and then suit.

The district court held that *United Airlines, Inc. v. Evans*, 431 U.S. 533 (1977) mandated dismissal of Leffman's claims because they were time-barred. In *Evans* the plaintiff flight attendant was terminated because she got married.. The policy violated Title VII, but the plaintiff did not file a timely charge. She was later rehired but United refused to take her prior service into account in determining her seniority. The plaintiff filed suit alleging the denial of seniority revived her old claim. The Supreme Court disagreed, finding that the discriminatory act was the termination. In now well known language, the Supreme Court held that, "A discriminatory act which is not made the basis

for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute period. It may constitute relevant background evidence . . . but separately considered, it is merely an unfortunate event in history which has no present legal consequences." *Id.* at 448.

The Sixth Circuit affirmed the district court's holding that *Evans* controls here. The act of discrimination was deducting the credited service from Leffman when she had her child in 1976, not applying that decision to severance benefits upon her layoff in 2000.

Employer has no duty to offer light duty work only to pregnant employees, just obligation to treat employees uniformly with regard to ability to perform job duties.

Tysinger v. Police Department of Zainesville, 463 F.3d 569 (6th Cir. 2006).

Patrol officer Teresa Tysinger learned she was pregnant in August of 2000, and almost immediately requested temporary reassignment out of concern for her fetus. No action was taken. In September, after having been involved in an altercation with a suspect, she presented a physician's note prescribing light duty work for the duration of her pregnancy. The employer responded that the Department had no light duty work and that she should remain off work until able to return to full duty.

Tysinger remained out on leave during the remainder of her pregnancy. Upon return, she filed a charge of discrimination, alleging pregnancy discrimination under Title VII, 42 U.S.C. §§2000e-(2)(a)(1) and 2000e-(k). She then brought suit under Title VII and the Ohio Pregnancy Discrimination Act (PDA).

Tysinger claimed she should have been accommodated by being permitted to work light duty and that she was treated differently than two "similarly situated" non-pregnant colleagues. The district court granted summary judgment in favor of the City, and the Sixth Circuit affirmed.

In order for her claim to survive summary judgment, Tysinger first needed to establish that 1) she was pregnant, 2) she was qualified for her job, 3) she was subjected to an adverse employment decision, and 4) a causal nexus existed between the pregnancy and the decision. *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000).

The Sixth Circuit held that Tysinger came up short as to the fourth element. To prove causation, Tysinger relied almost exclusively on what she claimed was disparate treatment of similarly situated non-pregnant employees. In order to give rise to an inference that the differing treatment was discriminatory, the comparables need to be similarly situated "in all relevant aspects," *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 353 (6th Cir. 1998). For pregnancy discrimination claims, the "relevant

aspects" are individuals' "ability or inability to work." *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996).

Two other employees who sustained non-work related injuries continued to work in spite of their inability to perform all their job functions. Both could not fully perform their jobs, and one went to significant lengths to conceal his injury from his supervisor. Importantly, neither requested any accommodation of their limitations, in spite of the fact that they could not run. They did have temporary infirmities; however, they presented themselves (albeit falsely) as capable of performing full duty work. Thus, they were not similarly situated to Tysinger.

The PDA does not require employers to give preferential treatment to pregnant employees. It does require employers to treat pregnant workers the same as similarly situated non-pregnant employees. *Ensley-Gaines,* 100 F.3d at 1226. The Sixth Circuit explained that the law only mandates that Tysinger be treated no differently than other non-pregnant workers, not that her pregnancy be accommodated.

The Sixth Circuit next held that, even assuming the other officers were permitted *de facto* light duty work while Tysinger was denied such a request, she could not rebut the legitimate, non-discriminatory reason articulated by her employer -- namely -- that it had no policy permitting light duty assignments for police officers. To the contrary, the City's policy prohibited such assignment (which probably explains the behavior of the other two officers). Tysinger claimed the policy was an "insufficient" explanation for the denial of her request, based on the *de facto* modified duty policy she claimed existed for the two male officers discussed above. The argument was rejected.

So what does this all mean? Take the time to develop integrated leave and light duty policies which will be applied consistently and uniformly to all employees. Had the facts been slightly different here, i.e., the coworkers reported their medical conditions and were granted temporary job changes, *or* the supervisor had instructed Tysinger to stay home out of his concern for her health/fetus rather than vice versa, this case could have gone the other way.

Temporal proximity alone suffices to show causal nexus at prima facie stage in pregnancy case.

Asmo v. Keane, Inc., 471 F.3d 588 (6th Cir. 2006).

Corporate headhunter Susan Asmo was laid off in December 2001, shortly after her announcement in September 2001 that she was pregnant with twins. Her subsequent suit alleged her termination was the result of her pregnancy. After the district court granted her former employer's motion for summary judgment, Asmo appealed.

The Sixth Circuit concluded that Asmo had met her prima facie case burden, demonstrating 1) she was pregnant, 2) she was qualified, 3) she was subjected to an adverse employment action and 4) there is a *nexus* between her pregnancy and the decision. *Cline v. Catholic Diocese*, 206 F.3d 651, 658 (6th Cir. 2000) (emphasis added).

In age-based reduction in force cases, plaintiffs can meet the fourth element only if they show evidence tending to indicate that the employer singled out the plaintiff for the RIF for impermissible reasons. *Barnes v. Gencorp Inc.*, 896 F.2d 1457, 1465 (6th Cir. 1990). The court declined to determine whether that requirement applies in the pregnancy discrimination setting, because even if it did apply, showing a "nexus" should suffice, said the court, to meet the heightened burden in a RIF case.

The court held, for the first time as far as we can tell, that temporal proximity alone was sufficient to establish the required *nexus* to prove the *prima facie* case. As Judge Gibbons' dissent points out, this conclusion is contrary to abundant prior Sixth Circuit case law requiring the proximity in time to be coupled with other indicia of retaliatory conduct. Indeed the Sixth Circuit has continued to require evidence beyond temporal proximity. *Michael v. Caterpillar Fin. Svcs. Corp.*, 2007 U.S. App. LEXIS 18154 (July 31, 2007).

Moving on to the pretext issue, the court reversed the district court's finding for the employer. Asmo's supervisor claimed he looked at three factors in the decision: 1) tenure, 2) number of 2001 hires made by the recruiters, and 3) forecasted hiring needs for 2002. This was problematic for two reasons. First, Asmo testified that, in addition to those factors, he told her she was being terminated because of salary concerns, her expenses being higher than other recruiters, and because she had less "face time" with clients than others. However, by the time the company responded to the administrative charge, these reasons disappeared. Not only did they disappear as justification, they were false. Second, the stated reasons appeared inconsistent with the company's policies on reductions in force, which pointed to skills and performance history as factors.

In disturbing reasoning, the court focused significant attention on what it characterized as "ominous silence" to the announcement by Asmo at a staff meeting that she was pregnant with twins. While her colleagues responded with spontaneous well-wishing, her supervisor made no comment then or later, never inquiring whether she had questions about employee resources or leave. It is troubling that a supervisor's focus on the business at hand rather than congratulating the plaintiff on her pregnancy was deemed to be evidence of animus.

In addition, the court considered that a comment by the Regional Sales Vice President, who was not involved in the decision, was circumstantial evidence of a discriminatory atmosphere and hence, of animus against Asmo. When she informed the vice president of her termination and told him she was seeking legal counsel based on her belief that she was being terminated because of her pregnancy, he replied, "I don't blame

you, Susan. Do what you need to do." This too is contrary to existing Sixth Circuit case law which holds that a statement such as this by a non-decisionmaker constitute hearsay, because the statement is outside the scope of the quoted manager's employment. *Jacklyn v. Schering-Plough Healthcare Products Sales Corp.*, 176 F.3d 921, 927 (6th Cir. 1999); *Hill v. Spiegel, Inc.*, 708 F.2d 233, 237 (6th Cir. 1983).

Finally, the court held that while the temporal proximity, standing alone, was not sufficient to prove *pretext* (as opposed to establishing the fourth prong of the prima facie case), it could, when combined with all the other evidence, permit a reasonable jury to find that the stated reason was pretextual.

Judge Griffin, writing a dissent, strongly disagreed with the majority's analysis that temporal proximity can suffice, without other indicia, to meet the causation requirement.

Bottom line here? Temporal proximity, <u>especially</u> in pregnancy discrimination cases, is dangerous territory. Make RIF decisions in a deliberate, defensible manner, in conformity with existing policies. Create a documentary trail, and keep your messages (to the affected employee, and to those outside) consistent and truthful. Finally, while it might be tempting to adopt an "ostrich" approach to an employee's announcement of pregnancy, this is just as problematic as over-solicitous and nosy inquiries. Had Asmo's supervisor been able to respond to the announcement with a simple, "Wow, a double blessing, how nice for you. Let me know if you have benefit and leave questions or, better yet, call Benefits," the tale might have ended differently.

D. National Origin Discrimination

Manager's statements regarding employee's accent and speech patterns considered direct evidence of discrimination, shifting burden of persuasion and production to employer to show it would have made the decision not to promote him even absent the decisionmaker's bias.

Rodriguez v. FedEx Freight East, Inc., 487 F.3d 1001 (6th Cir. 2007).

Truck Driver Jose Rodriguez worked under the Human Resource Manager Rodney Adkinson. In June of 2002, he told Adkinson he was interested in becoming a supervisor, who recommended he enroll in a required leadership course. As three positions became open he applied but was rejected. The interviewing manager and another manager were told by Adkinson that Rodriguez was unsuitable because of his speech patterns and accent.

Rodriguez learned of the alleged statements and complained to Adkinson's direct supervisor and to other FedEx managers. No investigation or corrective action was taken.

Rodriguez did not complete the leadership course and resigned a year after he expressed interest in becoming a supervisor. His resignation letter and charge referred to race discrimination rather than national origin, but the Sixth Circuit recast Rodriguez's claims as being based on national origin. Rodriguez brought failure to promote and hostile work environment, as well as alleging constructive discharge.

With regard to his failure to promote claim, the court declined to apply the *McDonnel Douglas* burden-shifting framework and instead characterized Adkinson's comments as direct evidence of discrimination. It concluded that if the evidence was believed, the conclusion that unlawful discrimination was a motivating factor is inescapable. Hence, the burden of both production and persuasion shifted to the employer to prove it would have taken the same action even if it had not been motivated by impermissible discrimination. *See Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000).

The court was less sympathetic to Rodriguez's hostile work environment and constructive discharge claims. Rodriguez claimed that hearing of Adkinson's remarks, and having been given the "run around" by him and being encouraged to keep taking classes, constituted a hostile work environment so humiliating and degrading he was forced to quit. Simply put, those facts do not add up to a hostile work environment. An individual's work environment has to be more than frustrating for the working terms and conditions to change so significantly that they will be characterized as a hostile environment. And, relying on *Hartsel v. Keys*, 87 F.3d 795, 800 (6th Cir. 1996), (no constructive discharge where plaintiff perceived employer failed to promote him to his rightful position), the court granted summary judgment to FedEx on the constructive discharge claim as well.

E. Race Discrimination

Failure to timely provide training can be an adverse action, and employer can lose honest belief defense if it cannot show <u>reasonable</u> reliance.

Clay v. United Parcel Service, Inc., No. 04-1262 (August 31, 2007).

A recent Sixth Circuit race discrimination decision raises troublesome issues for employers in disparate treatment claims. *Clay* involves an appeal by three UPS employees, only one of whom, Olin Clay, is notable. The district court granted summary judgment on Clay's discrimination and retaliation claims and the Sixth Circuit reversed. In doing so, the Court addressed the "honest belief" rule in new and somewhat cryptic ways.

Clay, an African American, was a "feeder driver" for UPS, an entry level position. He claimed that his supervisor's failure to train him for a "long-distance" driving job was

discriminatory. On December 18, 2000, Clay filed a race discrimination charge with the EEOC over the lack of training which would have led directly to a $1 per hour higher paying position. In April 2001, Clay was advised by a psychiatrist to stay off work due to depression. Clay received a right to sue letter on his charge on June 19, 2001. On July 27, 2001, Clay secured a work release from his psychiatrist. UPS management told Clay that his release was "no good" and to submit additional medical details. Clay's physician faxed his diagnosis to the company on August 7, 2001. Clay was not returned to work. On August 22, 2001, UPS sent Clay a termination letter, terminating him for an "unauthorized leave of absence."

In a post termination grievance proceeding, UPS told Clay that he could return if he was cleared by the UPS doctor. He was seen by the doctor on September 21, 2001, but not told to report to work. Wisely or not, Clay turned his cell phone off from September 21 to September 26. On September 26, he retrieved several messages from dispatch calling him back to work. On October 1, Clay received a letter dated September 26, advising that he was terminated or had voluntarily quit due to a 3-day "no-call, no show." Unfortunately for UPS, its manager testified that Clay was not recorded as released to work until September 25 – thus the letter went out after only two days.

Clay sued for discrimination over the training and retaliation for his termination after he filed his EEOC charge. The district court granted summary judgment. Judge Karen Nelson Moore reversed on both claims. As to the training, the court found UPS's stated reason, that it suspended long-haul training because it had hired forty new feeder drivers who needed training was pretextual because the company records arguably reflected far fewer new hires. Also, the supervisor had stated that the failure to train Clay was merely a "mistake", which was at odds with the excuse that he was too busy training new drivers.

As to the retaliation claim, UPS relied on its "honest belief" that Clay had missed three days. Judge Moore held (correctly) that to establish its honest belief, UPS had to establish its "*reasonable reliance* on particularized facts that were before it at the time of the decision.' *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 707-08 (6th Cir. 2006). Judge Moore held, for apparently the first time in the Sixth Circuit, that "the *burden is on the employer"* to point to specific facts that it had at the time the decision was made which would justify its belief in the proffered reason. Given its manager's testimony that Clay was only considered available for two days, not three, when UPS sent its termination letter, UPS failed to meet its "burden" of establishing the good faith defense.

In light of a vigorous dissent by Judge Batchelder that Judge Moore was engaging in burden shifting that was contrary to prior case law, Judge Moore elaborated that the employer must "demonstrate" honest belief as a "last ditch defense" if the plaintiff has established that the employer's reason was "mistaken, foolish, trivial, or baseless." The court held, "The honest belief rule is, in effect, one last opportunity for the defendant to prevail on summary judgment. The defendant may rebut the plaintiff's evidence of

pretext, by demonstrating that the defendant's actions, while perhaps 'mistaken, foolish, trivial or baseless,' were not taken with discriminatory intent." Thereafter, Judge Moore indicated that this rationale was not improperly shifting the burden to the defendant. Whether this rationale will be followed broadly by the Sixth Circuit remains to be seen - - it appears to be contrary to well-established Supreme Court and Sixth Circuit case law that the employer only has to articulate its legitimate non-discriminatory reason for its actions and then the burden lies with the plaintiff to prove pretext. Stay tuned.

Placement on administrative leave and/or improvement plan could be adverse action for retaliation purposes, but employee could not rebut employer's explanation.

Michael v. Caterpillar Fin. Svcs. Corp., 2007 U.S. App. LEXIS 18154 (July 31, 2007).

Shonta Michael brought a race discrimination, hostile work environment and race-based retaliation lawsuit against her employer after a series of conflicts with her supervisor and the grumblings of her subordinates bubbled over, resulting in her being placed on a 90 day performance improvement plan. Michael claimed her employer's actions violated Title VII of the Civil Rights Act of 1965, *42 U.S.C.* § 2000e *et seq.*, § 1981 of the Civil Rights Act of 1991, *42 U.S.C. § 1981*, and the Tennessee Human Rights Act (THRA), *Tenn. Code Ann*. § 4-21-101 *et seq.* The district court granted summary judgment in favor of Caterpillar, and the Sixth Circuit affirmed.

The conflict between Michael and her supervisor began when she was allegedly late to a departmental meeting. Only a few days later, however, she received a positive written performance evaluation at which she received an "Eye on Quality" $50 cash reward for customer service and for demonstrating the virtues of "responsibility," "care for others," and "exceeding expectations."

After the performance review, Michael was late to a second departmental meeting held, but there was no contemporaneous documentation. Two days later, Michael worked from home in order to complete a time-sensitive report without seeking supervisory approval. The same day, one of Michael's subordinates complained that she made him perform personal tasks and called him at home regarding work as early as 5:00 a.m. An investigation followed, and a meeting was scheduled on January 20th to discuss the "absence." True to form, she was fifteen minutes late for the meeting.

The meeting went down hill from there. Michael claimed her supervisor jumped up and down on her chair, pointed her finger in her face and got so close she could smell tobacco on her breath. The supervisor claimed Michael was the aggressor, slapping the desk, screaming and refusing to leave the room.

Human Resources investigated the conflicting complaints and interviewed all of Michael's subordinates. Another subordinate related similar personal errand issues, and an individual who overheard the confrontation confirmed the supervisor's version, i.e. that Michael was screaming at the meeting. Other non-subordinates expressed frustration that Michael was frequently late to meetings, had trouble completing tasks on time, and sometimes missed scheduled training sessions altogether.

Next, a meeting was held with management representatives. Michael asserted she was mistreated by her supervisor, but made no reference to race. Two days later she spoke to a Human Resources representative complaining of race discrimination. One day after meeting with Human Resources, Michael was placed on administrative leave pending further investigation. Four days later, she was offered the option of being placed on a ninety (90) day performance plan or accepting a lateral transfer with the same pay and benefits. Michael accepted the performance plan.

The improvement plan, which identified seven areas of needed improvement, included weekly feedback sessions with her supervisor. Michael resented her supervisor asking her subordinates about her actions, and filed an additional internal complaint alleging race discrimination.

The ninety day period was nonetheless successfully completed. Several months later, a company-wide reorganization resulted in the elimination of Michael's supervisory duties. About the same time, she was offered and accepted a transfer and 3% increase in pay to a position in Georgia. Nonetheless, Michael maintained her lawsuit.

With respect to her discrimination claim, Michael had to prove 1) protected group membership; 2) an adverse employment action; 3) her qualification for the position; and 4) different treatment than other similarly situated non-protected individuals. *See Warfield v. Lebanon Corr. Inst.*, 181 F.3d 723, 728-29 (6th Cir. 1999).

Neither the confrontation with the supervisor, nor her brief placement on administrative leave and the requirement to turn in her laptop, constituted adverse actions for the purpose of a discrimination claim. The performance improvement plan was likely not an adverse action, focusing as it did on communicating specific performance expectations. However, even assuming for argument's sake the action was materially adverse, the Sixth Circuit concluded there was no issue as to pretext.

The Sixth Circuit next analyzed the retaliation claim. There, the test of whether an action is materially adverse is whether it "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern v. White*, 126 S.Ct. 2405, 2415, 165 L. Ed. 2d 345 (2006).

The company was aware of Michael's internal assertions of the race discrimination prior to her placement on leave and on the performance plan. The court

concluded both that her brief placement on leave with pay and the performance plan might well dissuade a reasonable employee from making mistakes, and so, for retaliation purposes sufficed to meet "this relatively low bar."

The remaining element, that of causation, requires evidence sufficient to raise the inference that the protected activity was the likely cause of the adverse action. *Dixon v. Gonzales*, 481 F.3d 324, 334 (6th Cir. 2007). Temporal proximity, when coupled with other indicia, may be enough to establish a causal connection, said the court. *Randolph v. Ohio Dep't of Youth Servs.*, 453 F.3d 724, 737 (6th Cir. 2006). The temporal proximity between the complaint, combined with the fact that the supervisor was not warned or reprimanded, as well as the very recent positive evaluation and performance award, sufficed to establish a prima facie case.

Michael could nonetheless not defeat her employer's proffered reasons for its action. She needed to show that either the reasons 1) had no basis in fact; 2) did not actually motivate the decision; or 3) were insufficient to warrant the actions. *Hopson v. Daimler Chrysler Corp.*, 306 F.3d 427, 434 (6th Cir. 2002).

The court held that she could not establish that the reasons for 90 day probation were pretextual. Michael's disagreement with the facts uncovered in the investigation could not defeat summary judgment "as long as an employer has an honest belief in its preferred non-discriminatory reason." *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1117 (6th Cir. 2001). Notably, Judge Gilman correctly states the honest belief rule and placed the burden on the plaintiff to establish pretext which she could not do because of Caterpillar's honest belief in her performance deficiencies.

Federal agency's delay in responding to Freedom of Information Act Request for records regarding decision not to rehire FBI agent tolls the limitations period.

Dixon v. Gonzales, 481 F.3d 324 (6th Cir. 2007).

James Dixon, an African American FBI agent, worked in the Detroit field office and between 1981 and 1982 served as its Applicant Coordinator. Robert Reutter was his direct supervisor. Dixon complained Reutter behaved inappropriately toward him and another minority agent because of their race. Reutter was subsequently relieved of duties related to the Applicant Program by Anthony Davis, another African American.

A few months later, Dixon transferred to the White Collar Crime unit, where he remained until he left the Detroit office in 1986. Five months after Dixon's arrival, Reutter became the unit's head. Though the two did not have direct contact, Reutter was Dixon's second-line supervisor. Reutter had the authority to approve or disapprove of Dixon's evaluations, which were always favorable, including ratings of "superior" and "excellent."

Dixon resigned from the FBI in 1988 but applied for reinstatement in 1991. As part of its routine, the FBI began reference checking, including interviewing individuals identified by Dixon as references. John Anthony, who worked with Dixon in the 1980s, recommended against rehire based on an incident in which Dixon had admittedly changed a minority applicant's interview panel results from negative to positive. The FBI interviewed the other panel member who added that he had reported the behavior to Reutter. This member shared Anthony's concerns, stating it would be a "grave mistake" to rehire Dixon.

Reutter was then interviewed, and he recalled the incident and Dixon's admission that he had changed the interview score. Reutter recommended against rehiring Dixon On the other hand, a former supervisor and co-worker listed as Dixon's referrals both recommended reinstatement.

After review, the FBI wrote a later dated April 14, 1992, stating Dixon would not be reinstated. Dixon denied receiving the letter and claimed he did not learn of the decision until 1994 when he called to inquire about the status of the application. The FBI would only reveal that its decision was based upon some negative evaluations from some former colleagues and supervisors. Dixon submitted a request under the Freedom of Information Act ("FOIA") for his personnel file.

The FBI took **three years to respond**, providing him a copy in May of 1997. One month later, Dixon filed a formal EEO complaint, alleging that Reutter and the FBI retaliated against him for his earlier complaint of race discrimination. He then filed suit. The district court granted summary judgment in the FBI's favor on the ground that Dixon had not established a prima facie case. The Sixth Circuit affirmed.

The Attorney General argued Dixon's case was untimely. Federal employees only have forty-five days after the date of the alleged discriminatory act to make EEO contact. 29 C.F.R. §1614.105(a)(1). However, since it is merely a prerequisite and not a jurisdictional requirement, this period is subject to equitable tolling, waiver and estoppel. *Mitchell v. Chapman*, 343 F.3d 493, 498-500 (6th Cir. 2001).

Equitable tolling acts as a stop-watch, interrupting the running of the period, but not delaying the beginning of the "race." The Attorney General argued Dixon "should have known" Reutter played a role in the decision. The Sixth Circuit disagreed, stating the cursory information provided was not enough to alert Dixon to the possible taint of racial animus. His failure to earlier seek EEO counseling was due to circumstances beyond his control - - namely, a three year delay in providing the requested information. In spite of this, Dixon did not prevail.

Dixon alleged retaliation in violation of 42 U.S. C. §2000e-3(a), based on indirect evidence. Dixon engaged in protected activity and later suffered an adverse employment action. But in order to establish the necessary causal link, he needed to provide evidence

"sufficient to raise the inference that the protected activity was the likely reason for the adverse action." *EEOC v. Avery Dennison Corp.,* 104 F.3d 858, 861 (6th Cir. 1997). The burden is not very high, but the evidence has to be credible. *Id. at 861.*

In an opinion by District Judge Algenon L. Marbley, the Court held that Dixon failed to establish a causal connection between his race discrimination complaint against Reutter and a decision ten years later to reject his request for rehire. The court (correctly) held that temporal proximity alone is insufficient to establish causation; rather it must be "coupled with other indicia of retaliatory conduct." *Randolph v. Ohio Dep't. of Youth Servs.,* 453 F.3d 724, 737 (6th Cir. 2006.) The Court held that there was no temporal proximity. However, according to the court, this did not absolutely foreclose a finding of causation. Fortunately for the employer, the court found insufficient evidence of a causal connection in the record.

Reutter had been the second-line supervisor over Dixon for four years after his complaint and did not take any retaliatory action towards him. To the contrary, Reuttter approved a series of positive performance appraisal, which undercut the causal connection argument. Moreover, plaintiff failed to show that Reutter's negative comments likely caused the denial of his reinstatement request. It was the agent reviewing the request who called Reutther not the other way around, and this was only after two others and recommended against rehire.

Just how broadly the equitable tolling aspect of this decision will be applied is unknown. Private employees, unlike public employees, do not have rights under the FOIA or the Tennessee Public Records Act to obtain copies of their personnel files. Thus, presumably, it would not apply to private employers. Public employers, however, should timely respond to appropriate requests for public records, lest they inadvertently lengthen the statute of limitations.

F. Disability Discrimination

Employee whose injury rendered him incapable of job performance properly terminated, even if interactive process less than ideal.

Kleiber v. Honda, 485 F.3d 862 (6th Cir. 2007).

Michael Kleiber, a production worker, suffered a major head injury, and after lengthy hospitalization and rehabilitation, attempted to return to work while working with a state vocational rehabilitation specialist. Eleven months after the injury, he submitted a "Work Capacity Form" to Honda. Honda's representatives, including the plant placement leader and in-house nurse, immediately began identifying potential positions.

The Work Capacity Form was not specific enough, so Honda scheduled a meeting with Kleiber's vocational liaison. Honda asked for a fitness for duty examination by its

physician, who conducted a memory test and studied an earlier neuropsychological evaluation. The physician concluded there was no reason to expect significant future improvement in Kleiber's condition, that Kleiber couldn't work independently, needed a job where balance wasn't an issue, and couldn't perform rapid cyclical work or jobs requiring fine to motor medium dexterity. He also recommended a gradual return to work because of anticipated endurance and aural sensory overload problems.

After reviewing the physician's report, Honda concluded it had no appropriate Production Assistant positions to meet Kleiber's needs. Shortly thereafter, Kleiber's employment was terminated pursuant to a uniformly applied twelve month limitation on leaves of absences. Kleiber's vocational rehab liaison sent a follow-up letter asking for the results of the evaluation and exam, as well as on the jobs for which he was considered.

Kleiber filed a charge with the EEOC and later filed suit under the ADA for Honda's alleged failure to accommodate and refusal to participate in an interactive process. The district court granted Honda's motion for summary judgment on the grounds that Kleiber was not qualified for any position at Honda and he was not terminated because of his disability. The Sixth Circuit affirmed.

The ADA, at 42 U.S.C. § 12112(a), defines discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." Honda admitted it made no accommodation, but claimed Kleiber was simply not qualified for any of its vacant jobs.

To prevail on a failure to accommodate theory, an individual must show 1) he or she is disabled, 2) otherwise qualified a) without accommodation, b) with the removal of a non-essential job function or c) with reasonable accommodation. Then the employer bears the burden of showing 3) the challenged criterion really is essential or that the proposed accommodation will unduly burden it. *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 452 (6th Cir. 2004) *cert. denied* 543 U.S. 817, 125 S.Ct. 68, 160 L. Ed. 2d 25 (2004).

Kleiber sought transfer to another position as a reasonable accommodation under 42 U.S.C. § 12111(9)(B). Employers do not have to "bump" existing employees or create new positions. Honda's claim that it was not seeking any Production Associates during the relevant time was accepted, and Kleiber produced no evidence to the contrary. However, assuming *arguendo* one did exist, Kleiber could not actually perform any Production Associate job.

Kleiber claimed he could have done the exterior "wipe-off job" if given a job coach to help. The problem? Even the wipe-off job required dealing with raised platforms and uneven grates, which were beyond Kleiber's capabilities.

Next, Kleiber claimed he could not identify a particular job he was suited for because Honda "failed to engage in the required interactive process." The ADA regulations require employers and disabled applicants to participate as necessary to help identify appropriate reasonable accommodations. 29 C.F.R. § 1630.2(a)(3). This, said the court, "is mandatory and both parties have a duty to participate in good faith."

While the court recognized that the interactive process in this case was not ideal, Honda did engage in ongoing dialogue with Kleiber's vocational liaison. At the time, Kleiber appeared content to operate in that fashion. Ultimately, the court held that Honda had engaged in the interactive process in good faith, albeit without meeting personally with Kleiber. Finally, the court declined to opine whether, in an "interactive process" claim, a plaintiff must demonstrate that a reasonable accommodation would have been a possibility.

Head injury or not, employer may demand same behavioral standards of affected employee.

Macy v. Hopkins County School Board of Education, 484 F.3d 357 (6th Cir. 2007).

In April 2007, a panel the Sixth Circuit upheld a grant of summary judgment against a Kentucky teacher who claimed she was not reasonably accommodated and was retaliated against for filing an EEOC claim. The decision illustrates the reality that employers are entitled to apply standards of behavior to employees, even if the misbehavior is the result of an undisputed disabling condition.

Sharon Macy suffered two brain injuries in separate accidents about ten years apart. When she returned to work, the Board developed a written plan detailing her conditions and a list of accommodations. Over time, Macy and her principal butted heads about her needs, resulting in at least ten complaints. All issues save one were resolved to Macy's satisfaction. Macy requested a teacher's aide which was denied.

Macy also filed an EEOC charge, claiming she was sent a reprimand regarding tardiness when other non-disabled teachers engaged in similar conduct with no consequences. Eight months later, Macy was involved in an incident which led to her criminal conviction and eventual termination.

On November 1, 2000, Macy confronted a group of unsupervised middle school boys playing basketball. According to them she threatened to kill them and told them that "she meant it." She also berated them about their illegitimacy and their own sexual activities, claiming men raped women, got them pregnant, and abandoned them. Macy was later convicted of terroristic threatening, and the administrative tribunal which heard her appeal of the termination decision also concluded the event occurred.

The superintendent immediately investigated the boys' charges and conducted a broader inquiry into whether there were other similar problems. There were, and the Board determined that this incident was consistent with a number of prior incidents of inappropriate conduct.

Macy had previously left work without signing out or getting her "bus duty" covered, pushed a chair off a stage, called a student "a total loser," violated grading policy, kicked a trash can in anger, denigrated a parent and other employees to a classroom full of students (and another parent), sent a fake detention note to the assistant principal, had a violent, derogatory outburst at a meeting, and declared she wouldn't follow discipline policies. The Board terminated Macy.

The Sixth Circuit assumed Macy met her prima facie burden and focused on whether the legitimate, nondiscriminatory reasons for her termination were pretextual. Macy argued first that the charges had no basis in fact. *Cf. Abbott v. Crown Motor Co.*, 348 F.3d 537, 544 (6th Cir. 2003). On this point, Macy was constrained by issue preclusion. Both the administrative tribunal and the criminal court found she actually had made the threats against the boys, and the administrative tribunal also concluded that many of the other allegations lodged against her were true. Macy could not argue to the contrary as a matter of law.

Next, Macy argued the incidents did not actually motivate the termination decision, emphasizing that she had never been placed on a corrective action plan in the past. However, the information about her other inappropriate behavior was only gathered after the threatening incident <u>and</u> in connection with its investigation.

Finally, Macy argued the articulated reason was insufficient to motivate her termination on the grounds that another nondisabled employee was treated differently for the same behavior. The Sixth Circuit noted that the two situations were distinguishable on the grounds that making a comment to a teacher's aide was far less severe than making repeated, direct threats to the students themselves.

G. Age Discrimination

Sixth Circuit overrules prior ADEA decision requiring additional proof of discriminatory animus in cases involving facially discriminatory policies.

EEOC v. Jefferson Cty. Sheriff's Dep't., 467 F.3d 571 (6th Cir. 2006).

In October of 2006, the Sixth Circuit, sitting en banc, reversed a panel decision which had granted summary judgment to an employer whose disability-retirement benefits plan excluded employees who were still working beyond retirement age from

collecting disability benefits.[7] Instead, the Sixth Circuit concluded that the EEOC had established a prima facie ADEA claim because the plan, on its face, is facially discriminatory on the basis of age. Further, the court held that where the plan is facially discriminatory, no additional proof of discriminatory animus is required in order to establish the prima facie disparate treatment claim. In so doing, the court overruled an earlier decision, *Lyon v. Ohio Education Association and Professional Staff Union,* 53 F.3d 135 (6th Cir. 1995).

Charles Licktieg was a Deputy Sheriff with school-age children who kept working after he turned 55 the normal retirement age for workers with hazardous jobs. At 61, he became disabled and sought disability benefits. In response, the Kentucky Retirement Service replied,

> Our laws state that you must have at least 60 months of service credit, *be under age 55*, and apply within 12 months of you last day of paid employment in a regular full-time position to qualify for Disability Retirement. Therefore, you are not eligible to apply for Disability Retirement since you are over age 55 and in a hazardous position. (Emphasis added)

Neither party disputed the reality that youthful disabled workers were at a distinct advantage over their older colleagues. The EEOC did not challenge the "years of service" component of the criterion, but rather focused on the age limitations on disability retirement benefits.

The Sixth Circuit reasoned that the retirement plan's terms were facially discriminatory because it categorically excluded those over normal retirement age from participating.

The County argued that it was entitled to summary judgment on the grounds that the EEOC needed to demonstrate proof of discriminatory animus in order to prevail, relying on language in the Hazen Paper: "a disparate treatment claim cannot succeed unless the employee's protected trait *actually played a role* [in the employer's decision making process] and had a determinative influence on the outcome." *Hazen Paper*, 507 U.S. at 610 (emphasis added). The Sixth Circuit pointed out, however, that immediately prior to that language, the *Hazen* decision gave a formal, facially discriminatory policy as its first example of an intentional action.

More importantly, before *Hazen*, Congress passed the Older Worker Benefit Protection Act (OWBPA) in response to the Supreme Court's decision in *Public*

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[7] *EEOC v. Jefferson County Sheriff Dep.*, 424 F.3d 467 (6th Cir. 2005), *vacated on grant of reh'g en banc* (2006).

Employee's Retirement System v. Betts, 492 U.S. 158 (1989). *Betts* had upheld a disability benefit plan which excluded covered employees from disability retirement benefits once they reached 60 years of age, on the grounds that a then existing ADEA provision permitted age-based decisions pursuant to bona fide employee benefit plans provided there was no intent to evade the purposes of the ADEA. The OWBPA rolled back that language, removing the need for proof of subterfuge. 29 U.S.C. § 621. The Sixth Circuit held that this disability plan ran afoul of the OWBPA.

The Sixth Circuit reversed and remanded the case back to the district court for further proceedings. In so doing, it joined the Second, Seventh, Eighth, and Ninth Circuits in finding prima facie violations under similar circumstances.

In age claim, labeling a replacement as a "temporary worker" does not defeat conclusion that plaintiff was replaced. Sixth Circuit restores jury verdict in case where irksome older employee faced tougher consequences than similarly situated young employees, supervisor failed to complete her performance review as required, stripped her of job duties and made her "Supervisor of the Fridge."

Tuttle v. Metro Gov't of Nashville and Davidson Cty., 474 F.3d 307 (6th Cir. 2007), *petition for cert. filed at* 07/10/07.

The Metro Government of Nashville and Davidson County (Metro) learned the hard way how expensive the combination of a sympathetic plaintiff, poorly chosen words, conflicting stories, and inconsistent application of performance standards can be. The Sixth Circuit overturned a judgment as a matter of law in favor of the employer and restored a $199,200.00 (not including attorneys' fees) verdict in favor of a former accounting clerk in the Public Works Department.

Tuttle began working with Metro in 1994, working her way up to Account Clerk III, and receiving positive employment reviews. When a new supervisor arrived in 2000, Tuttle resisted instructions to correct payroll errors made by another employee and made a complaint to the human resources department that the new supervisor was shredding documents along with another coworker. That claim was investigated, but the result was inconclusive.

In October of 2000, the supervisor who had been the object of Tuttle's report submitted a negative job evaluation, rating her "below expectations" in peer relations. That supervisor retired. The newly arrived supervisor began hearing complaints about Tuttle, some of which involved disagreements with the other employee Tuttle had implicated in the previous shredding complaint.

In response, the new supervisor deprived Tuttle of all payroll responsibilities and began documenting Tuttle's performance issues. He also gave Tuttle the mock title

"Supervisor of the Fridge," requiring her to clean out the office refrigerator on a weekly basis.

Tuttle's new supervisor did not complete her performance evaluation, though he timely completed the performance evaluations of every other employee he supervised. He transferred Tuttle to an isolated job with twelve-hour shifts in October of 2001. Several weeks later, Tuttle filed an EEOC charge alleging age discrimination. The supervisor told her at the time of the transfer that it was temporary and would last no longer than 30 days. Five months later, when Tuttle was informed by the human resources manager that she must transfer out of the Department or receive an unfavorable evaluation and face demotion or termination, she was still working in the job.

When the evaluation was finally completed, it chastised Tuttle for her "poor social skills," "poor work habits," and "lack of honesty." Tuttle was terminated. She filed a second EEOC charge.

In a trial lasting four days, Tuttle testified about discriminatory age related statements made to her, including a supervisor's rhetorical query, "How old are you?. . .You will be retiring quicker than you think." A coworker who was sporadically delegated supervisory authority wrote an email stating, "This woman has no business on a PC." Another time, when Tuttle asked a supervisor whether he was trying to get rid of her, his response was, "There have been others, and they took their retirement or pension." He also remarked during a meeting with her that "I want to apologize to you for causing you stress. I wouldn't want anything to happen to my mom and dad."

Tuttle also claimed her job review was discriminatory, pointing to others who were treated more generally. One young employee was given the opportunity to correct documented deficiencies in working with others without suffering negative consequences. Another young employee made multiple payroll entry mistakes without ever being disciplined.

The supervisor who transferred her and recommended her termination gave conflicting explanations regarding his tardy review. First, he claimed it "slipped his mind." Next, he claimed he was "too busy." Finally, at trial, he claimed he did not complete it because he did not want to harm her chances of being able to transfer out of the department.

To establish her prima facie ADEA case, Tuttle needed to show 1) that she was at least 40 years old; 2) she was subjected to an adverse employment action; 3) she was otherwise qualified for the job; and 4) she was replaced by a younger worker. *Rowan v. Lockheed Martin Energy Sys., Inc.*, 360 F.3d 544, 547 (6th Cir. 2004). Metro claimed she had not been replaced. In fact, Tuttle's job duties were absorbed by a twenty-something female worker that the Department labeled "temporary." The Sixth Circuit was

unimpressed with the label, finding that for prima facie purposes, Tuttle was replaced with a non-protected worker.

As to pretext, the supervisor's inconsistent statements and the combined effect of age conscious statements made by Tuttle's two supervisors were enough for a jury to reasonably conclude the transfer and termination decisions were motivated by discriminatory animus.

On Tuttle's retaliation claim, temporal proximity between the initial EEOC charge and the completed negative evaluation, the threats she received and her subsequent termination, together sufficed to meet the causal connection requirements.

Lessons learned here abound: Be consistent in how you treat employees and in the way you communicate unpleasant realities. Document performance issues as they arise, not months later, when memories are stale and the stakes are high. Do not substitute humiliating job responsibilities for tough but real ones. Low performers should be dealt with firmly but with respect. Finally, always take a last, gimlet-eyed look at the documentation and facts before taking final action against an employee who has already filed an EEOC charge. Chances are good that someone other than the EEOC will be reviewing the record as well.

IV. FEDERAL LEGISLATION AND REGULATION

Fair Labor Standards Act

First hike in minimum wage rate in a decade takes effect in stages. Minimum wage raised to $5.85; will rise to $6.55 in 2008 and $7.25 in 2009.

Effective July 24, 2007, the new minimum wage was raised 70 cents per hour to $5.85. In July of 2008, the rate rises again to $6.55, and finally changes to $7.25 in July of 2009. The Department of Labor has issued new required workplace posters, copies of which may be found at www.dol.gov/esa/regs/compliance/posters/flsa.htm. Tennessee is one of the twenty-six states which do not have a minimum wage which is already above the federal minimum.

VI. TENNESSEE STATE COURT CASES OF NOTE

No privilege to interfere with contract where parent company does not have sole control.

Cambio Health Solutions, LLC et al., v. Reardon, 213 S.W.3d 785 (Tenn. 2006).

The Supreme Court of Tennessee recently settled an important question - - whether a tortious interference with contract claim can be based on directions from a parent corporation to a subsidiary where the subsidiary is not wholly owned by the parent. The answer is "yes."

Thomas Reardon owned Cambio which he sold to IRG, a wholly owned subsidiary of QHR, a wholly owned subsidiary of QHG. Reardon retained a 10% ownership in Cambio and extracted an agreement to pay him severance pay upon a "change in control" of Cambio or IRG. Triad subsequent purchased QHG. Reardon resigned and requested his severance pay. Triad, IRG, and QHR directed Cambio to deny the request and file for a declaratory judgment action in federal court. Reardon counterclaimed for breach of contract and tortious interference with contract under common law and Tenn. Code Ann. § 47-50-109.

At trial, the jury hit the employer with an award of $815,000 for breach of contract, and the parent companies with punitive damages ranging from $200,000 to $3,000,000. The Tennessee Supreme Court accepted certification of the question from the Sixth Circuit whether a parent can be liable tortious interference with contract where it has only majority, and not complete control, over the subsidiary.

The parent companies alleged they could not commit tortious interference with contract because of the Tennessee Supreme Court's decision in *Waste Conversion Systems, Inc. v. Greenstone Industries, Inc.*, 33 S.W. 3d 779 (Tenn. 2000). In that case the court held that a "parent corporation has a privilege pursuant to which it can cause a wholly-owned subsidiary to breach a contract without becoming liable for tortiously interfering with a contractual relationship." *Id. at 780.*

Here Tennessee Supreme Court declined to extend this privilege to subsidiaries which are not wholly-owned by a parent company. Wholly-owned parents and subsidiaries share a "complete unity of interest." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 81 L.Ed. 2d 628 (1984). The same cannot be said of corporations with minority shareholders, in which differing and frequently antagonistic interests are at stake.

Tortious interference with contract, which calls for treble damages, exists in addition to the rights of contracting parties, and protects against third party interference. The companies in question availed themselves of the benefits of separate corporate

identities, and, when hiring Reardon, created the minority shareholder situation they later found so vexing.

The Tennessee Supreme Court adopted a bright line rule against extension of the privilege where the corporation is not a wholly owned subsidiary, rejecting a case by case inquiry into whether the interests of the parent and subsidiary are actually aligned, noting that plaintiffs already face a steep battle in proving the tort of intentional interference with contract.

Tennessee Supreme Court holds that whether or not recreational activities are voluntary does not determine whether injuries occur in the course of and arise out of employment

Gooden et al., v. Coors Technical Ceramic Co., No. E2006-00836-SC-R3-WC, 2007 Tenn. LEXIS 779 (Sept. 6, 2007).

This case may place a serious damper on employee's down-time fun, if employers decide the risk of workers' compensation losses don't justify the productivity benefits gained when employees get a chance to play at work.

Greg Gooden, a night shift worker, died of a heart attack while playing a game of pick-up basketball during his thirty minute paid break. His widow sought workers' compensation benefits, which were denied. On appeal, the Tennessee Supreme Court concluded that Gooden's injuries qualified under Tenn. Code Ann. §50-6-103(a) (2005), i.e., they arose out of and occurred in the course of his employment.

"Arising out of" relates to causation, and is satisfied when a causal connection occurs between the working conditions and the injury. Whether an injury is "in the course of" employment necessitates an inquiry into the time, place and circumstances of the injury, and depends upon whether it occurs during working hours, where he may reasonably be expected to be, or whether he is fulfilling work duties or other incidental tasks.

Though Gooden had very bad arteries, the medical evidence indicated that the strenuous activity contributed to the event. Thus, the real question was whether he was injured in the course of employment.

Two years previous, the Tennessee Supreme Court barred recovery for a worker injured in a three-legged race at a company picnic, and indicated that its voluntary nature was the "touchstone" for determining whether recovery was appropriate. *Young v. Taylor-White, LLC*, 181 S.W.3d 324, 329-30 (Tenn. 2005). To the extent that language created the impression that voluntariness alone determined compensability, the Tennessee Supreme Court backtracked.

Here, Coors' required its employees to stay on premises during their breaks. It knowingly *permitted* the games, which occurred three to four times per week, acquiesced in the installation of the goal, and permitted supervisors to participate on occasion. All these factors, taken together, combined to make the games a regular incident of employment.

Don't fire the Good Samaritan - - Court of Appeals refuses to dismiss claim under public policy exception to at-will employment doctrine where employee left store to aid woman under assault.

Little v. Eastgate of Jackson, LLC, 2007 Tenn. App. LEXIS 242 (April 24, 2007).

Jason Little, a clerk at a beer and tobacco store, saw a woman being attacked outside the store where he worked. He ran outside with a baseball bat that was stored under the counter and scared the assailant away. He brought the woman inside and called the police. Two days later, along with his paycheck, Little received a separation notice stating

> [Little] took a baseball bat and left company property, while still on time clock and got involved in a fight across street from the store. This was none or our business, store cannot be put in this kind of liability situation.

Little filed suit, alleging he was terminated in violation of the public policy of the State of Tennessee. The company filed a motion for failure to state a claim, asserting that he was not terminated in violation of any clearly established public policy or for attempting to exercise statutory or constitutional rights. The trial court disagreed, relying in part on Tenn. Code Ann. § 39-11-612 (2003) (Defense of Third Person).

Though the Court of Appeals acknowledged that the exception to the at-will doctrine is to be narrowly applied so that the exception does not swallow up the rule, it nonetheless concluded that an exception was necessary in situations where an employee acts to rescue or protect another person he or she reasonably believes to be in imminent danger of death or serious bodily harm. In doing so, the court relied heavily on the only factually similar reported case which held it was a violation of public policy for an armored car company to fire its driver for getting out of the armored car to stop a knife wielding assailant attacking a victim. *Gardner v. Loomis Armor*, 913 P.2d 377 (Wash. 1996).

Under Tennessee Human Rights Act and Tennessee Handicap Act, no liability for employer where bullying supervisor was obnoxious to everyone.

Frye v. St. Thomas Health Services, 227 S.W.3d 595 (Tenn. Ct. App. 2007).

Joan Frye, a 54-year old accounting services manager for a large hospital system, learned recently that working for a horrible, abusive boss does not necessarily translate

into a courtroom victory. Frye filed suit under the Tennessee Human Rights Act, alleging age-based hostile work environment, retaliation, and wrongful disability-based discharge. The Court of Appeals at Nashville upheld the trial court's decision to enter summary judgment in the employer's favor and dismiss her claims.

Frye did not get along with Catherine Doyle, vice president of finance and controller at St. Thomas. While Doyle was out on maternity leave, Frye requested a lateral transfer from Doyle's supervisor, Ken Venuto. Doyle returned to work, and, upon learning of the contemplated move, met with Frye and demanded the transfer take place within two weeks, threatening to fire Frye for "chemistry." Frye speedily informed Venuto she would immediately accept a transfer to Baptist.

Venuto transferred Frye to a position managing the budget and reimbursement process at Baptist. The position had equivalent pay and benefits. Frye, however, claimed it was a demotion because she only supervised three instead of seven employees and because she reported to the controller instead of to Venuto.

Several months later, Frye took Family and Medical Leave for a physical and mental breakdown she attributed to the hostile work environment at St. Thomas. After the expiration of FMLA, she remained on leave. After having been absent for more than seven months and with no indication to her employer of her intent to return, Frye was terminated.

In a very employer-friendly decision, the Court of Appeals concluded that while Frye advanced evidence that the work environment was potentially hostile, there was no evidence (other than some conclusory deposition testimony by Frye) that Doyle was hostile toward her or anyone else *based on their age*. Doyle was found to be "an equal opportunity oppressor," using her dominant, abrupt, rude and oppressive management style on all employees with regard to age.

Plaintiff also alleged she was retaliated against for having complained about age discrimination. The court dispensed with Frye's argument by holding that lateral transfer was not an adverse employment action for the purposes of establishing a hostile work environment and hence, was not an adverse action for retaliation purposes. It would not be wise to assume that this opinion means that plaintiffs advancing only THRA retaliation claims will have to meet a higher standard for adverse action than those proceeding under Title VII theories. The opinion does not even mention *Burlington Northern and Santa Fe Railway Co. v. White*, 126 S. Ct. 2405, 165 L.Ed 345 (2006), under which the Supreme Court made it clear that, for retaliation purposes, the question is whether a reasonable person would be deterred by the activity in question.

VII. TENNESSEE LEGISLATIVE UPDATE

Physician non-competes. . . *They're baaaaack!*

For good or ill, the Tennessee legislature largely undid the work of the Tennessee Supreme Court in *Murfreesboro Medical Clinic, P.A. v. Udom*, 166 S.W. 3d 674(Tenn. 2005). That decision declared physician non-competes unenforceable unless specifically authorized by statute.

The new law addresses covenants not to compete in employment or contract for services settings. It deals separately with restrictions on competition in connection with the sale or purchase of a practice or its assets, which are given broader berth.

Restrictions on competition may be included in employment contracts, professional services contracts, shareholder and partnership arrangements and other contracts as long as they are 1) in writing, 2) signed by the parties, and 3) reasonable in scope.

To be reasonable, the restriction must be two years or less and either be restricted to a 10-mile radius of the physician's primary practice location or the county in which it is located, whichever is larger; or be limited to facilities where the employing contracting entity provided services while the physician was under contract.

Radiologists and emergency room physicians, along with osteopathic physicians, cannot be bound by non-competes. All other physicians, as well as podiatrists, chiropractors, dentists, psychiatrists and ophthalmologists can be. Also a non-compete agreement is not binding on a health care provider who has been employed or under contract with the employing or contracting entity for at least six years.

Non Smoker Protection Act snuffs out most workplace smoking.

Many Tennessee employers have opted for smoke-free workplaces for years, but smoking persisted in a few offices and a much larger number of manufacturing facilities, service businesses and restaurants. The passage of the Tennessee Non-Smoker Protection Act ("NSPA" or the "Act") during the legislature's latest session took some observers by surprise. After all, Tennessee is a state that bans employers from discharging employees solely because they use tobacco products. *Tenn. Code Ann*. § 50-1-304(e)(1). On October 1, 2007, however, nearly every workplace in the state will be "smoke-free" by law, and employers should be alerted both to the new requirements and the potential costs of ignoring them.

The Act is one of several recent victories for non-smoking advocacy groups, and its provisions most closely mirror Arkansas' "Clean Indoor Air Act of 2006."[8] When NSPA's provisions become effective this Autumn, employers, employees and the general public are in for some significant changes.

(A) What places are covered?

Found at *Tennessee Code Annotated* §39-17-1801 *et seq*., NSPA bans smoking in all "enclosed public places,"[9] subject to certain limited exceptions. It requires employers to notify existing employees and applicants of the restriction, as well as anyone who lights up in violation of the Act. Tennessee's Department of Health and its Department of Labor share investigatory responsibility and impose forms of "progressive discipline" against employers who permit smoking or fail to follow their notice obligations.[10]

"Places of employment," both public and private, are included in a long, non-exhaustive list of enclosed "public places" in which smoking is banned.[11] A "place of employment is any enclosed area under an employer's control and which employees normally frequent during employment."[12] Specifically excepted from "place of employment" are private residences, unless used for child, adult or health care facilities.[13] Additionally, some "public places" are not subject to the smoking restriction, namely: 1) businesses that employ three or fewer employees and at which the employer designates a restricted access smoking room; 2) private clubs; 3) age restricted venues; 4) nursing homes and long-term care facilities (with regard to residents only); 5) tobacco-related businesses; 6) commercial vehicles occupied solely by the operator; and 7) properly designated smoking rooms in hotels and motels.[14]

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[8] *Ark. Code Ann*. §20-27-1801 *et seq*.

[9] *Tenn. Code Ann*. §39-17-1803(a).

[10] The Act, at Section 2, also empowers both agencies to develop rules and regulations to effectuate its provisions. As of the date this article, no regulations have been announced.

[11] *Id.* at §1802(10); §1803(a).

[12] *Id.* at §1802(10).

[13] *Id*. at §1802(8).

[14] *Id*. at §1804.

Even where the number of employees is three or below, smoking must be conducted in areas not generally open to the public (an employee break room, for example, or an office which is off limits to clients or customers).[15]

Establishments cannot escape coverage merely by holding themselves out as private clubs. The Act requires they either be tax exempt veterans' organizations or auxiliaries or meet all the following criteria: have a permanent membership screening mechanism; limit access and use to members and guests; be controlled by and operate for the benefit and pleasure of its members; and, with the exclusion of membership drives, advertise only to members.[16] In short, if it looks and smells like a restaurant, it is an enclosed public place, no "butts" about it. On the other hand, smoking is permitted in age-restricted venues (e.g., bars, taverns or dance clubs).[17] Every person who seeks admission to the venue must be required to show identification indicating that he or she is over the age of twenty-one (21).

Though residents of nursing homes may smoke in conformity with whatever requirements the facility dictates, employees may not.[18] Properly designated hotel and motel rooms are not subject to the ban, however, so employees may apparently smoke in unoccupied smoking guest rooms if the employer so permits.[19] The sweep of the "enclosed areas" and "public place" definitions is so broad that smoking is banned in employer owned vehicles, except "commercial vehicles when such vehicle is occupied solely by the operator."[20] If "commercial vehicle" is interpreted in conformity with its U.S. Department of Transportation definition, all smoking is banned in the average company car, but permitted in heavy trucks and buses if occupied by the operator alone.

Non-enclosed areas of public places are not covered by the ban, so open air patios, porches, decks, and tents and awnings with the flaps or vents open are not banned areas, nor are buildings with garage doors, provided the bay(s) are actually completely open.[21]

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[15] *Id*. at §1804(6).

[16] *Id*. at §1802(9).

[17] *Id*. at §1802(2).

[18] *Id*. at §1804(5).

[19] *Id*. at §1804(2).

[20] *Id*. at §1802(5) and (10); §1804(10).

[21] *Id*. at §1804(4).

(B) Employer Responsibilities

Anyone who owns, manages, operates or controls any public place or place of employment where smoking is banned has responsibilities. First, the prohibition on smoking must be communicated to applicants and employees.[22] Second, "no smoking" signs or symbols must be clearly and conspicuously posted at every entrance to every public place and place of employment covered by the act.[23] Third, owners, managers, operators and employees "shall inform persons violating this part of the appropriate provisions thereof."[24]

(C) The consequences for violating the Act

What are the consequences for failing to provide notice to applicants, employees, the public and violators? The Act provides first for an initial written warning, then a one hundred dollar ($100) fine and, finally, a five hundred dollar ($500) fine for violations occurring within any twelve-month period.[25] Each day of a "knowing" violation counts as a separate and distinct violation,[26] so fines can add up quickly for those who have been given an initial warning by either the Department of Labor or the Department of Health.

One final, and very important word of warning to employers is in order. Because the Act so clearly enshrines public policy against smoking in public places, employers must handle employees who complain about violations of the Act with caution. NSPA expressly provides a complaint mechanism to be utilized by "any person."[27] Firing an employee because he or she complains about smoking coworkers or the public may well result in liability under the Tennessee Public Protection Act, *Tenn. Code Ann.* §50-1-304, as well as a potential common law retaliatory discharge claim.

(D) What's an employer to do?

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[22] *Id*. at §1803(b).

[23] *Id*. at §1805.

[24] *Id*. at §1806(e).

[25] *Id*. at §1807(b).

[26] *Id*. at §1807(c).

[27] *Id*. at §1806(c).

So what is an employer to do? Communicate NSPA's restrictions to applicants and employees (a concise, small print line on the application should suffice, as will a company-wide email or posting notices in conspicuous places). Enforce the ban on smoking inside, and create a clear policy regarding whether and where it is permitted anywhere outside. Post the required signs and symbols, or at least make sure the signs are posted at the entrances to the building in which the employer has offices. Consider a written policy in the employee handbook which communicates the above and encourages employees to report problems to management. And, in the event of a complaint, avoid characterizing the employee who makes the report as a "troublemaker" or "whiner" and prevent retaliation against the complainant.

VIII. TENNESSEE ATTORNEY GENERAL'S OFFICE

Vacation Pay policies control whether employee is paid for unused time at termination of employment.

The payment of final wages for **private** employees in Tennessee is governed by T.C.A. § 50-2-103(a)(3) and (g), which mandates payment "in full [of] all wages or salary" earned at the time of separation and all "vacation pay or other compensatory time that is owed to the employee by virtue of company policy or labor agreement" no later than twenty-one days following the date of separation. One frequent question posed to counsel is: "Can we deduct amounts from final paychecks for expenses such as uniforms, tuition or equipment costs?" Even more frequent are inquiries regarding whether, and under what circumstances, employees are entitled to be paid for vacation upon termination.

Employers frequently deduct amounts from employee paychecks for a variety of costs, but it is dangerous to do so without written evidence of an employee's consent. The statute mandates payment "in full [of] all wages or salary." To overcome the absolutist language of the statute, employers must demonstrate agreement to any wage payment deductions. This requirement applies even where an employer suspects employee theft. While explaining that the police have been notified while handing over the final check may not be particularly appealing, it will keep an employer from committing a criminal misdemeanor and subjecting itself to civil penalties and fines under this statute.

The proactive approach? Include a written agreement to deduct costs for uniforms, equipment replacement, lost keys and other security devices, travel or vacation advances, and the like as part of the hiring process. For existing employees, require a separate signed agreement when the next handbook or other major policy revisions are issued.

The greatest source of ongoing confusion is the vacation pay language, added in 1999. Many employers adopted an aggressive interpretation of the provision, refusing to pay accrued vacation in "for cause" terminations, for failure to give notice, or based on a "use it or lose it" policy. The Tennessee Department of Labor (TNDOL) responded to a

1999 Tennessee Attorney General opinion letter by taking the position that accrued vacation must be paid **regardless** of an employer's policies to the contrary. The opinion letter stated, "an employee who has accrued vacation leave under his or her employer's employment policy pertaining to the accrual of vacation leave is entitled to receive payment …upon termination of employment." Op. Att'y Gen. No. 00-132, 2000 Tenn. AG LEXIS 133 (August 17, 2000). The TNDOL's position essentially equated "accrued" with "earned."

Then, in November of 2006, the Attorney General's office issued another opinion letter, concluding that the language of the statute calls for the payment of "accrued" vacation only when the text of the employer's policy or collective bargaining agreement so dictates. Op. Att'y Gen. No. 06-169, Tenn. AG LEXIS 189 (November 13, 2006). The Attorney General's opinion directs attention at the "text" of an employer's policy, though the statute expressly does not require a written policy. Subsequent to the Attorney General's opinion the state is speaking with a single voice. Within a short period of time, the TNDOL's "Frequently Asked Questions" web page was altered to reflect the Attorney General's opinion.

In the context of terminations and final paychecks Tennessee employers are now free to apply vacation pay policies that do not permit payment of unused but accrued vacation, which permit payment only when the employee gives a certain amount of notice, or which deny payment in "for cause" terminations, without fear of facing an administrative enforcement action. Though that news is of great comfort, this interpretation of the statute still does not foreclose the possibility of a contract claim for payment of accrued vacation.

In *Vargo v. Lincoln Brass Works, Inc.*, 115 S.W.3d 487,492, 494 (Tenn. 2003), the Tennessee Supreme Court upheld an award of severance pay to a laid off employee on the theory that the company's ambiguous handbook language, the absence of a contractual disclaimer, and its prior record of routinely making such payments created a vested right.

The *Vargo* decision, in a footnote, cites to *Gaines v. Response Graphics, Inc.*, 1992 Tenn. App. LEXIS 895, No. 01A01-9204-CV-00181, at * 2 (Tenn. Ct. App. Nov. 6, 1992), for the proposition that courts decline to enforce handbooks as contracts where the document includes a specific disclaimer. In *Gaines*, the employer argued there was no agreement to pay employees for accrued but unused vacation and that its written policy providing for forfeiture was contractually binding. Citing *48A Am.Jur.2d Labor and Relations § 1822*, Judge Ben H. Cantrell upheld a vacation pay award to a laid off employee under the theory that "paid vacation is a form of compensation" and, once earned, must be paid, absent some agreement to the contrary. "If the employer is not bound by the handbook, the employee is not either. Therefore, the forfeiture provisions of the handbook cannot defeat the employee's right to accrued vacation pay." Id. at **3-5.

The bottom line: create a written policy including contract disclaimer language that makes clear the method for awarding or accumulating for vacation pay, when it begins accumulating, when it can be used, whether and how it may be carried forward from calendar or anniversary year, and whether and under what circumstances accrued vacation pay will be paid out upon termination of employment. If the employer has restrictions or forfeiture provisions, avoid describing vacation as "earned" or as "compensation." Distribute the policy in the company's handbook and require employees to sign acknowledgements of receipt and review of the handbook. As always, counsel employers that whatever policy they choose to adopt, uniform application is the key.

WAGE AND HOUR INVESTIGATIONS – IS YOUR COMPANY NEXT?

How To Prepare Your Company And Respond When Faced With An Investigation

Fourth Annual
Employment Law Conference

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INTRODUCTION

What would you do if your company received a letter from the United States Department of Labor ("DOL") stating that an investigator would be at the door in the next few days to talk to the company's employees and examine its wage and hour records? Worse, what if an investigator showed up unannounced and demanded to speak with employees and rifle through the company's records? Would you know what to do? This paper addresses the DOL's audit process and suggests ways to prepare your company when faced with an investigation.

THE LAW

The Fair Labor Standard Act[1] ("FLSA") is the foundation of federal wage and hour law. The FLSA regulates minimum wage, overtime pay, equal pay, and child labor. Its overtime requirements are the most significant contributor to wage and hour violations and litigation.

The FLSA is enforced by DOL's Wage and Hour Division, which has the authority to investigate and gather data regarding wages, hours, and other conditions of employment to determine whether an employer is violating the FLSA, and to subpoena witnesses and documentary evidence relating to any matter under investigation.[2]

In addition to the FLSA, the Wage and Hour Division is also responsible for administering and enforcing a number of other federal laws that set basic labor standards, including:

- The Family and Medical Leave Act
- The Migrant and Seasonal Agricultural Worker Protection Act
- The field sanitation standards of the Occupational Safety and Health Act
- The Employee Polygraph Protection Act
- Certain employment standards and worker protections under the Immigration and Nationality Act
- Government contracts prevailing wage statutes such as the Davis-Bacon and related Acts and the McNamara-O'Hara Service Contract Act
- Garnishment provisions of the Consumer Credit Protection Act

Investigations of employers may be conducted under any one or more of the laws enforced by the Wage and Hour Division.

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[1] *See* 29 U.S.C. 201, *et seq*.

[2] *See* 29 U.S.C. 209; 211(a).

WHY EMPLOYERS ARE SELECTED FOR AN INVESTIGATION?

The Wage and Hour Division conducts investigations of companies for a number of reasons. Although the Wage and Hour Division does not typically disclose the reason for an investigation, many are initiated by complaints. Complaints may come from a variety of sources, including present or former employees, competitors, unions, trade associations, and other interested outside parties. All complaints are confidential; the name of the complainant and the nature of the complaint are not subject to disclosure.

The Wage and Hour Division investigates complaints on a "worst-first" basis, giving priority to violations that affect the safety or welfare of employees. Examples of such violations include child labor hazardous occupation violations and farm labor complaints of slavery or peonage. In scheduling an investigation, the Wage and Hour Division also considers the seriousness of the violations, the extent of the violations, and the availability of investigative resources required.

Many complaints involving minor violations and affecting few employees are handled through the conciliation process. This process, frequently completed through telephone contact rather than a site visit by the investigator, limits the scope of the compliance action to a singe employee or single, minor violation. Typically, the investigator explains the law to the employer and the application of the law to the complainant's allegation. If the employer acknowledges that back wages are due, an arrangement for repayment is ordinarily agreed to and completed. Thereafter, the investigation is closed. If the Wage and Hour Division receives multiple complaints about a single employer, or if the employer resists the conciliation effort, a full investigation will likely occur.

In addition to investigating complaints, the Wage and Hour Division also develops its own "investigation leads" about potential violations. Potential sources of such leads include newspapers and other publications, information from other federal and state agencies, and information from unions, trade associations, and various other organizations. The Wage and Hour Division also sometimes targets certain types of businesses or industries for investigation. For example, the Wage and Hour Division often targets low-wage industries and industries where illegal aliens are used because of the high rates of violations and the employment of vulnerable workers. Occasionally, a number of businesses in a specific geographic area will be examined. This year, for example, the Wage and Hour Division has indicated that it will increase its presence in the Gulf Coast region to meet the compliance challenges associated with the reconstruction efforts from Hurricane Katrina.

Regardless of the reason for the investigation, it is important for you to know and understand what the investigator is seeking. It also is important to know and understand practices your company can implement immediately so if you are the subject of an

investigation, you know your company's books and records will be in compliance with the law.

INVESTIGATION PROCEDURES

Initial Interview With Employer

An investigator typically begins an investigation by arranging a meeting with the employer. DOL investigators are guided in their investigations by the Wage and Hour Division's "Field Operations Handbook" (FOH), which sets forth investigation procedures and other instructions concerning the Division's compliance activities.[3] The FOH lists several tasks for the investigator to perform during the initial employer interview:

> (1) inform the employer that the purpose of his visit is to make an investigation to determine compliance with the FLSA … (2) outline in general terms the scope of the investigation, including the examination of pertinent records, employee interviews, and the final conference with the employer or his designated representative to discuss the investigation findings; (3) give the employer a copy of the Handy Reference Guide, CL 101 or CL 102, and any other non-technical publication suitable to the type of establishment being investigated. Other materials shall be furnished at this time if requested; and (4) explore with the employer whether he believes his business to be subject to the FLSA … and his general approach to compliance.[4]

Although in many instances the investigator will alert an employer before opening an investigation, the Wage and Hour Division does not require an investigator to do so. The investigator has sufficient latitude to initiate unannounced investigations to directly observe typical business operations and develop factual information quickly.

Whatever the reason for the audit, a wage and hour investigator has the right to enter your business and gather records that may be necessary to determine whether you are complying with FLSA. Employers may be represented by their accountants or attorneys at any point during this process. Although the law allows most employers to decline to voluntarily cooperate with an investigator, it will do you little good to be adversarial, confrontational or non-cooperative. If you do not voluntarily cooperate with the request for records, DOL can issue an administrative subpoena to compel production of your records. However, if you believe the request for documents contained in the

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[3] DOL has made some portions of the FOH available on its website at http://www.dol.gov/esa/whd/foh/index.htm

[4] FOH § 52a09a.

subpoena is too broad or unreasonable, you can question the subpoena's reasonableness through a court petition before facing any penalty for failing to comply.

The best option is to reasonably assist the auditor, which means providing the records requested and making employees available for interviews, as well as providing a private space for the auditor to work.

Scope of the Investigation

The investigator will normally investigate allegations of noncompliance that have occurred during the preceding 2 years. In addition to examining compliance with the FLSA, the investigator will also look for violations of other acts that are administered by the Wage and Hour Division, including, but not limited to, the Family and Medical Leave Act of 1993 and the Davis-Bacon and related acts. Additionally, investigators may refer apparent violations of other labor statutes or suspected crimes to the appropriate agencies. For example, the Wage and Hour Division has a memorandum of understanding with the agency formerly known as the Immigration and Naturalization Service (INS), whereby an investigator who suspects violations of the Immigration and Nationality Act will notify the INS. On some investigations, the investigator will inspect the I-9 forms of the company's employees. The Wage and Hour Division has similar arrangements with other agencies including the Federal Bureau of Investigation (FBI) and the Occupational Safety and Health Administration (OSHA).

Inspection of Records and Employee Interviews

As noted, Section 11(a) of the FLSA authorizes DOL auditors to investigate and gather data concerning wages, hours, and other employment practices; enter and inspect an employer's premises and records and question employees to determine whether any person has violated any provision of the FLSA or other law enforced by the Wage and Hour Division. The investigator will examine a company's records to determine which laws or exemptions apply. These records include, for example, those showing the company's annual dollar volume of business transactions, involvement in interstate commerce, and work on government contracts. The investigator will also examine the company's payroll and time records not only to determine compliance with the substantive provisions of the FLSA, but also to determine if the company is complying with the record keeping requirements of the Act.[5] Information discovered from an employer's records will not be revealed or otherwise disclosed to the public.

Employee interviews are also an important component of the investigation. The FOH provides that the three objective of the interviews are to "(1) test the adequacy and accuracy of the records; (2) aid in substantiating or disproving alleged violations, and to

[5] The record keeping requirements of the FLSA, which are discussed below, are set out in 29 C.F.R. Part 516.

give the employees an opportunity to point out other violations (including those at some other place of employment); and (3) examine the validity of claimed exemptions."[6]

The investigator may interview employees on or off the employer's premises, but in either case, the investigator will assure the employee that the information they provide will be held in confidence so as to elicit frank and honest responses. In most cases, while the investigator may explain the law to the employee as well as answer questions about back pay if the employer has agreed to make back wage payments, the investigator will not explain the purpose of the interview to the employee and is not allowed to disclose any information learned from an examination of the employer's records. Finally, the FOH directs the investigator to avoid encouraging employees to file their own civil lawsuit against the employer.[7]

AFTER THE INVESTIGATION

Following the inspection of records and employee interviews, the investigator holds a final conference with the employer. At the final conference, the investigator informs the employer of the investigative findings. If violations are found, the investigator discusses with the employer both payment of back wages and the employer's future compliance. The Wage and Hour Division will usually attempt to reach a voluntary agreement with the employer regarding issues of compliance and payment of back wages. The investigator ordinarily will request back wages for a 2-year period.

If no voluntary agreement can be reached, the investigator will explain to the employer the remedies and enforcement procedures available under the FLSA, which include the following:

- The Secretary of Labor may file suit on behalf of employees for back wages and an equal amount in liquidated damages.

- The Secretary may obtain a court injunction to restrain any person from violating the law, including unlawfully withholding proper minimum wage and overtime pay.

- Civil money penalties may be assessed for child labor violations and for repeat and/or willful violations of FLSA's minimum wage or overtime requirements.

- Employers who have willfully violated the law may face criminal penalties, including fines and imprisonment.

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[6] FOH, § 52c00a.

[7] FOH, § 52d02.

- An employee may file suit to recover back wages, and an equal amount in liquidated damages, plus attorney's fees and court costs.

- Employees who have filed complaints or provided information during an investigation are protected under the law. They may not be discriminated against or discharged for having done so. If they are, they may file a suit or the Secretary of Labor may file a suit on their behalf for relief, including reinstatement to their jobs and payment of wages lost plus monetary damages.

The statute of limitations for these types of claims is two years unless an employer's violations were willful in which case the statute of limitations is three years. A willful violation is found when an employer either knew or showed reckless disregard for whether his pay policy violated the FLSA. A willful violation is deliberate, voluntary or intentional and may be subject to a criminal penalty, including fines up to $10,000 and imprisonment for up to six months for a second violation.

Lawsuits filed against employers by the Secretary of Labor alleging violations of FLSA also seek back pay, as well as liquidated damages. If DOL prevails in this type of lawsuit, it is entitled to liquidated damages in an amount equal to any unpaid wages in addition to the back pay and interest. Liquidated damages can be avoided if an employer shows he acted in good faith with a reasonable belief his pay practices complied with the FLSA.

PREPARING FOR THE INVESTIGATION

Because a company may not be alerted to a wage and hour audit, it is important to take preventive measures to reduce the risk an investigator will find a violation of the FLSA or other applicable laws. Below is a quick checklist of what you can do to prepare:

- Appoint a company representative or legal counsel to interact with the investigator. If you believe that you may have wage and hour issues, be sure to contact an experienced lawyer as soon as possible so you can get detailed information about your rights and responsibilities with respect to those issues.

- Before handing documents or other information over to the investigator, make sure you understand the scope of what's being requested, that the documents are responsive to the request, and that your representative or lawyer has reviewed everything first.

- Provide managers with information about the investigation so they know what to expect.

- Do not discourage employee cooperation with the investigation or respond negatively to any employee who files a wage and hour complaint.

- Be prepared to demonstrate your willingness to cooperate with investigators.

It will also help to understand in advance what violations are most often discovered by wage and hour investigators. The most common violations found by the Wage and Hour investigators and the most common violations resulting in litigation include the following:

- Misclassifying employees as "exempt" and failing to pay them overtime (the requirements for "exempt" status are set forth in the FLSA and often misapplied).

- Failing to pay non-exempt employees for overtime, including overtime not approved in advance.

- Allowing time worked "off the clock," such as requiring employees to arrive early to perform necessary preparations for work or stay late to perform duties such as "closing up" after punching out, and not paying employees for donning and doffing (putting on or taking off specialized work clothes and equipment).

- Granting compensatory time off to non-exempt employees in lieu of overtime pay.

- Making automatic wage deductions, such as from exempt employees' salaries for part-day absences, or from non-exempt employees' pay for meal breaks when they do not clock in or out for those breaks.

- Failing to pay overtime to independent contractors when they qualify for "employee" status under the law.

- Failure to compute overtime on a weekly basis. Each week stands alone. Many employers will average two or more weeks together or fail to identify work weeks in a semimonthly pay period.

- Over one half of all employers that pay a bonus or commission will fail to include it in the Regular Rate.

The first step to reduce the risk that an investigator will discover such violations is to ensure appropriate records are maintained. The FLSA requires employers to keep record of "wages, hours, and other conditions and practices of employment."[8] The

[8] 29 U.S.C. § 211(c)

FLSA's enabling regulations, 29 C.F.R. Part 516, set forth specific and detailed types of records that must be kept. In general, a company should keep the following information for every employee for at least three years:

- Full name, home address, ZIP code and birth date (if the employee is younger than 19 years old)
- Gender
- Occupation
- Time and day on which the workweek begins
- Regular hourly rate of pay, the basis on which wages are paid and regular rate exclusions
- Hours worked each day and total hours worked each workweek
- Total daily or weekly straight-time earnings or wages
- Total weekly overtime compensation
- Total deductions from wages and additions to wages each pay period
- Date of payment and the pay period covered by the payment

For a more detailed discussion of the record-keeping requirements, including special requirements for workers who are exempt under miscellaneous FLSA provisions, see 29 C.F.R., Part 516.

In addition to proper record keeping, an easy practice to immediately implement to lessen the risk of an investigator finding an FLSA violation is to ensure the FLSA-mandated poster informing employees of their minimum wage, overtime and other legal rights is prominently displayed. You can obtain a copy of this poster by accessing DOL's website at www.dol.gov/esa/regs/compliance/posters/flsa.htm.

Also, an employer should determine whether it is properly classifying employees as exempt from FLSA's overtime pay requirements. Particular attention should be given to those employees classified as exempt under one of the "white-collar" executive, administrative and professional employee exemptions. A full discussion of the exemptions is beyond the scope of this paper, but it is important to note a thorough and detailed analysis of every employee classification is necessary to determine whether an

employee spends more time doing nonexempt work than is permitted under the regulations, which may render the employee nonexempt and entitled to overtime.

It also is important to understand simply paying an employee a salary as opposed to an hourly rate does not exempt the employee from overtime pay requirements. Treating nonexempt salaried employees as if they were exempt may result in your company becoming liable for substantial overtime payments.

Equally important is ensuring that non-exempt employees are paid the correct hourly rate for straight-time work (the first 40 hours of work during a workweek) and overtime work (work beyond 40 hours during a given workweek). This becomes an issue that deserves special attention if your company employs individuals who perform two or more types of work at varying wage rates during a single workweek. Many employers are unaware special rules exist in the federal regulations for determining the regular rate of pay from which overtime must be calculated for those employees who perform two or more types of work at varying wage rates during a single workweek. An explanation of the these rules can be found on the Department of Labor's website at www.dol.gov/dol/allcfr/ESA/Title_29/Part_778/29CFR778.115.htm.

Another common problem in some industries is employees working "off the clock." To avoid this violation of FLSA, it is recommended to include a provision in your employee handbook that states nonexempt employees are prohibited from working "off the clock." The handbook should make explicitly clear supervisor approval is required before an employee engages in overtime work.

Supervisors must also be trained to monitor non-exempt employees performing overtime work. DOL requires employers to control their employees so work is not performed if the employer does not want it to be performed. Managers may not simply observe "off the clock" work and accept its benefits without facing the prospect of significant liability in the event of a wage and hour audit. Indeed, the most common willful violation is found when employers are discovered to have ordered their employees to work "off the clock" to meet a deadline or keep a project under budget. Although maintaining an employee handbook with the provisions described helps overcome a finding that this type of violation is willful, the best defense is actual evidence the policies in the handbook are enforced.

Another area of great concern involves classifying some workers as independent contractors rather than employees. Instead of focusing on the classification given to an individual, auditors focus on the economic realities of the relationship and totality of the circumstances in determining whether a worker is an employee or independent contractor.

Key factors auditors and courts consider in determining whether a particular relationship is that of an employer-employee or of an employer and an independent contractor include: (1) the right to control conduct of work; (2) the right of termination; (3) the method of payment; (4) the freedom to select and hire helpers; (5) the furnishing of tools and equipment; (6) self scheduling of working hours; and (7) freedom to render services to other entities.[9] Although there is no one factor that is entirely indicative of the relationship, courts have consistently considered the "right to control" the key factor.[10]

Misclassifying a worker as an independent contractor can result in substantial liability for overtime, payroll taxes, FICA, benefits and other payments, as well as penalties and interest.

Understanding these common violations as well as the DOL investigative process should allow you to take preventive measures to minimize your company's exposure under the FLSA and other applicable laws.

CONCLUSION: WHY COMPLIANCE MATTERS

Violations of the wage and hour provisions of the FLSA are perhaps the single largest liability exposure for employers today. In fiscal year 2006 alone, the Wage and Hour Division recovered more than $171.5 million in back wages for over 246,000 employees. This represents an increase of over 25% over the last five years.[11]

While DOL compliance actions increased steadily over the past several years, the number of wage and hour civil lawsuits has exploded. Because the FLSA has attractive damage remedies and often involves large numbers of plaintiffs in a single action, it is the employment lawsuit du jour. Under the FLSA, plaintiffs can recover double the amount of actual damages and attorneys' fees. In many instances, attorneys' fees reach into the high six figures and sometimes seven figures. Since FLSA cases often involve large groups of employees, liability exposure is often in the millions of dollars, and most insurance policies exclude coverage for FLSA claims. Recent news accounts of settlements reflect the dire consequences of FLSA violations: Wal-Mart - $34 Million (2007); IBM - $65 Million (2006); UBS - $89 Million (2006).

To minimize your company's liability exposure under the FLSA, you should consider the following:

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[9] *See* Masiers v. Arrow Transfer & Storage Co., 639 S.W.2d 654, 656 (Tenn. 1982); *see also* Goodale v. Langenberg, 2007 Tenn. App. LEXIS 326, at *13; Winginton v. C.J. Ogle Stone Co., 1990 Tenn. App. LEXIS 481, at *2-3; Carver v. Sparta Electric System, 690 S.W.2d 218, 220 (Tenn. 1985).

[10] *See* Sodexho Mgmt., Inc. v. Johnson, 174 S.W.3d 174, 178-79 (Tenn. Ct. App. 2004).

[11] http://www.dol.gov/esa/whd/statistics/200631.htm

- Perform an internal audit of the company's wage and hour practices with the assistance of legal counsel. Review employee classifications, records, and policies, and document the conclusions. Having the audit performed by an attorney, resulting in a legal opinion, helps establish a "good faith" defense to "double damages" under the FLSA and can decrease the statute-of-limitations period to two years.

- Keep an accurate record of non-exempt employees' work time. Have both employers and employees approve timesheets/hours records.

- Pay for all "hours worked." Require non-exempt employees to "clock in" and "clock out" at the beginning and end of the workday and before and after unpaid lunch periods.

- Prevent employees from taking breaks in work areas.

- Pay fixed, predetermined salaries to exempt employees, without improper deductions.

- Train managers on the FLSA and state wage and hour laws.

- Create a plan of action and contact legal counsel in the event of a DOL wage and hour investigation.

- Make documentation of job duties part of every employee's job. Create accurate and effective job descriptions and update them frequently. For exempt positions, ensure the descriptions themselves satisfy the applicable-exemption test.

Although understanding the wage and hour audit process eliminates a lot of anxiety, the best practice is to take preventive measures. It is better to conduct your own audit and discuss and correct potential violations with your attorney rather than have the government conduct an audit that reveals those same violations and concludes with a discussion about payment of back pay, penalties and interest. Taking these steps in advance will prepare your company for a DOL wage and hour investigation, and, if litigation does occur, minimize exposure.

MANAGING THE EMPLOYEE WHO IS ABSENT

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Managing the Employee Who Is Absent

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1

FMLA Is An HR Migraine

- FMLA concerns top the lists of HR professional concerns. Why?
- Regulations are confusing, and difficult to administer.
- FMLA leaves intersect frequently with ER obligations under disability, workers' compensation and Tennessee parental leave laws.
- Some (you know the ones) take advantage of FMLA to shield absenteeism.

2

The Bad News: No Relief Appears in Sight

- The law, passed in 1993, is firmly entrenched.
- Attempts to clarify existing regulations or roll back entitlements have fallen on deaf ears.
- Attempts are being made in Congress to broaden its scope – even make it paid leave.

3

The Good News:

Employers that create systems for identifying, designating and tracking FMLA leaves are not powerless.

4

When Employee is Covered By FMLA

- Employee has been employed by employer at least 12 months.
  - Temporary service counts.
  - Need not be consecutive.
- Employee must have worked 1250 hours in previous 12 months.
- Employee must work at worksite with 50 or more employees.

5

FMLA Eligibility:

Beware of Mistakes, Estoppel and Waiver

- FMLA regulations provide employer who mistakenly confirms FMLA eligibility "may not subsequently challenge eligibility."
- *Sorrell v. Rinker Materials Corp*., 395 F.3d 332 (6th Cir. 2005) (applied estoppel where employer approved leave then reneged.)
- *Mutchler v Dunlop Memorial Hospital*, 485 F.3d 854 (6th Cir. 2007) (no estoppel where employer wrongly assumed plaintiff was eligible but then corrected itself before second leave.)

6

For What Reasons?

- The *birth* of a child, and newborn care;
- Placement with employee of child for *adoption* or foster care;
- Employee's *serious health condition* that renders the employee unable to perform essential functions; and
- Care of spouse, child or parent with *serious health condition.*

7

What is an FMLA "Serious Health Condition"

- **Overnight hospitalization** plus follow up incapacity or treatment.
- **More than 3 days** incapacity plus **2 doctor visits.**
- **More than 3 days** incapacity plus **1 doctor visit** and **continuing treatment** (prescription or therapy).
- Any incapacity for **pregnancy**/pre-natal care.

8

What is an FMLA "Serious Health Condition") (continued)

- Any incapacity from "**chronic serious health condition**" requiring periodic treatment, episodic absences, e.g. asthma, diabetes.
- Any period of incapacity from "**long term serious condition**," e.g. Alzheimer's, AIDS, cancer.
- NOT colds, the flu, headaches, routine dental care, upset stomach (unless "complications arise").

9

How Much Leave?

- Twelve work weeks of leave during any 12 month period.
- Each time employee takes FMLA leave, the remaining leave entitlement is the balance of 12 weeks not used during the immediately preceding 12 months.
- We **strongly recommend choosing** your "twelve month period" - - **rolling twelve months** is most employer-friendly - - and applying it uniformly.

10

Medical Certification

- **Always** insist on employee providing completed medical certification.
- Use DOL Form WH-380.
- Employee's medical certification controls both serious health condition and leave duration.
- Employee has **15 days** to return certification. If incomplete, you **must** give opportunity to cure.
  - *Killian v. Yorozu Automotive Tennessee*, 454 F.3d 549 (6th Cir. 2006) (employer's policy imposing shorter limits on extended leave requests was unlawful interference).

11

FMLA Fitness for Duty Certification

- **Must** have uniform policy requiring medical certification upon return to work.
  - *Saroli v. Automation & Modular Components, Inc.*, 405 F.3d 446 (6th Cir. 2005) (finding employer's verbal demand for fitness for duty statement only when new mom tried to return to work violated FMLA).
- Should **always** be required prior to or upon return.
- Unfortunately, certification need only be simple statement of employee's ability to return.

12

FMLA-ADA Interplay and Return-to-Work

- Give employee greatest benefit under the two laws.
- Simple fitness-for-duty certification gets employee back into his or her job under FMLA, even with restrictions.
- If employee can't perform essential functions, further medical examination can be required **after** the employee is returned to work.
  - *Brumbalough v. Camelot Care Centers, Inc.*, 427 F.3d 996 (6th Cir. 2005)

13

Ten Tips to Navigate the Treacherous FMLA Waters

14

1. Update and Evaluate Your Policies Regularly

- If you have an employee handbook it **must** have an FMLA policy (if you have a location with 50 employees).
- If you have none, you **must** include it with any other written policy documentation.
- Policy **should closely track** FMLA regulations.
- Set your "twelve month period," establish requirement for medical certifications <u>and</u> for return to work certifications.
- Get employees to acknowledge receipt.

15

Update and Evaluate Your Policies Regularly

- Display the poster (WH 1420).
- Use DOL forms:
  - Certification of health care provider ("CFH") (WH 380)
  - Response to request for leave (WH 381)
- You can insist **on strict compliance** with the 15 days to provide health care certification **if** you properly communicate it.
  - *Frazier v. Honda of Am. Mfg., Inc.*, 431 F.3d 563 (6th Cir. 2005) (CFH submitted **one day late** was untimely - - discharge upheld).

16

2. Focus on Proper Notice

- Employee must provide notice by stating "qualifying reason for the needed leave."
- Employee **need not** assert rights under FMLA or **mention** FMLA.
- If Employee does not give complete information, Employer **must** inquire further.

17

What's enough notice?

- Employee advises he/she will be absent due to medical or family-medical condition that could be "serious health condition."
- Key words: sick children, spouse or parents; in-patient hospitalization; doctor visit; prescription medication; pregnancy; specific chronic/long term conditions like asthma, migraine, cancer.
- Key facts: coupling the above with 3 days absence should trigger inquiry.

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What's enough notice?

- "I need time off for nasal surgery."
- "I need a few days off to care for my sick son."
- "I need to go to the doctor because of my diabetes."
- "I cannot come in because I am depressed."
- "I have been hospitalized from an accident." *Cavin v. Honda of Am. Mfg., Inc.*, 346 F.3d 713 (6th Cir. 2003).

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What's not enough notice?

- Saying "I'm sick" and taking three days off – the period of absence alone does **not** constitute adequate notice. *Phillips v. Quebecor World RAI Inc.*, 450 F.3d 308 (7th Cir. 2006).
- "If you have brain cancer but just tell your employer you have a headache, you have not given the notice that the law requires." *Aubuchon v. Knauf Fiberglass, GMBH*, 359 F.3d 950 (7th Cir. 2004).
- "I twisted my knee and need a sick day" is **not** sufficient. *Walton v. Ford Motor Co.*, 424 F.3d 481 (6th Cir. 2005).

20

3. Get and Use the Right Information

- When in doubt, designate leave **conditioned** upon returning medical certification.
- Give employees 15 days to return it - - nothing less.
- Incomplete certifications - - document communication with employee and **give chance to correct**.
- Disputes about RTW deadlines can lead to interference and retaliation claims. Be **very certain** no dispute exists regarding timelines before acting.
  - *Edgar v. JAC Products*, 443 F.3d 501 (6th Cir. 2006) (no liability for employer only because plaintiff could not have returned to work even if her "late" verification was accepted).

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3. Get and Use the Right Information (cont.)

- Medical certification **controls** whether EE has serious health condition and leave duration.
- Do **not** call the employee's healthcare professional (except in workers' compensation situations).
- Properly use the **doctor to doctor** "clarification" provision when you question adequacy of certification.

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4. Understand "Serious Health Condition"

- Don't focus exclusively on "more than three consecutive days" - other conditions qualify, too.
- Err on the side of *granting* requested FMLA instead of counting the absence under attendance policy.
- Be very slow to reject medical certifications--grant the leave as FMLA-covered, count the days, and move on.

23

5. Manage Intermittent Leaves Effectively

- Certification and Recertification Requirements
  - Scrutinize initial certification carefully; decide whether to accept or reject as incomplete or not supported, or, with employees' permission, clarify through your doctor.
  - Require recertification where allowed.
  - Carefully track the FMLA leave used.
  - Make sure the absence is related to the condition requiring intermittent leave.
  - *Hoffman v. Professional Med. Team, Inc.*, 394 F.3d 414 (6th Cir. 2005) (no violation where employer insisted on correction of insufficient certification and terminated employee who went into tirade.)

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Manage Intermittent Leaves Effectively (cont.)

- Reassignment during intermittent leave
  - May be utilized to minimize disruption
  - Employee must receive equal pay and benefits.
  - Require certification no less than every 12 months.
- Recertification can be required not less than "minimum period specified on the certification," or if employee requests extension or doubt is cast on validity.

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Manage Intermittent Leaves Effectively (cont.)

- Require written verification for absences when connected to treatment or examination.
- Look for suspicious patterns, e.g. Monday/Friday absences - - discuss with employee.
- Discuss with employee the need for non-disruptive scheduling where absences are for treatment or examinations.

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6. Coordinate Leaves

- Don't forget to designate workers' compensation leave time as FMLA time ASAP after the injury.
- Don't allow the end of the 12 week FMLA leave to sneak up on you--communicate early with the employee.
- Send letter to employee prior to exhaustion of FMLA asking employee to coordinate return, obtain return to work certification, etc.

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7. Develop a Process for Leave Administration

- Designate a "Leave Coordinator".
- Train supervisors on FMLA basics and when to report absences to the Coordinator.
- Probe supervisors over reason(s) employee gave for absence.
- Use form letters to assist in communicating with employees (do not send blindly- each situation is different).

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8. Keep the Right Records

- Track leave days and hours meticulously, retain employee notices, responses to requests for leave, medical certifications related correspondence, premium payment records, and records of disputes related to leave designations.
- These records are your best ally in any subsequent dispute.

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9. Get Reinstatement Right

- When employee is ready to return to work and supplies a Fitness for Duty statement, return them to work **within two business days**.
  - *Hoge v. Honda of Am. Mfg., Inc.*, 384 F.3d 238 (6th Cir. 2004).
  - *Brumbalough v. Camelot Care Centers, Inc.*, 427 F.3d 996 (6th Cir. 2005)
- Address job function doubts and/or ADA accommodation issues **after** returning employee to work.

30

10. Repel Retaliation Claims

- Do not discipline or terminate under attendance policy without close review of documentation/facts by HR and Counsel.
- Carefully scrutinize any discipline shortly before or after FMLA or workers compensation leave. Always consult HR and counsel.
- If terminating for inability to return or perform job functions, make sure you have reliable information in hand before acting.
  - *Bryson v. Regis Corp.*, 2007 U.S. App. LEXIS 19481 (6th Cir. 2007) (retaliation claim established where employer terminated **before** it received notice that EE could not return after 12 weeks.)

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11. Bonus: Watch Out for Retaliation

- Negative comments about leave will come back to haunt.
  - *Bryson v. Regis Corp.*, 2007 U.S. App. LEXIS 19481 (6th Cir. 2007)
  - *Saroli v. Automation & Modular Components, Inc.*, 405 F.3d 446 (6th Cir. 2005)
- View taking leave as any other protected activity and analyze decisions under a retaliation analysis.
- Retaliation claims **much harder** to defend than interference claims.

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RECENT SIXTH CIRCUIT FMLA DECISIONS OF INTEREST

Repeated angry comments by supervisor, temporal proximity and factual questions about whether employee's work restrictions were reason for firing result in denial of summary judgment.

Bryson v. Regis Corp., 2007 U.S. App. LEXIS 19481 (August 16, 2007).

Supercuts store manager Karen Bryson was told by her doctor on December 3rd that she needed knee surgery, which was scheduled for December 16. She informed her supervisor on December 6th that she would be absent, and the supervisor told her she would not be permitted leave. Bryson tried to reschedule the surgery, but her physician instructed her that it could not wait.

The supervisor's response was to threaten Bryson with termination and engage in other retaliatory behavior. She alternately described her to other Regis employees as a cripple, a faker, and selfish bitch. Nonetheless, Bryson completed the paperwork, requesting leave between December 16th and January 1. This request was granted by Regis' corporate offices. Curiously, the company explained that it would not count her use of paid leave against her FMLA entitlement.

Bryson developed complications, and timely filed a request for an extension of leave, to which Regis responded with a letter explaining that she needed to return to work by March 10th - - the day her 12 week entitlement expired.

Bryson submitted two certifications supporting her need for extended leave. Two days prior to her scheduled return to work, she and her physician completed different parts of her return to work forms. The physician's RTW certificate indicated that Bryson "could not return at this time." Bryson mailed the form on March 8th, but it was not received by Regis until March 15th, five days **after** she was terminated.

Bryson called her supervisor on March 8th, leaving a message updating her on her ability to return to work with some restrictions. On March 9th, she called a senior manager who worked closely with Bryson's supervisor and left a similar message. The manager allegedly told Bryson she didn't think "corporate or [the supervisor] would go for that [performing work while seated]. Bryson received the March 10th termination letter on March 11th, and though she attempted to contact company officials, was unable to speak with any.

Without question, Bryson engaged in protected activity by taking leave, and suffered adverse action in the form of termination. The district court, however, concluded she could not show a **causal connection** between the two because she could not come back to work at the expiration of her leave.

The Sixth Circuit disagreed, noting that Bryson's termination, occurring on the precise date she was scheduled to return to work and **without** the employer's receipt of the doctor's statement was sufficient to constitute evidence of a causal connection. Moreover, the information that she could not return could have come from the supervisor who had expressed animus toward her leave.

An inability to return to work is a legitimate, non-discriminatory reason to terminate an employee whose FMLA entitlement runs out, and there is no "interference" under those circumstances – – even if the knowledge of inability is gained after termination. For retaliation purposes, however, employers **cannot** rely on "after acquired evidence" to insulate themselves for decisions made prior to knowledge of an employee's inability to return to work. Put another way, an employer cannot wash away the sin of deciding to fire someone because they took leave by later claiming it does not matter because the employee could not come back to work anyway.

Bryson's termination letter was sent five days before the company's receipt of the problematic physician certification statement. Thus, the company had to be acting on some other basis, and there were genuine factual questions about whether the direct supervisor's animus played a role in the decision to terminate.

Lessons here? First, always count paid leave against an employee's twelve week entitlement. Second, never let frustration about difficulties with workload be expressed as personal attacks, and be sensitive to the warning signs of a supervisor who is placing you at risk. If the information about an individual's proposed return to work is not clear, exercise a little extra patience. Had Regis waited to drop the hammer until it was clear that she could not return to work, it would have been in a much stronger position.

Employer not estopped from denying second FMLA request by ineligible employee where it had wrongly approved a previous request.

Mutchler v. Dunlap Mem'l Hosp., 485 F.3d 854 (6th Cir. 2007).

Carol Mutchler, a registered nurse, requested and was approved for medical leave in order to obtain treatment for bilateral carpal tunnel syndrome - - one surgery at a time. The employer apparently relied upon the verifications of employees as to the number of hours they had worked rather than independently verifying eligibility.

Mutchler's leave request covered the period necessary to recover from surgery on the left hand. While she was out, the human resources manager discovered that Mutchler had actually worked only 1,242.8 hours. The human resources manager told Mutchler while she was recovering from the initial surgery her initial leave would be allowed, but that her second request would not qualify for FMLA protection. Mutchler completed the

second surgery, and she was bumped into an alternate position in which she made less money.

Plaintiff argued that though she did not actually work 1,250 hours, her "hours of service" for FMLA purposes included the additional ten hours per week for which she was routinely compensated for under the "Weekender Program." The extra pay Mutchler received was an incentive designed to entice nurses to be available to work weekend shifts if necessary (i.e., non-compensable waiting time).
The district court rejected Mutchler's argument, concluding that she was not an "eligible employee." The court declined to credit the extra pay as part of the 1,250 hours because it was not "hours worked."

The FMLA regulations, at 29 C.F.R. § 825.110(c), reinforce the district court's conclusion.

[W]hether an employee has worked the minimum 1,250 hours

> of service is determined according to principles established under the [FLSA] for determining compensable hours of work (see 29 C.F.R. part 785). The determining factor is the *number of hours an employee has worked* for the employer within the meaning of the FLSA … any accurate accounting of *actual hours* worked under FLSA principles may be used. (Emphasis added.)

Next, Mutchler argued the hospital should be *equitably estopped* from denying her leave. 29 C.F.R. § 825.110(d) provides, "If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility." Noting that some other Circuits have found 29 C.F.R. § 825.110(d) invalid, the Sixth Circuit stated that estoppel did not apply to the circumstances of this case. Here, there were two separate requests for leave for finite periods of time. Plaintiff's argument that her second request was an extension, rather than a new request, proved unavailing.

Finally, Mutchler asserted a common law estoppel claim. To prevail, she needed to show 1) a representation of a material fact; 2) awareness of the true facts by her employer; 3) either actual or implied intent by her employer that she act upon the represented fact; 4) her own ignorance of the true facts; and 5) detrimental and justifiably reliance. *See Tregoning v. Am. Cmty. Mut. Ins. Co.*, 12 F.3d 79, 83 (6th Cir. 1993) (quoting *Armistead v. Vernitron Corp.* 944 F.2d 1287, 1298 (6th Cir. 1991). Unfortunately for Mutchler, her claim fell apart. As to the first surgery, she could not demonstrate detrimental reliance. As to the second, she chose to move forward with the surgery in spite of being forewarned that the employer had determined she was ineligible.

The Sixth Circuit affirmed the grant of summary judgment to the employer. Ironically, had Mutchler simply submitted and been granted leave based upon a single request for the entire period, the result would likely be different. And, though this employer emerged "victorious," its sloppy leave processing procedures created an expensive legal nightmare, which could have ended very differently. Lesson here? Don't rely on an employee's assertions that he or she qualifies for leave. Take time to thoroughly review the employee's eligibility at the time of the request and be specific in your written response. If an error is discovered, communicate clearly and quickly and allow the leave request to play itself out before moving the problem forward.

Employer That Failed to Provide Time to Certify Requests for Extension of Original Leave Pays Hefty Price

Killian v. Yorozu Automotive Tennessee, 454 F.3d 549 (6th Cir. 2006).

This case demonstrates the importance of adhering to the FMLA regulations when drafting a company leave of absence policy. The employer in this case relied on its own policy rather than the FMLA regulations and got burned with a verdict for damages.

Killian worked as a welder who had worked her way into a first shift position. Her work record was excellent and she made a higher hourly wage than was generally available in the area. Killian requested medical leave for November 29, 2001, through December 4, 2001. She submitted a medical certification from her physician that stated she should not return to work before December 10, 2001. The employer approved her leave until December 10, 2001.

During the Killian's surgery, the physician discovered that her condition was more serious than was first reported. She contacted the company nurse on December 4, 2001, and requested a leave extension. The nurse told Killian that she should get a statement from her physician and the time would be extended. On December 10, 2001, Killian's supervisor called, asking why she had not reported to work. Killian stated her leave had been extended. She later followed up with her physician and requested a new certification. The physician responded with a certification by fax that same day (December 10) which stated that Killian could not return before December 17, 2001. Killian was terminated on December 10, 2001 when she called to confirm that human resources had received her physician's certification.

The trial court found in favor of the plaintiff and awarded her $55,000 in back pay and front pay (plus attorney fees). The employer appealed to the Sixth Circuit, arguing first that the company's policy requiring employees to provide medical recertification prior to the expiration of their original leave did not violate the FMLA. The court disagreed, citing a specific FMLA regulation allowing an employee to request additional leave while providing reasonable notice, i.e., two days. 29 C.F.R. §825.309(c). Since Killian had

requested additional leave at least six full days before the expiration of her original approved leave in this case, the employer was required to extend the leave because proper notice had been given. Further, the court considered whether the submission of medical certification was timely. The FMLA regulations give employees *fifteen days* to submit medical certification or recertification. 29 C.F.R. § 825.311. The court held that the employer could not avoid the regulations requirement of fifteen days by having a *more restrictive policy* and found that the employer violated the FMLA.

This case also provides some guidance on the amount of damages available to successful FMLA plaintiffs. The court was quick to point out that the damages awarded here were for *interference* with FMLA rights, not *retaliation*, since the Plaintiff was fired for not returning from leave, rather than for taking FMLA leave. The Plaintiff was awarded front pay based on her inability to find a new position with pay equivalent with her job with the defendant. The court found the plaintiff's efforts were sufficient and confirmed that a Plaintiff must not always perform a successful job search, just a diligent one.

By way of dicta, the court noted that even if the medical certification had been late, the remedy pursuant to FMLA regulations was to delay the leave, not to terminate the plaintiff. This dicta conflicts with *Frazier v. Honda*, infra. Thankfully, though the opinion is frequently cited for the purposes of explaining the elements of and distinctions between interference and retaliation claims, the troublesome dicta has not resurfaced to date.

After-Acquired Evidence of Inability to Return to Work and the Defense of FMLA Claims

Edgar v. JAC Products Inc., 443 F.3d 501 (6th Cir. 2006).

This opinion is of great significance and benefit to employers defending against FMLA entitlement (interference) and retaliation claims. The holding establishes that an individual's inability to return to work at the expiration of the twelve (12) week FMLA entitlement period operates as a complete bar in a case in which the plaintiff argues that the employer <u>interfered</u> with his or her FMLA rights. Where the plaintiff asserts <u>retaliation</u> as well as interference, the inability to return to work serves to severely limit the plaintiff's recovery, thus making the claim much less attractive to potential plaintiff's counsel.

Gail Edgar worked at a specialty automotive parts manufacturing plant, holding several jobs since her hire in 1984. After her last transfer, she experienced high blood pressure and anxiety, and was advised to take a leave of absence by her physician. She informed a supervisor about her need for leave, and was instructed to meet with human resources representatives. At the meeting, she was given FMLA forms, including the written leave request and a medical certification form. She returned the request and gave a note from

her physician stating a need for leave, but she did not return the certification form until some time after the employer claimed the fifteen day period had run. The employer mailed her a termination letter, and, at about the same time, the plaintiff was diagnosed by a psychiatrist as suffering from "major depression." Initially, the psychiatrist determined she could not return to work until three months after her initial visit to her primary care physician; however, at a subsequent examination, the psychiatrist extended her need to remain on leave for another month. Shortly thereafter, she started seeing a different psychiatrist, who treated her for a year and finally released her to return to work fifteen months after the expiration of the FMLA period to which she would have been entitled.

Edgar brought suit, alleging that her employer **interfered** with her entitlement to leave by terminating her for failing to provide the certification in a timely fashion. Edgar claimed she returned the form within the time period she negotiated with the human resources manager, and the company insisted it established a firm requirement (oral) that the form be returned by an earlier date.

In order to prevail, Edgar needed to show she was an eligible employee, that her employer was covered, that she was entitled to leave, that she gave notice of the need for leave, and that she was denied benefits to which she was entitled. Intent is not relevant under the entitlement theory; rather, the question is whether the employee was harmed by the employer's failure to provide the benefits due under the statute.

Under *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 84-85 (6th Cir. 1998), no FMLA entitlement violation occurs when an employer terminates an employee incapable of returning to work at the end of the leave period. In this case, Edgar's only evidence that she would have been able to return to work was her own conclusory deposition testimony, which was in direct conflict with the testimony of both her physicians and the documentary evidence.

The Sixth Circuit determined that the significance of "after acquired evidence" of an employee's inability to return to work depends upon the theory of recovery invoked by the plaintiff. First, if the plaintiff relies upon an entitlement theory, the court will consider all the medical evidence related to the employee's ability to return to work, not just that which was available at the time the termination decision was made. The focus in the entitlement case is on the objective question of whether the employee could actually have returned to duty upon expiration of the leave period. On the other hand, in a retaliation action, after acquired evidence of inability to return to work at the end of the leave period does not defeat the claim altogether. It can, rather, limit the plaintiff's relief.

Edgar never claimed that she was terminated because she invoked her FMLA rights, and her own subjective claims that she would have been willing to return to work could not

trump the testimony of her own physicians. Her case was dismissed. Changing her theory to retaliation (or adding that theory) could have rendered a different result.

Properly Communicated Requirement of the Need to Timely Return Certification Form Supports Firing for Failing to Comply

Frazier v. Honda of America Mfg., Inc., 431 F.3d 563 (6th Cir. 2005).

This FMLA case is proof positive that employers are not the only people for whom the FMLA requires strict technical compliance. In 2000-2001, Frazier allegedly violated the attendance requirements set by Honda and was placed into the Attendance Improvement Program.

In the summer of 2001, Frazier notified Honda he was experiencing wrist pain and was unable to report to work. On July 26, 2001, he called Honda's Leave Coordination Department to discuss a request for leave of absence. The FMLA coordinator verbally asked Frazier to provide a medical certification form and stated that the materials would be sent to him in the mail. On July 31, 2001, Frazier received a "facts sheet," a leave of absence request form, and a Certification of Health Care Provider ("CHP") form from Honda. The materials noted that they must be returned to Honda within fifteen (15) days of receipt, so that the due date for the materials was August 14, 2001.

The Plaintiff did not return the paperwork but instead returned to work on August 6, 2001. Shortly after, on August 14, 2001, the Plaintiff visited his doctor again as a result of continued pain in his wrist. Following that doctor's visit, the Plaintiff submitted the CHP form to Honda on August 15, 2001--one day late. The Plaintiff was discharged on August 23, 2001 for multiple violations of its leave of absence policies, the last absence being the one where he submitted the late CHP.

Honda admitted that the Plaintiff would not have been fired if he had submitted the CHP form on time. The Sixth Circuit upheld the grant of summary judgment to the employer. The court discussed 29 C.F.R. §825.311, which allows an employee fifteen days to submit the medical certification form requested by his or her employer. In this case, much ado was made about the method of request by the employer: oral or written. The court dismissed those arguments by reaffirming that an employer's request for medical certification can be oral or written under 29 C.F.R. §825.301(c).

The complicating factor here was that the employer had requested the information by both oral and written means (the telephone call with the Leave Coordination Department and the subsequent packet of materials mailed to the Plaintiff's home). The court affirmed that the oral request was sufficient and that the fifteen days could have run from the date the oral request was made. However, since follow-up materials were sent giving

the Plaintiff fifteen days from the date of receipt to submit the certification, the follow-up written materials served to extend the deadline until the date contained in the written materials. Plaintiff's submission of the medical certification forms was late and the absence was not protected by the FMLA.

This is an employer-friendly case supporting the strict interpretation of the FMLA regulations regarding certifications. The most important lesson is the court's willingness to uphold a termination based on an employee's failure to follow the letter of the regulation (i.e. submitting the medical certification one day late). The message for employers here is clear: when dealing with an FMLA or a possible FMLA situation, notify the employee of his or her responsibilities and adhere to your deadlines for medical certification submission.

Simple statement by provider that employee may return to work triggers employer duty to reinstate; if additional information is needed, it must be sought after employee is brought back to work.

Brumbalough v. Camelot Care, Inc. 427 F.3d 996 (6th Cir. 2005).

Linda Brumbalough, state Clinical Director for a large company providing care for abused and neglected children, went on FMLA leave in June of 2001, indicating that she would need about two to three months of time away from work. About six weeks later, she sought to return to work. Her employer provided her a letter describing her job responsibilities for her physician to sign and return, indicating when she could return to full-time work (which the company maintained was about 60-65 hours per week). The physician instead provided a short handwritten note reading, "She may return to work on 8/13/01. She should only work a 40-45 hour week and limit her out-of-town travel to 1 day per week." Brumbalough claimed she faxed it to the employer- it denied receiving it.

A few days later, the employer sent a letter stating it had not received a response to its fitness-for-duty request, and setting a new deadline for return of the certification. That deadline was extended until August 15th. On August 17th, after she did not return a certification, her employment was terminated.

The issue here was whether Brumbalough's reinstatement rights were interfered with, rather than on unlawful termination during leave. Camelot had required recertification by Brumbalough every thirty days in accordance with 29 C.F.R. § 825.308(c). She did not turn her second recertification statement in, and instead relied upon her fitness for duty statement to support her attempt to come back to work. The court observed in a note that the company may not have been able to terminate her for her failure to recertify because of the requirement under 29 C.F.R. § 825.305(a) and (d) that employee's receive notice of the consequences of failing to timely recertify.

The Sixth Circuit concluded that a plain reading of the fitness for duty statement regulation requires the conclusion that a bald statement that an employee can return to work is all that is needed. If employers need more information, it must be sought after the employee is returned to work. If the employer concludes that the physician's statement clearly indicates an inability to perform essential job functions, the employer can, of course, deny reinstatement.

For employers, this decision complicates the return to work process significantly. If an employee attempts a return to work during a period of FMLA coverage and presents a note that is less than a full release but which does not flatly undercut the ability to perform a clearly essential job function, put the individual back to work immediately. Then, address performance and safety issues separately, requiring a fitness for duty examination by a physician of your choosing if the circumstances merit.

Termination for Failure to Give Notice of the Need for Leave Upheld Where Employee Ignored Multiple Instructions and Never Said He Was Anything But "Sick"

Walton v. Ford Motor Co., 424 F. 3d 481 (6th Cir. 2005).

Terry Walton, an hourly automotive parts worker, suffered a knee injury while doing yard work. He came to work the next day, but left complaining of pain. His physician instructed him to remain off of work until evaluated by an orthopedic surgeon. Walton did not contact the plant regarding his status that day, but called the security office (staffed by independent contractors) and told them he could not come in and to give him a "sick day." The security office reported unscheduled absences to the shift managers so that they could replace Walton on the shift. Walton did not contact his supervisor, the labor relations department or the medical department regarding his status. Four days later, Walton saw the orthopedic surgeon, who instructed him to stay off work for four weeks. Again, Walton called security to take a "sick day," but took no other steps to request medical or FMLA leave.

The company sent Walton a letter, in conformity with standard practice, informing him that if he failed to return to work or provide satisfactory explanation for his absences, he would be terminated. The letter was sent by certified mail, but though delivered three days later, Walton did not pick it up until eight days passed. By that time, he had been fired.

Finally, Walton sent in medical documentation, but the employer refused to reinstate him because he did not properly follow its procedures. The company's written procedures generally required notice to the labor relations department within two days of the initial absence, and prompt return after the request of medical documentation to the medical department. Over the course of his employment Walton received multiple notices of how

to properly request leave, and instructions were also posted on bulletin boards throughout the work site. His employer also sent out a pay notice stuffer that read, **"Do not request FMLA through security."** Most importantly, Walton had requested and received medical leaves of absence on multiple occasions, following the stated procedure, and he admitted that he knew security could not grant a medical leave of absence.

The Sixth Circuit rejected Walton's claims that his FMLA rights had been interfered with by the company's refusal to treat his absence as FMLA-qualifying leave. While it is true that employers cannot rely upon internal procedures as a reason to deny leave where the employee gives timely verbal or other notice, the Sixth Circuit held that **Walton's' "notices" were insufficient** to invoke the protection of the FMLA. The fact that Walton told his supervisor he "twisted his knee" was insufficient to indicate a need for leave, as there was no reason to believe that he had a serious health condition. When Walton called security, he specifically told security to list him as taking a "sick day." "Sick," said the court, does not equal "serious health condition." These ambiguous messages were insufficient to alert the company that Walton had a serious health condition.

The Sixth Circuit distinguished this case from an earlier, much less employer-friendly opinion, *Cavin v. Honda of America Manufacturing, Inc*., 346 F.3d 713 (6th Cir. 2003). In that case, the employee in question called the security office, speaking to the company's employees, not independent contractors, told them that he had been in a motorcycle accident for which he was hospitalized, and the company did not have a specific prohibition against calling security to request medical leave. The content of the *Calvin* notice was sufficient to trigger the FMLA.

Failure to Respond to Leave Request, Combined With Other Circumstantial Evidence, Supports Employee's Claim of Constructive Discharge in Response to Request for Maternity Leave

Saroli, et. ux. v. Automation & Modular Components, Inc., 405 F.3d 446 (6th Cir. 2005).

Marria Saroli was a Controller, the highest level position within her employer's financial division. In late 2000, she became pregnant. Shortly after she announced her pregnancy, she was given a raise and bonus based upon the results of a performance review. After making several verbal requests to discuss the terms of her maternity leave, Saroli prepared a written request for four weeks off after delivery (with the exception of continuing to prepare payroll), and then a graduated return to full time work. The next day, she met with the company owners, who informed her that they had hired one of the owner's sons to manage the accounting and finance department, and that her job responsibilities would largely remain the same. They did not respond to her request for maternity leave. In late March of 2001, Saroli again broached the subject of maternity leave. The co-owner did not discuss any terms, except to state that she would not lose medical coverage while being on leave. He also purportedly distinguished between

medical leave previously given to two male employees for illness and Saroli's maternity leave, stating that "if [plaintiff's] husband needs to go out and get a job, that's not my fault."

Saroli's physician ordered her to stop working in May of 2001, and she prepared a memorandum informing her employer of the need for leave and requesting clarification of compensation during her leave. She met with the two owners, who gave her a letter informing her that her leave was covered under the FMLA, and that the Company would pay for six weeks of salary. It also stated that she could then use vacation pay to supplement an extension of leave. Saroli extended her leave twice, and looked for employment elsewhere while recovering from pregnancy and caring for her infant. On the day she returned to work, she was informed she needed to present a doctor's note certifying her fit for duty. Later that day, she met with one of the co-owners, who informed her he was unhappy with her job performance. At that meeting and in an encounter the next morning, he proposed three options. She could remain employed, and her job responsibilities would be decreased; she could accept a four-week severance and continuing medical coverage package; or, she could remain employed for 2-3 months while she looked for employment elsewhere and the terms of her position would be determined in the upcoming days. Saroli was given a day to consider her options.

Saroli returned the next morning requesting restoration to her job. She claimed she asked whether she would be demoted if she stayed and that the co-owner replied, "probably." After speaking with her attorney, she informed him that a demotion was unacceptable and that he gave her no other option but to resign effective immediately. She did not wait for a response. Saroli filed suit, claiming she was constructively discharged in violation of the Family and Medical Leave Act ("FMLA") and under Michigan's state antidiscrimination statute. As to the gender/pregnancy discrimination claim, the district court concluded she had not been constructively discharged and granted summary judgment to the employer. The Sixth Circuit disagreed, reversed, and remanded the case for further consideration.

Standing alone, the possible threat of demotion would have been insufficient to support a constructive discharge finding. However, other circumstantial evidence suggested that a reasonable person in Saroli's shoes could have felt that the co-owner created an intolerable working environment in hopes of forcing her to resign. From the outset, the co-owner made the process of obtaining maternity leave exceedingly difficult. He commented about his displeasure with her attempt to exercise a right to maternity leave, and indicated it should be treated differently than leave for unexpected illness. In his own deposition, he referred to his female employees as "girls" on six different occasions, never once saying the words "women" or "female." There had never been a pregnant employee at the company and it had no maternity leave policy prior to Saroli's request for leave. The day after Saroli submitted her leave request in writing, her boss informed he'd hired his son to manage the department, thus cutting her off from directly reporting

to the company's owners and resulting in the loss of certain job duties. Finally, the co-owner did not tell her she needed to submit a fitness for duty note until she attempted to return to work, her computer account was not reactivated, and work had been taken from her desk. When she finally was able to reactivate her computer and begin work, she was summoned to a meeting to discuss her future employment. At that meeting, her boss made it clear he desired that she resign.

As to her FMLA claim, the district court had held that the "borderline non-compliance with the procedural requirements of the statute" was of no consequence as Saroli was ultimately granted maternity leave. The defendants conceded that the facts demonstrated multiple failures to comply with the FMLA regulations. The employer did not respond in writing within two days of her notice designating the leave and informing her whether it was paid or unpaid. The employer also failed to inform her she was entitled to twelve, not six weeks, of leave for maternity. The employer further erred by insisting, without the required notice, that she provide a fitness for duty certification. The Sixth Circuit reversed the district court, finding the facts clearly demonstrated **interference** with her FMLA rights. On remand, it instructed the court to determine whether Saroli could show that she was actually prejudiced by her employer's failure to respond to her repeated requests, its discouragement from taking leave, and failure to inform her of her full entitlement. If Saroli could show such prejudice then she would be entitled to repayment, reinstatement, or other equitable relief.

This is 2007. Employers are required to treat leaves for maternity precisely the same way they treat leaves of absence for any other reason, except to the extent that the FMLA or the Tennessee Maternity Leave Statute (if applicable) are more generous. For example, absences related to pregnancy are not subject to the general three-day requirement for serious health conditions under the FMLA. And, even if an employer has a twelve-week outside limit on all leaves of absence (a risky approach unless it employs an exceptionally small number of people), keep in mind the possibility that you'll need to extend that period to 16 weeks if you have 100 or more full-time employees at a single location. And, if an employer has a pregnant employee whose work performance is lacking (for reasons unrelated to any absences related to her pregnancy), it should think long and hard about whether dealing with the performance issue during a pregnancy or immediately after a return to work is worth the likelihood of facing a claim with enough teeth to survive a motion for summary judgment. Pregnancy, adverse action, qualification for the position, and circumstances giving rise to an inference of unlawful discrimination are the hallmarks of serious pregnancy discrimination. The cost of defense is expensive--even if the employer is successful.

Equitable Estoppel and Subsequent Contest of FMLA Entitlement, as well as Challenges to Certification on the Grounds of Incompleteness

Sorrell v. Rinker Materials Corp., 395 F.3d 332 (6th Cir. 2005).

This case applies the doctrine of equitable estoppel to the analysis of FMLA claims brought by employees whose claims are based on the argument that they were unconditionally granted leaves of absence which were later "interfered" with by being denied. It also concluded that, while employers do not have to insist upon a second or third medical opinion, or ask for clarification of a certification, in order to assert that the employee was not actually entitled to leave, they must provide employees notice and an opportunity to correct an allegedly incomplete certification if they later want to rely upon "incompleteness" as a grounds for denying leave.

The plaintiff notified his supervisor that he intended to retire, and began training his replacement. At the time he made the announcement, he thought that the FMLA applied to new parents only. After learning that he might be entitled to leave to care for his wife, Sorrel decided he wanted to apply for leave instead of retiring. The factual record was unclear as to the timing of his oral notice to his supervisor, but prior to the effective date of his "retirement" he was given the appropriate forms. His leave was officially approved. A personnel change notification form documented that he had rescinded his earlier retirement decision, and had been restored to active employee status. Before the expiration of his leave, the employee made contact with his supervisor, and was informed that a "hiring freeze" precluded his return to work.

The district court concluded that the employee had voluntarily relinquished his position by notifying the company of his retirement before requesting the leave, and found for the employer. The Sixth Circuit reversed. On remand, the district court was instructed to consider whether, based on either a failure to inform its employees of their rights under the statute or upon its unconditional guarantee of protection, the employer should be estopped from challenging Sorrell's entitlement.

What lessons are to be learned from the outcome here? First, employers will find little solace in the courts when they unconditionally grant leave and then seek to justify a decision not to return an employee to work based on inadequate paperwork. Second, supervisors and Human Resources staff need to identify problem requests for leave at the earliest of stages, and then develop a consistent approach to the treatment of both individual eligibility and the sufficiency and completeness of the medical certifications in question. FMLA policies and procedures should be implemented and followed.

Employee Misconduct in Conflict Over Intermittent Leave Medical Certification Defeats Retaliation Claim

Hoffman v. Professional Medical Team, 394 F.3d 414 (6th Cir. 2005).

The Sixth Circuit decided a case in which a terminated employee argued that her employer willfully **interfered** with her FMLA rights and **retaliated** against her for taking federally-protected leave. The employer's position was that the employee was fired because of her repeated hostile interactions with her supervisor over a disputed medical certification form, including at least one exchange (there was a dispute over whether she used profanity on one or two occasions) in which, using the "f" word, she told her supervisor to "quit *&#!!ing with [her]" and to "leave [her] alone!"

Since the employee waited more than two years to file her claim, she needed to prove that the company's behavior was willful in order to avoid losing on the issue of timeliness. The district court found, and the Sixth Circuit agreed, that the company's insistence that she correct a vague and conflicting medical certification for intermittent leave due to migraines was not evidence that it was knowingly or recklessly interfering with her rights. The court also looked favorably upon the company's consultation with counsel regarding the disputed medical certification form. The plaintiff argued that the company's engagement of counsel was motivated by the goal of forcing the plaintiff to part-time status; however, the Sixth Circuit opined that the duality of the employer's motives in discerning the outside limits of its obligations did not make its actions willful.

As to the retaliation claim, the Sixth Circuit likewise found for the employer. While acknowledging that there was evidence that scheduling needs played a role in its insistence upon a corrected certification, the court nonetheless concluded that the district court did not err in concluding that the employee's outbursts (waving papers in her supervisor's face and shouting profanities) were the reason for her termination.

The decision should be of great comfort to employers. Intermittent leave requests are among the most difficult to administer. There are two lessons here. First, when the certification form is returned and is so vague or conflicting as to make it impossible to make a determination about whether the condition is qualifying and what the actual intermittent leave needs actually are, employers may rightly insist on the form being corrected. Second, the "protected activity" cloak is not impermeable. Employees cannot engage in misconduct like cussing out a supervisor in the guise of protected activity.

Employers must reinstate returning employees within two business days.

Hoge v. Honda of America Mfg., 384 F.3d 238 (6th Cir. 2004).

Under this decision an employee who presents a return to work statement, either prior to or at the planned expiration of leave, is entitled to prompt reinstatement provided he or she can perform essential job functions. Simply translated, that means within two business days of notice to the employer.

Lori Hoge had physical restrictions unrelated to her FMLA leave and which dictated the job she performed at Honda. While she went on leave for an unrelated reason, Honda instituted a "new model changeover" for the 2000 models. When she attempted to return to work, Honda delayed her reemployment for several weeks, arguing that the FMLA should be interpreted *in pari material* with the ADA and permits employers to restore employees to positions within a "reasonable" timeframe.

The Sixth Circuit disagreed, stating that nothing in the FMLA's restoration provision, 29 U.S.C. § 2614(a) permits employers to delay job restoration for "reasonable" periods of time. Moreover, employees cannot be required to take more leave than they need under 29 C.F.R. §825.312(e) and 29 U.S.C. §2615(a)(1). Since employers are entitled to at least two business days of notice if the employee returns to leave earlier than originally planned under 29 C.F.R. §825.309(c) and 825.312(e), the longest period of time Honda would delay restoring Hoge was two business days after it received notice of her fitness for duty.

Lesson here? There is little breathing room for employers when dealing with sticky return to work questions. If an employee presents with appears to be a facially sufficient fitness for duty statement (or even one that raises more questions than it answers), put them back to work within two business days and manage the lingering questions later.

SETTLEMENT OF EMPLOYMENT DISPUTES

Fourth Annual
Employment Law Conference

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How to Buy Some Peaceful Sleep Following a Difficult Separation

Problem employees? Nope, not me. All of my employees are attentive, prompt, loyal, timely, effective, efficient, well-groomed, drug and alcohol-free, followers of all my company policies, and arrive at work on time every day with an appropriate attitude! If this is you, let me know. I will alert the national media and have your company bronzed and sold at auction. If, however, you are like every other company, you have the occasional bad apples.

You take great pains to deal with your bad apples in a fair, consistent and effective manner. After attending last year's Kramer Rayson Employment Law Conference, you (and the company's supervisors) engage in management practices that counsel employees on their performance or conduct issues and provide opportunities for improvement. You document those meetings and implement progressive discipline to deal with the problem. You have an employee that has been warned repeatedly and has been given written warnings, and that employee has just violated the same company policy again. You have your mind made up – "I have done what it takes and this person will be terminated!"

First, let me commend you for your management practices and patience in dealing with a problem employee. You have taken every step possible (so far) to protect your company from a discrimination lawsuit. It would be nice if taking those steps and having your "ducks in a row" were enough to stop a former employee from filing a charge with the EEOC or THRC and eventually filing a lawsuit. But, the simple fact is that any employee or former employee can walk into the EEOC's or THRC's office, spend 5 minutes filling out a charge (whether supported or not), and send your business into a tailspin. Charge responses are complex, and although an attorney is not necessarily required, most companies hire an attorney to draft their responses. It is hard to believe that after all that work to do it right, you might still have to defend a charge or a lawsuit!

At this point, your options are limited. You can go on with your business, much like you do after every other termination or employment action you take. But what if, for those problem employees, you could spend a little money to obtain a release from the employee? And what if the worst happens? A current or former employee files a charge or lawsuit against you based on employment rights. Release and settlement agreements, if done correctly, can be a good investment.

I. Separation Agreements

A separation agreement is a contract between an employer and an employee or former employee that states that the employer is giving the employee money (or some other form of consideration) in exchange for the employee's release of all claims against the employer. It should summarize the relationship between the parties and resolve all matters at issue.

As with any contract, valuable consideration must be offered by both parties to make the contract enforceable. The consideration passed from the employee is, of course, the promise and covenant not to file a lawsuit against the employer. It can also include promises not to compete, not to solicit clients or employees, and promises not to reveal trade secrets or confidential information. All those promises are valuable to an employer and qualify as good consideration.

And of course no employee is willing to offer up those promises for nothing (nor would such a "contract" be enforceable). The most common form of consideration by an employer is a money payment, either in lump sum form or regular payments. Alternatively, if the employee owes the employer money, the employer may agree to release the employee from his or her obligation to repay the money.[1]

The amount of a separation payment or payments is not an exact science. There is no right amount. Certainly it is not good business to go around paying former employees for months and months of work they do not even perform. However, if you have made the decision to offer an employee severance payment in exchange for a separation agreement, you do want the employee to sign the agreement. You have to make it worth an employee's while to waive the right to sue. Generally, an offer of 1 – 3 months of salary paid in a lump sum is an attractive offer and is hard to turn down.

The amount of a settlement payment is also uncertain. These amounts are more likely to be the result of a negotiation between the Company and the employee.

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[1] Be careful here. In order to be proper consideration, the release of debt must actually be worth something. If an employer is attempting to have an employee pay money back that either the employer is not actually entitled to, or which cannot legally be recouped by the employer, releasing that debt is not valid consideration.

A. When to Consider a Separation Agreement

It is not necessary, nor is it advisable, to propose a Separation Agreement to every employee who resigns or is terminated. Most employees come and go quietly, and you may have no reason to believe that your company is at risk for a charge or lawsuit. But there are times when a particular situation raises a red flag for a future claim. Some of the following are times when you might consider a settlement agreement:

- the employee is in a protected category or multiple protected categories
- the employee has raised concerns in the past
- the reasons for your decision are not well-documented
- the employee is being treated differently than others committing same offense
- progressive discipline was not used
- the employee has an attitude of distrust
- the circumstances might suggest the employee was treated "unfairly"
- the termination or resignation comes close in time to a protected event (e.g., return from FMLA leave, etc.)
- you want the employee to agree not to solicit employees, reveal confidential information or similar activities
- any other reason that leaves you feeling like a charge or lawsuit might be filed.

These agreements should not be used as a way to buy you out of consistently making poor decisions regarding termination of employees. Used for that purpose, they are much too expensive. It is not good business practice to present these agreements to every employee leaving your company.

B. Settlement Agreements

Settlement agreements and releases are similar to separation agreements, but are offered in response to a specific demand, complaint, charge, lawsuit, or any other assertion of rights. It can be expensive to defend discrimination charges and lawsuits. While many employers would rather pay legal fees to defend the actions on principle, some employers make a business decision to offer small amounts of money to settle the matter. On the whole, similar provisions exist for both separation agreements and settlement agreements.

C. What should these agreements include?

Drafting a proper settlement or separation agreement (hereinafter "separation agreement") is not as simple as pulling one from the internet and filling in the blanks. It is also not advisable to use one prepared years ago for another departing employee. It is a contract between two parties and should be specific to the situation. Below is an outline of "must-have" provisions:

1. Set the Scene.

The preamble, or preliminary statement at the beginning of the settlement agreement, should establish the existence of a contract. It should also unambiguously state the parties' mutual assent to the terms of the agreement:

> This Separation Agreement and Release (the "Agreement") is made and entered into as of October 1, 2007, by and between **My Company, Inc.**, a Tennessee corporation with an address at 800 South Gay Street, Knoxville, Tennessee, 37901 (the "Company"), and **Bad Apple**, an individual resident of Knoxville, Tennessee, Social Security Number _____, date of birth _____ (the "Employee").
>
> WHEREAS, Employee has been employed at the Company since December 1, 2004 as its Director of Bad Attitude; and
>
> WHEREAS, the Company terminated Employee's employment on October 1, 2007 (the "Separation Date") due to continued attendance problems;
>
> [If a charge has been filed, "WHEREAS, Employee has filed a charge of discrimination with the EEOC (Charge No. 11111-555555) asserting gender and race discrimination;]
>
> WHEREAS, the Company and the Employee mutually desire to enter this Agreement to amicably resolve any and all matters between the Company and the Employee;
>
> NOW, THEREFORE, in consideration of the

> mutual covenants and agreements contained herein, and other good and valuable consideration, the receipt, adequacy and sufficiency of which is hereby acknowledged, the parties agree as follows:

What have you accomplished here? You've clearly identified the parties and provided yourself a useful shorthand for all future references to them. You've established the date the contractual relationship was entered. And, most importantly, you've established the critical elements of a contract and demonstrated that the parties' minds have met.

2. Confirm the Termination.

You want to make it clear that whether or not the employee chooses to sign the settlement agreement has no effect whatsoever on whether the employee is terminated. The termination should stick, regardless of the agreement. It should further be clear that the employee is not responsible for performing, and should not perform, any more work on behalf of the employer. The last thing you want is a former employee asking for more money for work performed post-termination because it was not clear that he or she had been relieved of his or her duties.

> Termination of Employment. Employee's employment with the Company shall terminate effective as of the close of the meeting on the Separation Date pursuant to Employee's termination letter. Such termination shall be without liability to either party except to the extent of the parties' voluntary covenants and agreements set forth in this Agreement. Employee shall cease to serve as the Director of Bad Attitude of Employer upon termination of employment.

3. State the Consideration.

It should be evident in the agreement what amount of money the Employee is receiving in exchange for his or her signature. If the amount is two months of pay for a salaried employee making $60,000, state it as follows: "the Severance Amount shall be payable in a lump sum equal to two months of Employee's current salary, or ten thousand dollars ($10,000.00)." The section should also make it clear that the payment total is gross, and the appropriate taxes and such

will be withheld. The easiest way to accomplish this is to issue the lump sum severance payment in the form of a paycheck.

You should also make sure to state that the employee is not otherwise entitled to the severance amount. Because you must offer consideration, you must be giving the employee something above and beyond what is already owed to him or her. It is best to have the employee agree that he or she is not entitled to the money under any other circumstances. Finally, the money is not being offered for nothing. Some employers require further promises from the employee, such as covenants to not disclose confidential information or trade secrets. If the employee breaches those provisions, you will want to recover a chunk of the money paid. A liquidated damages provision appears later as well.

> Severance Payments to Employee. Employer shall pay severance pay in the total amount of ten thousand ($10,000.00) dollars (the "Severance Amount"). The Severance Amount shall be payable in a lump sum and will be less all applicable taxes and withholdings. Employee acknowledges that Employer is not legally obligated to pay the Severance Amount and the payment of the Severance Amount and the other consideration provided by this Agreement, represents adequate consideration for all of Employee's covenants and agreements under this Agreement. In the event Employee breaches any of his covenants under [include paragraph numbers of non-competition, non-solicitation, and non-disclosure covenants] of this Agreement in any material respect, Employer shall have the right, in addition to any other remedies available at law or in equity, to recover any of the Severance Amount paid pursuant to this Agreement.

There are other forms of consideration besides cash payments. For instance, it may be valuable to an employee to be promised paid health insurance through the employer's insurer for a period of time. This is an offer that many employees cannot afford to turn down. If you really want the employee to sign the agreement, think about offering a month or two of salary plus an agreement to continue the employee's health insurance through COBRA, with the company paying the entire premium for the employee for a period of six months or so.

> COBRA Benefits. Employee shall be entitled to continue coverage under Employer's group health insurance plan subsequent to the Separation Date in accordance with COBRA requirements. The Employer agrees to pay the full amount of the premium due on Employee's health insurance for the first six (6) monthly premiums due following the Separation Date, beginning October 1, 2007. Following the payment of six (6) monthly premiums paid by Employer, Employee will be entitled to remain on the health insurance plan subject to COBRA's requirements and at his own expense.

4. Get your release.

You are not paying the employee a severance amount for no reason. If there is a section in the agreement to focus on, this is it. Think about the employee's situation and what federal and state statutes and common law provide a cause of action against you. List as many of those statutes or causes of action as possible and include a more general release of liability as well.

Although it is included in the release paragraph by name, release of the Age Discrimination and Employment Act of 1967 ("ADEA") is more complicated. Its inclusion in this release section is NOT sufficient to waive an employee's right to sue for age discrimination. More information on proper waiver of ADEA claims appears later.

The recent position of several courts is that Fair Labor Standards Act claims and Family and Medical Leave Act ("FMLA") claims cannot be waived, even in knowing and voluntarily waivers. The literal view of that interpretation is that any waiver or separation agreement is unenforceable as to those claims. For that reason, until the line becomes clear about what claims can be waived, FLSA and FMLA claims should be treated cautiously. In the meantime, the best course of action is to include the statutes in the general waiver and include a factual acknowledgment from the Employee that he or she has received any and all compensation and leave to which he or she is entitled.

> Release of Employer. Employee hereby agrees to release and forever discharges, for himself, his heirs, successors and assigns, Employer, its subsidiaries and

affiliates, and its directors, officers, employees and agents (collectively the "Releasees") from any and all claims or causes of action Employee now holds or claims to have, of any nature whatsoever, at law or at equity, whether known or unknown, related in any way to his employment or former employment with, separation from or termination of employment with Employer or with any of its subsidiaries or affiliates; specifically including, but not limited to, any rights or claims Employee may have arising under Title VII of the Civil Rights Act of 1964, as amended; the Age Discrimination and Employment Act of 1967, as amended; the Americans With Disabilities Act; the Older Worker's Benefit Protection Act of 1990; the Employee Retirement Income Security Act of 1974, as amended; the Fair Labor Standards Act of 1938, the Family and Medical Leave Act; the Tennessee Human Rights Act and all other federal or state civil rights laws; all oral and written contract rights and the common law. The claims Employee is releasing hereunder include, but are not limited to, those based on breach of contract, wrongful termination (for any reason), defamation, slander and libel, negligent or intentional infliction of emotional distress, invasion of privacy, misrepresentation, and any other claims or causes of action arising out of his employment with Employer or the termination thereof. Employee agrees not to file or pursue any claims he might have for pain and suffering, negligence and/or intentional infliction of emotional distress or similar claims under the Tennessee Workers' Compensation Act and he warrants and represents he has no such claims. Employee also warrants and represents that he has received all benefits, leave and compensation to which he is entitled under the FMLA and the Fair Labor Standards Act of 1938. This release is intended to cover all claims or causes of action Employee now holds or claims to have or which he at any time had or claimed to have, had or held against any or all of the Releasees, whether known or unknown.

5. Keep it Confidential.

These agreements are not for every employee. If you do not have a company policy on paying employees severance pay, you certainly don't want to effectively create one by locking yourself into giving this "opportunity" to each departing or complaining employee. Nor do you want your employees to get wind that the company prefers to pay people to make problems go away. A widespread communication that the company is offering severance pay or settlement pay can result in an increased number of claims upon termination/resignation. Avoid the expectation from employees by protecting the confidentiality of these situations. You will want your separation agreement to reflect that the employee is prohibited from divulging the severance payment to anyone other than the few exceptions listed. It is also advisable to include a liquidated damages provision linked to the confidentiality provision. Make it clear to the employee that the seriousness of this promise should not be underestimated and that breaches of it will result in repayment of most of the original severance payment.

> Confidentiality. The terms of this Agreement including, but not limited to its financial terms, are strictly confidential. Employee agrees he will maintain it as confidential, except (i) to immediate family, legal counsel, and tax and financial planners who have a need to know, (ii) as otherwise required by law in which case Employee will notify Employer in advance of disclosure, and (iii) as necessary to enforce this Agreement. If Employee makes such disclosure to his immediate family, legal counsel, or financial planners, he shall, prior to sharing the information, inform them of the strict confidentiality requirements of this Agreement, require them to agree not to share the information with anyone else, and take all reasonable steps to ensure their compliance. It is agreed that if Employee breaches this confidentiality by disclosure of the terms of this Agreement, then Employee will reimburse the Company the amount of Five Thousand Dollars ($5,000) as liquidated damages and will pay all costs, including reasonable attorney fees incurred by the Company, to enforce this Agreement.

7. No Rehire Provision.

If this is an employee that you have had difficulty with, you want to ensure that this separation agreement will terminate your responsibilities to this employee for good. You do not want this person applying for a job in the future, which places you in a precarious position in defending yourself in a failure-to-hire case. Have the employee agree that he or she understands that there will be no opportunity for future employment, either directly or indirectly, for your company.

> No Rehire. As a free and voluntary act, Employee agrees never to seek or accept employment or any indirect employment or work by, for, with, or on behalf of the Company, including work through a temporary agency or as an independent contractor at any time after the Separation Date. If the provisions of this paragraph are breached by Employee, his application will be rejected by the Company without any resulting liability to the Company. If Employee is employed by, with, for or on behalf of the Company as an employee through a temporary agency, or as an independent contractor, or otherwise, he shall be subject to summary dismissal or discharge from employment with the Company without any resulting liability to the Company.

E. The Extras

Again, general contract law applies to separation agreements. It is important that you establish some basic fundamentals, such as the law under which the contract will be interpreted and that, if a provision is found invalid, it does not invalidate the entire agreement. Below are some common provisions:

> Acknowledgment of Payments. Employee acknowledges that this Agreement provides for all payments and benefits, including severance payments, due to Employee from the Company or any of its subsidiaries or affiliates as a result of the termination of Employee's employment.

Opportunity to Review. Employee acknowledges that he has received a copy of this Agreement; that he has had a reasonable time to review it; that he has read and understands all of the terms, conditions and the effect thereof; that he has been advised to consult with counsel and has consulted with counsel prior to executing this Agreement; and that he has executed this Agreement knowingly and voluntarily

No Reliance. Employee acknowledges that he has not relied upon any representations or statements made by the Company or any of its directors, officers, agents, employees or attorneys with regard to the subject matter, basis or effect of this Agreement.

Governing Law and Venue. This Agreement is made and entered into in the State of Tennessee and shall in all respects be interpreted, enforced and governed under the laws of Tennessee. The language of all parts of this Agreement shall in all cases be construed as a whole, according to fair meaning and not strictly for or against either of the parties. Any action to enforce this Agreement shall be brought in the courts of Knox County, Tennessee.

Severability. Should any provision of this Agreement be declared void or be determined by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions, shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement, unless the elimination of such provision alters a material right or interest of a party, in which case this Agreement shall be deemed to be void *ab initio* and the parties shall be returned to their original positions and any payments made by the Company shall be reimbursed to the Company.

Entire Agreement. This Agreement sets forth the entire agreement between the parties hereto and fully supersedes any and all prior agreements or understandings between the parties hereto pertaining to the subject matter hereof, whether oral or written.

> Binding; Effect. This Agreement shall be binding on the heirs, successors and legal representatives of the parties.

II. Tax Issues on Settlement Payments

In most separation agreements offered to departing employees, the consideration paid is in the form of severance pay. The general consensus has always been that severance pay is considered "wage income" and should be reported as such. For that reason, my advice to employers has always been to pay the severance payment through the payroll system, so that the appropriate amount of taxes is withheld.

The same may be true for settlement payments made to an employee who has already made a claim, complaint, report, charge or suit alleging discrimination or harassment. The settlement amount, whether classified as payment for back wages or for emotional distress, will be taxable unless the employee suffered an actual physical injury or medical expenses associated with the emotional damages. In any event, however the settlement amount is classified by the parties, it is advisable to include an indemnification section which essentially places the responsibility for taxes on the employee.

> **Payment of taxes**. Employee agrees he is solely and entirely responsible for the timely reporting, paying and discharging of all federal, state and local taxes, penalties and interest which may be found due upon the consideration listed in paragraph ___, regardless of how the payment is characterized by Employee for tax purposes. The Company and Employee intend that the payment for emotional distress not be construed as wages, or compensation for employment but Employee agrees to indemnify and hold harmless the Company in the event income taxes, penalties or interest are found to be due on the payment to Employee. The Company and Employee agree they will promptly provide notice to the other in the event a claim is made for tax, withholding or unemployment compensation which they believe is the responsibility of the other party.

III. Separation Agreements under the ADEA

Special language is required for separation agreements involving employees 40 years of age or older if you want the employee to waive age discrimination claims.

A. Waiver of individual ADEA Claims

The Older Workers Benefit Protection Act ("OWBPA") "is designed to protect the rights of and benefits of older workers." *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998). "A waiver may not be enforced unless it is knowing and voluntary," and it is "not knowing and voluntary unless it strictly satisfies enumerated requirements". *Id.* at 426 (quoting 29 U.S.C. § 626(F)(1)). "Congress imposed specific duties on employers who seek releases of [ADEA] claims . . . . an employee 'may not waive' an ADEA claim unless the employer complies with the statute." *Id*. at 427.

Any time you are entering into a separation agreement and release with an employee 40 years of age or older, you MUST follow the specific requirements of the ("OWBPA"). The OWBPA revised the ADEA to state that age discrimination waivers cannot be considered knowing and voluntary and the claims are therefore not waived unless each of the following are true:

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
(B) the waiver specifically refers to rights or claims arising under the ADEA;
(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;
(F) (i) the individual is given a period of at least 21 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.

29 U.S.C. § 626(f)(1).

An example of a paragraph meeting the requirements of the OWBPA for an individual waiver of ADEA rights is as follows:

> Right of Revocation. Employee acknowledges that he has been offered a period of twenty-one (21) days in which to consider entering into this Agreement and has been advised by the Company to seek legal advice prior to entering into this Agreement. As evidenced by his signature below, Employee acknowledges that he has read and reviewed this document and now freely and voluntarily, without coercion, agrees to and understands the significance and consequences of its terms. Following the date of execution of this Agreement by Employee, Employee shall have seven (7) days in which to revoke this Agreement, in which case this Agreement shall become null and void and the Company shall not make any payments to or extend any benefits to Employee as contemplated under this Agreement. Should Employee not exercise his right to revoke this Agreement within seven (7) days from its date of execution, this Agreement shall become effective and each party shall be obligated to comply with the requirements stated herein. Employee acknowledges that the Company shall have no obligation to make any payments to Employee, or take any other actions hereunder during the seven-day period immediately following execution of this Agreement. Employee acknowledges that he is not waiving rights or claims that may arise after the date the waiver is executed. Neither Employee's failure to execute this Agreement nor Employee's rescission of this Agreement after execution shall affect or prevent Employee's termination of employment on the Separation Date.

B. Waiver of ADEA claims for group programs

The OWBPA (as a revision of the ADEA) goes on to state that even stricter requirements must be met for "waivers requested in connection with an exit incentive or other employment termination program offered to a group or class of employees." 29 U.S.C. § 626(f)(1)(F)(ii).

There are two types of "group programs" covered by 29 U.S.C. § 626(f)(1)(F)(ii). The first, "exit incentive programs," are also commonly referred to as voluntary reductions in force ("RIF"). The second, "other employment termination programs" refers to an involuntary RIF where a group of employees is involuntarily terminated and offered consideration (usually severance pay) in exchange for a waiver of ADEA claims. Severance pay offered in an involuntary RIF in exchange for a waiver of, among other things, ADEA claims is an "other employment termination program." 29 C.F.R. § 1625.22(f)(1)(F)(ii). Assuming there is more than one employee in the group offered the program benefit, the RIF is governed by 29 U.S.C. § 626(f)(1)(F) and (H).

Pursuant to 29 U.S.C. § 626(f)(1)(F), the individuals must be given 45 days in which to consider the employment termination program offer. Pursuant to 29 U.S.C. § 626(f)(1)(H), the individuals covered by the program must receive: (1) written notice of the "class, unit, or group" of individuals covered by the program, any eligibility factors, any time limits applicable to the program; and (2) the job titles and ages of those individuals in the group selected for the program and the ages of all individuals in the same job classification or organizational unit who are not selected.

Specifically, Section 626(F)(1)(H)(i) and (ii) provides, in pertinent part:

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer . . . informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to --

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such programs; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

C. Non-Compliance with the Waiver

It has been held in at least one case that the employer's waivers were voided because it did not describe to the employee the factors considered in selecting them for a RIF. Recall that 29 U.S.C. §(f)(1)(H)(i) requires that the employer notify those selected of "any eligibility factors for such program and any time limits applicable to such program" In *Merritt v. FirstEnergy Corp.*, 2006 U.S. Dist. LEXIS 10589 (N. D. Ohio, March 31, 2006) the court held that the employer's ADEA waiver was void because it had "failed to provide the 'eligibility factors' for the RIF and 'any time limits applicable to such program' to Merritt in writing at the time the release was given to him. The failure was that the employer did not explain what factors it considered in selecting the individual employees for the RIF. Therefore, Merritt's release of his ADEA claim was not knowing or voluntary." *Id*. at *9-10. The court cited *Kruchowski v. Weyerhauser Co.*, 423 F.3d 1139, 1143-44 (10th Cir. 2005) where the Tenth Circuit held the employer had failed to provide the eligibility factors for the RIF because it failed to provide the factors utilized to analyze each individual in determining whether to retain or terminate. That version of *Kruchowski* was pulled and replaced by 446 F.3d 1090 which does not address the "eligibility factors" issue. Nevertheless, the conservative view is to take the cases seriously and describe the factors being considered in the RIF when discussing the eligibility factors. And even if there is no "time limit" to the severance program other than the 45 days given to consider the release, the notice should specifically state that the "only time limit to the program is the 45-day period."

It is also important to be broadly inclusive on the age-related information given. The EEOC regulations state, "Information regarding ages should be broken down according to the age of each person eligible or selected for the program and each person not eligible or selected for the program. The use of age bands broader than one year (such as 'age 20-30') does not satisfy this requirement." 29 C.F.R. § 1625.22(f)(4)(ii). "If the terminees are selected from a subset of the decisional unit, the employer must still disclose information for the entire population of the decisional unit." 29 C.F.R. § 1625.22(f)(4)(v). If only salaried employees are considered, you should provide the ages and classifications of all salaried employees at the facility. The same rationale applies if only hourly employees are considered. If the management looked at all employees and then focused on one group or another, then all employees at the facility should be disclosed by age and

classification. This allows the employee maximum information from which to judge the possible validity of an age discrimination claim.

D. Recent Case Law on Waiver Enforceability

Kellogg Co., v. Sabhlok, 471 F.3d 629 (6th Cir. 2006).

Jatinder Sabhlok, a Vice-President and "business partner" at Kellogg in charge of international research and development, was part of a group of employees whose permanent jobs were eliminated as part of a business reorganization in September 2001. After the reorganization was communicated but before the work actually ended, Kellogg asked him to extend his employment for an additional year to assist in overseas research and development of new laboratories abroad. Sabhlok claimed he was induced to accept the job extension based on oral assurances before and after the RIF took effect in September 2001 that a permanent position would be located.

Kellogg offered RIF'd employees a "carrot" and "bigger carrot" approach. Everyone was given some severance benefits. If employees signed a Separation Agreement and Release of Claims Form, they received enhanced severance amounts and benefits. Sabhlok executed the Separation Agreement in November.

During the one year extension, Sabhlok was on the road nearly 70% of the time. He asked to be considered for several permanent positions which became available during the year, but was not selected for any of the openings. Sabhlok claimed that younger, less qualified individuals were selected over him, and that he was told, "as you can see, we are bringing up the younger people."

After the end of the extension, Sabhlok and Kellog executed an amendment to the Separation agreement, which provided six weeks of severance pay to Sabhlok and a pro rata bonus for the year. Beginning in 2004, Sabhlok, through counsel, wrote Kellogg threatening suit. Kellogg filed a declaratory judgment action seeking to snuff out Sabhlok's age discrimination claims on the grounds that they were barred by the Separation Agreement and Release of Claims and the Amendment that was executed after the extension period ended.

Applying Michigan contract interpretation law, the district court found, and the Sixth Circuit agreed, that Sabhlok's claims were barred by the agreements. First, the original agreement included language stating that there was no obligation on Kellogg's part to rehire him, and the Amendment specifically incorporated the

terms of the original document. Additionally, the district court held that common sense dictated that there would have been no incentive for Kellogg to offer additional benefits at the conclusion of the extension period if Sabhlok was not waiving rights related to the sought after permanent position.

IV. Conclusion

Separation agreements and settlement agreements are useful tools when used properly. Keep in mind that these are contracts and involve an employee's waiver of certain rights. Any flaw in the agreement will be construed against the employer and may result in an unenforceable agreement. It is wise to consult your counsel about getting a properly drafted separation or settlement agreement.

REQUIRED ELECTRONIC RECORDKEEPING AND DISCOVERY ISSUES UNDER NEWLY-AMENDED FEDERAL RULES

Fourth Annual
Employment Law Conference

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Required Electronic Recordkeeping and Discovery Under the Newly Amended Federal Rules

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September 20, 2007
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Agenda

- Federal E-Discovery Rules: origin and text
- Other laws regarding information management
- Recent developments
- Policy elements
- Litigation holds

What is electronic discovery?

- Routine and basic part of civil litigation.
- No longer “mutually assured destruction.”
- Almost all documents are electronic.
- Most corporate data reside in or are attached to e-mail messages.
- Most companies lack a written information management policy.
- Many companies cannot coherently explain their IT architecture or operation.

Electronic discovery vs. paper

- **High volume** (increased costs to locate, preserve and review)
- **Dynamic nature** (increased risk of inadvertent loss or destruction – or preservation)
- **Potentially incomprehensible** (without the right technology)

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How did we get here?

- **December 1, 2006 –** FRCP e-discovery amendments took effect.
- **August 2, 2007 –** Uniform Law Commission approved Uniform Rules Relating to Discovery of ESI.
- **September 6, 2007 –** TBA Litigation Section circulated proposed e-discovery amendments to TRCP.

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Defining ESI: Rule 34(a)

Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, **test, or sample** any designated documents **or electronically stored information** – including writings, drawings, graphs, charts, photographs, sound recordings, images, and **other data or data compilations stored in any medium from which information can be obtained – translated, if necessary, by the respondent into reasonably useable form**…

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Early ESI Discussion: Rule 26(f)

(f) Conference of Parties; Planning for Discovery.

Parties must confer **to discuss any issues relating to preserving discoverable information**, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning…

• any issues relating to disclosure or discovery of **electronically stored information**, including the form or forms in which it should be produced

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Early ESI Discussion: Rule 26(f)

- any issues relating to claims of **privilege or of protection** as trial-preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order
- Form 35 Report of Planning Meeting specifically requires description of proposals for disclosing and discovering ESI; allows for description of any privilege agreements reached.

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Early ESI Discussion: Rule 16(b)

Rule 16: Pretrial Conferences; Scheduling; Management

(b) Scheduling and Planning.

The scheduling order also may include:

(5) provisions for ***disclosure or discovery of electronically stored information***;

(6) any ***agreements*** the parties reach for asserting claims of ***privilege or protection*** as trial-preparation material after production.

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Practical Impact: Geek up!

- Consider what you know, or need to learn, about all relevant systems.
- Understand possible forms of production.
- Agree on form, accessibility, search terms, date restrictions, sampling.
- This may be your “last clear chance” to save money.

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Reasonably Accessible ESI: Rule 26(b)(2)

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(b) Discovery Scope and Limits.

(2)(B) A party need not provide discovery of electronically stored information from sources that the party **identifies as not reasonably accessible because of undue burden or cost**.

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Reasonably Accessible ESI: Rule 26(b)(2)

- Party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.
- Court may nonetheless order discovery from such sources if the requesting party shows **good cause**.

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Reasonably Accessible ESI: Rule 26(b)(2)

- **The two-tier approach:**
  - Sort through the easily accessed sources
  - Decide what you need to do with the more inaccessible sources.
- This was written with backup tapes in mind.

Reasonably Accessible ESI: Rule 26(b)(2)

- **Preserve broadly, produce narrowly.**
- Inaccessible ESI is presumptively excluded from production.
- Committee notes: while you may not have to produce inaccessible ESI absent a motion to compel, you still must **preserve it and identify it** in your responses.

Reasonably Accessible ESI: Rule 26(b)(2)

- Examples of not reasonably accessible ESI include “deleted” info that could be restored with forensics; disaster recovery backup tapes not meant for searching; legacy data from outmoded systems.
- Microsoft’s definition of reasonably accessible ESI: “in active use for the day-to-day operation” of the party’s business.

Belated Assertion of Privilege: Rule 26(b)(5)(B)

Rule 26(b)(5) Discovery Scope and Limits. Claims of Privilege or Protection of Trial Preparation Materials.

(B) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim **may** notify any party that received the information of the claim and the basis for it.

After being notified, a party **must** promptly return, sequester, or destroy the specified information and any copies it has and **may not use or disclose** the information until the claim is resolved.

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Belated Assertion of Privilege: Rule 26(b)(5)(B)

- A receiving party **may** promptly present the information to the court under seal for a determination of the claim.
- If the receiving party disclosed the information before being notified, it **must** take reasonable steps to retrieve it.
- The producing party **must** preserve the information until the claim is resolved.

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Belated Assertion of Privilege: Rule 26(b)(5)(B)

- ***The amended rule does not answer the substantive question of whether privilege was waived.***
- Under the Rules Enabling Act, 28 U.S.C. 2074, new procedural rules cannot modify substantive privilege law, so existing law on waiver and "inadvertent" production will determine whether a claw-back preserves privilege in a given case.

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Belated Assertion of Privilege: Rule 26(b)(5)(B)

- *Zubulake III,* 216 F.R.D. 280 (S.D.N.Y.2003), suggests a producing party may forego a privilege review entirely with a claw-back agreement in place.
- *Hopson v. Baltimore*, 232 F.R.D. 228 (D. Md. 2005), says absent a definitive court ruling on waiver, no prudent party would agree to follow quick-peek or claw-back procedures.

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Belated Assertion of Privilege: Rule 26(b)(5)(B)

- *Hopson* decision discusses the three approaches: (a) disclosure must be intentional to be a waiver, (b) disclosure must be reckless to be a waiver, and (c) ***any*** disclosure is a waiver.
- Is it really "inadvertent" if you willingly allow a quick-peek or enter a claw-back?
- In any event, think back to your discovery conference.

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Proposed Federal Rule of Evidence 502

- May 15, 2007: Advisory Committee issued recommendations for new Rule 502.
- June 11-12, 2007: Standing Committee approved proposed new Rule 502.
- Standing Committee transmits proposed new rules to the Judicial Conference with a recommendation that they be approved and transmitted to the Supreme Court.
- As early as **May 2008** the Supreme Court could approve a final draft and refer it to Congress.

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Proposed Federal Rule of Evidence 502

(b) Inadvertent disclosure. — When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal **or state** proceeding if:

(1) the disclosure is **inadvertent;**

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B).

Proposed Federal Rule of Evidence 502

(d) Controlling effect of court order. — A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court. The order binds **all persons or entities in all federal or state proceedings**, whether or not they were parties to the litigation.

(e) Controlling effect of party agreements. — An agreement on the effect of disclosure is binding on the parties to the agreement, but **not on other parties unless the agreement is incorporated into a court order**.

Sanctions: Rule 37(f)

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(f) Electronically stored information. Absent exceptional circumstances, a court **may not** impose sanctions **under these rules** on a party for failing to provide electronically stored information lost as a result of the **routine, good-faith operation** of **an** electronic information system.

Sanctions: Rule 37(f)

- Litigation holds; communicate in writing, disseminate, follow up, have audit trails.
- Be prepared to have IT employees or outside experts who can explain what you did and when.
- Target your holds – save the critical employees' e-mails and not everyone's

Sanctions: Rule 37(f)

- Note it's "**an** electronic information system," not "a party's" system. That's meant to capture third-party vendors' info systems if, for example, your e-mail or HR-related ESI is handled by an outside vendor not a party to the action.
- Your good faith will be measured in part by your efforts to arrange for preservation of the ESI on that outside system.

Sanctions: Rule 37(f)

- Satellite discovery or "**meta-litigation**"
  - What is the system?
  - When was it imposed?
  - How does it "routinely" operate?
  - What are the instructions on how to use it?
  - How is it policed?

Sanctions: Rule 37(f)

- Sanctions still available under inherent authority, ethics rules, 28 U.S.C. § 1927 for "vexatious" litigation, or other federal statutes, *e.g.*, patents 35 U.S.C. § 285, trademarks 15 U.S.C. § 1117.
- Court can manage discovery by ordering depositions of additional witnesses, allowing additional interrogatories, or appointing a special master.

What is *not* amended

Good old Rule 26 proportionality factors:

- unreasonably cumulative or duplicative
- obtainable from some other source that is more convenient, less burdensome, or less expensive
- Burden > benefit considering needs of case, amount in controversy, parties' resources, importance of issues at stake

Good old Rule 1: the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

Other sources of the obligation to manage information

- Section 802 of the Sarbanes Oxley Act (18 U.S.C.A. § 1519) requires corporations to retain certain corporate audit records.
- Equal Employment Opportunity Act (29 C.F.R. § 1602.14) requires retention of employment records until "final disposition" of a discrimination claim.

Other sources of the obligation to manage information

- FLSA: Two or three years' retention, depending on the type of records. 29 C.F.R. § 516.5.
- FMLA: Three years. 29 C.F.R. § 825.500.
- ERISA: Six years. 29 U.S.C. § 1027.
- Safety: Five years. Tenn. Comp. R. & Regs. R. 0800-1-3-.04.

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Other sources of the obligation to manage information

- DOT: Five or three years. 49 C.F.R. §§ 40.333, 382.401.
- Unemployment: Seven years. Tenn. Comp. R. & Regs. R. 0560-2-3-.10.
- Healthcare: failure to preserve a record that meets the authenticity and integrity requirements of the Security Standards at 45 C.F.R. § 164.312 could be disastrous for a healthcare provider.

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Other sources of the obligation to manage information

- Spoliation doctrine: destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.
- Triggers: demand letters, EEOC charges, internal complaints, lawsuits, subpoenas.

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Recent cases re litigation holds

- *Doe v. Norwalk Cmty. Coll.,* 2007 WL 2066497 (D. Conn. July 16, 2007).
- Sexual assault case against school and professor.
- Court found that duty to preserve arose **no later than** time of plaintiff's counsel sending defendants a demand letter indicating intention to sue.

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Recent cases re litigation holds

- Court expressed belief that duty to preserve arose when **meeting** was held between college dean and two professors regarding incident of assault.
- Defense witnesses testified that they had never been asked to perform a records search, nor had they ever heard of the term "litigation hold."

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Recent cases re litigation holds

- Court found that failure to place a litigation hold and to preserve e-mails and hard drives relevant to plaintiff's allegations was "at least grossly negligent, if not reckless."
- Court found no evidence that defendants did anything to stop routine destruction of backup tapes or relevant data after the obligation to preserve arose.

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Recent cases re litigation holds

- *Google, Inc. v. American Blind & Wallpaper Factory, Inc.,* No. C-03-5340-JF-(RS), 2007 WL 1848665 (N.D. Cal. June 27, 2007).
- Court issued evidentiary and monetary sanctions against American Blind for "willful indifference" to its obligations in the early stages of litigation.
- Court ruled that duty to preserve evidence likely arose when a "cease and desist" letter was sent that foreshadowed litigation.

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Recent cases re litigation holds

- **No** deposed employee or ex-employee of American Blind recalled the existence of any document retention policy, recalled being instructed to preserve relevant documents, or recalled engaging in any preservation efforts before or after the litigation began.

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Recent cases re litigation holds

- Court was unsatisfied with declarations that employees were instructed to preserve and collect documents without **additional detail as to how they followed** those instructions.
- Court deemed certain facts "judicially established" for purposes of trial and ordered American Blind to pay Google $15,000 as a sanction for its wrongful conduct. Case settled 8/31/07.

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Recent cases re litigation holds

- *In re September 11 Liability Ins. Coverage Cases,* No. 03-Civ.-332 (AKH), 2007 WL 1739666 (S.D.N.Y. June 18, 2007).
- Zurich American Insurance Company alleged it was not obligated to insure the Port Authority of New York and New Jersey and related corporations under a general liability policy issued to World Trade Center properties.

Recent cases re litigation holds

- Zurich ultimately changed its position when it produced documents that produced otherwise – **three years** after the documents were first requested.
- District Court sanctioned Zurich and its attorneys for asserting unsupported defenses, deleting electronic evidence, and delaying the production of the insurance policy among other relevant documents: **1.25 million dollars.**

Recent cases re litigation holds

Scotts Co., LLC v. Liberty Mut. Ins. Co., Civil Action No. 2:06-CV-899, 2007 WL 1723509 (S.D. Ohio June 12, 2007).

- Plaintiff sought an order requiring defendant to allow forensic expert to search defendant's computer systems, network servers and databases and requiring defendant to provide backup tapes of certain systems that would include data for nine years. Plaintiff also offered to pay for the forensic expert.

Recent cases re litigation holds

- Court declined these requests, noting that "without a qualifying reason, plaintiff is no more entitled to access defendant's electronic information storage systems than to defendant's warehouses storing paper documents."

Recent cases re litigation holds

- Courts have mandated access to information storage systems where there have been findings of systematic deletion of relevant e-mails and files after litigation had commenced, or demonstrating discrepancies with respect to document production.

Recent cases re litigation holds

- Courts had also allowed such access where representations had been made that no responsive materials existed but were then subsequently contradicted by later production of e-mails and other documents.

Recent cases re litigation holds

- Plaintiff also asked defendant to produce certain requested electronic data, including metadata, in electronic forms in which it was maintained instead of the hard copy form initially produced.

Recent cases re litigation holds

- Court reviewed rules' text and advisory committee notes and found that the parties needed to meet and confer about this particular issue because it was unclear whether the responding party ordinary maintained the information it was producing in a way that made it searchable by electronic means or not.

Recent cases re litigation holds

- *If a responding party ordinarily maintains information in a way that makes it electronically searchable, then the information should be produced in a form that preserves that feature and does not significantly degrade it.*

Recent law re litigation holds

- July 1, 2007 Tennessee statute:
- Adds new injunction, which takes effect upon filing of divorce or legal separation, which restrains and enjoins both parties from hiding, destroying, or spoiling, in whole or in part, any evidence electronically stored on computer hard drives or other memory storage devices.

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It's OK to have a policy.

- *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704 (2005).
- Supreme Court acknowledged the importance of valid records management policies that provide for the routine destruction of unneeded records under ordinary circumstances.

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It's OK to have a policy.

- "'Document retention policies,' which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business. **It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.**"

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The Sedona Guidelines for Managing Information and Records in the Electronic Age

- An organization should have reasonable policies and procedures for managing its information and records.
- An organization's information and records management policies and procedures should be realistic, practical, and tailored to the circumstances of the organization.
- An organization need not retain all electronic information ever generated or received.

The Sedona Guidelines for Managing Information and Records in the Electronic Age

- An organization adopting an information and records management policy should also develop procedures that address the creation, identification, retention, retrieval, and ultimate disposition or destruction of information and records.
- An organization's policies and procedures must mandate the suspension of ordinary destruction practices and procedures as necessary to comply with preservation obligations related to actual or reasonably anticipated litigation, government investigation, or audit.

The **Pre-**Litigation Hold Memo

- You may have read in the papers that employers (including all employees, supervisors, managers, officers, etc.) must keep electronically created and/or stored data. This is a federal rule which applies to you. It also applies to those who prepare information for you such as secretaries, administrative assistants, associates, and others.

The **Pre-**Litigation Hold Memo

- This duty starts from the time that you first reasonably anticipate the possibility of litigation. That means you may have to start keeping data even before a lawsuit or charge is filed.
- This applies to data stored on your company computer, and perhaps your own personal computer.

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The **Pre-**Litigation Hold Memo

- It also applies to voicemails, data kept on disks, drives, tape recorders, handheld devices, electronic calendars and all other kinds of electronically kept data.
- If you anticipate possible litigation with an employee, vendor or customer, notify Human Resources, the legal department, or your manager immediately.

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Holding time: What will happen?

- Meet with attorneys, managers, and IT personnel.
- Notify all relevant parties of the need to preserve data for litigation.
- Continually communicate with these individuals to ensure preservation is maintained.
- Take control of the data to safeguard against inadvertent destruction.

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The Litigation Hold Memo

- Notify **all** employees who may have relevant information of the matter and their obligation to preserve data.
- Outline in broad terms what material must be preserved.
- Use any unique terminology of your systems that readers will understand.

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The Litigation Hold Memo

- Make clear that normal deletion procedures should cease until further instructions.
- Name a contact person who will address questions.
- Formal letter or memorandum to IT personnel about locating and preserving backup tapes and other storage media.

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The Litigation Hold Memo

- Do NOT delete, erase or destroy relevant electronic data.
- Keep data in a separate electronic file.
- Remember, the same applies to paper.
- Err on the side of caution (that is preservation of data). Ask if in doubt.
- Print a copy of the data, file somewhere secure - avoid inadvertent destruction.

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The Litigation Hold Memo

- This is intended to help us avoid federal penalties.
- If you fail to observe these requirements under federal law, **you** could make yourself subject to court-imposed penalties, i.e., monetary payment, contempt of court.

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The Litigation Hold Memo

- Your misconduct also could result in penalties against the Company.
- Failing to observe these rules could lead to discipline up to and including termination.
- Do NOT retaliate against anyone whom you anticipate will sue the Company or who has sued. (If you retaliate, that also can result in the above penalties.)

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It's all in the follow-through.

- Send regularly scheduled reminders and find a way to confirm they're read.
- Face-to-face meetings should follow the reminders.
- Exit meetings and new hires.
- Document, document, document.

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It's all in the follow-through.

- How is access to pertinent data controlled?
- How is access to specific programs controlled?
- How are changes in data logged or recorded?
- How are backup systems structured and implemented?
- What are your audit procedures for assuring the continuing integrity of the data?

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Now what?

- You must make information management a priority.
- You must develop a coherent, reasonable policy.
- You must educate, educate, educate.
- *You must be able to order a litigation hold.*

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"Now that the key issues have been addressed and national standards are developing, **parties and their counsel are fully on notice** of their responsibility to preserve and produce electronically stored information."

Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 440 (S.D.N.Y. **2004**) (*Zubulake* V).

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APPLICATION OF NLRB TO NON-UNION EMPLOYERS

Fourth Annual
Employment Law Conference

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I. ORGANIZING CAMPAIGN CONDUCT

A. EMPLOYER CONDUCT - TIPS

1. Bridgestone Firestone South Carolina (11-CA-20424; 350 NLRB No. 52) Aug. 8, 2007.

On June 1, Plant Manager Michael Rose distributed a letter to all plant employees expressing his position on the union campaign. The June 1 letter, in its entirety, states as follows:

> Over the last six years I have had the good fortune of being part of something special—assisting in the building and operating of Bridgestone Firestone's Aiken tire plant. I am particularly proud of the culture we have developed together that puts the concern for our team members first. I believe we have created an environment in which we can openly and honestly speak to one another on any topic.
>
> That is why I want to thank the many team members who have chosen to provide information to me regarding the recent attempt by the United Steelworkers to organize our facility. As I stated in the recent MAMM meeting, I do not believe we need a union to stand between us and I want you to know that I will continue to support a culture in our plant that allows open dialogue while insuring that our team members at all times are treated with respect and dignity.
>
> In closing, I am very proud of the many successes we have shared and I know I can count on each of you to support me as we continue our journey in assuring the Aiken Facility's place as the number one tire plant within the Bridgestone Firestone family without the assistance of a union.

The General Counsel alleged that, in the context of the Respondent's antiunion campaign, employees reasonably would assume from this letter that their union activities were under surveillance and that Rose was encouraging employees to continue disclosing employees' union activity. The judge agreed. Although he acknowledged that Rose merely thanked employees who had provided him with information, the judge concluded that "it is obvious that Rose was encouraging employees to keep him informed," thus reasonably putting employees on notice that their union activities were under surveillance.

The Board overturned the judge's finding that the Respondent's letter to plant employees thanking employees "who have chosen to provide information . . . regarding the recent attempt" to organize the facility constituted the creation of an unlawful impression of surveillance. The Board found that employees would not reasonably assume from the statement that their union activities had been placed under surveillance because the Respondent merely relayed to employees that certain coworkers had voluntarily provided information about the existence of the union campaign; there was no evidence or implication that management had previously solicited or coerced that information.

2. United Rentals, Inc. (8-CA-34853, et al.; 350 NLRB No. 76) Aug. 24, 2007. The Board adopted all of the administrative law judge's unfair labor practice findings. The unfair labor practices occurred during the Union's successful effort to organize United's employees.

The Board affirmed the judge's findings that the Respondent violated Section 8(a)(3) by suspending annual performance evaluations and pay raises; by discontinuing its practice of permitting employees to rent equipment without charge; by imposing a stricter dress code; and by changing its practice of permitting employees to call in before a scheduled shift to advise that they would be late. In so doing, the Board clarified the applicable legal standard. The General Counsel easily met his initial burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Employer's proffered nondiscriminatory reasons for the conduct at issue were unworthy of belief and therefore pretextual. The Board held that the Employer failed to show that it would have taken the same actions even in the absence of its employees' union activity. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F. 2d 799 (6th Cir. 1982).

***

3. Wal-Mart Stores, Inc. (28-CA-16831, et al.; 350 NLRB No.71) Las Vegas, NV Aug. 20, 2007. This case involved alleged violations of Section 8(a)(1) and (3) arising in the context of a union organizational campaign conducted at three of the Respondent's retail stores in Las Vegas, Nevada.

The Board affirmed the judge's finding that Wal-Mart violated Section 8(a)(1) when a district manager told employee Avis Hammond that he was not "worthy" of working for Wal-Mart if he believed the contents of a union press release. The majority found that the district manager's comment disparaged the employee for engaging in protected activity and suggested that his protected activity was incompatible with continued employment. Member Schaumber, dissenting, would have dismissed the complaint on the ground that the comment was an off-the-cuff expression of personal opinion.

The Board reversed the judge's finding that Wal-Mart violated Section 8(a)(1) by warning Hammond for distributing union literature on the sales floor. The majority found that the record did not support the judge's finding that Wal-Mart had disparately enforced its no-solicitation rule against union activity.

The Board also reversed the judge's finding that Wal-Mart violated Section 8(a)(1) by denying Griego's request for a coworker representative to be present at an interview with managers. The majority reversed the judge's finding that the Wal-Mart violated Section 8(a)(1) by creating the impression of surveillance of its employees' union activities. The facts showed that when Griego handed another employee a union pen, an assistant manager told them to "take this to the break room." The majority relied on the principle that it is lawful for management officials to observe open union activity, particularly when it occurs on company premises, unless the officials act in a manner that is out of the ordinary.

***

4. Medieval Knights, LLC (22-RC-12727; 350 NLRB No. 17) June 29, 2007. Contrary to the hearing officer, a Board majority found that statements made by a labor consultant to unit employees one week before the election were not objectionable. Consequently, the Board certified the election results, in which the Joint Petitioners did not receive a majority of the valid ballots cast.

The Employer's business involves staging medieval events. The Joint Petitioners filed a petition to represent a unit of show employees. In August 2006, about one month before the election, the Employer hired labor consultants to educate employees and management about the election and bargaining processes. At meetings held with employees one week before the election, the consultants conducted a collective-bargaining exercise involving hypothetical employers and employees. During the presentation, the consultants stated, among other things, that an employer did not have to agree on any specific proposals, that all negotiations were different, and that the bargaining process could take weeks, months, or more than a year. According to credited testimony, he said that an employer could "stall out" the negotiations by "giving in to lesser items or addendums . . . but not really getting anything done." Witnesses could not remember the exact words, but it was undisputed that the presentation was about a hypothetical employer, and at no time did he say that Medieval Knights would engage in any particular bargaining conduct.

Members Schaumber and Kirsanow found that the consultant's statements about a hypothetical employer merely described "the possible pitfalls for employees of the collective-bargaining process." *Standard Products Co.*, 281 NLRB 141, 163 (1986) (citations omitted). Employees could understand that the presentation described a hypothetical employer's bargaining strategy, and it was not said or implied that the Employer in this case would engage in the same conduct.

5. Restricting Personal Email Use By Employee's;

The Guard Publishing Co., Case 36-CA8743-1

This case is currently on appeal to the Board. The Board has requested that the parties address a series of issues including:

1. Do employees have a right to use their employer's email system to communicate with other employee's about union or other concerted, protected activities?

   If so, what restrictions, if any, may an employer place on those communications?

   If, not, does an employer nevertheless violate the Act if it permits non-job-related emails but not those related to union or other concerted, protected activity?;

2. May an employer prohibit nonemployees from accessing its employees on its e-mail system?;

3. Do employers have a right to monitor e-mail use to prevent unauthorized use?;

4. What is the relevance of employees' work location, if any, to the above analyses? ;

5. How common are employer policies regulating e-mail usage and what are the common provisions of such policies?;

6. Whether e-mail policy is a mandatory subject of bargaining?;

The HR Policy Association has filed an amicus brief (copies available).

B. UNION CONDUCT DURING ORGANIZING CAMPAIGN

1. <u>PPG Industries, Inc. (25-RC-10347; 350 NLRB No. 25)</u> Evansville, IN July 3, 2007. Contrary to the hearing officer's recommended finding, the Board concluded that the conduct of several Union supporters was sufficient to warrant setting aside the election held on June 28, 2006, which the Auto Workers (UAW) won by a 186-to-158 vote. The Board set aside the election and directed a second election.

During the critical election period, several Union supporters, including members of the employee-comprised voluntary organizing committee, made numerous statements threatening physical harm and property damage to those employees who stated they would, or would be inclined to, cross a picket line. Applying the standard for determining whether third party threats are objectionable, <u>the Board found that the recurring and pervasive nature of the serious threats throughout the critical period, combined with their application to the entire bargaining unit and dissemination to numerous employees, created a general atmosphere of fear and reprisal that warranted setting aside the election.</u>

***

2. "SALTS" - <u>Oil *Capitol Sheet Metal, Inc.* (17-CA-19714; 349 NLRB No. 118) May 31, 2007.</u> The Board announced new evidentiary standards for determining the duration of the backpay period when the discriminatee is a "salt."

"Salting" cases occur when a union has sent members to seek employment from a nonunion employer with the intent of obtaining employment and then organizing the employer's employees. Those members are commonly referred to as "salts." <u>Generally, under the law, if the employer discharges or refuses to hire the "salt" because of his union affiliation or activity, the employer's conduct is unlawful</u>.

In this decision, the Board found unanimously that the employer, Oil Capitol Sheet Metal, Inc., violated Section 8(a)(3) and (1) of the Act by refusing to hire a salt. The Board split, however, over the remedy to be ordered.

Prior to this decision, the remedy for an unlawful discharge or refusal to hire included the employer's payment of backpay to the employee for the period from the unlawful act until the employer made a valid offer of reinstatement (or instatement, in the case of an unlawful refusal to hire). The Board applied a presumption that, if hired, the "salt" would have stayed on the job for an indefinite period. If the job was a construction job, the Board applied a further presumption that the employer would have transferred the employee to other jobsites when the job from which he was discharged (or for which he should have been hired) came to an end.

The Board declined to continue to apply those presumptions. The majority reasoned that they are inconsistent with the reality of salting. The reality is that salts, when hired, stay on the job until they succeed in their organizational effort or reach the point where such efforts are unsuccessful. In either situation the union typically then sends the salt to seek to organize the employees of another nonunion employer.

The majority recognized that this will not always be the case. There may be instances where the union will permit a member to work for the targeted employer for an indefinite period. However, The Board majority view is that the union is in the better position to explain its intentions, and thus the burden to establish the fact should be on the union. The burden should not be on the employer to prove the contrary.

Charges were filed by Union in 1999. ALJ William Cates issued decision Jan. 3, 2000.

***

C. What is the Appropriate Bargaining Unit? Definition of Supervisors

The Kentucky River Cases - The 2006 Kentucky River cases (**Oakwood Healthcare**) attempted to clarify the meaning of supervisor status under the Act. The Board ruled in the Oakwood Healthcare case the UAW was attempting to organize all registered nurses. The charge nurses were responsible for "overseeing the patient care units" and making patient assignments for other employees during the shift. The Board ruled that the charge nurses were supervisors but that "rotating charge nurses" were not because they did not have sufficient authority, duties, discretions, etc. The Board focused on the following factors in deeming the charge nurses as supervisors:

1. They have the authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action;

2. Their authority requires the exercise of "independent judgment;" and

3. Their authority is held "in the interest of the employer."

The Board held that "assign" means "the act of designating authority to replace or assign tasks," etc. The Board stated that "responsibility to direct" requires that "the employee must be accountable for performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." Thus the "responsibility to direct" must carry with it the interest of management to see that the task is not simply carried out but it is carried out properly. The Board also expanded upon the meaning of "independent judgment." The Board wrote that independent judgment requires that the employee act "free from the control of others in forming an opinion or evaluation by discerning in comparing data."

The Kentucky River decisions should help employers be proactive to insure that those who they intend to be supervisors are supervisors under the NLRA. Employers may want to review and to revise their supervisor job descriptions to insure that they list the functions recognized by the Board and possibly giving them additional authority. Employers should also document that supervisors are evaluated and compensated based upon their successful performance of supervisory responsibilities, including, taking appropriate disciplinary actions and timely performance of job evaluations of subordinates.

II. LABOR CONTRACT ADMINISTRATION

UNILATERAL IMPLEMENTATION BY EMPLOYER

1. Provena Hospitals d/b/a Provena St. Joseph Medical Center (13-CA-39122-1; 350 NLRB No. 64) Frankfort, IL Aug. 16, 2007. A Board majority affirmed the ALJ's application of the "clear and unmistakable waiver" in finding that the Employer violated Section 8(a)(5) of the Act by unilaterally, and without notice to the union, implementing a staff incentive policy. However, the Board reversed the judge and dismissed another 8(a)(5) allegation with respect to the Respondent's unilateral implementation of a new attendance plan.

The Employer admitted that it acted unilaterally with respect to both matters, claiming that the Union had waived its right to bargain about these matters. Employer argued that the "contract coverage" standard should be followed rather than the "clear and unmistakable waiver" standard applied by the judge. The "contract coverage" standard provides, where there is a contract clause that is relevant to the dispute, it can reasonably be said that the parties ***have bargained*** about the subject and have reached some accord. Thus, there has been no refusal to bargain.

The majority noted that while the "contract coverage" analysis has been endorsed by the Seventh and DC Circuits, a majority of courts, including the Supreme Court, has embraced the "clear and unmistakable waiver' standard.

Applying the "clear and unmistakable waiver" test, the majority determined that because (1) the parties collective-bargaining agreement did not contain an express provision regarding

incentive pay, and (2) there was no evidence that during the course of negotiations, the subject of incentive pay was consciously explored or that the Union intentionally relinquished its right to bargain over the topic, the Respondent was not privileged to act unilaterally on the matter.

With respect to the attendance and tardiness policy, however, the majority determined that several parts of the contract's management rights clause, read together, explicitly authorized the Respondent to take unilateral action:

> **"We find that the Respondent violated Section 8(a)(5) by unilaterally implementing the incentive policy. There is no express substantive provision in the contract regarding incentive pay. Moreover, there is no evidence that incentive pay was consciously explored in bargaining or that the Union intentionally relinquished its right to bargain over the topic.[35] See generally Georgia Power Co., 325 NLRB 420, 420–421 (1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999). In the absence of either an explicit contractual disclaimer or clear evidence of intentional waiver during bargaining, the Respondent was not authorized to act unilaterally on this undisputedly mandatory subject of bargaining.**
>
> **We find that the Respondent did not violate the Act with respect to the newly-implemented disciplinary policy on attendance and tardiness. Application of our traditional standard reveals that several provisions of the management- rights clause, taken together, explicitly authorized the Respondent's unilateral action. Specifically, the clause provides that the Respondent has the right to "change reporting practices and procedures and/or to introduce new or improved ones," "to make and enforce rules of conduct," and "to suspend, discipline, and discharge employees." By agreeing to that combination of provisions, the Union relinquished its right to demand bargaining over the implementation of a policy prescribing attendance requirements and the consequences for failing to adhere to those requirements. Such a conclusion requires no resort to a "contract-coverage" analysis, for the contract itself plainly speaks to the right of the Respondent to act."**

Charge was initially heard Oct. 16, 2001. Adm. Law Judge issued decision on Dec. 21, 2001.

III. <u>STRIKES/LOCKOUTS</u>

The 7th Circuit recently addressed an issue that we have also experienced with several clients in the last couple of years. This issue arises following a strike. The facts arise after the union goes on strike and a percentage of employees elect to voluntarily cross the picket line and continue working. This situation may continue for several days or weeks. The question then arises: "If the union says, "We are going to return to work

without a contract and continue to negotiate…"…Should the company allow that to happen or 'lockout' the employees?" However, the answer to that question oft depends on the answer to the following question? "If we decide to lockout the employees, can we lockout only those who have not crossed the picket line…and allow those who have crossed the picket line to continue reporting to work?"

The National Labor Relations Board in ***Midwest Generation***, 341 NLRB No. 120 (2004) upheld the employer's "partial" lockout of employees engaged in an economic strike and not locking out those individuals who had previously crossed the picket line. The Seventh Circuit Court of Appeals reversed the Board, finding that the employer failed to prove a business justification for the "partial lockout." The Court rejected the employer's claim that it needed those employees who crossed the picket line in order to continue operations. The Court found that the employer could maintain its operations with supervisors, contractors and temporary replacements. In conclusion, the Court found that the employer demonstrated anti-union animus "by acting only against those who had exercised their Section VII right to strike…". The Court directed the Board to consider voiding the Collective Bargaining Agreement that resulted from employer's unfair labor practice. **Local 15, IBEW v. NLRB, 429 F.3rd 651 (7th Cir. 2005) (cert. den. 10/02/06).**

SUCCESSFULLY DEFENDING WORKERS' COMPENSATION CLAIMS

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SUCCESSFULLY DEFENDING WORKERS COMPENSATION CLAIMS

WORKERS COMPENSATION 101

THE BASICS ALWAYS MATTER

The Workers' Compensation Act of Tennessee

- A History of the Act

THE PURPOSE OF THE WORKERS' COMPENSATION ACT

THE WORKERS' COMPENSATION ACT OF TENNESSEE

T.C.A. § 50-6-101
through
T.C.A. § 50-6-801

50-6-108
RIGHT TO COMPENSATION EXCLUSIVE

50-6-201
NOTICE OF INJURY

50-6-204
MEDICAL TREATMENT

50-6-205
PERIOD OF COMPENSATION –
NOTICE OF CONTROVERSY

50-6-207
SHEDULE OF COMPENSATION

50-6-208
THE SECOND INJURY FUND

50-6-224
LIMITATIONS OF ACTIONS

50-6-230
AWARDS AND AGREED SETTLEMENTS -- FINALITY

50-6-239
BENEFIT REVIEW CONFERENCE

COVERED INJURIES AND DISEASES

GENERAL RULE

INTENTIONAL INJURIES BY FELLOW EMPLOYEES NOT COMPENSABLE

50-6-110
INJURIES NOT COVERED – DRUG AND ALCOHOL TESTING

- No compensation allowed for injury or death due to:
  1) Willful misconduct
  2) Self-inflicted injury due to willful intoxication or illegal drug use
  3) Willful failure or refusal to use safety appliance or perform a duty required by law.
- BURDEN OF PROOF – EMPLOYER

If employer implemented drug-free workplace and at time of injury employee has a blood alcohol concentration level equal to or greater than

(.08%) non-safety sensitive positions

(.04%) safety sensitive positions

- It is presumed that drug or alcohol was proximate cause of injury
- Presumption can be rebutted

If injured employee refuses drug test, presumed that proximate cause of injury was influence of drugs

- Presumption can be rebutted

THE BENEFITS

MEDICAL

TEMPORARY TOTAL DISABILITY

PERMANENT PARTIAL DISABILITY

PERMANENT TOTAL DISABILITY

CHANGES TO THE WORKERS' COMPENSATION LAW

The headlines in the summer of 2004 heralded a "sweeping overhaul" of the existing Workers' Compensation system. Some provisions took effect immediately, others are and will be phased in between July 1, 2004 and July 1, 2005.

So, what do these "sweeping changes" amount to, and who benefits? Is the drama over, or has the battle merely begun in earnest?

Total system wide annual costs:

Approximately $1 Billion

Total estimated annual savings from the "multiplier" changes:

$30 - $50 Million

Employers, while pleased with the partial victory on the multiplier issue, are keenly interested in putting a lid on provider costs, pushing for changes to the definition of injury, and other, more aggressive cost containment measures.

Frankly, with the exception of the multiplier limits, which employee advocates regard with horror, many of the changes were employee friendly. Some business interests regard the changes as a Phyrric victory.

Where's the truth? Only time will tell whether and to what extent the reforms suffice to control costs . . . In the meantime, the major changes include:

MULTIPLIER MYSTERY

The multiplier controversy was resolved by implementing a sharp reduction in the amounts plaintiffs can recover -- that is, one particular class of plaintiffs.

What's the change: A reduction from 2.5 times the medical impairment rate that would have been awarded to 1.5 times.

To whom does it apply? Only to employees who suffer a *permanent partial disability*, who are injured on or after July 1, 2004, and who return to their jobs at the same or higher wages (or the injury is to a scheduled member, the award must be more than 200 weeks).

Who doesn't it apply to?

- Employees who are permanently, totally disabled
- Employees who suffer smaller "scheduled member" injuries
- Employees who are permanently partially disabled and who aren't returned to work at the same or higher rate
- Employees who qualify for the "escape hatch"

What escape hatch?

Plaintiff must prove that at the time of the award, at least 3 of the following four factors applied:

1) Lacking GED or high school diploma, or cannot read/write at eighth grade level;
2) 55 years or older;
3) No reasonably transferable job skills; and
4) No locally available job opportunities

Reconsideration

Employees subject to the 1.5 cap and employees who suffer injury to the body as a whole can request reconsideration of their claims, but not if loss of employment is due to:

1) voluntary resignation or retirement not resulting from the disability;
2) misconduct

Required Benefit Review Conferences or Mediation

- Parties (including employers seeking a "jump suit) cannot file without seeking a BRC or mediation within one year of the injury or of the issuing date of the last check.
- If it fails, parties have 90 days, except 90 days can't shorten the SOL.
- BRC no-shows may result in order of dismissal, which shortens period to 60 days.
- BRC must be exhausted if court refuses to approve a settlement.

Restrictions Against "Closing" Medicals

- No closure in permanent total disability cases.
- In permanent partial disability cases to body as a whole or serious scheduled member injuries, no closure allowed until three years have passed since settlement or judgment.
- This means two separate deals: one to settle the claim, another one at least three years later that addresses the future.

New Documentation Requirements

- Make sure that panel of three physicians is posted (this isn't a 2004 change, but lots of employers haven't yet complied)
- Get and use the new DOL Form which documents the employee's choice of physician

Civil Penalties for Failure to Timely Pay

- Make sure your HR Department provides information to the corporation's insurer ASAP.
- If payment not made within 20 days, or if payment is paid on less than semi-monthly basis, DOL Specialists can order fines to be paid by employer or insurer – 25% of benefits not paid timely.

SUPER DOCS: Undercutting Employer Choice

As of July 1, 2005, when parties dispute the impairment rating, either may request an independent medical exam. If they can't agree, employer must request doc list from registry. Three are chosen at random and employer gets to strike one. Employer Pays.

MEDICAL PROOF

Physicians must base their opinions on the most recent adoption of the AMA Guides to the Evaluation of Permanent Impairment, unless there isn't a guide for the particular injury.

On the Horizon: A battle over the proposed fee schedules for physicians and hospitals

- The proposal drops reimbursement for in-patient care to 67% and out-patient specialist care to 73%
- "Draft" proposal made by the Commissioner in December of 2004. Public comment period has expired, and final proposal is due by the 15th of February. Fee schedule must be adopted by legislature by July 1, 2005.

AVOIDING WORKERS COMP LITIGATION (A Review)

THE RULES

RULE NO. 1

REGULARLY INFORM EMPLOYEES TO IMMEDIATELY REPORT ACCIDENTS/ INJURIES/ILLNESSES

RULE NO. 2

REGULARLY DESIGNATE TO WHOM THEY SHOULD REPORT

RULE NO. 3

EXPLAIN IMPORTANCE OF TIMELY NOTICE

RULE NO. 4

DEVELOP A PLAN FOR REPORTING

RULE NO. 5

<u>ALWAYS</u> FOLLOW YOUR PLAN

RULE NO. 6

TREAT ALL EMPLOYEES FAIRLY AND EQUALLY

RULE NO. 7

INVESTIGATE LATE REPORTED OR SUSPICIOUS CLAIMS

RULE NO. 8

DOCUMENT!

RULE NO. 9

WHEN IN DOUBT –

ASK

WORKERS' COMPENSATION FRAUD

THE COST OF FRAUD

$1 OUT OF EVERY $10

Suspicion Factors

The Accident

- Unwitnessed
- Late Friday/early Monday
- Prior to departure from work, i.e. layoff, termination
- After return from leave
- Not reported promptly
- Details vague or contradictory

Treatment

- Injuries are subjective
- Accident report inconsistent with diagnosis
- Diagnosis inconsistent with treatment
- Extensive treatment, testing, and procedure
- Lab report or physicians' report appears identical to other reports for other individuals
- Physician is known for handling suspect claims

THE EVIDENCE

LATEST CASES

-Hearing Loss
-Scar

IMPLEMENTATION --

A COMPANY WIDE EFFORT

KEEP UP

THE GOOD

WORK

IMMIGRATION UPDATE

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I-9 Compliance

Shelter From The Storm

I-9 Procedures: Timing

- Employee's Responsibility on Day One
  - Employee completes Section 1
  - Employee Swears to be Authorized
  - Employee must sign Section 1
  - Employee must attest to being one of the following
    - U.S. Citizen
    - U.S. Lawful Permanent Resident
    - Authorized to work in U.S. until certain date

I-9 Procedures: Timing

Employee's Responsibility by Day Three

- Present identity and work authorization documents, or
- Present a receipt for application to replace lost, stolen or damaged document that would qualify
  - 90 days to present actual document

I-9 Procedures: Timing

Employer's Responsibility By Day Three

- Employer completes Section 2
  - Review original/actual document(s) (not photocopy)
  - Document from List A OR
  - Documents from List B and C
  - List type, issuing authority, document number and expiration date (if any).
- Sign and Date the Certification Block
- Same person must verify and sign
- Track expiration dates
- Section 3: Re-verification

I-9 Compliance: Acceptability of Documents

- Do not require "more or different documents than required" under I-9 regulations
  - Avoid discrimination suit based on national origin or citizenship status
- Documents should "reasonably appear to be genuine"
- No overzealous scrutiny of documents
  - Employer is not required to be a document expert
  - *Collins Foods International Inc. v. U.S. Immigration and Naturalization Service*
    - *"Congress did not intend for the statute to cause employer to become document experts in identifying and examining a prospective employee's employment authorization documents."*

I-9: Record Retention

- Keep verification document photocopies for all or none of the employees
- Photocopies should be kept with the completed I-9 forms
- Keep I-9 records separate from personnel records
- Store in centralized place
- DHS (ICE) must adhere to 3-day advance notice
- Record Retention
  - Three years after hire or
  - One year after termination
  - Whichever date is later
- Independent contractors and their employees
  - Assurance of compliance and indemnification

PENALTIES FOR I-9 VIOLATIONS

- Civil Monetary Penalties
  Fines:
  - *1st Offense:* **$275 to $2,200** per alien
  - *2nd Offense:* **$2,200 to $5,500** per alien
  - *3rd Offense:* **$3,300 to $11,000** per alien
- Criminal Penalties
  - Up to **six months'** imprisonment for the entire pattern or practice
  - Fines up to **$3,000** for each unauthorized alien
- Paperwork Violation Fines: **$110 to $1,100** per violation

B.I.C.E. (Pending?) Amendment to Regulations

- ***Knowing*: "actual" and "constructive" knowledge**
- **Constructive Knowledge further defined**:
  1. Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;
  2. Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or act on its behalf;'
  3. Fails to take reasonable steps after receiving information indicating that the employee may be an alien who is not employment authorized, such as –
     - Written notice from the Social Security Administration that name and SSN do not match SSA records ("no-match" letter); or
     - Receipt of a Notice of Suspect Documents from DHS
- **Describes reasonable steps the employer may take within 30 days of receipt of "no-match" letter or Notice of Suspect Documents**

"Safe-Harbor" Procedures Within 30 Days

Within 30 days of receipt of a "no-match" letter or Notice of Suspect Documents:

1. Employer checks records promptly to rule out clerical errors
2. If clerical error, employer would:
   - Correct records;
   - Inform relevant agencies;
   - Verify that name and number, as corrected, match agency records; and
   - Make a record of the manner, date and time of the verification
   - No need to perform new I-9 verification, although can update I-9

"Safe-Harbor" Procedures Within 30 Days

If the actions previously listed do not resolve discrepancy:

1. Employer would promptly request the employee to confirm that the employer's records are correct.
2. If Employee confirms that the records are not correct, follow the steps outlined above.
3. If Employee confirms that records are correct:
   - Request Employee resolve the discrepancy with the SSA, such as by visiting SSA office and bringing original or certified copies of documents that prove age, identity, and citizenship or alien status, and other documents that may be relevant (such as name change documents)

"Safe-Harbor" Procedures: Within 90 days

- **If the employer is unable to verify the employee's name and SSN within 90 days of receiving written notice from the SSA, the employer has three days in which to re-verify the employee's employment authorization.**
  - To re-verify the employee's employment authorization, the employer must complete a new I-9 form for the employee using the same procedures as if the employee were newly hired. However, the employer cannot accept any document referenced in the no-match letter or any document that contains a disputed SSN or alien number or a receipt for an application for replacement of such a document to establish work authorization or identity.
  - The employee must present a document that contains a photograph to establish identity or both identity and work authorization.
  - The employer must retain the new I-9 form with the prior I-9 forms in accordance with federal laws and regulations.

"Safe Harbor" Provision

- If the described procedure is completed, and the employee is verified, then even if the employee is in fact an unauthorized alien, the employer will not be considered to have constructive knowledge of that fact.
- If the discrepancy referred to in the "no-match" letter is not resolved, and if the employee's identity and work authorization cannot be verified using a reasonable verification procedure, then the employer must choose between taking action to terminate the employee or facing the risk that DHS may find that the employer had constructive knowledge that the employee was an unauthorized alien.

Comments to the New Regulation

- The pending regulation only specifies “safe-harbor” procedures employers could follow to avoid imputation of "constructive knowledge" that an employee is not authorized to work in the U.S.
- The regulation would not preclude DHS from finding that an employer had actual knowledge that an employee was an unauthorized alien. An employer with actual knowledge that one of its employees is unauthorized to work could not avoid liability by following the procedures described in the pending regulation.

Document Verification

Employers may wish to make sure they have documented any prudent action taken to ensure an individual is authorized to work in the United States. Such prudent action would include using the following:

- SSA’s Social Security Number Verification System, available at http://www.ssa.gov/employer/ssnv.htm;
- USCIS’ Systemic Alien Verification for Entitlements (SAVE) Program and EEV: http://www.vis-dhs.com/EmployerRegistration; or
- ICE’s IMAGE program: http://www.ice.gov/partners/opaimage/index.htm.

DHS has stated it will consider such action in determining whether the employer has exercised reasonable care to ensure it is not employing unauthorized aliens, even if the employer has not followed the safe harbor provisions outlined in the new regulations.

Immigration Law Update

- What’s New
- What to Expect
- Compliance Questions?

WHAT HR MANAGERS NEED TO KNOW TO AVOID ERISA PITFALLS

Fourth Annual
Employment Law Conference

Sponsored by

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WHAT HR MANAGERS NEED TO KNOW TO AVOID ERISA PITFALLS

A third of a century later, it is difficult to image how employment law would look had Congress not enacted the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. ("ERISA") in 1974. Prior to ERISA, the tax code and state laws regulated employee benefit plans. Employers in multiple states were subject to varying and often inconsistent state procedures. An employee's right to a retirement benefit could be forfeited with remarkably few procedural safeguards as compared to today's standards.

In passing ERISA, Congress wanted to better protect vested retirement benefits, increase the soundness and stability of those benefits and preclude the loss of benefits by early termination of pension plans. One fundamental principle established by ERISA was "disclosure:"

> It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

It is this principle of *open* and *accurate* disclosures about the terms of a benefit plan, particularly about how a beneficiary obtains benefits, that generates the pitfalls for many employers and HR managers.

This is not, however, a lecture on how benefit plan administrators and trustees can avoid breach of fiduciary duty claims. The goal of this topic is not to train HR managers to be ERISA plan administrators. Rather, it is to help HR managers realize when they might impact ERISA concerns so that they can secure accurate advice from the plan administrator.

How ERISA Works

To understand the pitfalls, Human Resource managers need to understand a few basic principles applicable to ERISA litigation.

ERISA operates on a honey instead of vinegar principle. No employer is legally required to have any benefit plan. Nor is an employer that offers benefits required to establish the plan as an ERISA qualified plan. The honey, however, is that by qualifying the plan as an ERISA plan, the employer and the employee are permitted to defer paying

taxes on much or all of the money used to fund the benefit.[1] This is why employees generally do not have to pay income taxes on the employer's contribution to the company pension plan or on their own contribution to the plan.

Correspondingly, the vinegar is exceptionally bitter. Should a plan fail to comply with certain minimum requirements established by ERISA and/or the tax code, the plan could lose its tax qualified status and the funds contributed to the benefit plan(s) would be subject to immediate taxation.[2]

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[1] The idea of receiving favorable tax treatment in exchange for complying with minimum standards did not originate with the passage of ERISA. The Department of Labor website explains:

> The Revenue Acts of 1921 and 1926 allowed employers to deduct pension contributions from corporate income, and allowed for the income of the pension fund's portfolio to accumulate tax free. The participant in the plan realized no income until monies were distributed to the participant, provided the plan was tax qualified. To qualify for such favorable tax treatment, the plans had to meet certain minimum employee coverage and employer contribution requirements. The Revenue Act of 1942 provided stricter participation requirements and, for the first time, disclosure requirements.
>
> The U.S. Department of Labor became involved in the regulation of employee benefits plans upon passage of the Welfare and Pension Plans Disclosure Act in 1959 (WPPDA). Plan sponsors (e.g., employers and labor unions) were required to file plan descriptions and annual financial reports with the government; these materials were also available to plan participants and beneficiaries. This legislation was intended to provide employees with enough information regarding plans so that they could monitor their plans to prevent mismanagement and abuse of plan funds. The WPPDA was amended in 1962, at which time the Secretary of Labor was given enforcement, interpretative, and investigatory powers over employee benefit plans to prevent mismanagement and abuse of plan funds. Compared to ERISA, the WPPDA had a very limited scope.

http://www.dol.gov/ebsa/aboutebsa/history.html

[2] Such events are rare because not every error or mistake causes a plan to lose its tax qualified status. The IRS also has an "Employee Plans Compliance Resolution System" which allows otherwise qualified plans to correct many failures that are not egregious. These subjects are beyond the scope of the topic, however.

The Two Types of ERISA Plans

ERISA divided benefit plans into two categories, "Pension" plans and "welfare" benefit plans. Generally speaking, pension plans provide retirement benefits. Welfare benefits plans cover about everything else that qualifies as an ERISA plan.[3] ERISA does not regulate employee salaries (though it does, of course, affect how those salaries are taxed).

Depending on the type of benefit, certain provisions must be included in the written plan document. The terms of employee pension plans are more heavily regulated than are the terms of a welfare benefit plan.

HR managers are not ordinarily involved in drafting pension plans so a discussion of the provisions that must be in a pension plan would not be helpful. At least two of these standard provisions cause consternation among managers who are not familiar with ERISA so these will be used as examples of provisions that must be in a pension plan.

ERISA imposes minimum "participation" and "vesting" standards on pension plans. Thus, a pension plan may not require an employee to wait more than one "year of service" before the employee is eligible to participate in the pension plan. 29 U.S.C. § 1052(a)(1)(A)(ii). (ERISA and the Internal Revenue Code ("IRC") define a "year of service" as "a 12-month period during which the employee has not less than 1,000 hours of service.") This is why an employer, according to the IRS, may not preclude "part-time" or "seasonal" employees *per se* from participating in pension plans.[4]

ERISA also mandates vesting within a period of years – it varies depending on the schedule selected by the employer. It is not necessary to know these schedules for present purposes. It is important to remember that under ERISA, once a benefit (pension or welfare) is "vested" that benefit may not be taken away. 29 U.S.C. § 1053 (applying to pension benefits), and *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983) (addressing when retiree medical benefits are vested under the terms of a collective bargaining agreement.) Similarly, ERISA prohibits a plan amendment that retroactively decreases any accrued benefit. 29 U.S.C. § 1054(g); *see also* 26 U.S.C. § 411(d)(6).

While there are other mandatory provisions, ERISA permits employers the freedom to design a pension plan. Courts have steadfastly refused to dictate substantive

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[3] This greatly oversimplifies the matter – the DOL regulations defining "pension" and "welfare" plans are seven pages long. 29 C.F.R. § 2510.3-1 to -2.

[4] While an employee has a choice as to whether to participate in a pension plan, an employee cannot waive the minimum participation or vesting requirements. *Holt v. Winpisinger*, 811 F.2d 1532, 1541 (D.C. Cir. 1987).

terms that are not specifically mandated by ERISA - *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981).

With few exceptions, the choice of welfare benefits to offer, as well as the level and means of funding those benefits (i.e. employer funded v. employee withholdings), is left to the economic goals and needs of the employer. Over the years, however, Congress and the States have added (or attempted to add) several substantive requirements to welfare plans, most notably health care plans. The most significant of these is the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), prohibition on health care plans imposing pre-existing condition limitations on participants who have previously participated in group health plan. 29 U.S.C. § 1181. States, moreover, continue to legislatively impose conditions on health care plans.[5]

ERISA Plans Must be in Writing

ERISA plans typically have two formal documents that describe the offered benefits: the "Plan Document" and the "Summary Plan Description" ("SPD"). The terms of some welfare benefit plans (particularly, disability and severance plans) are often simple enough so that the SPD can also function as the Plan Document.

ERISA requires plans to be in writing. Every plan "shall be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). ERISA "has an elaborate scheme in place for beneficiaries to learn their rights and obligations at any time, a scheme that is built around reliance on the face of written plan documents." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995). This ensures that "every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." *Id*.

The fact that an employer does not necessarily hold out a "plan" as being an "ERISA plan" does not control whether or not the plan is considered an ERISA governed plan. *Cassidy v. Akzo Nobel Salt*, 308 F.3d 613, 615 (6th Cir. 2002). The failure to have a written plan could subject the employer to administrative or civil penalties should the employer be unable to provide a copy of the plan documents upon request.

The Plan Document (especially for retirement plans) is typically complex. In contrast, the SPD must "reasonably apprise ... participants and beneficiaries of their rights

[5] Under Tenn. Code Ann. 56-7-2301, a newborn child is covered from birth for 31 days. No ifs, ands or buts; no notice is required to get this coverage. If it costs extra to insure the child and the employee wants the child covered after the first 31 days, the employee must give the employer notice within the 31 day period. Federal law (HIPAA) also requires health care plans to open a "special enrollment" period for 30 days after a child is born to a participant. While the intersection of the state and federal statutes create some conceptual difficulties, as a practical matter, there is no real conflict.

and obligations under the plan." 29 U.S.C. § 1022(a). "Employees count on [SPD's] to provide an accurate picture of their current benefits situation, as well as for information which will allow them to make intelligent decisions about their future benefits needs." *Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243, 247 (6th Cir. 1996).

Almost every SPD provides that "in the event" of a conflict between the SPD and Plan document, the language in the Plan document governs. Courts take a different view. In *Edwards v. State Farm Mutual Automobile Insurance, Co.* 851 F.2d 134, 136 (6th Cir. 1987), the court held that statements made in a SPD are binding, and if they conflict with statements in the Plan itself, the SPD controls. See also *Helwig*, 93 F.3d at 249-50 ("it would make no sense for Congress to require employers to provide clear, simple, complete descriptions of benefits plans if the employee were expected to also know and understand every clause in the voluminous, complex, and legalistic document the SPD was intended to accurately describe."). The Sixth Circuit continues to adhere to this principle. *Haus v. Bechtel Jacobs Co., LLC*, 491 F.3d 557 (6th Cir. 2007) ("When an employer distributes a document that purports to summarize an employee's benefit information, a lay beneficiary should logically be able to rely on that summary rather than combing through the often nearly incomprehensible plan itself.")

There is, however, a difference between a "conflict" and silence. In *Sprague v. GMC*, 133 F.3d 388, 401 (6th Cir. 1998), the court held that "[a]n omission from the summary plan description does not, by negative implication, alter the terms of the plan itself." On the other hand, silence on a topic that would be expected to be mentioned in the SPD could be deemed to be a "conflict." Such a "conflict" occurred in *Helwig* where other "booklets and brochures" said the employer reserved the right to modify or terminate retiree health care benefits but the SPD was silent on the subject, and otherwise promised that these benefits would be "continued without cost to you." The Sixth Circuit held the SPD's promise to continue the benefits "without cost to you" was therefore binding and could not be modified as to those employees who retired while that language was in effect.

Where there is no conflict, the SPD and the Plan documents are read "together as an integrated whole." *Morrison v. Marsh & McLennan Cos.*, 439 F.3d 295, 302 (6th Cir. 2006); *Wendy's Int'l, Inc. v. Karsko*, 94 F.3d 1010, 1013 (6th Cir. 1996); *Musto v. American Gen. Corp.*, 861 F.2d 897 (6th Cir. 1988).

While ERISA does not mandate substantive content, ERISA does specify how an SPD is to be written, what the SPD must say (about the employer's benefits) and when it must be provided to employees. The SPD "shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022.

Further, the SPD must include the following information (from 29 U.S.C. § 1022(b)):

- The name and type of administration of the plan;
- In the case of a group health plan, whether a health insurance issuer is responsible for the financing or administration (including payment of claims) of the plan and (if so) the name and address of such issuer;
- the name and address of the person designated as agent for the service of legal process, if such person is not the administrator;
- the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator);
- a description of the relevant provisions of any applicable collective bargaining agreement;
- the plan's requirements respecting eligibility for participation and benefits;
- a description of the provisions providing for nonforfeitable pension benefits;
- circumstances which may result in disqualification, ineligibility, or denial or loss of benefits;
- the source of financing of the plan and the identity of any organization through which benefits are provided;
- the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis;
- the procedures to be followed in presenting claims for benefits under the plan including the office at the Department of Labor through which participants and beneficiaries may seek assistance or information regarding their rights under this chapter and the Health Insurance Portability and Accountability Act of 1996 with respect to health benefits that are offered through a group health plan and the remedies available under the plan for the redress of claims which are denied in whole or in part.

These are not the only requirements. The Department of Labor regulations on what must be in an SPD go into much more detail about the above provisions and require the inclusion of provisions. 29 C.F.R. § 2520.102–3.[6]

What many other employers and employees (and courts) do not get is that the SPD is the official means of communicating with employees about the benefits offered by the employer. Therefore, the first rule HR managers should learn about ERISA is to always refer employees who have benefit questions to their copy of the SPD.

Most ERISA Claims Must be Brought in Federal Court and are Governed by Federal Law

Most every ERISA claim must be brought in federal court. The two ERISA claims that may be brought in state (or federal) court are (1) where the claim asserts the employee has been denied a benefit due under the terms of the plan, 29 U.S.C. § 1132(a)(1)(b), and (2) a state seeks to enforce a "qualified medical child support order." (We will henceforth ignore the second type of claim.)

All other claims must be brought in federal court. 29 U.S.C. § 1132(e)(1) (stating that federal courts have "exclusive jurisdiction"). Thus, if the employee or participant seeks any relief other the benefits allegedly due them *under the terms of the plan* the claim must be brought in federal court.[7]

The most commonly asserted exclusively federal claim is a claim that the employer has "breached a fiduciary duty." Breach of fiduciary duty claims may be asserted for a variety of ERISA violations. Perhaps the most commonly asserted type of breach of fiduciary duty claim is one where the employee/participant asserts that the employer has misled or failed to accurately advise the employee about the benefits offered by the plan. HR managers should understand that they are much more likely to be witnesses in breach of fiduciary claims than in claims that simply seek benefits under the terms of the plan.

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[6] Department of Labor rules also permit plans to post the SPD online as long as the participating employees have the ability to access it and the employer provides a written copy upon request. 29 C.F.R. § 2520.104b–1(c).

[7] The phrase "due under the terms of the plan" is shorthand. The statute permits actions "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Any of these types of actions may be brought in state or federal court.

ERISA also provides the exclusive set of rules governing claims that relate to employee benefit plans. This means that state laws are "pre-empted" (unless the claim falls within a preemption exception). 29 U.S.C. § 1144. In *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142, 112 L. Ed. 2d 474, 111 S. Ct. 478 (1990), the Court explained:

> Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries. . . . Allowing state based actions like the one at issue here would subject plans and plan sponsors to burdens not unlike those that Congress sought to foreclose through § 514(a). Particularly disruptive is the potential for conflict in substantive law. It is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement.

State laws are pre-empted even if an employee is not entitled to relief under ERISA. *Smith v. Provident Bank*, 170 F.3d 609, 616 (6th Cir. 1999) ("it is the nature of the claim -- breach of fiduciary duty -- that determines whether ERISA applies, not whether the claim will succeed.").[8]

Employers May Wear "Two Hats"

ERISA permits an employer to also act as a plan fiduciary so long as the employer does not try to act in both roles simultaneously. Exactly what conduct makes an

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[8] ERISA's sweeping pre-emption of state laws is a trap for the unwary attorney who practices estate planning or family law. For example, in a divorce, most state laws invalidate all beneficiary designations as a matter of law. ERISA, however, has a strict "anti-alienation" provision that applies to pension benefits and which generally preempts these state laws. Thus, unless the parties execute a "Qualified Domestic Relations Order" (QDRO) as part of the divorce, plans (with the approval of the courts) have paid ex-spouses hundreds of thousands of dollars in retirement benefits where the ex-spouse was still listed as a residual beneficiary on the pension form and the employee failed to execute a change in the beneficiary form or a QDRO. *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 2007 U.S. App. LEXIS 19336 (5th Cir. 2007) (upholding plan's payment of $400,000 to former spouse over objections that she had waived right to benefits under state law).

employer a "fiduciary" is horribly complex. Courts agree on broad general principles but disagree in how these principles apply in specific situations.

Generally, a fiduciary is someone who manages, administers or provides financial advice to a plan. The conduct at issue determines whether an employer acted as a fiduciary or an employer: "[W]e must examine the conduct at issue to determine whether it constitutes 'management' or 'administration' of the plan, giving rise to fiduciary concerns, or merely a business decision that has an effect on an ERISA plan not subject to fiduciary standards." *Hunter v. Caliber Sys.*, Inc., 220 F.3d 702, 718 (6th Cir. 2000); *see also Akers v. Palmer*, 71 F.3d 226, 231 (6th Cir. 1995) ("ERISA does not require that day-to-day corporate business transactions, which may have a collateral effect on prospective, contingent employee benefits, be performed solely in the interest of plan participants . . . . Only discretionary acts of plan management or administration, or those acts designed to carry out the very purposes of the plan, are subject to ERISA's fiduciary duties.").

The fact that the plan does not list the employer as a fiduciary is not dispositive. Quite to the contrary, courts have held that if the "factual circumstances contradict the designation in the plan document" (as to who functioned as a fiduciary), the designation in the plan document will not control. *Hamilton v. Allen-Bradley Co.*, 244 F.3d 819, 824 (11th Cir. 2001) (holding employer was properly used as a fiduciary where the employer required "employees to go through its human resources department in order to obtain an application for disability benefits" and "field[ed] questions about the plan from employees").

When an employer is acting as a fiduciary, the employer must act *exclusively* for the benefit of its employees. ERISA specifies that fiduciaries must discharge their duties with respect to a plan "solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(a)(1), that is, "for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan," 29 U.S.C. § 1104(a)(1)(A).

Many potential pitfalls occur because ERISA permits employers to wear "two hats", the fiduciary hat and the employer hat. This leads to the ERISA-unique rule that:

> a fiduciary may have financial interests adverse to beneficiaries. Employers, for example, can be ERISA fiduciaries and still take actions to the disadvantage of employee beneficiaries, when they act as employers (*e.g.,* firing a beneficiary for reasons unrelated to the ERISA plan), or even as plan sponsors (*e.g.,* modifying the terms of a plan as allowed by ERISA to provide less generous benefits).
>
> * * *
>
> ERISA does require, however, that the fiduciary with two hats wear only

> one at a time, and wear the fiduciary hat when making fiduciary decisions. See *Hughes Aircraft Co.* v. *Jacobson,* 525 U.S. 432, 443-444, 142 L. Ed. 2d 881, 119 S. Ct. 755 (1999); *Varity Corp.* v. *Howe,* 516 U.S. 489, 497, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996). Thus, the statute does not describe fiduciaries simply as administrators of the plan, or managers or advisers. Instead it defines an administrator, for example, as a fiduciary only "to the extent" that he acts in such a capacity in relation to a plan. 29 U.S.C. § 1002(21)(A). In every case charging breach of ERISA fiduciary duty, then, the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.

Pegram v. Herdrich, 530 U.S. 211, 225-26 (2000).

Defining where the "employer hat" comes off and the "fiduciary hat" is on can be quite challenging. The leading Supreme Court decision on the subject is *Varity Corp.* v. *Howe*, 516 U.S. 489 (1996), but the Court's failure to address the issue in the eleven years since has left the lower courts divided on many key issues. In *Varity*, the employer established a new subsidiary and transferred several money-losing divisions and other debts to it. Varity hoped that the new subsidiary would fail so that Varity could write off these bad debts without having to charge them to its profitable divisions and subsidiaries. 516 U.S. at 493. Among the debts Varity wanted to eliminate were its obligations under certain medical and other welfare (i.e., non-pension) benefits plans. A key part of Varity's scheme was to persuade the employees to withdraw from the existing plans.[9] Thus, when Varity's officers set about to persuade employees to agree to transfer to the new subsidiary, they told the employees that their current benefits would "remain unchanged" and, in the same presentation to employees, told them that the new subsidiary would be provided "funds necessary to ensure its future viability." 516 U.S. at 500. When they made these assurances, however, Varity's officers knew that the new subsidiary was "insolvent from the day of its creation." Not surprisingly, the new subsidiary "ended its first year with a loss of $88 million, and ended its second year in a receivership." 516 U.S. at 494. The employees who agreed to transfer to the new subsidiary were thus left with no benefits despite the prior assurances of Varity's management.

The Court held that Varity was acting as an ERISA fiduciary when it assured employees their benefits at the new subsidiary were "secure.". 516 U.S. at 502. In

[9] The mystery is why Varity went to such elaborate attempts to mislead its employees when it could have lawfully modified or terminated the health benefits offered to its employees.

language that has confused many lower courts, the court held the exercise of fiduciary power included "[c]onveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation." Once it reached this conclusion, it was a given that the Court would find Varity breached its fiduciary duty to the employees when it "intentionally connected its statements about Massey Combines' financial health to statements it made about the future of benefits, so that its intended communication about the security of benefits was rendered materially misleading." 516 U.S. at 505.

By now, it should be obvious that HR managers (who are not trained as plan administrators) should never wear the "fiduciary" hat. Nevertheless, it happens with alarming repetition, often with costly results for the employer (and disastrous results for the affected employees).

How to Avoid ERISA Pitfalls

1. Read the Entire Summary Plan Description.

Most SPD's are written by lawyers or insurance professionals who are intimately familiar with the various types of benefits available but who tend to write at a level that can be inscrutable to normal folks. As a result, many SPD's are poorly written and fail to comport with DOL requirements.

ERISA mandates that the SPD "shall be written in a manner calculated to be *understood* by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022 (emphasis added). DOL rules specify that this means the SPD "shall" be written "taking into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan." 29 C.F.R. § 2520.102-2.

HR managers should not try to determine whether the SPD fully complies with ERISA or the DOL regulations. HR managers, however, are familiar with the "level of comprehension and education" of the company's employees (i.e., plan participants). Thus, HR managers should read the SPD to gage whether the company's employees are capable of understanding the SPD. As a good rule of thumb, if an HR manager finds the SPD confusing, then so will most employees. HR Managers should communicate any problems to the appropriate benefit person.

2. Timely Provide the SPD for all Benefit Plans to All Employees (New and Current)

Under 29 U.S.C. § 1024, the plan administrator must provide the SPD to a participant within 90 days of the date when the individual becomes a participant.

If there is a material modification to a Plan, a summary description of that modification must be provided within 210 days of the end of the plan year in which the modification was adopted. *Crosby v. Rohm & Haas Co.*, 480 F.3d 423, 428 (6th Cir. 2007) ("After a company validly amends a plan, plan administrators need not immediately update and republish the summary plan document; they may instead furnish employees with a summary of material modifications 'written in a manner calculated to be understood by the average plan participant,' 29 U.S.C. § 1022(a), so long as they provide an updated summary plan description to participants every five years, see id. § 1024(b)(1).")

If, however, the modification was a "material reduction in covered services or benefits provided under a group health plan" the summary of that modification must be provided within 60 days of the date the modification was adopted. 29 U.S.C. § 1024(b)(1).

New SPD's must be provided every 5 years if there is any modification to the Plan during this time. If there are no changes, new SPD's must be distributed every 10 years.

Copies of the "latest updated" SPD and the collective bargaining agreement ("CBA") (if the benefit is established by the CBA) must be placed where it is "available for examination" by any participant.

ERISA makes these duties that of the "Plan Administrator" rather than the HR Manager. For many plans, however, the employer is the designated Plan Administrator. (Where an insurance company provides the benefits, it will usually designate itself as the Plan Administrator.)

As a practical matter, however, many employers have the HR staff distribute the SPD to new employees. If so, HR employees need to know it is important to distribute the SPD for each benefit plan within the time frame allowed, and that a copy of the SPD must be "available" to any plan participant.

3. Promptly Refer Written Requests for Copies of Benefit Plan Documents

In addition to the requirement addressed in the previous "pitfall," ERISA also lets plan participants and beneficiaries "request" (*i.e.,* demand) the plan administrator send them a copy of the following types of plan documents:

- The latest updated summary plan description
- The latest annual report
- Any terminal report

- The bargaining agreement, trust agreement, contract or other instruments under which the plan is established or operated.

29 U.S.C. § 1024(b)(4).[10] Because ERISA puts considerable importance on disclosure, the penalty for failing to timely provide the information upon written request can been quite steep. Under 29 U.S.C. §1132(c), an Administrator has 30 days in which to mail the above documents to the requesting participant or beneficiary. Failure to comply subjects the plan administrator to penalties of up to $110 per day for each "violation."

Most HR managers are not tasked with furnishing plan information beyond the SPD and a few forms or notices. (Few HR managers have access to all of the above information.) Despite this, HR managers are likely to receive a request for plan documents. It is also common for attorneys who represent employees to include a request for "all" plan documents in any letter sent to the company prior to filing a lawsuit

Thus, while it is true that ERISA requires the request for plan documents to be sent to the "Plan Administrator", most requests for plan documents are sent by people who do not have the address of the Plan Administrator so the request is sent to the HR manager. Moreover, where the employee is also the plan administrator, courts are unwilling to excuse an employer who ignores a request for plan documents simply because it was not sent to the correct department. *See Minadeo v. ICI Paints*, 398 F.3d 751, 758 (6th Cir. 2005) (that even if written request was not sent to proper entity, employer had no right to have "simply ignored" the request for four months).

Thus, when an HR manager receives any request that mentions ERISA and asks for documents, the safest move is to immediately send a copy of the letter to the benefit plan administrator and ensure that the requested documents are timely provided.

Several other points bear mentioning:

ERISA specifies that the request be in writing so only a written request will start the 30 day clock ticking.

Section 1024(b) permits a participant to request a copy of the "bargaining agreement" if the benefit is one established in the CBA. The National Labor Relations

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[10] The plan administrator may impose a "reasonable charge" to cover the cost of furnishing the copies. The DOL regulations specify that a "reasonable charge" is the "least expensive means of acceptable reproduction" but cannot exceed 25 cents per page. "No other charge for furnishing documents, such as handling or postage charges, will be deemed reasonable." 29 C.F.R. § 2520.104b-30(b).

Act, however, requires a union furnish a copy of the CBA to any member of the bargaining unit. 29 U.S.C. § 414. These duties are independent, and an employer is best advised not to simply refer the employee to the union for a copy of the CBA when it receives a request for all plan documents from an employee.

A plan administrator may require written authorization from a plan participant before satisfying a third party's request for information. *Bartling v. Fruehauf Corp.*, 29 F.3d 1062, 1072 (6th Cir. 1994). The administrator may not, however, simply ignore a request by a "third party" (i.e., an attorney), however, who purports to represent a participant or beneficiary. Instead, it "must either provide the requested information directly to the plan beneficiary" or "inform the attorney that the information will be released upon the receipt of an authorization signed by the plan participant." *Minadeo*, 398 F.3d at 758.

Plan documents are not the only types of "information" that an Administrator must furnish within 30 days of a written request. For example, under 29 U.S.C. § 1025, an administrator give a statement showing the "total benefits accrued" and/or showing the employee's nonforfeitable pension benefits. Despite the significant penalty that can accrue, there is unfortunately no exhaustive list of the "information" that § 1132(c)(1) requires to be provided.

There has been a significant increase in litigation over plan document requests in the last few years. It is easy to see why. A penalty of $110 *per* day *per* violation is essentially "free" money for the employee and her lawyer.

Finally, the key point to remember is that courts are reluctant to punish administrators who act in good faith where the employee is not prejudiced by the employer's delay. *Crosby*, 480 F.3d at 432.

4. Always Advise Employees to Consult the SPD to Resolve Current Questions

Much litigation occurs over what happens when an employee is "promised" (in some way) a benefit and the written benefit plan (1) does not provide for that benefit, (2) provides that the benefit may be modified or canceled or (3) doesn't say anything about the benefit.

The whole point of ERISA is that individual employee decisions should be guided by the written plan documents. Courts have repeatedly stated that employees cannot obtain benefits by claiming the employer made an oral promise to pay them what the written plan document does not provide. Courts have even said that written documents cannot modify the terms of the plan unless the document is an official plan modification. See *Sprague v. GMC*, 133 F.3d 388, 401 (6th Cir. 1998).

The confusion occurs because these same courts have held an employer will be bound by oral statements made by an HR employee. In *James v. Pirelli Armstrong Tire*

Corp., 305 F.3d 439, 443 (6th Cir. 2002), the employer held a series of group meetings designed to inform employees about an early retirement program. The meetings urged employees to "act now" to obtain low deductibles on their health insurance so they would not be affected by "upcoming" changes. When asked, the HR liaison told employees that their health benefits would last "during retirement." When some employees asked about language in the SPD that said the company could alter or amend the plan, the HR liaison said the language let the company change insurance carriers. The company later changed the retirees' health plans to increase the "out of pocket" expenses that would be paid by the retirees so they sued. The court held *Pirelli* was bound by the statements made when the employees retired.

Much could be written about whether the decisions in *James* and *Sprague* (among many other decisions) are truly consistent. That discussion is not presently relevant. HR managers need to learn a few simple lessons from *James*. The reason the court nailed Pirelli was because the HR liaison staff strayed away from the SPD and offered their own interpretation of it.

Stay with what is in the SPD. Don't try to explain it. You may think, based upon your long experience and knowledge of the company, that you know the answer. Nevertheless, when times are not placid, employees need to be directed to the SPD for all benefit information. (The next section addresses how to respond to questions that are not answered in the SPD.)

Another decision illustrates the importance of following this rule. In *Krohn v. Huron Memorial Hospital*, 173 F.3d 542, 548 (6th Cir. 1999), the employee was seriously injured in a car accident. The employee's husband met with a "personnel assistant" for the hospital (the employer) who told him that his wife was eligible for short-term disability benefits. She also said, however, that employees who were in car accidents "normally" opted to have the "car insurance" pay the employee's lost wages because the monthly amount was higher and short-term disability benefits would not pay "if you're collecting it from other companies." Husband filled out the short-term disability benefit forms but when he returned them to the employer, he told them his wife had decided to receive benefits under the "car insurance". The employer therefore did not submit the forms to the disability insurance provider. When the "car insurance" benefits expired, however, the employee found out that she could not collect long-term disability benefits (which, while they paid a lower amount per month, would have lasted longer), because the employer had not turned in the STD forms. The court held the employer (not the disability plan insurer) had violated the employee's rights by failing to

advise the husband about the availability of long-term disability insurance even though he did not ask about them.[11]

From an HR point of view, *Krohn* demonstrates why it is crucial to always advise employees who have questions to follow the steps listed above. As the court decision stated, "it would have been preferable . . . to refer the plaintiff to her summary plan description or employee handbook to find the answer to her questions, and to have given her an additional copy if she had lost her own, than to have undertaken to provide such information and to have done so in such a careless and incomplete manner."

5. Never Convey Information about the Likely Future of Plan Benefits.

The Merger Scenario

The August 31, 2007, online edition of *Forbes Magazine* said what has been obvious for some time: "Merger fever continues to course through the global economy as companies with ample cash use acquisitions to satiate the growth desires of hungry investors."

ERISA litigators shudder in thinking about all the things that can go wrong (from a benefit point of view) when corporations merge. In fact, few if any mergers of Fortune 500 corporations do not result in some type of ERISA breach of fiduciary duty litigation.

In every instance, how the corporations will merge the pension plans, as well as what type and form of welfare benefits the "new" company will offer are complex questions that can take considerable time to work out. Some employees are notoriously impatient in such situations. Some employees can't handle the uncertainty. Those employees who have worked at both companies will want to know whether their prior service (with the other company) will be counted toward their retirement, vacation pay, severance pay etc. The job security fears of employees is driven by the fact that after most mergers, the company sheds itself of employees in redundant positions. In these situations, HR personnel can be inundated with questions about what will happen in the future.

In the world of benefits litigation, companies are incurring substantial costs, costs that often cannot be mitigated, because serious mistakes are by well-meaning employees

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[11] What is most interesting about *Krohn* is that the "advice" given by the "personnel assistant" was literally true. Most disability plans would have offset the "car insurance" benefits against what was owed under the STD and then LTD plans. The court, however, said the issue was not whether the advice was "true" but whether it was accurate and complete. Even if the disability insurer would have initially offset the "car insurance" money, the advise was incomplete because of what happened when those benefits expired.

who offer predictions what might happen regarding future benefits. HR managers must remember that any statement that conveys "information about the likely future of plan benefits," *Varity*, 516 U.S. at 502, subjects a company to potential litigation if that information later turns out to be less than 100 percent accurate.

The acquisition by Martin Marietta Corporation (as it was then known) of General Electric's Aerospace Division provides a lesson in how to give advice during uncertain times. In *Flanigan v. General Electric*, 242 F.3d 78, 88 (2nd Cir. 2001), Martin Marietta Corporation purchased General Electric's Aerospace Division in what the court described as a "bewilderingly complex transaction." Lockheed, as it came to be known, hired all 37,000 GE aerospace employees. During the period of uncertainty before the merger, GE provided its employees with written updates which included the following statement (or some variant):

> We want to respond quickly to employee concerns, but more importantly, we want our responses to be correct. The fact is that it will take longer to answer some questions than others. For instance, some of the benefit questions raised are very complex. They need to be thoroughly researched and considered by both GE and Lockheed people working these issues. Many involve legal and tax ramifications which must be carefully deliberated. This will require diligent effort on our part, and patience on your part.

The court of appeals held these type of statements "easily fulfilled" any obligations on GE's part to apprise its employees of the effect in the merger on their benefits until the final decision on those benefits was made. *Flanigan*, 242 F.3d at 84.

While few HR managers will be required to issue statements in mergers the size of the one between Martin Marietta and GE Aerospace, the point is that in any period of uncertainty (whether it is a sale, merger or downsizing), it far better to say "we have not been told" or "a decision has not been given to us" when asked how future benefit issues will be handled. This is because companies are "not required to voluntarily disclose changes in a benefit plan before they are adopted". *Flanigan*, 242 F.3d at 85.

The Downsizing Scenario

The above advice applies outside of the merger scenario. The *Pirelli* case was a prime example of the ERISA pitfalls that can occur as a result of downsizing activities. Not only did the "assistant employee relations manager" in *Pirelli* fail to confine her statements to what was in the SPD, she went further and gave assurances that the company did not know about and had no intention of making. Pirelli bore the fault for this because it failed to properly train the local plant personnel on how to answer questions. It is not unusual for employees to have questions that HR cannot answer.

What Pirelli should have done is instruct the HR staff to pass on these questions to benefits personnel for official responses from the Plan Administrator.

As noted, the Supreme Court and all other courts treat "advice" about the "likely future of plan benefits" as being a fiduciary duty.[12] So far, the lower courts have expansively interpreted what constitutes "future benefits." In *Varity*, the "future plan benefits" included the company's false assurance that employees could expect secure benefits if they agreed to go work for the new division. In *Flanigan*, "future benefits" included statements about what would happen to existing benefits when GE Aerospace employees transitioned to Martin Marietta. In *Pirelli*, it was whether the company had the right to alter the manner in which retiree medical benefits were funded coupled with the assurance that if employees retired, the company would pay medical benefits for their lifetime. In short, HR managers should never make any statement about any "future benefit" without specific authorization from the Plan Administrator.

The Voluntary Separation Program Scenario

Conveying information about the likely future of plan benefits can also occur in the context of offering voluntary separation benefits. Some employers choose not to engage in layoffs. They reduce either by attrition or by offering generous separation benefits. The voluntary reduction often includes some type of additional benefit such as an increase severance benefit or an offer to "bridge" years of service so that the employee may retire with a full pension. While there is nothing wrong with this practice, an employer must be very cautious about when they inform employees about the offering of a voluntary separation benefit.

In *Berlin v. Michigan Bell Telephone Co.,* 858 F.2d 1154, 1164 (6th Cir. 1988), the employer wanted to reduce its workforce without conducting a layoff so it offered a generous separation pay and medical benefit package to its employees. After the first offering ended, the employer found that its retirement eligible employees held off on retiring in the hope that the employer would offer another voluntary separation package. To counter this, the employer (though the vice-president of human resources) informed employees that "no additional offers" would be made and that there was "no reason" for employees contemplating retirement to delay that decision. 858 F.2d at 1159. The employer's HR personnel continued making similar statements as late as two weeks before the employer offered yet another separation incentive program.

The Sixth Circuit held that when the employer started giving "serious consideration" to implementing the second offering, the employer (who was also the plan

[12] There is an important distinction between the decision to change a benefit (which is not a fiduciary duty) and how that decision is communicated to employees (which can be a fiduciary duty).

administrator) had a fiduciary duty to discontinue telling employees that no additional offers of the generous separation package would be made: "Any misrepresentations made to the potential plan participants after serious consideration was given to a second offering could constitute a breach of a fiduciary duty." 858 F.2d at 1163-64.

The problem in *Berlin* was not that the employer made statements that were true at the time but which later turned out to be incorrect. The problem was that the employer allowed its HR employees to continue making incorrect statements after the employer seriously considered making a second offering.[13]

The Golden Rule

One rule can be derived from the Supreme Court and Sixth Circuit decisions on fiduciary duties.

An employer who makes any statement about future benefits, whether in response to questions or on the employer's own initiative, will be held liable for any inaccurate information: (a) when the statement is materially misleading when made or (b) when the statement is true when made but turns out to be inaccurate because of later decisions *and* the employer fails to timely provide participants with the correct information.

6. The Unique Problem of Silence

Under certain situations, remaining silent can be a breach of fiduciary duty. In *Griggs v. E. I. DuPont de Nemours*, 237 F.3d 371, 381 (4th Cir. 2001), the employee had several discussions with benefits personnel as to whether he could receive a lump-sum early retirement benefit without having to pay a tax penalty. The plan administrator initially advised the employee that there would be no tax penalty but later learned that advice was not correct. After this realization, however, the plan administrator said nothing to the employee until the employee received the lump sum payment. The employee sued because he ended up having to pay a tax penalty. The court of appeals held that DuPont violated a fiduciary duty to the employee when it said nothing to him despite knowing that he was laboring under a misunderstanding about the tax consequences of his decision. 237 F.3d at 381-82.

Not every silence breaches a fiduciary duty: "ERISA does not impose a general duty requiring ERISA fiduciaries to ascertain on an individual basis whether each beneficiary understands the collateral consequences of his or her particular election." 237 F.3d at 381. What violates an ERISA fiduciary duty is silence in the face of knowing

[13] "Serious consideration" occurs "when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change." *McAuley v. Int'l Bus. Machs.*, 165 F.3d 1038, 1043 (6th Cir. 1999).

that the employee is laboring under a misimpression regarding the consequences of a specific benefit decision.

It should be unusual for silence by an HR manager to implicate a fiduciary duty. Where HR staff serve as the conduit for information, their knowledge of an employee's unique situation could be imputed to the employer (when the employer also functions as the plan administrator).

7. Ensure that Benefits Books and/or Handbooks Do Not Violate ERISA Minimum Vesting or Minimum Participation Rules.

As stated earlier, ERISA imposes certain minimal standards on pension plans. One cardinal rule relates to when an employee is eligible to participate in the plan and when the employee has a vested right to pension plan benefits.

An HR manager not charged with administering a pension plan does not need to know the participation and vesting rules in detail. What many HR managers do not realize, however, is that IRS regulations prohibit any employee classification that directly *or indirectly* prevents an eligible employee participating in the retirement plan.

The IRS gives as an example from a pension plan that limits participation to "regular" or "full-time" employees. This is prohibited, the IRS says, because it is possible for even "part-time" or "seasonal" employees to work 1000 hours within a year-long period. Once an employee meets the 1000 hours of service test, ERISA makes them eligible to participate in the retirement plan.

HR managers do not typically draft pension plans but are often called upon to draft handbooks and employee policies. In doing so, it is important to remember not to draft the handbook so that it provides that only "full-time" employees are eligible to participate in the company retirement plan or so that, "part-time" or "seasonal" employees are not eligible to participate in the retirement plan.

8. Ensure that COBRA Notices Are Sent Out to all Qualified Participants.

Most every HR manager knows that COBRA requires health care plans to offer "continuation" health care coverage to employees when employment ends (or some other "qualifying event" occurs). What seems simple in concept trips up many employers, small and large.

COBRA, codified at 29 U.S.C. §§ 1161 to 1169, requires all "group health plans" to offer "each qualified beneficiary" the option of electing to continue the health plan coverage for a certain period of time (between 18 and 36 months) if the beneficiary would otherwise lose coverage because of a "qualifying event."

Employers who offer health insurance to employees by purchasing health insurance coverage are usually given the option of having the health insurance company

"administer" COBRA coverage. Of course, the insurer charges more for this service but many employers who find themselves in hot water over a COBRA issue, wish they had paid the insurer.

COBRA litigation is almost always a "no win" proposition for the employer. The violation (the failure to send out the COBRA notice) is a pretty cut and dried issue. COBRA litigation is typically only brought by former employees (or their spouses) who cannot work due to their medical condition.[14] By its very nature these employees have likely incurred substantial health care bills.

If the insurer administers COBRA, the employer's obligation is simple – notify the insurer whenever there is a qualifying event. The insurer will send out the COBRA notification forms and collect the premiums (should the qualified beneficiary elect coverage).

The first COBRA pitfall every HR manager should avoid, therefore, is knowing whether the employer or the insurer "administers" COBRA coverage. COBRA is by no means impossible for an employer to manage. With a few pre-packaged forms and some bookkeeping caution, the process can be easily automated.

The second COBRA pitfall is to ensure that a COBRA notice is sent to every "qualified beneficiary." Employers or insurers sometimes send notices only to the former employee (in a termination situation). However, COBRA provides that notices must be sent to "any qualified beneficiary." 29 U.S.C. § 1166(a)(4). This has been interpreted to mean all qualified beneficiaries are entitled to individualized notice. "A covered spouse has his or her own rights under COBRA, which are not dependent on the covered employee's rights." *McDowell v. Krawchison*, 125 F.3d 954, 959 (6th Cir. 1997). Presumably, in a termination, this can be accomplished by addressing the COBRA notification letter to both the former employee and the covered spouse. The same ruling would apply in the case of a dependent child who "ages out" of the plan's coverage limits. The child is the one entitled to the COBRA notice.

The third COBRA pitfall is one of recent making and affects only small employers. COBRA's continuation coverage does not apply to a group health plan when "all employers maintaining such plan normally employed fewer than 20 employees on a typical business day during the preceding calendar year." 29 U.S.C. § 1161(b). In the

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[14] The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") "portability" requirement, see 29 U.S.C. § 1181, has affected COBRA litigation. On the one hand, the change it made to the pre-existing condition exclusion, tended to reduce the number of COBRA elections. Conversely, HIPAA effectively raised the stakes in COBRA litigation because employees who now need COBRA the most are those who cannot work because they (or a spouse) have a serious (i.e., costly) medical condition.

typical context, this means employers who have fewer than 20 employees need not offer COBRA coverage. In *Thomas v. Miller*, 489 F.3d 293 (6th Cir. 2007), the Sixth Circuit held that an employer who has less than 20 employees can nevertheless be required to offer COBRA coverage if the employer's conduct misleads employees into believing that they will have COBRA coverage when in fact they do not.

As a practical matter, the decision in *Thomas* demonstrates that smaller employers must now be more cautious in representing to employees that they are eligible for COBRA coverage. Because COBRA requires all summary plan descriptions to include an explanation of COBRA rights, small employers who are not subject to COBRA should now review the SPD (which is typically prepared by the health care insurer) to determine whether their SPD unnecessarily promises COBRA coverage. If the SPD promises COBRA coverage, any employee who sustains a qualifying event could argue they relied on that promise and are therefore entitled to COBRA coverage. To defeat such an argument, the employer will need to formally amend the SPD (remember that there is no such thing as an "informal" amendment to the SPD) so that it removes the COBRA explanation.

The Tennessee General Assembly created a minor pitfall last year when it passed a law directed at spouses who are about to file for a legal separation or divorce.

The law, which went into effect on January 1, 2007, imposes a new notice requirement on employees when the employee's spouse participates in the employer's health care plan. Should the employee terminate the spouse's health care coverage because of a divorce, legal separation or other separation, the employee (not the employer) must provide the spouse with at least 30 days prior notice. The statute is poorly worded but simply seems to require 30 days advance notice before the employee may terminate the spouse's coverage. The statute further requires the employee to notify the spouse that COBRA coverage is available "when the divorce is final" and advise the spouse how to apply for it.

The only requirement imposed on the health care plan itself is to include in the SPD an explanation of the statute when the SPD is next updated. The statute does not require the plan to provide any notice to the affected spouse but of course, under COBRA, once the plan is informed that there has been a divorce or legal separation, the plan must offer the spouse COBRA continuation coverage.

Arguably the state law is pre-empted as it applies to the employer. States have some authority to regulate health insurance but have not been given the right to specify what must be included in a plan document or SPD. Given that the burden of compliance is not heavy, it is probably not worth fighting, however.

Also, the state law is slightly inaccurate in saying that COBRA coverage may be obtained when the divorce is final. COBRA defines a qualifying event to include a legal separation when the result of it is the loss of coverage.

9. "Side Agreements" with the Union that Let the Employer Avoid Making Contributions to Union Managed Pension Plans are Never Enforceable.

The last pitfall applies only to employers who enter into a CBA with one or more unions and the CBA requires the employer to make contributions to the union's pension fund. These type of CBA's are common in the coal industry and the construction industry. Many local Project Labor Agreements also require the individual employers make contributions to the pension fund contribution requirements.

Many employers have entered into a CBA that requires the employer to make pension contributions. At the same time, the union representative also promises (either orally or in writing) that the employer does not have to make these contributions (or need only make them on certain projects). Employers need to understand that courts uniformly hold these types of "side agreements" are void as against public policy.

Section 515 of ERISA, 29 U.S.C. § 1145, provides, "Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement."

This statute entitles a union managed pension fund to enforce the terms of a CBA. Under ERISA, a pension fund and the Union that sponsors it are legally separate entities. Because a pension fund is entitled to rely on the terms of a CBA, the pension funds action to collect unpaid contributions cannot be defeated by citing to oral understandings between the employer and the union, *Central States, Southeast & Southwest Areas Pension Fund v. Joe McClelland, Inc.*, 23 F.3d 1256, 1257-58 (7th Cir. 1994)), or by written side agreements between the employer and the union that have not been disclosed to the fund. *See Central States, Southeast & Southwest Areas Pension Fund v. Transport, Inc.*, 183 F.3d 623, 628 (7th Cir. 1999).

Several employers have had the unpleasant experience of opening a letter from the union pension fund which (1) demands the employer make up unpaid contributions and (2) demands the employer provide the pension fund with access to the employer's payroll records that the pension fund can ascertain whether additional contributions may be owed.

Accordingly, no employer should ever sign any CBA or Project Labor Agreement (that includes a pension fund contribution provision) on the "assurance" that the pension fund provision won't be enforced.

TRADE SECRET CLAIMS AND COVENANTS NOT TO COMPETE

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TRADE SECRET CLAIMS AND COVENANTS NOT TO COMPETE

Introduction

Employers know that one of the most expensive costs of doing business is finding, training and retaining quality employees. It is easy to imagine a scenario where an employee comes to work for an employer, undergoes months of training, develops personal relationships with key customers, and then leaves to work for a competitor. When that happens, a former employee is leaving with experience and information, all obtained at the employer's expense. What can an employer do to protect its interests?

A well drafted non-competition provision including agreements by the departing employee: (1) not to compete either during or for a specified time period after employment; (2) not to induce other employees to leave the employer; and (3) not to divulge the employer's trade secrets or confidential information are important methods of limiting the business disruption and loss that may result with the employee's departure.

The old theory was that any attempt to prevent an employee from working for a competitor was prohibited as a restraint on trade, both because competitors are limited by the agreements and because employees are subject to restrictions on where they can work and what type of work they can perform. On the whole, restraints on trade are forbidden.

However, as business has evolved, it has become overwhelmingly clear that there are some circumstances under which an employer may have sufficient reason to justify the restraint. The concepts of non-competition, non-solicitation, and nondisclosure of trade secrets and confidential information are largely controlled by state law and this discussion will focus on Tennessee law concepts. Despite the points in this article, one thing is clear: interpretation of these agreements is highly subjective.

As a final introductory note, all of the agreements discussed in this article must be valid contracts between the employer and the employee. An employer may not simply include non-competition or non-disclosure terms in its employee handbook (which should painstakingly repeat that it is NOT a contract). These agreements are subject to interpretation under contract law. The most important point here is that there must be an exchange of "consideration" between the employer and the employee. If an employee is being newly hired, the

consideration extended by the employer in exchange for these promises by the employee is the opportunity for employment. However, if an employer seeks to have current employees sign agreements related to employment, the employer will have to offer up either money in the form of a bonus or offer the employee a raise. Otherwise, the agreement is invalid and unenforceable.

What is a Non-Competition Covenant?

An employer may seek to have an employee enter into an employment agreement which contains non-competition provisions. For example, the employer may have the employee agree that he or she will not perform any work, either directly or indirectly, for another employee in a competitive business for a period of one year. The terms of such an agreement should be specific about the type of work that is prohibited, the geographical area involved, and any other terms important to the employer.

Covenants not to compete, because they are a restraint on trade, are disfavored in Tennessee. Hasty v. Rent-A-Driver, Inc., 671 S.W.2d 471, 472 (Tenn. 1984). But, when an employer implements non-competition provisions which are reasonable, courts are willing to enforce them. What does reasonable mean? As always, it is subjective, but the courts have stated the factors considered in determining whether a covenant not to compete is reasonable. The factors are: "the consideration supporting the agreements; the threatened danger to the employer in the absence of such an agreement; the economic hardship imposed on the employee by such a covenant; and whether or not such a covenant should be inimical to public interest." Allright Auto Parks, Inc. v. Berry, 409 S.W.2d 361, 363 (Tenn. 1966).

The threshold question is whether the employer has a legitimate business interest that is properly protectable by a non-competition covenant. See Hasty, 671 S.W.2d at 473. Protectable interests exist where an employee would gain an unfair advantage in competition, over and above ordinary competition. Considerations related to whether an employer has a protectable interest include: "(1) whether the employer provided the employee with specialized training; (2) whether the employee is given access to trade or business secrets or other confidential information; and (3) whether the employer's customers tend to associate the employer's business with the employee due to the employee's

repeated contacts with the customers on behalf of the employer." Id. Either individually or joined together, these considerations can give rise to a properly protectable business interest. Vantage Technology, LLC v. Cross, 17 S.W.3d 367 (Tenn. Ct. App. 1999).

Specialized training does not include normal training related to a position. Training, generally, is not a protectable interest; it is, instead, a cost of doing business. There are some types of positions, however, that offer an employee highly specialized training which goes beyond general knowledge and skill. Compare the training required for a retail salesperson to the training required for a salesperson engaged in the sale of advanced-technology surgical equipment. With the latter, large amounts of money and many months are spent training a salesperson on the operation and specific features of the products, all for the purpose of helping increase sales for the employer. Competition in such a field is fierce, and an employer can be expected to take action to protect the money and time spent training its salespeople on the particulars of its product. In contrast, a retail salesperson admittedly receives training to learn the job, but the training would not qualify as specialized training because the employee is not gaining unique knowledge and skills through the training.

The Tennessee Court of Appeals very recently held that an employer cannot claim specialized training when the employer did not provide the training specifically for its employees. In Girtman & Associates v. St. Amour, Girtman's non-competition agreement was held unenforceable because there was no protectable business interest. Girtman & Associates v. St. Amour, 2007 Tenn. App. LEXIS (Apr. 27, 2007). Girtman insisted that it paid for St. Amour's training in professional courses. But, the court noted that the courses were not taught by Girtman, did not provide materials from Girtman, were not solely for Girtman employees, and were open to any participants who wished to pay the fee and attend. Id. Because of those factors, the court held that there was no protectable interest in the knowledge and skill because it would not create an unfair competitive advantage if used by St. Amour. Id.

Just as important as the training received by the employee is the access of the employee to trade secrets or other confidential information. Trade secret has been defined as any "formula, process, pattern, device or compilation of information that is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not use it." Hickory Specialties, Inc. v. B & L Labs, Inc., 592 S.W.2d 583, 586 (Tenn. Ct. App. 1979). A trade secret

consists of a secret process or method developed or used by the employer that allows it a competitive edge over its competitors and is not shared outside those at the employer's business with a need to know. It is this reason that the courts allow employers to claim a protectable interest over such secrets.

In Tennessee, for information to be deemed a trade secret, it must (1) be unknown outside of your business; (2) have its access limited to only a few key managerial employees; (3) be subject to reasonable measures to guard its secrecy; (4) be of considerable value to you and likely of considerable value to your competitors; (5) be the result of your expending considerable time and resources developing and compiling it; and (6) not be ascertainable to competitors through any public medium or any other avenue. See, e.g., Venture Express, Inc. v. Zilly, 973 S.W.2d 602, 606 (Tenn. Ct. App. 1998).

The first and last factors listed above are critical: it must be difficult for anyone outside the confidential relationship to acquire the information by proper means, and it must be unknown. Information readily available through public sources or generally well known in an industry cannot be considered confidential. But information acquired by an employee through a confidential relationship may be protected even if the information potentially could have been obtained through independent research. This is particularly true where acquisition of the information through independent research would be difficult, costly, or time consuming. Wright Med. Tech., Inc. v. Grisoni, 135 S.W.3d 561, 589 (Tenn. Ct. App. 2001).

Confidential information is harder to define. Confidential information must be information that is not known to people outside the employer's business and is not readily available from public sources. If an employer wishes to protect its confidential information, it must take internal steps to do so. If the identities of customers, customer buying habits, customer pricing schemes and the like are confidential, then the employer's business should reflect as such. For instance, that information should not be accessible by the receptionist of the office. If an employer expects to treat that information as a protectable interest, it must actually be one.

Also considered in the evaluation of whether an employer has a protectable interest is the employee's contact with customers. There are some positions, typically sales positions, which rely heavily on a close relationship developed between the employee and the customer. In those cases, the employee is acting as

an agent of the employer and is developing goodwill for the employer. The courts have recognized that in essence the employee becomes the face of the employer to customers. "In this role, the employee is made privy to certain information that is personal, if not technically confidential. Because this relationship arises out of the employer's goodwill, the employer has a legitimate interest in keeping the employee from using this relationship, or the information that flows through it, for his own benefit." Vantage Technology, 17 S.W.3d at 645-6.

Covenants not to compete must be reasonable in scope in order to be enforceable. "The time and territorial limits involved must be no greater than is necessary to protect the business interests of the employer." Allright Auto Parks, 409 S.W.2d at 363. Courts are willing to enforce the agreements as written when the terms are reasonable. If a court finds that the agreement as written is too broad, it has the authority to revise the agreement accordingly. If the agreement is unnecessarily unreasonable and broad, the court may find the entire agreement invalid. Id. at 364.

There are no pre-determined guidelines for reasonable geographic restrictions. Reasonableness is determined on a case by case basis. The important thing to remember when drafting the agreement is to tie the geographical restriction to the employer's business interest. If the employer provides sales and services to customers across the State of Tennessee, it will likely be considered reasonable to include a non-competition provision covering the entire state. But what if the individual employee at issue only has contact with customers in Knoxville? A court would likely only find the non-competition agreement valid and enforceable as to competition in Knoxville and surrounding areas, but not enforceable across the entire state.

The same is true for the time restrictions included in the non-competition agreement. Because non-competition agreements operate as a restraint of trade, they cannot be overly broad but must be connected to protecting the employer's business interest. Non-competition agreements that have no time limit will certainly not be enforceable. It is impossible to predict what time periods will be considered "reasonable" by each court, but periods of three years have been found reasonable in some cases.[1] Keep in mind that if the time limitation included in the

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[1] See Vantage Technology, 17 S.W.3d at 648; Mike Glynn & Son, Inc. v. Schang, 1990 Tenn. App. LEXIS 75 (Tenn. Ct. App., Feb. 5, 1990).

agreement is found by a court to be overly broad, it can be shortened in the court's discretion. The common rule of thumb is to draft the agreement to prevent unfair competition for the shortest period of time which will protect the employer's interest.

Tennessee courts will usually enforce two-year temporal restrictions and geographical restrictions of a 50-mile radius from the employer's headquarters, although in some cases courts have enforced even broader restrictions because of the nature of the business or industry at issue and the particular facts of a given case. See, e.g., Dabora, Inc. v. Kline, 884 S.W.2d 475, 477-78 (Tenn. Ct. App. 1994) (enforcing a three-year nationwide restriction on competition).

Some employers may not prohibit competition or working for a competitor, but may instead prohibit the employee only from disclosing trade secrets and confidential information or from soliciting the employer's customers or employees. These types of agreements are not viewed as strictly as agreements which completely restrict an individual's ability to perform a particular type of work. But, in order to be enforceable, they do still have to relate to a protectable interest.

How do I draft a valid and enforceable agreement?

First, evaluate the position for which you propose to have the employee sign an agreement. Analyze your company and determine what actions you want to prohibit. You may not believe that you have the ability to restrain an employee from competing in the future, but you may be concerned about making sure that the employee does not solicit your customers and employees after he or she leaves your employment. Not every position is right for a non-competition agreement, but may it be a position that has a lot of customer contact and would present the opportunity to solicit customers.

If you propose to restrain the employee from competing, make sure that the position is one over which you can claim a protectable business interest. If so, carefully lay out the terms of the agreement so that they can be easily understood. The most important consideration will be the reasonableness of the scope of the agreement, including time and geographic limitations. It pays to analyze your situation and create a truly reasonable agreement. Although you may want to make sure your employees do not compete with you for three years after they leave your employment, consider whether one year would accomplish your goals.

If one year would allow you the opportunity to fill the position with a new employee and rebuild and retain a solid relationship with your customers, stick with the one year agreement. The more reasonable your agreement, the greater chance that it will be enforced, as written, by a judge.

If you propose to restrict an employee from revealing or using confidential information or trade secrets, define those terms as clearly as possible, including examples. If you intend pricing strategies to be considered a trade secret because they have been developed by specialized skill and they are only shared with a small number of employees with a need to know, make it clear in the agreement that pricing strategies are considered trade secret. Consider the following when determining whether information qualifies as a trade secret:

- Is the information commonly known in the particular trade? Remember, it must be a trade **secret**.
- Does the information provide a competitive edge?
- Has the information been disclosed previously?
- Does the employer own and use the information?
- Has the employer expended effort in developing the information?

The clearer the agreement, as long as it is reasonable, the better argument you will have for enforceability.

These agreements should include a provision where the employee agrees that actual damages would be difficult to calculate and that the employer will suffer irreparable harm if the employee breaches the agreement. The agreement should also state that the employer will be entitled to injunctive relief for any breach of the agreement by the employee.

What constitutes a breach of the agreement?

Interpretation of the agreement and decision about whether the employee has breached the agreement is left up to only one person: the judge assigned to hear the case. There is a large amount of case law interpreting different non-competition, non-solicitation and non-disclosure provisions, and none definitively answers the difficult questions. For example, consider the following actual decisions by courts on the definition of "solicitation":

- Compass Bank v. Hartley, 430 F. Supp.2d 973 (D. Ariz. 2006) – the court held that a letter announcing that the defendant had joined a new company as the President and Chief Investment Officer and which also contained new contact information for the defendant was an active solicitation in violation of the defendant's agreement

- Merrill Lynch, Pierce, Fenner & Smith v. McClafferty, 287 F. Supp.2d 1244, 1248 (D. Haw. 2003) – the court held that a "wedding-style announcement" of a former employee's new employment, even assuming it was sent as a matter of professional courtesy, was a solicitation where it was directed toward and based on client lists

- Merrill Lynch v. Schultz, 2001 WL 1681973 (D.D.C. Feb. 26, 2001) – the court found that the defendant's announcement of his resignation did constitute a solicitation because of his "initiation of targeted contact through the use of client information gained through his employment"

- Money & Tax Help, Inc. v. Moody, 180 S.W.3d 561 (Tenn. Ct. App. 2005) – the court held that the defendant's letter advising former clients that "effective September 1, 2000, I will no longer be working with Money & Tax Help, Inc., but will be opening my own accounting practice. . ." constituted a solicitation in violation of his non-compete agreement

- Intermodal Cartage Company, Inc. v. Cherry, 227 S.W.3d 580 (Tenn. Ct. App. 2007) – The court found that plaintiff's former employee, Cherry, violated his non-solicitation agreement. Cherry had taken steps to encourage one of the plaintiff's customers to switch business to defendant's current employer by contacting a customer "to alert her of his employment change, telling her to call him if there was anything he could do for her." Id. at *11.

What do I do if I want to enforce an agreement?

Despite having these agreements, some employees will breach them, whether knowingly or not. At that point, it is up to the employer to make a decision about whether to commence litigation to enforce the agreement. Here is what you need to know about enforcing these agreements: it can be expensive and time is of the essence. If you have an employee in breach, contact your counsel to discuss your options. It may be beneficial to have your counsel draft a stern

"cease and desist" letter to the employee, if working independently, or the employee's new employer. In such a letter, the new employer would be advised of the non-competition agreement, told that its actions in allowing the employee to engage in those activities were unlawful, and warned that any further breach of the agreement would result in litigation against both the new employer and its new employee. When faced with a potential lawsuit, most new employers will relent and reassign the employee. No new employer wants to be faced with a lawsuit which may (1) potentially cost it money, and (2) result in an injunction against its new employee forbidding the employee from performing the work for which he or she was hired. That should send quite a message.

But, there are times when both a former employee and his or her new employer do not believe there has been a breach and are prepared to litigate over the issue. Tennessee law allows a party to obtain injunctive relief against another party where the party can show that irreparable harm will result if the court does not take action to prohibit the other party from its current actions. While courts may be persuaded that such relief is necessary, persuasion will be simpler if the employee acknowledges that injunctive relief is appropriate. Tennessee Rule of Civil Procedure 65.04 provides that a "temporary injunction may be granted during the pendency of an action if it is clearly shown … that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual."

Because injunctive relief is extraordinary relief, the burden is on the party seeking the injunction to prove wrongful actions and resulting damages. If an employer is seeking to enforce a non-competition agreement by obtaining an injunction, it should be prepared to present the judge with more than just accusations. The employer should rely on at least some objective facts which indicate breach of the agreement by the former employee.

Of course, injunctive relief is just the tip of the iceberg. Successful lawsuits against former employees in breach of non-competition agreements can result in an array of damages to the employer. Examples can include permanent injunctive relief and profits from any work performed in breach of the agreement.

Enforcing its non-competition covenants can benefit the employer in other ways as well. When an employer has sued a former employee for breaching a

non-competition agreement, a message has been sent to every other employee subject to a similar agreement. There is a deterrent effect on other employees who know that the company can and will pursue enforcement of the agreement, resulting in a large amount of attorneys fees to the employee to defend the action.

Should I hire an employee who is subject to a Non-competition Agreement from Another Employer?

Employers may also be faced with making hiring decisions involving employees subject to noncompete provisions from an old employment agreement. Employers should realize that hiring an employee who is breaching a valid non-competition agreement may subject the new employer to claims based on tortious interference with contractual relations. The most egregious act which would result in a lawsuit would be recruiting and inducing an employee to knowingly violate a non-competition agreement.

Actions by a hiring employer that may indicate improper conduct are:

- Offering a new employee substantial bonuses or salary raises as compared to the old position
- Directly contacting the employee to recruit him or her
- Recruiting employees from a competitor for the purpose of injuring its business
- Recruiting and hiring an entire working group or team from a competitor

Indications that a hiring employer has acted appropriately are:

- Using a recruiting firm to make contact, particularly if the employee initiates contact
- Recruiting only at-will employees

What things can I do to lower the risk of an action from a former employer of one of my new employees?

The best thing an employer can do to lower the risk of getting caught in the middle of a fight between its new employee and a former employer is to be educated about non-competition agreements. Know the factors used to determine whether these agreements will be held enforceable.

When interviewing potential candidates, ask whether the applicant is subject to any obligations to his or her former employer(s). If the applicant responds that no such covenants exist, ask the applicant to sign a statement of non-obligation, which should affirmatively state that the employee is not subject to any restrictive covenants which would have any affect on his or her ability to perform the job. If the applicant is subject to restrictions, do not take those lightly. The employer should ask the applicant for a copy of the agreement and forward it to its own counsel for an opinion about the enforceability of the agreement. If an employer does knowingly hire an employee subject to restrictive covenants, the employer should make every effort to employ its new employee in a position that does not violate the specific agreement.

Conclusion

The law of non-competition and similar agreements is constantly evolving. These agreements, if drafted correctly, can help protect business advantages. Employers should evaluate their business and employees to determine whether non-competition agreements are needed. If so, employers should work with counsel to draft reasonable agreements that cover protectable business interests. Employees should receive a warning that these agreements will be enforced through litigation, and, in the event of a breach, they should be enforced.