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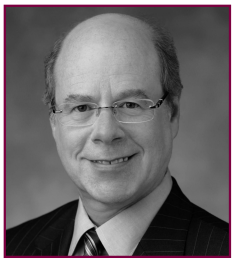
COMMENTS FROM THE SENIOR EDITOR

Fredric C. Leffler



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It is a sunny crisp Fall day as I write these "Comments" for our November-December year-end edition of *HR ADVISOR*. I don't know about you, but I always associate Fall with change, things anticipated, and the excitement of new beginnings. This is reflected in the leaves turning dazzling shades of color on the trees here in the Northeast; the anticipation of the new school year; changes in Congress that may result from the mid-term elections, just weeks away; and the promise of the holiday season with Thanksgiving, Christmas, and New Year's Eve all on the horizon.

In many ways, the Human Resources field has much in common with Fall: it is dynamic, yet "grounded," and change is a certainty. It has a solid foundation built on labor and employment laws which evolve over time, and there is always the anticipation of new issues arising from legislative developments, the introduction of new workplace strategies, and new interpretations of existing laws and practices.

This edition of *HR ADVISOR* feels right for the Fall. Included within these pages are articles addressing the essentials of the EEO complaint investigation, the status of the Obama Administration's labor and employment legislative agenda, changes at the U.S. Department of Labor which impact regulatory interpretations, a critically important niche issue pertaining to plant closings and layoff, an analytical framework to help assist employers when employees request leave or accommodations, and the challenges posed by the potentially violent employee in the workplace. As you can see, this edition of *HR ADVISOR* is built on a firm foundation but one which anticipates change and offers practical guidance for handling dynamic issues in today's workplace.

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THE INTERNAL EEO COMPLAINT INVESTIGATION

Every now and then, it's great to revisit recurring issues that confront Human Resources professionals. Most employers today have adopted anti-discrimination policies which include internal complaint procedures for aggrieved employees. That's the easy part. Much more difficult is how that employer goes about conducting a sound internal investigation when an employee claims that s/he has experienced or witnessed discrimination in the workplace.

In their article "Internal EEO Investigation Essentials," Yvonne Williams and Kandis Avant provide employers with a terrific roadmap for conducting an internal investigation involving a discrimination or harassment complaint. Among other things, they discuss planning the investigation, document retention and review, interviewing witnesses, and drafting the final report. They also explore issues involving the attorney-client

privilege, confidentiality, and the need for employers to locate and stop the destruction of potentially relevant documents, including electronically stored information. Whether you are a seasoned HR veteran, a newcomer to the field, or a lawyer, this article serves up essential guidance with practical tips for conducting a discrimination/harassment investigation.

AN UPDATE ON FEDERAL LEGISLATION AFFECTING THE WORKPLACE

Back in the Spring, 2009, we featured an article in *HR ADVISOR* entitled "2009—New Landscape for Employers" which discussed legislative proposals that might be enacted into law during the first year of the Obama Administration. Four bills that were introduced (or re-introduced) in 2009 that have remained stalled in Congress include the Employee Free Choice Act (EFCA), the Re-Empowerment of Skilled and Professional Employees and Construction Track-Workers Act (RESPECT Act), the Healthy Families Act, and the Paycheck Fairness Act. While the Obama Administration had a few successes (*e.g.*, the Lilly Ledbetter Fair Pay Act), its failure to enact more labor-friendly legislation is puzzling.

In their article "How Employers Are Faring Under Barack Obama: An Update on Federal Proposals That Would Affect the Workplace", Thomas Crookes and Liana Hollingsworth examine why these bills failed to become law and whether they are likely to get passed by Congress in the future. Since all of these bills would significantly impact HR professionals and some, such as the Healthy Families Act and the Paycheck Fairness Act, might well require that employers modify and change their personnel and human resources policies in significant ways, this article describes the central components of each piece of legislation and its anticipated effects. Since the Paycheck Fairness Act was first introduced by then-Senator Hillary Clinton, and has the enthusiastic support of President Obama, Senate Majority Leader Harry Reid, and Speaker of the House of Representatives Nancy Pelosi, it is the one bill with the best chance of passage in the months ahead. If you are unfamiliar with the Paycheck Fairness Act, spend a few minutes with this interesting article by Crookes and Hollingsworth.

DOL'S ADMINISTRATOR INTERPRETATIONS

The U.S. Department of Labor (DOL) administers some of the most important laws impacting the American workplace. This includes the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA). The FLSA, among other things, provides overtime for workers who work in excess of 40 hours in a week, but also exempts from overtime certain categories of employees. The FMLA, among other things, provides up to 12 weeks of unpaid leave for covered employees regarding newborn childcare, the employee's serious health condition, or for the serious health condition of an immediate family member. How these laws are interpreted and applied is of critical interest to employers because they can affect the "bottom line" in important ways.

As discussed by D. Gregory Valenza in his article "The U.S. Department of Labor's 'Administrator Interpretations,' " in March 2010, the DOL announced its intention to replace fact-specific Opinion Letters which it had issued for decades to interpret the FLSA, and later the FMLA, with more generalized guidance that would be "useful in clarifying the law as it relates to an entire industry, a category of employees, or to all employees". As Valenza points out, these Administrator Interpretations (AI) are intended by the DOL to clarify the proper interpretation of a statutory or regulatory issue.

Valenza highlights for us the first three AIs which have been issued, all of which are important to HR professionals. The first involves the classification status of mortgage loan officers for overtime purposes and, most importantly, provides guidance on how the new administration's DOL interprets the administrative exemption from overtime. Notably, this inaugural Administrator Interpretation reversed two previously issued DOL Opinion Letters which had found mortgage loan officers exempt from overtime. According to the DOL, those prior Opinions were wrongly decided and employers with mortgage loan officers should evaluate whether their employees fit within the new interpretation set forth by the DOL to determine their proper classification status for overtime purposes. The upshot, not surprisingly, is that a host of lawsuits have been brought around the country by mortgage loan officers seeking overtime, as the plaintiffs' bar now relies on this new Administrator Interpretation.

The second AI concerns clothes changing in the workplace and whether "changing time" is part of an employee's "principal activities" triggering the start of compensable working time. For many employers, if the clock starts following the changing of clothes, this could trigger overtime obligations. So, if you are unfamiliar

with the issues surrounding "donning and doffing," or activities which are "preliminary or postliminary," or activities which are integral to the start of the workday, this AI and Valenza's article should be on your reading list. Finally, the third AI issued by the DOL addresses the meaning of "*in loco parentis,*" as that term is used in the FMLA, and essentially redefines who might be within its scope, expanding the reach of the statute and regulations "through interpretation." For those of us who have not closely followed these developments in the DOL, Valenza's article is a gift, succinctly describing these important changes which may affect your workplace in the near future.

WARN: THE SINGLE SITE OF EMPLOYMENT TEST

Over the last two years, many HR professionals and lawyers have taken a "crash course" in the Worker Adjustment and Retraining Notification Act (WARN) as the declining economy triggered widespread layoffs. With few exceptions, WARN requires that covered employers give written notice to employees sixty (60) days before a plant closing or mass layoff at a "single site of employment". A key to avoiding liability for failing to provide the required notice is understanding what is a "single site of employment", a much litigated issue.

I want to thank our Publisher's Editorial Staff for its insightful article on this issue, " 'Single Site of Employment' Test for Determining Whether a Plant Closing or Mass Layoff Has Occurred under the WARN Act." Describing a series of different court cases which have as a core issue whether different sites should be counted separately or as a "single site of employment" for purposes of triggering WARN obligations, West's editorial staff identifies the key variables highlighted in court decisions, "fleshing out" the meaning of the "single site of employment." If layoffs are in the future of your business, I recommend you spend a few minutes with this invaluable discussion of a key provision found in WARN.

ACCOMMODATIONS, LEAVE, AND EMPLOYER OPTIONS

In his HR Troubleshooter column, Gerry Panaro identifies an analytical process that all of us should consider when an employee requests a change in schedule to accommodate an impairment that the employee is experiencing. As Panaro points out, simply because an employee requests an accommodation does not mean that the employee's condition is a "disability" triggering ADA coverage and a duty to accommodate. In fact, the employee's impairment might not be a disability at all within the meaning of the federal law, yet it could constitute a "serious health condition" triggering FMLA coverage.

So, what is the employer to do in these circumstances? I suggest all our HR advisors read "Employer's Options When Employee Demands Accommodations or Leave" to find out. Here, Panaro takes us through a disability law and FMLA analytical framework for approaching such employee requests, referring to caselaw along the way and, as always, offering up some well-honed practical guidance.

WORKPLACE VIOLENCE

Can you fire an employee based on the individual's propensity for violence stemming from things s/he says? This is the central issue raised by Marty Denis in his Termination of Employment column "Firing The Violent Employee." In typical fashion, Denis presents us with a hypothetical, bringing together the competing legal issues of concern that HR professionals must weigh when a depressed employee with all sorts of personal issues and workplace stresses comments that he "feels like blasting off the kneecaps" of his female manager.

Is there an ADA or FMLA issue? What about OSHA's general duty clause? Might the employer be liable for negligent retention for failure to take proper action, or negligent termination? Does the employer have in place a workplace violence policy? Did the employer discipline others who previously made comments suggesting violence? Would a background check of the employee have made a difference and does such a background check pass muster with the EEOC?

Denis' article raises all these issues and then some and gives us much to think about and discuss.

★ ★ ★

Change …. HR advisors are regularly confronted with a changing legal landscape and an ever-changing multi-cultural and multi-generational employee population. We anticipate change, plan for it, but can't always predict how it will impact us. As we head into 2011, this edition of *HR ADVISOR* provides a solid foundation for today's and tomorrow's workplace challenges and arms us with practical guidance to confront the myriad issues we all face, and help resolve daily. Here's to a successful new year … and Happy Holidays! ■

THE U.S. DEPARTMENT OF LABOR'S "ADMINISTRATOR INTERPRETATIONS"

D. Gregory Valenza

The United States Department of Labor is the agency responsible for administering many of the federal laws governing the American workplace.[1] To handle its wide-ranging responsibilities, the DOL is organized into smaller bureaus. The Wage Hour Division ("WHD") is responsible for the enforcement and interpretation of the FLSA and the FMLA.

Considered by some to be a "sleeping giant" during the Bush administration,[2] the DOL is newly invigorated. The WHD, for example, announced in March 2009 the addition of 250 field investigators, a 33% increase.[3] In addition to new personnel, the WHD has begun issuing a new form of informal enforcement guidance, called Administrator Interpretations.

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The WHD's first three forays into Administrator Interpretations involve the application of the "administrative exemption" to the FLSA's minimum wage and overtime provisions, the definition of "clothes" for purposes of determining whether changing time is compensable under the FLSA, and the definition of "in loco parentis" under the FMLA.

Employers and their lawyers should take notice. The common theme among these Administrator Interpretations is expansion of the law without new legislation or regulation, resulting in increased liability for employers. The Interpretations foreshadow the enforcement position that the WHD will take when investigating complaints against employers and undertaking audits. They may influence courts' decisions. They also will provide the basis for more formal agency action, such as future regulations or additional Administrator Interpretations. This article summarizes the Interpretations and their effect on existing law.[4]

A. WHAT ARE ADMINISTRATOR INTERPRETATIONS?

Like other administrative agencies, the Department of Labor issues formal regulations to implement and administer the laws within its purview. Courts give significant deference to an agency's properly promulgated regulations.[5] Issuing new or revised regulations is a long slog, though, because of the Administrative Procedures Act's requirements.[6] Additionally, regulations cannot address all of the questions that employers and their lawyers may have about the application of the laws and the regulations themselves.

To provide guidance without issuing new regulations, the WHD issues materials such as "fact sheets," and even publishes its "Field Operations Handbook," originally intended to guide investigators' determination of violations.[7] The WHD in the past issued "opinion letters," in which the WHD Administrator or staff would respond to

employers' questions about the Fair Labor Standards Act and the Family and Medical Leave Act. Although courts do not defer to these letters as readily as regulations, judges are free to give them the weight they deserve.[8]

The WHD has decided to replace opinion letters with "Administrator Interpretations." The WHD explains its reasons for this change on its website:

> the Wage and Hour Administrator will issue Administrator Interpretations when determined [sic] … that further clarity regarding the proper interpretation of a statutory or regulatory issue is appropriate. Administrator Interpretations will set forth a general interpretation of the law and regulations, applicable across-the-board to all those affected by the provision in issue. Guidance in this form will be useful in clarifying the law as it relates to an entire industry, a category of employees, or to all employees. The Administrator believes that this will be a much more efficient and productive use of resources than attempting to provide definitive opinion letters in response to fact-specific requests submitted by individuals and organizations, where a slight difference in the assumed facts may result in a different outcome….[9]

Thus, the WHD expressly intends Administrator Interpretations to apply generally, not in connection with a single set of facts. Intended to "clarify regarding the proper interpretation of a statutory or regulatory issue," "clarity" comes in the form of significant changes to the WHD's policies and enforcement positions, at least in the case of the first three Interpretations discussed below.

B. ADMINISTRATOR INTERPRETATION 2010-1: APPLICATION OF THE ADMINISTRATIVE EXEMPTION UNDER SECTION 13(A)(1) OF THE FAIR LABOR STANDARDS ACT, 29 U.S.C.A. §213(A)(1), TO EMPLOYEES WHO PERFORM THE TYPICAL JOB DUTIES OF A MORTGAGE LOAN OFFICER.

The inaugural Administrator Interpretation,[10] No. 2010-1, is an analysis of whether the "administrative exemption" to the FLSA[11] applies to mortgage loan officers. In the Administrator's view, it does not.

1. The Administrative Exemption Generally

The FLSA does not define what constitutes an "administrative" employee. The DOL's regulations explain:

> the term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act shall mean any employee:
>
> (1) Compensated on a salary or fee basis at a rate of not less than $455 per week … exclusive of board, lodging or other facilities;
>
> (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
>
> (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.[12]

Generally, all of these elements must be satisfied. However if the employee earns over $100,000 in total compensation (including commissions), the exemption applies if the employee "customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee …."[13]

2. The Administrator's Interpretation

The Administrator[14] set out what she found to be "typical" duties of mortgage loan officers:[15]

> Mortgage loan officers collect required financial information from customers they contact or who contact them, including information about income, employment history, assets, investments, home ownership, debts, credit history, prior bankruptcies, judgments, and liens. They also run credit reports. Mortgage loan officers enter the collected financial information into a computer program that identifies which loan products may be offered to customers based on the financial information provided. They then assess the loan products identified and discuss with the customers the terms and conditions of particular loans, trying to match the customers' needs with one of the company's loan products. Mortgage loan officers also compile customer documents for forwarding to an underwriter or loan processor, and may finalize documents for closings.

The Administrator's conclusion that mortgage loan officers typically are non-exempt is based on its analysis of the second prong of the exemption test discussed above: whether the employee's "primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers."[16]

a. The Production/ Administrative Dichotomy

The Administrator decided that mortgage loan officers were more akin to sales employees than financial consultants. That is, they are a part of the "production" process of loan sales. Relying on the "production versus administrative dichotomy,"

the Administrator noted mortgage loan officers do not service the employer's internal needs as "staff" (such as accounting and human resources), which is required for the administrative exemption.

The Administrator found significant that many mortgage loan employees are evaluated based on the number of mortgages closed and provided sales training. Many mortgage loan officers are paid on commission, which also is indicative of a sales function. In fact, the Administrator noted, employers sometimes argued in litigation that mortgage loan officers were exempt as both "outside sales" employees under 29 U.S.C.A. §213(a), and "inside sales" employees under 29 U.S.C.A. §207(i). Because a salesperson cannot be exempt under the administrative test, the Administrator concluded that the job of mortgage loan officer normally would not qualify for the administrative exemption.

b. Administrative Work for Customers

The Administrator rejected the notion that mortgage loan offers perform administrative work on behalf of their customers, rather than for the employer, another way to meet the requirements of the administrative exemption. The Administrator distinguished between providing advice and administrative work for an individual's personal needs, rather than for a business' needs:

> work for an employer's customers does not qualify for the administrative exemption where the customers are individuals seeking advice for their personal needs, such as people seeking mortgages for their homes. Individuals acting in a purely personal capacity do not have "management or general business operations" within the meaning of this exemption.[17]

However, the Administrator noted, if an employee were advising a business about financial management, or even real estate purchases (such as a consultant might do), the work could be exempt.

c. Rejection of Wage and Hour Opinion Letter FLSA 2006-31 (Sept. 8, 2006)

The production/administrative dichotomy is not new, and neither is the principle that "sales" employees are not exempt under the administrative test. But Administrator Interpretation 2010-1 is directly contrary to the Administrator's Opinion Letter FLSA 2006-31, issued on September 8, 2006.

In Opinion Letter 2006-31, the previous WHD Administrator decided that mortgage loan officers likely were exempt under the administrative test. The previous Administrator relied on 29 C.F.R. §541.203(b), a regulation suggesting that financial services employees could qualify as exempt, when their duties include:

> collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.[18]

The mortgage loan officers' duties are described similarly in Opinion Letter 2006-31 and Administrator Interpretation 2010-1. However, the Administrator in Interpretation 2010-1 decided that §541.203(b) did not require the conclusion that mortgage loan officers perform exempt duties. The Administrator suggested that Opinion Letter 2006-31 in essence was an "end run" around the general administrative test contained in §541.200. In so doing, the Administrator narrowed §541.203 by (1) holding that the term "customer" in §541.203(b) must apply only to business, not individual, customers, and (2) deciding that work such as analyzing information, deciding which financial products meet the customer's needs, etc. were simply part of the sales process. The current Administrator resolved the inconsistent analyses by disapproving Opinion Letter 2006-31. It is now marked "withdrawn" on the WHD's website.[19]

3. The Effect of Administrator Interpretation 2010-1

Unfortunately, the Administrator failed to address the "high compensation" exemption contained in 29 C.F.R. §541.601.[20] Therefore, it remains to be seen whether Interpretation 2010-1 will apply to employees earning more than $100,000 per year.

The Administrator's emphasis in Interpretation 2010-1 on the difference between individual and business customers may affect the exempt status of jobs in which employees service individual customers' needs. The WHD's enforcement position is that advising individuals regarding financial matters likely is not considered exempt work.

Under the Administrator Interpretation, employees paid on

commission, who attend sales training, and who are evaluated based on sales productivity may well fall on the "production" side of the "dichotomy," failing the exemption test.

Finally, the Administrator Interpretation expressly does not apply to outside sales workers. The Administrator also leaves open the possibility that commission-based employees qualify under the special inside sales exemption applicable to retail or service establishments.[21] However, employers should proceed cautiously, because many financial services employers may lack a sufficient "retail concept" to qualify under the exemption.[22]

C. ADMINISTRATOR INTERPRETATION NO. 2010-2: SECTION 3(O) OF THE FAIR LABOR STANDARDS ACT, 29 U.S.C.A. §203(O), AND THE DEFINITION OF "CLOTHES."

The second Administrator Interpretation is the latest see-saw move in the WHD's enforcement position regarding payment for "donning and doffing" work clothes and protective gear.

1. FLSA §3(o) and the Portal-to-Portal Act

The Portal-to-Portal Act[23] amended the FLSA to exclude from compensable work time activities that are preliminary and "postliminary" to the employees' principal work activities, including walking between the workplace entrance and the work site. Separately, §3(o) of the FLSA provides that time spent "changing clothes or washing at the beginning or end of each workday" is excluded from compensable time, if the employer and union expressly or by "custom and practice" agree to exclude it.

The interplay between these provisions is significant. If employees' change into safety equipment or protective gear, the argument arises that the time spent "changing clothes," is not excluded under §3(o) and, therefore, is compensable work time.[24] When changing is not excluded under §3(o) and is considered part of the employee's "principal" work activity, then the Portal-to-Portal Act does not apply. Consequently, even the time spent walking to and from the plant entrance becomes compensable under the "continuous workday rule."[25] A less common question is whether changing clothes alone, which is not compensable under §3(o), nevertheless can be a "principal activity," rendering subsequent time compensable. The WHD took up these issues in Administrator Interpretation 2010-2.[26]

2. Administrator Interpretation 2010-2

The Administrator made two significant changes to its enforcement policy. First, the term "clothes" under §3(o) of the FLSA "does not extend to protective equipment worn by employees that is required by law, by the employer, or due to the nature of the job …." Second, the Administrator opined that even changing "clothes," which is not compensable under §3(o), can constitute a "principal activity" under the Portal-to-Portal Act. As a result of this second opinion, the time walking to and from the work site would be compensable.

a. Protective Equipment Is Not "Clothes"

The Administrator's "new" interpretation of "clothes" under §3(o) of the FLSA is a return to the WHD's enforcement position, as explained in a WHD Opinion Letter dated December 3, 1997.[27] There, an employer in the meat-packing industry requested an opinion regarding whether "sharpening knives, waiting in line at wash stations, cleaning equipment, and putting on and taking off required safety gear" were considered changing clothes under §3(o).

The Administrator deemed §3(o) to be an "exemption" from compensable work time.[28] This is significant because exemptions to the FLSA are construed narrowly, and the burden is on the employer to prove they apply. The Administrator then concisely opined:

> The plain meaning of "clothes" in section 3(o) does not encompass protective safety equipment; common usage dictates that "clothes" refer to apparel, not to protective safety equipment which is generally worn over such apparel and may be cumbersome in nature.[29]

However, the WHD in 2002 reversed its 1997 interpretation. In Wage and Hour Opinion Letter FLSA 2002-2, the Administrator opined that "clothes" under §3(o) included the protective equipment typically worn by meat packing employees.[30] In 2007, the Administrator reaffirmed this position.[31]

In Administrator Interpretation 2010-2, the WHD withdrew the 2002 and 2007 letters and restored its 1997 interpretation of "clothes." The Administrator cited several

opinions in which courts held that "clothes" did not include protective equipment such as face shields, helmets, smocks, plastic aprons, arm guards, belly guards, plastic arm sleeves, a variety of gloves, a hook, knife holder, a piece of steel to straighten the edge of a knife blade, and knives.[32] In a footnote, however, the Administrator conceded that two courts of appeals had held certain safety equipment could constitute clothes, but then disagreed with those opinions.[33]

b. The Sixth Circuit Rejects the Administrator's Definition of "Clothes"

Barely six weeks after the WHD issued Administrator Interpretation 2010-2, the Sixth Circuit, in *Franklin v. Kellogg Corp.*,[34] rejected the Administrator Interpretation's narrow definition of "clothes." There, hourly employees wore company-provided uniforms, which consist of pants, snap-front shirts, and slip-resistant shoes. In addition, hourly production and maintenance employees wore "standard equipment," including hair nets, beard nets, safety glasses, ear plugs, and bump caps.

The court of appeals first held, contrary to the Administrator, that the §3(o) exclusion is not an "exemption," but is merely part of the definition of hours worked. Therefore, the burden of proving the exclusion does not apply rests with the plaintiff.[35]

The court also refused to give deference to the Administrator Interpretation: "The DOL's position on this issue has changed repeatedly in the last 12 years, indicating that we should not defer to its interpretation. Additionally, we find its interpretation to be inconsistent with the language of the statute."[36]

The court then explained that the uniforms and standard equipment were "clothes":

> Given the context of the workday, §203(o) clearly applies to the uniform at issue in the case at hand. The remaining items—hair and beard nets, goggles, ear plugs, non-slip shoes, and a bump cap—are also properly construed as clothes within the meaning of §203(o). Each of these items provides covering for the body. Although they also provide protection to the body, we see no reason to distinguish between protective and non-protective clothes.

Thus, the Administrator's restricted view of "clothes" will be the subject of continued challenges unless or until the Supreme Court steps in to settle the matter, Congress amends the FLSA, or the DOL adopts formal regulations.

c. Changing Clothes Can Be a "Principal Activity," Triggering the Start of the Compensable Work Day

Administrator Interpretation 2010-2 also states that even clothes-changing that would not be compensable time under §3(o) still may constitute a "principal activity" under the Portal-to-Portal Act. As the Administrator points out: "Where that is the case, subsequent activities, including walking and waiting, are compensable."

This opinion will have more significant effects than the definition of "clothes." The §3(o) exclusion applies only in unionized settings. And many employers require changing into uniforms and other "clothes" without the addition of safety gear and other items not considered "apparel."

The Administrator cited as the "leading case," *Figas v. Horsehead Corp.*, a district court opinion not published in the official reports.[37] In *Figas*, the plaintiffs claimed that changing into protective coveralls at a chemical plant was not changing "clothes" under §3(o), and that the time spent changing, as well as all subsequent time, was compensable.

The district court held that the time spent changing was indeed excluded under §3(o) because the protective clothing constituted "clothes." However, the court denied the employer's motion for summary judgment on the plaintiffs' claim that the time walking to the work area following clothes-changing was compensable.

The court held non-compensable changing time could be part of the workers' "principal activities," triggering the beginning of compensable work time.[38] The Administrator noted two district courts had held that clothes-changing excluded from work time under §3(o) could not be "principal activities," but stated the "weight of authority is to the contrary" and cited a handful of other district court decisions.[39]

The court of appeals in *Franklin v. Kellogg*, discussed above, is possibly the first appellate court to have considered the issue. The court agreed with the Administrator on this point. The court held that §3(o) simply means that changing clothes itself is not a compensable activity. But §3(o) does not preclude the conclusion that donning and doffing clothes are part of the worker's principal activity.

d. When Is Changing Clothes Considered a "Principal Activity"

There are regulations[40] and numerous court cases analyzing the

breadth of the term "principal activity" and its application to "donning and doffing."[41] Principal activities may include not only the work itself, but also activities, such as donning safety equipment, that are "integral" and "indispensable" to the principal activity (usually the work performed).

The court in *Franklin* analyzed "'(1) whether the activity is required by the employer; (2) whether the activity is necessary for the employee to perform his or her duties; and (3) whether the activity primarily benefits the employer.'"[42] Based on this test, the court held the Kellogg employees' donning and doffing their uniforms were integral and indispensable to their work at the factory:

> First, the activity is required by Kellogg. Second, wearing the uniform and equipment primarily benefits Kellogg. Certainly, the employees receive protection from physical harm by wearing the equipment. However, the benefit is primarily for Kellogg, because the uniform and equipment ensures sanitary working conditions and untainted products. Because Franklin would be able to physically complete her job without donning the uniform and equipment, unlike the plaintiffs in Steiner, it is difficult to say that donning the items are necessary for her to perform her duties. Nonetheless, considering these three factors, we conclude that donning and doffing the uniform and standard equipment at issue here is a principal activity.

3. Compliance Following Administrator Interpretation 2010-2

Employers in unionized settings must consider whether §3(o) and their collective bargaining agreements or practices will insulate them from liability for unpaid changing time. The courts are not in agreement regarding whether "clothes" includes only apparel, as the Administrator opined, or also protective clothing and equipment.

All employers, however, must consider whether clothes-changing is an "integral" or "indispensable" part of employees' principal activities. As discussed above, the Administrator's opinion that even donning wearing apparel can be part of employees' principal activities may create liability for employers who do not pay for time spent walking to the work area. Under the test endorsed in *Franklin*, employees may argue that merely donning and doffing required uniforms is sufficiently related to principal work that all time between changing in and out of the uniform must be paid. That argument, if accepted by courts, potentially could result in major unforeseen wage and hour liability and a new round of class actions.

D. ADMINISTRATOR INTERPRETATION 2010-3: CLARIFICATION OF THE DEFINITION OF "SON OR DAUGHTER" UNDER SECTION 101(12) OF THE FAMILY AND MEDICAL LEAVE ACT (FMLA) AS IT APPLIES TO AN EMPLOYEE STANDING "IN LOCO PARENTIS" TO A CHILD

Administrator Interpretation 2010-3[43] re-defines who is entitled to take leave under the Family and Medical Leave Act. The Secretary of Labor, Hilda Solis, has written that Administrator Interpretation 2010-3 is an expansion of the law through "interpretation."[44] She is correct. If courts adopt the Administrator's new construction of the FMLA, more FMLA claims and, therefore, more litigation over denial of leave, discrimination, and retaliation will result. The Interpretation also makes it nearly impossible to verify the bona fides of who is entitled to leave.

1. FMLA Leave Related to a Son or Daughter

The Family and Medical Leave Act of 1993,[45] as amended, allows eligible employees to take up to 12 workweeks of job-protected, unpaid leave in any 12-month period for, among other reasons, the birth of a "son or daughter," to bond with a newborn or newly placed adopted child, or to care for a "son or daughter" with a serious health condition.[46]

The FMLA and the DOL's regulations define a "son or daughter" as: a biological, adopted or foster child, a step child, a legal ward, or a child of a person standing in loco parentis, if that child is either under 18 years old, or is 18 years or older and incapable of self care because of a mental or physical disability.[47]

The DOL's regulations also define who is "a person standing in loco parentis" as follows:

> Persons who are "in loco parentis" include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.[48]

2. Administrator Interpretation 2010-3

The definition of "in loco parentis" quoted above expressly requires the person seeking leave to (1) have day-to-day responsibilities to care for and (2) financially support a child. But the Administrator wrote: "the regulations do

not require an employee who intends to assume the responsibilities of a parent to establish that he or she provides both day-to-day care and financial support in order to be found to stand in loco parentis to a child."[49]

Because there is no requirement of "financial support," nearly anyone who helps "care" for a child may now claim FMLA leave:

> where an employee provides day-to-day care for his or her unmarried partner's child (with whom there is no legal or biological relationship) but does not financially support the child, the employee could be considered to stand in loco parentis to the child and therefore be entitled to FMLA leave to care for the child if the child had a serious health condition. The same principles apply to leave for the birth of a child and to bond with a child within the first 12 months following birth or placement.[50]

The Administrator then opined that persons may stand "in loco parentis" regardless of whether the child already has two parents:

> the fact that a child has a biological parent in the home, or has both a mother and a father, does not prevent a finding that the child is the "son or daughter" of an employee who lacks a biological or legal relationship with the child for purposes of taking FMLA leave. Neither the statute nor the regulations restrict the number of parents a child may have under the FMLA. For example, where a child's biological parents divorce, and each parent remarries, the child will be the "son or daughter" of both the biological parents and the stepparents and all four adults would have equal rights to take FMLA leave to care for the child.

After granting nearly anyone who knows a child the right to take FMLA leave, the Administrator then relaxed the documentation requirement:

> Where an employer has questions about whether an employee's relationship to a child is covered under FMLA, the employer may require the employee to provide reasonable documentation or statement of the family relationship. A simple statement asserting that the requisite family relationship exists is all that is needed in situations such as in loco parentis where there is no legal or biological relationship.[51]

In support of this statement, the Administrator cites 29 C.F.R. §825.122(j), a regulation that indeed says the employer may accept an employee's "simple statement." But the Administrator omitted the portion of the regulation allowing the employer to require "reasonable documentation," which may include "a child's birth certificate, a court document, etc."

3. Employers' Strategies

Given that Administrator Interpretation 2010-3 contradicts the DOL's own regulations, and appears to expand FMLA coverage without congressional authority, the courts may accord this Administrator Interpretation little deference. However, employees merely "attempting" to obtain FMLA leave are protected from retaliation.[52] The Interpretation at minimum will result in more employees covered by the anti-retaliation provisions.

Although the term "in loco parentis" previously existed in the law, the Administrator Interpretation expands the term's usual meaning. Employers choosing to follow the Interpretation will face claims for leave by relatives such as aunts and grandparents, boyfriends, roommates, and other persons who care for an employee's children.

One might argue this Interpretation also facilitates potential abuse of FMLA leave. It is likely employers will see more claims for leave coinciding with holidays, and in response to negative performance reviews. Employers will be faced with the Hobson's choice of denying potentially bona fide leave and risking litigation, or running short-handed.

Employers have little recourse except to insist on the minimal documentation permitted under the regulations. Documentation in the form of the employee's own "simple statement" does not impose much of a procedural hurdle. Nevertheless, to determine "in loco parentis" status, courts consider factors such as the child's age, the amount of financial support provided, if any, and the "parental duties" assumed by the person seeking in loco parentis status.[53] The "simple statement" may be evaluated under these factors to see if the employee indeed qualifies.

Finally, employers may wish to ensure that employees seeking leave are otherwise eligible (e.g., have one year of service, etc.), and that the employee seeks leave for a covered reason (e.g., to bond with or care for a child's serious health condition). There are additional verification and documentation requirements associated with these issues. ■

NOTES

1. Among other laws, the DOL enforces the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), the Employee Retirement Income Security Act (ERISA), the Occupational Health and Safety Act (OSHA), and the Worker Adjustment and Retraining Act (WARN).
2. In fact, the federal Government Accountability Office found the WHD's enforcement activities were inadequate in several respects. See GAO, Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft (Mar. 25, 2009), available at: http://www.gao.gov/new.items/d09458t.pdf (last visited Sep. 5, 2010) (citing GAO, Department of Labor: Case Studies from Ongoing Work Show Examples in Which Wage and Hour Division Did Not Adequately Pursue Labor Violations, GAO-08-973T, (Washington, D.C.: July 15, 2008)).
3. Press release, U.S. Dept of Labor, Statement of U.S. Secretary of Labor Hilda L. Solis on GAO Investigation Regarding Past Wage and Hour Division Enforcement, Release Number: 09-0324-NAT (2009), available at http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=national/20090325.xml) (last visited: Sept. 4, 2010).
4. The article is limited to discussion of the FLSA. Employers also must consider the effect of state wage and hour laws providing employees with more protection than the FLSA, which are beyond the scope of this article.
5. See, e.g., *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L. Ed. 2d 694, 21 Env't. Rep. Cas. (BNA) 1049, 14 Envtl. L. Rep. 20507 (1984) (holding administrative agency's regulations promulgated under Congressional grant of authority upheld unless arbitrary, capricious or contrary to statute).
6. The Administrative Procedure Act, 5 U.S.C.A. §500 et seq. is the federal law that specifies how administrative agencies must promulgate formal regulations.
7. See U.S. Dept. of Labor, Wage and Hour Division, Field Operations Handbook, available at http://www.dol.gov/whd/FOH/index.htm (last visited Sep. 5, 2010).
8. See, e.g., *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944) (holding that administrative rulings, interpretations, and opinions may be entitled to some deference by reviewing courts). "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.*
9. See U.S. Dept. of Labor, Wage and Hour Division, Rulings and Interpretations, http://www.dol.gov/whd/opinion/opinion.htm.
10. U.S. Dept. of Labor, Administrator Interpretation 2010-1: Application of the Administrative Exemption under Section 13(a)(1) of the Fair Labor Standards Act, 29 U.S.C. §213(a)(1), to Employees who Perform the Typical Job Duties of a Mortgage Loan Officer (Mar. 24, 2010), available at: http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_1.htm (last visited Sep. 5, 2010).
11. The Fair Labor Standards Act of 1938, 29 U.S.C.A. §§201-219, as amended, prescribes a minimum wage and imposes the payment of premium pay for "overtime." However, the law contains a number of exemptions from these provisions, including "any employee employed in a bona fide executive, administrative, or professional capacity …." *Id.* §213(a)(1).
12. See 29 C.F.R. §541.201.
13. See 29 C.F.R. §541.601(a).
14. At the time of this writing, the position of Administrator of the Wage and Hour Division is vacant, according to the Department of Labor's website. See http://www.dol.gov/whd/whdkeyp.htm.
15. U.S. Dept. of Labor, Administrator Interpretation 2010-1: Application of the Administrative Exemption under Section 13(a)(1) of the Fair Labor Standards Act, 29 U.S.C. §213(a)(1), to Employees who Perform the Typical Job Duties of a Mortgage Loan Officer (Mar. 24, 2010), available at: http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_1.htm (last visited Sep. 5, 2010). The Administrator noted that the job titles vary in the mortgage industry and that its analysis would apply to employees performing similar duties with titles such as mortgage loan representative, mortgage loan consultant, and mortgage loan originator.
16. U.S. Dept. of Labor, Administrator Interpretation 2010-1: Application of the Administrative Exemption under Section 13(a)(1) of the Fair Labor Standards Act, 29 U.S.C. §213(a)(1), to Employees who Perform the Typical Job Duties of a Mortgage Loan Officer (Mar. 24, 2010), available at: http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_1.htm (last visited Sep. 5, 2010).
17. U.S. Dept. of Labor, Administrator Interpretation 2010-1: Application of the Administrative Exemption under Section 13(a)(1) of the Fair Labor Standards Act, 29 U.S.C. §213(a)(1), to Employees who Perform the Typical Job Duties of a Mortgage Loan Officer (Mar. 24, 2010), available at: http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_1.htm (last visited Sep. 5, 2010).
18. 29 C.F.R. §541.203(b).
19. See U.S. Dept. of Labor, Opinion Letter FLSA 2006-31 (Sep. 8, 2006) available at: http://www.dol.gov/whd/opinion/FLSA/2006/2006_09_08_31_FLSA.htm (last visited Sep. 5, 2010).
20. See supra n. 13 and accompanying text.
21. See 29 U.S.C.A. §207(i).
22. See 29 C.F.R. §779.317 (listing types of businesses lacking a "retail concept"); Mitchell v. Kentucky Finance Co., 359 U.S. 290 (1959) (holding employees of credit company did not qualify under the retail inside sales exemption).
23. 29 U.S.C.A. §254.
24. See generally *IBP, Inc. v. Alvarez,* 546 U.S. 21, 126 S. Ct. 514, 163 L. Ed. 2d 288, 10 Wage & Hour Cas. 2d (BNA) 1825, 151 Lab. Cas. (CCH) P 35056 (2005) (holding that once the employee engages in a principal activity, or an activity "integral and indispensable" to the principal activity, such as "donning and doffing" certain protective gear and safety equipment, all changing and walking time is compensable under the FLSA and the Portal-to-Portal Act).
25. See 29 C.F.R. §790.6(b).
26. U.S. Dept. of Labor, Administrator Interpretation 2010-2: Section 3(o) of the Fair Labor Standards Act, 29 U.S.C. § 203(o), and the definition of "clothes" (Jun. 16, 2010), available at: http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_2.htm (last visited Sep. 5, 2010).
27. See U.S. Department of Labor, Opinion Letter (Dec. 3, 1997), reprinted at BNA, Wage and Hour Man. at 99:8106.
28. As discussed infra, §3(o) is included within the FLSA's "definitions," not exemptions (e.g., the executive, administrative and professional exemptions contained in §213). The courts are split on whether §3(o) is an "exemption" or merely part of a "definition" of hours worked. This is a significant point, as courts construe exemptions to the FLSA narrowly and exemptions are considered affirmative defenses, shifting the burden of proof to the employer.
29. See U.S. Department of Labor, Opinion Letter (Dec. 3, 1997), reprinted at BNA, Wage and Hour Man. at 99:8106.
30. See U.S. Department of Labor, Opinion Letter FLSA 2002-2 (Jun. 6, 2002) ("we interpret 'clothes' under section 3(o) to include items worn on the body for covering, protection, or sanitation, but not to include tools or other implements such as knives, scabbards, or meat

hooks."), reprinted at BNA, Wage and Hour Man. at 99:8381.

31. See U.S. Department of Labor, Opinion Letter FLSA 2007-10 (Mar. 14, 1007) ("'changing clothes' referred to in section 3(o) applies to putting on and taking off the protective safety equipment typically worn by employees in the meat packing industry"), reprinted at BNA, Wage and Hour Man. at 99:8693.
32. See U.S. Dept. of Labor, Administrator Interpretation 2010-2: Section 3(o) of the Fair Labor Standards Act, 29 U.S.C. § 203(o), and the definition of "clothes" (Jun. 16, 2010) (citing *In re Cargill Meat Solutions Wage & Hour Litig.,* 2008 WL 6206795 (M.D. Pa. Apr. 10, 2008) (protective equipment worn by meat processing employees was not clothing under §203(o)); *Spoerle v. Kraft Foods Global, Inc.,* 527 F. Supp. 2d 860, 868, 155 Lab. Cas. (CCH) P 35382 (W.D. Wis. 2007), clarified on denial of reconsideration, 2008 WL 4079234 (W.D. Wis. 2008) ("donning and doffing of safety and sanitation equipment on the work site" not covered by §203(o)); *Gonzalez v. Farmington Foods, Inc.,* 296 F. Supp. 2d 912, 9 Wage & Hour Cas. 2d (BNA) 769 (N.D. Ill. 2003) (donning and doffing of "sanitary and safety equipment," including helmet, smock, plastic apron, arm guard, belly guard, plastic arm sleeve, a variety of gloves, a hook, knife holder, a piece of steel to straighten the edge of a knife blade, and knives, does not constitute "changing clothes" under §203(o)); *Spoerle v. Kraft Foods Global, Inc.,* 626 F. Supp. 2d 913, 15 Wage & Hour Cas. 2d (BNA) 1322 (W.D. Wis. 2009), aff'd, 614 F.3d 427, 16 Wage & Hour Cas. 2d (BNA) 711, 160 Lab. Cas. (CCH) P 35792 (7th Cir. 2010), available at: http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_2.htm (last visited Sep. 5, 2010). On appeal, the Seventh Circuit in *Spoerle* held that the protective equipment worn at Kraft Foods' plant indeed was "clothes" and called the employees' contrary argument a "loser." See *Spoerle v. Kraft Foods Global, Inc.,* 614 F.3d 427, 16 Wage & Hour Cas. 2d (BNA) 711, 160 Lab. Cas. (CCH) P 35792 (7th Cir. 2010).
33. See U.S. Dept. of Labor, Administrator Interpretation 2010-2: Section 3(o) of the Fair Labor Standards Act, 29 U.S.C. § 203(o), and the definition of "clothes" at n. 3 (Jun. 16, 2010) (citing *Sepulveda v. Allen Family Foods, Inc.,* 591 F.3d 209, 15 Wage & Hour Cas. 2d (BNA) 1135, 159 Lab. Cas. (CCH) P 35683 (4th Cir. 2009), petition for cert. filed, 78 U.S.L.W. 3764, 79 U.S.L.W. 3018 (U.S. May 10, 2010); *Anderson v. Cagle's, Inc.,* 488 F.3d 945, 12 Wage & Hour Cas. 2d (BNA) 1160, 154 Lab. Cas. (CCH) P 35313 (11th Cir. 2007), cert. denied, 128 S. Ct. 2902, 171 L. Ed. 2d 841, 13 Wage & Hour Cas. 2d (BNA) 1344 (2008); and see also *Allen v. McWane, Inc.,* 593 F.3d 449, 15 Wage & Hour Cas. 2d (BNA) 1230, 159 Lab. Cas. (CCH) P 10156, 159 Lab. Cas. (CCH) P 35680 (5th Cir. 2010), petition for cert. filed, 78 U.S.L.W. 3612, 79 U.S.L.W. 3015 (U.S. Apr. 8, 2010) (protective gear worn in manufacturing plant constitutes "clothes" under section 3(o)). Two appellate decisions issued after Administrator Interpretation 2010-2 agree with this view. See *Franklin v. Kellogg Co.,* 16 Wage & Hour Cas. 2d (BNA) 939, 2010 WL 3396843 (6th Cir. 2010) and *Spoerle v. Kraft Foods Global, Inc.,* 614 F.3d 427, 16 Wage & Hour Cas. 2d (BNA) 711, 160 Lab. Cas. (CCH) P 35792 (7th Cir. 2010).
34. *Franklin v. Kellogg Co.,* 16 Wage & Hour Cas. 2d (BNA) 939, 2010 WL 3396843 (6th Cir. 2010).
35. *Franklin v. Kellogg Co.,* 16 Wage & Hour Cas. 2d (BNA) 939, 2010 WL 3396843 (6th Cir. 2010) (joining "the majority of our sister circuits that have addressed this issue have concluded that §203(o) is not an affirmative defense and that the plaintiff bears the burden to prove that the time should not be excluded under §203(o)").
36. *Franklin v. Kellogg Co.,* 16 Wage & Hour Cas. 2d (BNA) 939, 2010 WL 3396843 (6th Cir. 2010).
37. *Figas v. Horsehead Corp.,* 14 Wage & Hour Cas. 2d (BNA) 172, 156 Lab. Cas. (CCH) P 35483, 2008 WL 4170043 (W.D. Pa. 2008). Ironically, the district court in *Figas* also held, contrary to Administrator Interpretation 2010-2, that protective clothes donned and doffed by workers in a chemical plant constituted "clothes," under §3(o), exempting from "hours worked" the time spent changing into them. The Administrator did not cite or rely on this opinion as contrary authority in the first part of the Interpretation.
38. Activities that are "'integral and indispensable'" to "'principal activities'" are themselves "principal activities." *IBP, Inc. v. Alvarez,* 546 U.S. 21, 33, 126 S. Ct. 514, 163 L. Ed. 2d 288, 10 Wage & Hour Cas. 2d (BNA) 1825, 151 Lab. Cas. (CCH) P 35056 (2005).
39. See U.S. Dept. of Labor, Administrator Interpretation 2010-2: Section 3(o) of the Fair Labor Standards Act, 29 U.S.C. §203(o), and the definition of "clothes" (Jun. 16, 2010) (citing *In Re Tyson Foods, Inc.,* 2010 WL 935595 *10 (M.D. Ga.) ("§203(o) only relates to the compensability of time spent donning, doffing, and washing of the person and that does not mean that 203(o) tasks cannot be considered principal activities that start the continuous workday."); *Arnold v. Schreiber Foods, Inc.,* 2010 WL 455248 at * 15, n.15 (M. D. Tenn.) ("§203(o), by its terms, applies only to clothes changing that occurs 'at the beginning or end of each workday.' This implies that such activities are work and that the continuous-work-day clock has already started to run."); *Sandifer v. United States Steel Corp.,* 2009 WL 3430222 at *40 (N.D. Ind. 2009) ("The court can't conclude as a matter of law that the non-compensability … under [§203(o)] excludes consideration of whether, pursuant to [the Portal Act], those activities are an integral and indispensable part of the employees' principal activities …."); *Andrako v. United States Steel Corp.,* 632 F. Supp. 2d 398, 412-413 (W.D. Pa. 2009) ("Section 203(o) relates to the compensability of time spent donning, doffing and washing in the collective-bargaining process. It does not render such time any more or less integral or indispensable to an employee's job."); *Johnson v. Koch Foods Inc.,* 2009 WL 3817447, * 32 (E.D. Tenn. 2009) ("[I] f the donning, doffing, and washing excluded by 203(o) are determined by the trier of fact to be integral and indispensable, those activities could commence the workday."); *Gatewood v. Koch Foods of Mississippi, LLC,* 569 F. Supp. 2d 687, 702 (S.D. Miss. 2008) ("Although the statute precludes recovery for time spent washing and 'changing clothes,' it does not affect the fact that these activities could be the first 'integral and indispensable' act that triggers the start of the continuous workday rule for subsequent activities …")).
40. See 29 C.F.R. §790.8 ("Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity. " (footnotes omitted)).
41. See *Steiner v. Mitchell,* 350 U.S. 247, 256, 76 S. Ct. 330, 100 L. Ed. 267 (1956). There, the court held employees in a battery factory should be compensated for time donning and doffing protective clothing because "it would be difficult to conjure up an instance where changing clothes and showering are more clearly an integral and indispensable part of the

principal activity of the employment than in the case of these employees."

42. *Franklin v. Kellogg Co.,* 16 Wage & Hour Cas. 2d (BNA) 939, 2010 WL 3396843 (6th Cir. 2010) (quoting *Bonilla v. Baker Concrete Constr., Inc.,* 487 F.3d 1340, 1344 (11th Cir. 2007) (concluding that time spent going through security screening made mandatory by the FAA was not integral and indispensable because it was not for the benefit of the employer)).
43. See U.S. Dept. of Labor, Administrator Interpretation 2010-3: Clarification of the Definition of "Son or Daughter" Under Section 101(12) of the Family and Medical Leave Act (FMLA) as It Applies to an Employee Standing "in Loco Parentis" to a Child (Jun. 22, 2010), available at: http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm (last visited Sep. 8, 2010).
44. See Hilda Solis, "Sometimes, It Takes an Interpretation," Huffington Post (Jun. 25, 2010), http://www.huffingtonpost.com/rep-hilda-l-solis/sometimes-it-takes-an-int_b_625580.html (last visited Sep. 8, 2010). ("we have expanded FMLA protections to cover loving caregivers that have traditionally been left out.").
45. 29 U.S.C.A. §§2601-54.
46. See 29 U.S.C.A. §2611(12).
47. See 29 U.S.C.A. §2611(12); 29 CFR §825.800 (regulations' definition of "son or daughter.").
48. 29 C.F.R. §825.122(c)(3).
49. The regulations use the term day-to-day care "and," financial support but the conjunction did not stop the Administrator. The Administrator also cited no case law in which a person was deemed to stand "in loco parentis" without providing financial support.
50. See U.S. Dept. of Labor, Administrator Interpretation 2010-3: Clarification of the Definition of "Son or Daughter" Under Section 101(12) of the Family and Medical Leave Act (FMLA) as It Applies to an Employee Standing "in Loco Parentis" to a Child (Jun. 22, 2010), available at: http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm (last visited Sep. 8, 2010).
51. See U.S. Dept. of Labor, Administrator Interpretation 2010-3: Clarification of the Definition of "Son or Daughter" Under Section 101(12) of the Family and Medical Leave Act (FMLA) as It Applies to an Employee Standing "in Loco Parentis" to a Child (Jun. 22, 2010), available at: http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm (last visited Sep. 8, 2010).
52. See generally 29 C.F.R. §825.220.
53. See U.S. Dept. of Labor, Administrator Interpretation 2010-3: Clarification of the Definition of "Son or Daughter" Under Section 101(12) of the Family and Medical Leave Act (FMLA) as It Applies to an Employee Standing "in Loco Parentis" to a Child (Jun. 22, 2010), available at: http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm (last visited Sep. 8, 2010).

HOW EMPLOYERS ARE FARING UNDER BARACK OBAMA

AN UPDATE ON FEDERAL PROPOSALS THAT WOULD AFFECT THE WORKPLACE

Thomas R. Crookes and Liana R. Hollingsworth

With Barack Obama as the newly elected President and an increased Democratic majority in the Senate, 2009 promised to be a year of change for employers. However, the most highly anticipated pieces of federal legislation that promised to substantially affect employers still lay dormant in Congress.

The three most significant legislative proposals that many expected to pass in 2009 were identified in an article entitled "2009—New Landscape for Employers" that appeared in the March/April 2009 Issue of *HR Advisor: Legal and Practical Guidance*.[1] The article discussed the Employee Free Choice Act, Re-Empowerment of Skilled and Professional Employees and Construction Trade-Workers Act, and the Healthy Families Act. In a follow-up to that article, we will examine here why these Acts have thus far failed to become law and whether they are likely to pass in the future. In addition, we will examine the Paycheck Fairness Act that is predicted to become law during this session of Congress.

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THE EMPLOYEE FREE CHOICE ACT

Current System

Under the current system, union organizing is governed by the National Labor Relations Board ("NLRB") and the National Labor Relations Act ("NLRA"). Formal unionizing efforts begin with authorization cards. If at least 30% of workers sign authorization cards, the union can petition the NLRB to conduct a secret ballot election. Once a union is formed and certified, both parties are obligated to bargain in good faith. However, neither party is required to agree to a proposal or to make any concessions.[2]

Proposed Employee Free Choice Act

The Employee Free Choice Act ("EFCA") would amend the NLRA in three major ways. First, and most controversial, the EFCA would implement a card check system that allows unions to bypass secret ballot elections. Under this card check system, if a majority of employees sign authorization cards, the NLRB must certify the union without holding an election.[3] Employees would have no right or opportunity to privately vote for or against the union.

Second, the EFCA requires mandatory and binding arbitration if the parties cannot form a collective bargaining agreement. Under the EFCA, if the union and employer cannot agree on the terms of the initial collective bargaining agreement, either party can request federal mediation.[4] If an agreement still cannot be reached after mediation, the matter will be referred to an arbitration panel that will render a final

and binding decision that will remain in effect for two years. [5]

Third, the EFCA makes additional remedies available for violations of the NLRB. Under the EFCA, employers found to have unlawfully terminated any pro-union employee while employees were seeking union representation or before the initial bargaining agreement was entered into, are subject to liquidated damages of two times back pay.[6] Additionally, a $20,000 penalty may be assessed against employers for each willful or repetitive unfair labor practice committed while employees were seeking union representation or before entering into the initial collective bargaining agreement.[7]

Effects

The EFCA may lead to unsupported union formations and union abuse. Currently, even though a majority of employees sign authorization cards, not every election is successful. Under the EFCA, these elections would not take place and the union would be certified. Thus, it is anticipated that union organizers will zealously encourage employees to sign authorization cards, although the resulting union certification may not accurately reflect the true intention of the employees. Additionally, without a secret election, one potential outcome is that the proposed legislation will lead to an increase of union abuse directed toward non-consenting workers. Lastly, the binding arbitration provision may subject both unions and employers to unfavorable terms in collective bargaining agreements for two years.

Legislative History

On March 1, 2007, the House passed the EFCA. To prevent an anticipated Republican filibuster in the Senate, the Senate voted on a motion to invoke cloture—which forces an immediate vote—on the motion. The Senate fell nine votes short of the 60 required to invoke cloture, and as a result the bill was tabled for the remainder of the 110th United States Congress.[8]

During the First Session of the 111th Congress the EFCA was reintroduced in the House and the Senate on March 10, 2009.[9] The new bills were referred to House and Senate committees where they are still pending.

What to Expect

The EFCA is unlikely to become law in its current form. The EFCA has 230 co-sponsors in the House and could therefore pass if it emerges from the House subcommittee. The EFCA does not, however, have enough support to pass in the Senate. Senate Bill 560 only has 40 co-sponsors, which is not enough to defeat a Republican filibuster. Although Democrats enjoy a 57 to 41 advantage in the Senate,[10] several moderate Democrats oppose the controversial card check system.[11]

In July 2009, the New York Times reported that a group of Democrat senators were working on a new version of the bill that would drop the card check system, in an effort to garner enough party support to avoid a filibuster.[12] A year later, a new version of the bill has yet to surface. Now that the year-long fight over health care legislation is over, maybe Democrat senators will switch their focus to a labor law agenda.

In May and June of this year, Democrat Senator Tom Harkin, Chairman of the Senate Committee on Health, Education, Labor, and Pensions (HELP Committee), said that Congress would take up the EFCA over the next few months or potentially during the lame duck session after the November elections.[13] On July 28, 2010, House Speaker Nancy Pelosi showed her support for the legislation by stating that she hopes the EFCA will soon become law.[14] Pelosi did not, however, provide a time frame for passing the legislation.[15]

A few states, fearing that the passage of the EFCA may be on the horizon, have approved ballot initiatives that would preempt the EFCA.[16] South Carolina and South Dakota voters in the upcoming November elections will vote on proposed state constitutional amendments that would affirm the states' commitment to secret ballots elections by designating the right to vote by secret ballot as fundamental.[17]

While the controversial EFCA remains a top priority for organized labor and is supported by the President, Vice President, and the Speaker of the House, President Obama acknowledged on September 13, 2010, that the chances of passing the bill at this time are "not real high."[18]

THE RE-EMPOWERMENT OF SKILLED AND PROFESSIONAL EMPLOYEES AND CONSTRUCTION TRADE-WORKERS ACT ("RESPECT ACT")

Current System

The NLRA governs the relationship between employers and unions. Under the NLRA, unions cannot organize supervisors. A supervisor is defined as an employee with the authority to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to responsibly direct them, or to adjust their grievances, or effectively to recommend such action," so long as this authority requires the use of "independent judgment."[19]

Over time, the Supreme Court and the NLRB have interpreted the NLRA's definition of supervisor. The RESPECT Act seeks

to overturn precedent established by these seminal cases, including *NLRB v. Kentucky River Comty. Care, Inc.*,[20] and a series of NLRB decisions that followed.[21]

In *Kentucky River*, the Supreme Court held that nurses were supervisors because they used "independent judgment" by exercising "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards." Following the *Kentucky River* decision, the NLRB issued the *Oakwood Healthcare Decisions* that made it even easier for an employee to be classified as a supervisor by clarifying the definition of "assign," "responsibility to direct," and "independent judgment."

Proposed RESPECT Act

The RESPECT Act would redefine "supervisor" under the NLRA, by removing the duties of "assigning" and "responsibility to direct" other employees from the definition.[22] Additionally, the RESPECT Act would require an employee to "hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees" for a *majority* of their work time to be considered a supervisor.[23]

Effects

In redefining supervisor under the NLRA, the RESPECT Act may, in some cases, abolish the distinction between supervisor and employee. It may be that few supervisors spend a majority of their work time hiring, transferring, suspending, laying off, promoting, discharging, or disciplining other employees. Instead, most supervisors spend a majority of their time managing and directing employees' work.

If the RESPECT Act abolished the distinction between supervisor and employee, then supervisors would be in the same bargaining unit as the workers.[24] This would result in a division of a supervisor's loyalty between management and the work force. Thus, a supervisor's decisions could be shaped by union politics instead of efficiency and merit. Additionally, supervisors could face internal union discipline for making decisions that the union opposes. As such, conflicts between labor and management would be resolved by union discipline instead of collective bargaining agreements.

Legislative History

The RESPECT Act was introduced in the House of Representatives on March 22, 2007, with 163 co-sponsors. The bill was referred to the Subcommittee on Health, Employment, Labor and Pensions in June 2007 and was ordered reported on September 19, 2007. However, the House of Representatives failed to act on the bill during the remainder of the 110th Congress. The bill has yet to be introduced in the 111th Congress. The Senate's companion legislation, Senate Bill 969, was introduced on March 22, 2007, and referred to the HELP Committee, but has yet to be reported.

What to Expect

Over the past year, commentators have predicted that the RESPECT Act might pass as part of a compromise over the controversial card check system of the EFCA. However, given the recent Obama appointments to the NLRB, it is much more likely that the provisions of the RESPECT Act will be given effect through an NLRB decision, rather than by legislative action.

NLRB Appointments

In July 2009, President Obama announced Craig Becker, Mark Pearce, and Brian Hayes as nominees to fill three vacancies on the five-member NLRB. Becker and Pearce are both union-side labor lawyers and advocates. Becker, the most controversial of the three nominees, was previously the Associate General Counsel to both the Service Employees International Union and the AFL-CIO. Hayes, Obama's Republican nominee, worked as a labor lawyer for over 25 years representing management-side clients.

President Obama's nominations were met with pushback from Republicans in the Senate, and on March 27, 2010, Obama unilaterally bypassed the Senate by giving Becker and Pearce recess appointments to the NLRB. On June 22, 2010, the Senate cleared dozens of backlogged Obama administration nominees,[25] including Pearce and Hayes who were confirmed by unanimous consent. Senators approved Pearce and Hayes only after Democrats agreed to put off a vote on Becker. While Becker's term as a recess appointee is set to expire in 2011, Pearce's confirmation extended his appointment through August 2013.

Rounding out the NLRB is Wilma B. Liebman, who was appointed Chairman of the NLRB by Obama in January 2009. Peter Schaumber, a Bush-appointee, stepped down after his term expired in August 2010 and, as of this writing, has not been replaced.

The NLRB is thus operating with a three to one Democratic majority. Also significant, the NLRB General Counsel Ronald Meisburg, whose term was set to expire in August 2010, resigned

early on June 20, 2010. President Obama named veteran NLRB attorney Lafe Solomon to serve as Acting General Counsel effective June 21, 2010.[26] As Acting General Counsel, Solomon oversees the processing of cases and acts as a gatekeeper for the cases heard by the NLRB. In this function, Solomon will be able to set the agenda for the NLRB, and may push forward precedent changing cases.

With these appointments, the NLRB is positioned to reconsider several seminal cases including the *Oakwood Healthcare Decisions*.

THE HEALTHY FAMILIES ACT

Proposed Healthy Families Act

The Healthy Families Act[27] aims to prevent the spread of illness among workers by providing employees with paid sick leave. Under the Act, covered employers must allow each employee to earn one hour of sick time for every 30 hours worked, to a maximum of 56 hours (seven days) per year. An employer is covered under the Act, if it employs 15 or more employees for each working day during 20 or more workweeks a year.

An employee can use the leave for an absence: (1) resulting from a physical or mental illness, injury, or medical condition; (2) resulting from obtaining professional medical diagnosis or care, or preventative medical care, for the employee; (3) for the purpose of caring for a child, a parent, a spouse, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship; or (4) resulting from domestic violence, sexual assault, or stalking.

Under the Act, employers must provide sick leave upon oral or written request of an employee, provided that the request: (1) include a reason for absence and expected duration; and (2) is given at least seven days in advance if the need for leave is foreseeable or is provided as soon as practicable. Employers may request that the leave be supported by a medical certification, if the employee requests at least three consecutive days of leave.

Legislative History

The Healthy Families Act was introduced in the House and in the Senate on March 15, 2007.[28] Upon introduction, the bill was referred to subcommittees where it stayed through the remainder of the 110th Congress.

A modified version of the Act was introduced during the 111th Congress in May 2009.[29] The new version of the Act extended paid sick leave to employees who are victims of domestic violence, stalking, or sexual assault. The Act was referred to House and Senate subcommittees for consideration.

The Act met with resistance from business groups who argued that the recession made it an inopportune time to pass legislation that would raise costs for employers.[30] Supporters of the Act countered by arguing that the legislation was timely given the H1N1 pandemic, which began in April 2009.[31] The business sector ultimately succeeded in advocating for the tabling of the Act for the remainder of 2009.

What to Expect

The recently enacted Patient Protection and Affordable Care Act (the "Health Care Reform Act") brought the Healthy Families Act back into the limelight. Although the Health Care Reform Act provides health insurance coverage to millions of uninsured Americans, it does not provide paid leave for employees to receive medical treatment.

In March 2010, the congressional Joint Economic Committee released a report at the request of the Senate HELP Committee which estimated the economic impact of the Healthy Families Act.[32] According to the report, more than 40% of American workers currently do not receive paid sick leave.[33] The report estimates that the Act would provide paid sick leave to more than 30 million additional workers.[34] After the report was released, Senator Dodd, a member of the HELP Committee, said that the Act is awaiting markup.[35]

The Healthy Families Act is widely supported by the public. On June 21, 2010, a survey conducted by the National Opinion Research Center at the University of Chicago found that the majority of Americans support the Healthy Families Act.[36] Worldwide, 163 countries, including 14 of the world's most competitive countries, offer paid sick leave.[37] It may only be a matter of time before the public's support moves the Act in Congress and America joins the ranks of nations that provide employees paid sick leave.

Similar Bills

Paid leave in general is a prominent public issue. In addition to the Healthy Families Act, there are a number of congressional bills that would grant employees paid leave. For example, the Paid Vacation Act of 2009[38] would amend the Fair Labor Standards Act to require covered employers to provide one week of paid vacation during each 12-month period. Additionally, the Family-Friendly Workplace Act[39] would require private employers to offer employees the option of receiving com-

pensatory time in lieu of overtime pay for overtime hours worked.

THE PAYCHECK FAIRNESS ACT

Current Law

In 1963, Congress passed the Equal Pay Act ("EPA") which amended the Fair Labor Standards Act by prohibiting wage discrimination on the basis of sex by requiring that employees of the opposite sex be paid equally for performing equal work.[40] Under the EPA, wage differentials are only allowed if they are based on a seniority system, merit system, quality or quantity of production, or any factor other than sex.[41] A successful plaintiff is entitled to any unpaid wages,[42] and may also recover liquidated damages plus attorneys' fees.[43]

Despite the enactment of the EPA, women statistically continue to earn less pay than men for equal work.[44] There is also a belief that female workers are handicapped because they may not know what their co-workers earn, and may therefore be unaware that they are victims of pay discrimination.[45]

Proposed Paycheck Fairness Act

The Paycheck Fairness Act seeks to strengthen the EPA by revising legal burdens and defenses under the law, by implementing stricter enforcement provisions, and by expanding available remedies.

Under the Paycheck Fairness Act, employers are prohibited from retaliating against employees who inquire about, discuss, or disclose their own wage or that of another employee.[46] The Act also revises the broad exception for wage differentials that are based on any factor other than sex. The Act limits such factors to bona fide factors, such as education, training, or experience.[47] Additionally, the employer must demonstrate that such bona fide factor: (1) is not based upon or derived from a sex-based differential in compensation; (2) is job-related with respect to the position in question; and (3) is consistent with business necessity.[48] The bona fide factor defense is not available if the employee demonstrates that: (1) an alternative employment practice exists that would serve the same business purpose without producing differential treatment; and (2) the employer has refused to adopt such alternative practice.[49]

The Act also expands available damages by making employers liable for compensatory damages, as well as punitive damages, if the employee demonstrates that the employer acted with malice or reckless indifference.[50] This provision allows employees to receive the same remedies for sex-based pay discrimination that are currently available for discrimination based on race or national origin.

Additionally, the Paycheck Fairness Act authorizes the establishment of federal grant programs to teach negotiation skills to girls and women.[51] The Act also allows the Equal Employment Opportunity Commission to collect data from employers on pay information to be used in the enforcement of federal laws prohibiting pay discrimination.[52] Lastly, the Paycheck Fairness Act establishes the National Award for Pay Equity in the Workplace to recognize employers who have made "substantial effort to eliminate pay disparities between men and women."[53]

Legislative History

The Paycheck Fairness Act was first introduced in the 109th Congress by then-Senator Hillary Clinton and Representative Rosa DeLauro on April 19, 2005, but was never acted upon.[54] Clinton and DeLauro reintroduced the Act during the 110th Congress on March 6, 2007. The Act passed in the House on July 31, 2008, but was never voted on in the Senate.[55]

The Act was introduced for a third time in both houses in January 2009.[56] Having passed the bill during the previous congressional session, the House immediately passed the Paycheck Fairness Act on January 9, 2009, three days after its' introduction. On March 11, 2010, the Senate referred the Act to the Committee on Health, Education and Labor.

What to Expect

In July 2010, President Obama called on the Senate to approve the legislation, referring to it as a "common-sense bill" that would ensure that men and women receive equal pay for doing equal work.[57] On September 14, 2010, Senate Majority Leader Harry Reid placed the Paycheck Fairness Act on the legislative calendar, meaning that the Senate may consider the bill at any time.[58] Reid said that he would do his utmost to find a away to have a vote on the Act.[59] Senator Tom Harkin, Chairman of the HELP Committee, has also stated that he expects to see movement on the Act during this session of Congress. With the 111th Congress concluding on January 3, 2011, we will soon find out if Obama's "common-sense" bill will make it through the Senate this session.

CONCLUSION

With the EFCA, the RESPECT Act, the Healthy Families Act, and the Paycheck Fairness Act still on the horizon, the next two years promise to be a time of continued debate and potential change for both employee (unions) and employers. Reasonable prognos-

ticators are looking to November, 2010 and after to see what legislative action and board decisions will shape the future of employment relations in America.

NOTES

1. The article "2009-Landscape for Employers" also discussed two changes that took effect in January 2009: the Americans with Disabilities Act Amendments Act of 2008; and the Department of Labor's Final Rule regarding the Family Medical Leave Act Amendments.
2. 29 U.S.C.A. §158(5)(c).
3. H.R. 1409, §2; S. 560, §2.
4. H.R. 1409, §3; S. 560, §3.
5. H.R. 1409, §3; S. 560, §3.
6. H.R. 1409, §4; S. 560, §4.
7. H.R. 1409, §4; S. 560, §4.
8. U.S. Senate, Roll Call vote on Motion to Invoke Cloture on the Motion to Proceed to Consider H.R.800, *available at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=1&vote=00227.
9. *See* H.R. 1409; S. 560.
10. The two independent senators are not included in this ratio, although they formally caucus with the Democrats.
11. Steven Greenhouse, *Democrats Drop Key Part of Bill to Assist Unions*, N.Y. TIMES, July 16, 2009, *available at* http://www.nytimes.com/2009/07/17/business/17union.html.
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13. Derrick Cain, *EFCA Could Be Taken Up in Congress*, BNA DAILY LABOR REPORT, June 25, 2010.
14. Susan R. Hobbs, *Pelosi Holds Out Hope for EFCA Passage*, BNA DAILY LABOR REPORT, July 28, 2010.
15. Susan R. Hobbs, *Pelosi Holds Out Hope for EFCA Passage*, BNA DAILY LABOR REPORT, July 28, 2010.
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19. 28 U.S.C.A. §152(11).
20. N.L.R.B. v. Kentucky River Community Care, Inc., 532 U.S. 706, 121 S. Ct. 1861, 149 L. Ed. 2d 939, 167 L.R.R.M. (BNA) 2164, 143 Lab. Cas. (CCH) P 10988 (2001).
21. *See* Oakwood Healthcare Decisions, 348 NLRB No. 37, 348 NLRB No. 38, 348 NLRB No. 39 (2006).
22. H.R. 1644; S. 969.
23. H.R. 1644; S. 969.
24. *See* WebMemo, *The Heritage Foundation*, October 17, 2007, *available at* www.heritage.org/Research/Labor/wm1667.cfm.
25. Ted Barrett, *Senate Clears Backlogged Obama Nominations*, June 22, 2010, *available at* http://www.cnn.com/2010/POLITICS/06/22/senate.obama.nominations/index.html?section=cnn_latest.
26. Press Release, NLRB, Veteran NLRB Attorney Lafe Solomon Named Acting General Counsel (June 20, 2010) *available at* http://www.nlrb.gov/About_Us/news_room/.
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31. Steven Greenhouse, *Bill Would Guarantee Up to 7 Paid Sick Days*, N.Y. TIMES, May 16, 2009, *available at* http://www.nytimes.com/2009/05/16/health/policy/16sick.html.
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35. Susan R. Hobbs, Paid Sick Leave for 30 Million More Workers under Healthy Families Act, Report Estimates, BNA DAILY LABOR REPORT, Mar. 11, 2010.
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39. H.R. 933.
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42. 29 U.S.C.A. §206(d)(3).
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46. H.R. 12 §3(b); S. 182 §3(b).
47. H.R. 12 §3(a); S. 182 §3(a).
48. H.R. 12 §3(a); S. 182 §3(a).
49. H.R. 12 §3(a); S. 182 §3(a).
50. H.R. 12 §3(c); S. 182 §3(c).
51. H.R. 12 §5; S. 182 §5.
52. H.R. 12 §8; S. 182 §8.
53. H.R. 12 §7; S. 182 §7.
54. H.R. 1687; S. 841, 109th United States Congress.
55. H.R. 1338; S. 766, 110th United States Congress.
56. H.R. 12; S. 182, 111th United States Congress.
57. Derrick Cain, Pay Equity: Reid Reintroduces Paycheck Fairness Act, Places Legislation on Legislative Calendar, BNA DAILY LABOR REPORT, September 14, 2010.
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INTERNAL EEO INVESTIGATION ESSENTIALS

Yvonne M. Williams and Kandis Gibson Avant

Employee complaints of unlawful treatment or of unfair application of company policies *will* lead to investigations. Employers can either react to investigations precipitated by the government or plaintiffs, or they can proactively conduct an internal investigation when complaints are first raised. Waiting until after a plaintiff has filed a lawsuit to conduct an investigation is too late and will leave an employer in a far worse legal position than it would have been had it investigated the complaint earlier.

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Employers should promptly conduct internal employment investigations whenever an employee claims that he or she has experienced, witnessed, or is aware of harassment or discrimination, and the complaint or report cannot be resolved summarily. These claims can result in employee dissatisfaction, bad publicity, government sanctions, and significant monetary awards for plaintiffs if employers do not quickly, appropriately, and effectively address them.

Conducting a sound internal investigation in equal employment opportunity ("EEO") cases is not merely the right thing to do, it is good business. It ultimately ensures the fair and objective treatment of employees and can assist the employer's defense against such claims[1] (when no tangible employment action is taken in response to a complaint of discrimination, a defending employer may raise an affirmative defense that it "exercised reasonable care to prevent and correct promptly" any harassing behavior). Indeed, these investigations can protect an employer from liability if administered properly and effectively[2] (no finding of liability where the employer had reasonably conducted an investigation of the discrimination allegations and took appropriate and effective steps to stop the discriminatory treatment). If employers do not take care in conducting these investigations, however, they can fail to determine what actually happened, they can lose credibility with their employees, the government, and the public, and they may expose themselves to claims of coverups—or worse.

This article is intended to provide employers with essential guidance as to how they should conduct investigations of employment issues that fall under the jurisdiction of the Equal Employment Opportunity Commission ("EEOC"), including planning the investigation, collecting, retaining and reviewing documents, interviewing relevant witnesses, and drafting a final report that will

be the basis for appropriate corrective or disciplinary action.

A. MAINTAINING AN INTERNAL EEO COMPLAINT PROCESS

It goes without saying that a company should not wait until it is faced with an EEO complaint to craft a process for how to respond to it. An employer should have a set of policies and procedures that explain how it will respond to such complaints, the process for investigating such complaints, and stopping any questionable conduct, including noting the possibility of severe corrective action if a finding of discrimination or harassment is made. This policy should be distributed to all employees. Employees should sign acknowledgments that they have received information concerning these procedures and are aware of what to do if they feel they have been subjected to, witnessed, or are aware of harassment or discrimination. It is essential that the employer adhere to and follow its policies.

Not only will clear policies, routinely followed by the employer, help establish trust with employees, employees are more likely to report improper behavior early before harm—and damages—escalate. Indeed, an employer may be able to avoid liability altogether if it can show that it had a policy, the policy "alert[ed] employees to management interest in specifically correcting" and preventing harassment, the policy was disseminated to all employees and, "the employer's response to the inappropriate conduct" was effective.[3]

B. WHEN TO INVESTIGATE A COMPLAINT

Once an employer receives a complaint of discrimination or harassment, the employer should immediately determine whether it needs to conduct an internal investigation or whether the allegations can be reviewed more simply. Not all conduct alleged by an employee can or should warrant a formal investigation, as some claims involve employees who simply do not like each other and cannot get along. These kinds of complaints can be resolved quickly and informally. In assessing employee complaints, an employer should employ sufficient standards for judging employee conduct to ensure that the equal employment laws are not used to redress acts of general incivility.[4] ("[S]tandards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.'"[5] Properly applied, such standards should filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing."[6])

Certain complaints, however, do involve conduct that has a sufficient legal basis. These include, but are not limited to, unlawful terminations, failure to promote or hire for unlawful reasons, discriminatory or harassing statements, improper touching, illegal retaliation, and wage disparities. To determine which complaints warrant a formal investigation, an employer's human resources or legal department should know and remain current on changes to anti-discrimination and harassment laws and be intimately familiar with the employer's policies. If this expertise is not available in-house, the employer should consult with outside counsel to determine whether an investigation is necessary.

When a complaint does have an arguable legal basis, the company should promptly institute a full, formal internal investigation. This requires far more than casually questioning employees in the hallways or simply cautioning alleged perpetrators against behaving in an improper or inappropriate manner.

C. HOW TO INVESTIGATE A COMPLAINT

1. Planning the Investigation

Once a decision is made to conduct a formal internal investigation, the employer must appropriately plan it. Investigations done on the fly are not only ineffective, but can be counterproductive. At the outset of the investigation, an employer should determine what kind of information and advice it is seeking, and plan accordingly. If an employer has a procedure in place that establishes mandatory consequences for certain improper conduct, it may simply be looking for a factual determination of whether such conduct occurred. An employer may, however, be seeking advice on whether to take corrective action and what type of corrective action to take. This may require not only a factual investigation, but also a legal determination and recommendation. No matter the situation, the investigator should always consider the employer's concerns and goals in investigating the employee complaint.

After the goals of the investigation have been established, the employer immediately should determine who will conduct the investigation, when and where it will be conducted, which employees are relevant to the inquiry, and which documents or tangible items are likely relevant and where they are located. In deciding who should conduct the investigation, the employer should consider the nature of the claim, the seniority of the "accused," the potential biases of the investigator against the complainant, and other bottom-line implications, including shareholder or media interests. At a minimum, the investigator must be familiar with company policy and procedures and, more importantly, should have experience conducting internal investigations of EEO complaints.[7]

One fundamental decision an employer must make is whether the investigation will be handled by lawyers or by non-lawyers. Some employers require that human resources or employees with compliance functions direct and conduct these investigations. In such instances, while the process may be less expensive, the company will not be protected by the attorney-client privilege. The results of its investigation, therefore, may be obtainable by third parties or by the employee in litigation. Alternatively, if an attorney directs the investigation, no matter whether in-house or outside counsel, the employer may be protected by the attorney-client privilege—even if a non-lawyer conducts the interviews on behalf of counsel to ascertain pertinent facts. If an attorney conducts the investigation, it must be clear that the purpose of the investigation is to enable the attorney to give the employer legal advice, or the attorney-client privilege will not apply. A more complete discussion of the privilege issues is discussed below in Section (C)(4).

The investigator, with the employer, must decide who to interview. Most relevant interviewees will be readily identifiable by virtue of the allegations. At a minimum, individuals who have witnessed or participated in any discriminatory conduct should be interviewed. Additional names of interviewees will likely surface after initial interviews have been completed and relevant documents have been reviewed. Former and non-employees, including vendors, contractors, and colleagues may be witnesses to the complaint allegations and may need to be interviewed. Unlike employees, former employees and non-employees generally cannot be required to participate in interviews because they do not work for the employer and are not subject to the employer's policies and procedures. However, they should be asked to submit to interviews. If they refuse to participate, determine whether there are conditions under which they will participate or the reason that they will not.

At the planning stage, the chosen investigator should identify the types of documents and tangible evidence that are potentially relevant to the complaint allegations. Depending on the allegations, such documents and tangible evidence could include emails, notes, personnel files (including performance appraisals, prior complaints, and disciplinary records), text messages, phone records, photographs, video recordings, correspondence, payroll records, statements, and memoranda. Finally, the investigator should identify where all potentially relevant documents and tangible items are maintained, who the investigator needs to contact in order to collect and retain such documents or tangible items, and how to ensure that the relevant documents and tangible items are retained and not subject to future destruction or deletion.

2. Identifying and Retaining All Relevant Documents

An employer must take steps necessary to retain documents relevant to the complaint allegations (1) to review for use during the investigation, and, oftentimes, (2) to preserve for reasonably anticipated litigation. Once a complaint is made, and the employer has decided to conduct a formal investigation, the employer should issue a document retention letter or notice to affected employees requesting that such documents, including electronic documents, be retained until the complaint's disposition—whether resolved by the employer or in court after litigation. Failure to preserve relevant documents can subject an employer to costly litigation, and possibly severe court sanctions. As such, it is a best practice to collect and retain the relevant documents and tangible evidence at the time the internal investigation begins. Indeed, an internal investigation will identify and capture all relevant documents and tangible evidence, because it is necessary to review them—or at least to know of their existence—as part of the investigation.

Zubulake v. UBS Warburg LLC[8] is an excellent example of the consequences of a company's failure to appropriately collect and retain documents relevant to a

complaint of discrimination. The plaintiff filed an EEOC complaint against her previous employer for gender discrimination. Although the employer issued a document-retention notice when it initially received the complaint, the court, in one of seven legal opinions written related to discovery issues in this matter, found that the employer failed to locate and stop the destruction of potentially relevant documents.[9] The employer was ultimately sanctioned by the court for its repeated failure to retain relevant documents—most of which should have been collected and retained during the initial employment internal investigation.[10]

Although the *Zubulake* decisions were the result of litigation, they certainly define the circumstances under which documents should be collected and retained upon receipt of an EEO complaint, whether filed through the EEOC or through the employer's internal complaint procedures, and as part of an internal investigation. Employers should consider the following when collecting and retaining documents relevant to an EEO complaint.

- *When does the duty to preserve documents attach?* An employer has a duty to preserve documents generally when litigation is reasonably anticipated or when the employer knows or should know which documents are relevant to the anticipated litigation.[11] This duty can attach, when an employee complains to an employer of discrimination or harassment, often well before a formal EEOC complaint is filed, if the employer believes litigation is reasonably anticipated.
- *What documents and other evidence must be preserved?* An employer does not have to preserve every document in its possession as such a rule would cripple most corporations. An employer must preserve only those documents "it knows, or reasonably should know [are] relevant" to the allegations. *Id*. at 217.
- *Whose documents and other evidence must be retained?* The relevant documents belonging to any individual likely to have relevant information must be retained; these individuals are generally referred to as the "key players." Any and all documents related to an employer's potential defenses to a claim of discrimination must also be preserved.[12]
- *What information must be retained?* An employer must retain all documents and tangible evidence in existence at the time the duty to preserve attaches including those stored off-site, electronically, or otherwise, as well as archived electronic files. Documents or tangible items created after the duty to preserve attaches must also be preserved as long as they are not subject to the attorney-client or work product privilege.[13]

A party failing to preserve relevant documents and tangible evidence, should the complaint allegations result in litigation, can be sanctioned for spoliation—*i.e.* the "destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."[14] Conducting a thorough internal investigation that includes the collection of all relevant documents and tangible items minimizes or prevents such concerns during subsequent litigation.

3. Interviewing Witnesses

After people have been identified as potential witnesses, and therefore, interviewees, the investigator should determine the order in which the interviews will be conducted. Ideally, an investigator should first interview the complainant, witnesses with background information, those who witnessed the alleged discriminatory conduct, and those who heard the complainant complain about the alleged discriminatory conduct. The investigator generally should interview the "accused" last, to ensure that all the information pertinent to the allegation has been collected and evaluated. The accused can then respond to and address every issue raised.

The purpose of conducting interviews is for the employer to determine what happened, but also to assess the credibility of each witness, which can be difficult. Thus, all interviews should be done in-person so the interviewer can view the witness's reaction to questions and overall demeanor, both of which can be critical to assessing credibility. If an in-person interview is not possible, phone interviews are acceptable but are less desirable because of the difficulty in making credibility determinations. Also, investigators should re-interview witnesses if additional or conflicting information is ascertained. Re-interviews may clarify interviewee statement discrepancies.

Prior to actually conducting the interviews, the investigator should prepare an outline of interview topic areas and/or write

specific questions that should be asked of each interviewee. Sometimes these will be uniform for each interview, but many times they are specific to an individual witness. The topic areas and/or specific questions should incorporate key documents about which the interviewee should be asked. Sometimes it can be very helpful to draft a chronology or time line of events in preparation for the interviews to maintain the order of the allegations and witness accounts. The chronology or timeline should be updated as the investigator receives additional information. This can be useful when determining conclusions or drafting a final report. Despite the care in plotting the interview questions, interviewers should be experienced at questioning witnesses because the interviews will inevitably diverge from any predetermined set of questions based on the witness's responses.

Once the interviewees have been identified, the employer should notify relevant employees of the investigation and inform them of its scope. Such notification is not necessary if doing so would compromise the integrity, accuracy, or strength of the investigation. Relevant employees should be asked by the employer representative to cooperate fully with the investigator, including keeping confidential all communications, discussions, and interviews.

When conducting the interviews, the investigator should never express his or her opinion or judgment of the facts or write his or her opinion or judgment of the facts in the interview notes. The investigator should always keep his or her composure and remain objective. At the end of the interview, the investigator should request that the witness contact him or her if they remember any other relevant information or need to correct any of their statements. Finally, the investigator should not ignore other issues that are raised by interviewees during the interview, such as complaints of discrimination against other employees not relevant to the current investigation. Such information should be reported immediately to the employer.

To document the interviews, the investigator must simultaneously ask questions and take extensive notes. This is a difficult task, and is often disconcerting to the interviewee, who sits in silence as the investigator writes down the witness's answers. Interview notes, however, are central to any investigation as they will be reviewed later and ultimately used to draw final conclusions—as such, the more thorough they are, the better. Thus, ideally, interviews should be conducted by at least two people: one person to ask the questions, and one person to take notes.

Some consider it a "best practice" to draft an interview memorandum of each interview, which has the obvious advantage of memorializing the substance of an interview, including specific statements, characterizations, and even direct quotes. Whether to draft interview memoranda will depend upon the investigation goals outlined by the employer at the outset of the investigation. If an investigator drafts interview memoranda, the investigator should consider carefully whether the interview notes must, or should, be retained after the memorandum is prepared. Interview memoranda can prove to be invaluable when that interview later becomes relevant, particularly if the interviewer or interviewee is no longer available, conflicting evidence has subsequently emerged, or a substantial period of time has passed.

4. Preserving the Privilege and Work Product Protections

Because of the sensitive, serious, and personal nature of EEO internal investigations, the content of the investigations should be kept confidential. Maintaining confidentiality (*i.e.*, ensuring that witnesses do not discuss the investigation), however, may not ensure that the employer is able to keep the findings, conclusions, and results internal to the employer. Preserving such confidentiality may not be important to an employer investigating a complaint from which litigation cannot be reasonably anticipated. If preservation of such confidentiality is important, the only way to achieve this end is if the investigation is protected by the attorney-client privilege and the work-product doctrine.

Where an employer wants the content of an investigation to be protected by the attorney-client privilege, as discussed more fully below, investigators should take steps to ensure that these protections are available to the employer. The rules vary from state to state, but the general elements of the attorney-client privilege are: (1) a communication; (2) made in confidence; (3) between an attorney and client; (4) for the purpose of providing or obtaining legal advice.[15] If all of these elements are met, the attorney-client privilege

protects confidential communications from disclosure to anyone.

To preserve the attorney-client privilege, the investigator should ensure that the employee understands the context of the interview at the beginning of the interview. An investigator should inform the interviewee of the following: (1) the purpose of the interview; (2) that the investigator represents the company, and not the employee; (3) that the interview is covered by the company's attorney-client privilege and work-product doctrine (this is applicable to human resources personnel as long as they have been directed by counsel to gather pertinent facts, which will be the basis for counsel's legal advice to the company); (4) that the company—not the employee—may choose to waive its privilege in the future; (5) that, consistent with protecting the company's privilege, the employee should not talk to anyone about the interview; and (6) that the employee should tell the truth.[16] This privilege may not extend to interviews of non-employees or former employees as they do not work for the employer.

The attorney-client privilege protects communications between an attorney and client, it does not protect facts.[17] Thus, facts disclosed to an attorney or his agent and included in a memorandum are not protected from disclosure. Additionally, if the employer relies on the investigative report as a defense to a lawsuit, the report is not protected by the privilege as complainants may seek the report to challenge the sufficiency of the investigation and ultimately the conclusions of the final report.[18]

The work-product doctrine protects from disclosure to third parties documents and other tangible things prepared by an attorney or someone acting under his or her direction in anticipation of litigation.[19] Documents prepared in the ordinary course of business are not protected by the work-product doctrine. Although documents may be used for multiple purposes, to secure the work-product privilege the primary purpose behind the creation of the document must have been to aid in possible future litigation. Memos of interviews of former or non-employees may qualify as work product.

To ensure that an attorney-client communication is privileged or a document made in anticipation of litigation is found work product protected, the attorney and client must take appropriate care, as the communications are occurring and documents are being created, to preserve the privilege. Some of the more common steps include:

- The investigation must be conducted by or under the direction of an attorney;
- Document (in writing and during discussions with witnesses) that the investigation is necessary for the attorney to give legal advice to the client. If work-product protection is being sought, the purpose for the investigation should include a reference to possible future litigation;
- Specify that the investigation, including the identity of the interviewee, the questions asked, the information obtained, and the conclusions reached, is intended to be confidential and privileged; and
- State that the investigation and the conclusions reached are protected by the company's attorney-client privilege.

Additionally, when documents are created, the attorney should:

- Make clear they relate to advice sought by the client;
- Decide whether to integrate legal conclusions and facts;
- Label the documents created as "attorney-client privileged" and/or "work product protected"; and
- Ensure that the circulation and maintenance of documents is consistent with a desire to maintain confidentiality (*e.g.*, limit circulation to those who have a need to know).

Once a communication or document qualifies as privileged or work-product-protected, the attorney and client should take steps to ensure it remains so by, for example, filing the documents in separate secure locations to maximize confidentiality. Any action inconsistent with maintaining such communications or documents as confidential will be deemed a waiver of the privilege. This includes any discussion or dissemination with anyone other than the few representatives of the company who need to know the information and allowing others to be present during the interview—including friends and spouses (this does not include the interviewee's attorney or union representative). The danger of waivers is that they may apply not only to the single communication at issue, but to all other communications or documents relating to the same subject matter. The company may have

good reason to waive its privileges at some point, but inadvertent waiver caused by carelessness, lack of careful thought, or ignorance of the law should be avoided at all costs.

D. RETALIATION

Throughout any investigation, employers must always be mindful of and guard against any retaliation—or the appearance of retaliation. An employer cannot retaliate against employees for complaining about any discrimination or harassment they feel they have suffered.[20] Retaliation encompasses those actions "that a reasonable employee would have found [] materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[21] Retaliatory actions include, among other things, job reassignments, suspensions, duty reductions, and pay cuts.

Employers conducting internal investigations must also be vigilant to ensure that employees who corroborate a complaint of discrimination or who complain about discriminatory conduct directed to others, are also protected from retaliation. The protection against retaliation is not limited to individuals actually experiencing the alleged discrimination or harassment. Title VII prohibits an employer from discriminating against an employee "because he has opposed any practice made an unlawful employment practice by [the Title VII antiretaliation provision], [] or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [provision]."[22] "[W]hen an employee communicates to her employer a belief that the employer has engaged in … a form of employment discrimination, that communication virtually always constitutes the employee's opposition to the activity."[23] The "opposition clause" extends to employees who involuntarily testify in an internal investigation.[24] As such, an employer can be found liable for unlawful retaliation if it subjects either the actual complainant *or* an interviewee who corroborates and supports the complainant's allegations to any retaliatory action.

E. CONCLUDING THE INTERNAL INVESTIGATION

Once the factual investigation is complete, the investigator should have a full grasp of the relevant facts and be able to reach a reasonable conclusion. In reaching a conclusion, the investigator must make credibility determinations including: assessing a witness's potential bias for or against the complainant, the accused, or the employer; evaluating a witness's demeanor and memory; reviewing evidence that corroborates or undermines the accounts related in the witness interviews; and determining whether the witness appeared to be telling the truth. Many EEO cases turn on the word of one person versus the word of another. However, only on rare occasions will the evidence be inconclusive.

An employer should determine whether it wants a final written report or executive summary produced, and whether it wants recommendations of corrective action. If the employer wants a full final report, it should detail the scope of the investigation including listing who was interviewed and the documents reviewed, summaries of critical facts elicited through interviews, credibility determinations, and investigation conclusions. The report should also include key documents to the extent that they corroborate the final conclusions or help describe what occurred. The final report or executive summary must be marked confidential.

If the employer wants recommendations of corrective actions, such recommendations may or may not be included in the final report. Whether corrective actions are taken or not should be documented and explained. This can protect an employer from any allegation that it did not appropriately and effectively respond to the complaint. If recommending corrective action, the action should be fair and appropriate under the circumstances.

CONCLUSION

The findings and conclusions made in a final written or oral report only can be made fairly if the employer has conducted a thorough investigation of the facts. That requires proper planning of the investigation, identification of key witnesses, retention of relevant documents and tangible evidence, and preservation of the attorney-client and work product privileges, if applicable. Following these steps provides employees peace of mind and confidence that their complaints will be taken seriously and vigorously investigated. Alternatively, a thorough investigation allows an employer to rid its work place of unlawful conduct and implement corrective actions that can reduce its ultimate liability, if any. In short, conducting timely, objective, and

thorough EEO internal investigations can yield positive results for both employers and employees if done carefully.

■

NOTES

1. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807, 118 S. Ct. 2275, 141 L. Ed. 2d 662, 77 Fair Empl. Prac. Cas. (BNA) 14, 73 Empl. Prac. Dec. (CCH) P 45341, 157 A.L.R. Fed. 663 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 764-765, 118 S. Ct. 2257, 141 L. Ed. 2d 633, 77 Fair Empl. Prac. Cas. (BNA) 1, 73 Empl. Prac. Dec. (CCH) P 45340, 170 A.L.R. Fed. 677 (1998).
2. *See e.g.*, Harvill v. Westward Communications, L.L.C., 433 F.3d 428, 96 Fair Empl. Prac. Cas. (BNA) 1793, 11 Wage & Hour Cas. 2d (BNA) 142, 87 Empl. Prac. Dec. (CCH) P 42222, 152 Lab. Cas. (CCH) P 35090 (5th Cir. 2005); Hayut v. State University of New York, 352 F.3d 733, 183 Ed. Law Rep. 668, 197 A.L.R. Fed. 659 (2d Cir. 2003).
3. Bennett v. Progressive Corp., 225 F. Supp. 2d 190, 206, 8 Wage & Hour Cas. 2d (BNA) 204 (N.D. N.Y. 2002).
4. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662, 77 Fair Empl. Prac. Cas. (BNA) 14, 73 Empl. Prac. Dec. (CCH) P 45341, 157 A.L.R. Fed. 663 (1998).
5. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662, 77 Fair Empl. Prac. Cas. (BNA) 14, 73 Empl. Prac. Dec. (CCH) P 45341, 157 A.L.R. Fed. 663 (1998) (citation omitted).
6. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662, 77 Fair Empl. Prac. Cas. (BNA) 14, 73 Empl. Prac. Dec. (CCH) P 45341, 157 A.L.R. Fed. 663 (1998) (internal quotations and citation omitted).
7. *See* Bennett v. Progressive Corp., 225 F. Supp. 2d 190, 206, 8 Wage & Hour Cas. 2d (BNA) 204 (N.D. N.Y. 2002).
8. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 92 Fair Empl. Prac. Cas. (BNA) 1539 (S.D. N.Y. 2003).
9. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 219, 92 Fair Empl. Prac. Cas. (BNA) 1539 (S.D. N.Y. 2003).
10. Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 437, 94 Fair Empl. Prac. Cas. (BNA) 1, 85 Empl. Prac. Dec. (CCH) P 41728 (S.D. N.Y. 2004).
11. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216, 92 Fair Empl. Prac. Cas. (BNA) 1539 (S.D. N.Y. 2003).
12. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 217-218, 92 Fair Empl. Prac. Cas. (BNA) 1539 (S.D. N.Y. 2003).
13. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218, 92 Fair Empl. Prac. Cas. (BNA) 1539 (S.D. N.Y. 2003).
14. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216, 92 Fair Empl. Prac. Cas. (BNA) 1539 (S.D. N.Y. 2003).
15. U.S. v. Pipkins, 528 F.2d 559, 561 (5th Cir. 1976); *see also* U.S. v. BDO Seidman, 337 F.3d 802, 811, 2003-2 U.S. Tax Cas. (CCH) P 50582, 56 Fed. R. Serv. 3d 19, 92 A.F.T.R.2d 2003-5443 (7th Cir. 2003); Cavallaro v. U.S., 284 F.3d 236, 245, 2002-1 U.S. Tax Cas. (CCH) P 50330, 52 Fed. R. Serv. 3d 761, 89 A.F.T.R.2d 2002-1699 (1st Cir. 2002); In re Richard Roe, Inc., 68 F.3d 38, 40, 43 Fed. R. Evid. Serv. 175 (2d Cir. 1995) (quoting United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961)); In re Grand Jury Proceedings, Thursday Special Grand Jury Sept. Term, 1991, 33 F.3d 342, 348, 30 Fed. R. Serv. 3d 115 (4th Cir. 1994); U.S. v. Landof, 591 F.2d 36, 38, 3 Fed. R. Evid. Serv. 647 (9th Cir. 1978).
16. Upjohn Co. v. U.S., 1981-1 C.B. 591, 449 U.S. 383, 394-395, 101 S. Ct. 677, 66 L. Ed. 2d 584, Fed. Sec. L. Rep. (CCH) P 97817, 1980-81 Trade Cas. (CCH) ¶63797, 81-1 U.S. Tax Cas. (CCH) P 9138, 7 Fed. R. Evid. Serv. 785, 30 Fed. R. Serv. 2d 1101, 47 A.F.T.R.2d 81-523 (1981).
17. Upjohn Co. v. U.S., 1981-1 C.B. 591, 449 U.S. 383, 395, 101 S. Ct. 677, 66 L. Ed. 2d 584, Fed. Sec. L. Rep. (CCH) P 97817, 1980-81 Trade Cas. (CCH) ¶63797, 81-1 U.S. Tax Cas. (CCH) P 9138, 7 Fed. R. Evid. Serv. 785, 30 Fed. R. Serv. 2d 1101, 47 A.F.T.R.2d 81-523 (1981), quoting *Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962).*
18. McGrath v. Nassau County Health Care Corp., 204 F.R.D. 240, 245 (E.D. N.Y. 2001).
19. *See* Fed. R. Civ. P. 26(b)(3); F.T.C. v. Grolier Inc., 462 U.S. 19, 25, 103 S. Ct. 2209, 76 L. Ed. 2d 387, 9 Media L. Rep. (BNA) 1737, 1983-1 Trade Cas. (CCH) ¶ 65404, 36 Fed. R. Serv. 2d 636 (1983).
20. Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 56, 126 S. Ct. 2405, 165 L. Ed. 2d 345, 98 Fair Empl. Prac. Cas. (BNA) 385, 87 Empl. Prac. Dec. (CCH) P 42394 (2006).
21. Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 68, 126 S. Ct. 2405, 165 L. Ed. 2d 345, 98 Fair Empl. Prac. Cas. (BNA) 385, 87 Empl. Prac. Dec. (CCH) P 42394 (2006).
22. Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn., 129 S. Ct. 846, 850, 172 L. Ed. 2d 650, 105 Fair Empl. Prac. Cas. (BNA) 353, 91 Empl. Prac. Dec. (CCH) P 43434 (2009).
23. Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn., 129 S. Ct. 846, 851, 172 L. Ed. 2d 650, 105 Fair Empl. Prac. Cas. (BNA) 353, 91 Empl. Prac. Dec. (CCH) P 43434 (2009).
24. Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn., 129 S. Ct. 846, 851, 172 L. Ed. 2d 650, 105 Fair Empl. Prac. Cas. (BNA) 353, 91 Empl. Prac. Dec. (CCH) P 43434 (2009).

"SINGLE SITE OF EMPLOYMENT" TEST FOR DETERMINING WHETHER A PLANT CLOSING OR MASS LAYOFF HAS OCCURRED UNDER THE WARN ACT

Publisher's editorial staff

The Worker Adjustment and Retraining Notification Act (WARN Act or Act),[1] requires, with a few exceptions, that covered employers give written notice sixty days before undertaking a plant closing or mass layoff at any single site of employment. Detailed advance written notice of mass layoffs and plant closings must be given to each employee who will suffer an employment loss, or to his or her union, and to state and local governmental agencies. Failure to provide notice exposes the employer to liability for up to sixty days' pay and benefits to terminated employees, civil penalties to the local government, and attorneys' fees incurred by successful plaintiffs.

The Act covers issues including which employers are required to notify employees of an upcoming loss of employment and the events that trigger the notice obligation, *i.e.,* plant closings and mass layoffs. This article examines the rules for calculating whether employment losses reach the statutory numerical thresholds for a plant closing or mass layoff using the "single site of employment test".

The numerical tests for a plant closing and a mass layoff count only those employment losses that occur at a "single site of employment." A single site is defined as including, among other things, buildings in reasonable geographic proximity that are used for the "same purpose and share the same staff and equipment." Buildings at the same site that have separate management, workforces, and products are considered separate sites.[2] Geographically separate buildings in which the same work is performed generally will not be considered a single site. Employment losses at different sites are separately counted and considered.

For example, the Eleventh Circuit, in *International Union, United Mine Workers v. Jim Walter Resources, Inc.*,[3] held that four coal mines, at which 640 miners were laid off, did not constitute a single site of employment since the managerial and employment systems at the mines were "fundamentally distinct."

The UMW represented the miners who were laid off by Jim Walter Resources (JWR) in April 1992. The layoffs occurred in four mines in Alabama, three of which were in the same county.

For ease of reference, the court numbered the affected mines as 3, 4, 5, and 7. The number and percentage of employees affected by the layoffs were as follows:

— Mine 3: 657 workers prior to the layoffs, 140 employees affected (21.317 percent);

— Mine 4: 695 workers prior to the layoffs, 165 employees affected (23.747 percent);

— Mine 5: 518 workers prior to the layoffs, 166 employees affected (32.057 percent); and

— Mine 7: 641 workers prior to the layoffs, 169 employees affected (26.377 percent).

None of the mines individually satisfied the Act's mass layoff requirement of fifty affected employees who constituted at least 33 percent of the site's full-time workforce.

At trial, the UMW contended that the layoffs constituted a mass layoff because the four mines comprised a "single site of employment." JWR, however, moved for summary judgment on the grounds that the layoffs failed to satisfy the requirements of a mass layoff. The district court agreed with JWR, concluding that no combination of the four mines constituted a single site of employment and, thus, the sixty days' advance notice to the union was not required. On appeal, the circuit court affirmed.

The WARN Act defines a mass layoff as a reduction in force that results in employment losses for either 50 employees who constitute 33 percent of a single site's full-time workforce, or 500 full-time employees at the site. The UMW argued that by aggregating the layoffs that had occurred at the four mines, at least 500 miners had been laid off from a single site of employment.

The court noted that the regulations suggest that when a single employer has a series of sites that operate autonomously, those sites should not be considered a single site. Those regulations provide as follows:

> Noncontiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site. For example, assembly plants which are located on opposite sides of town and which are managed by a single employer are separate sites if they employ different workers.

The court also found the legislative history to be instructive.

> According to the Conference Report, the conferees removed all references to "place of employment" and replaced them with "single site of employment." Apparently "[t]his change is intended to clarify that geographically separate operations are not to be combined when determining whether the employment threshold for triggering the notice requirement is met."

The Eleventh Circuit analyzed the facts of the case and concluded that the four mines did not constitute a single site of employment. The court based its decision on four factors.

First, the mines were managed independently by different mine managers, assistant mine managers, industrial relations supervisors, safety supervisors, and strata control engineers.

Second, the mines ordinarily did not share employees, nor did miners rotate among the four mines. Moreover, miners at one mine could not bid on job vacancies at another mine; they could only bid on vacancies at the mine in which they presently worked.

Third, each mine site was considered a separate facility by the federal government, which had granted separate permits and mine numbers. More significantly, the UMW itself treated the mines separately. In his deposition, a union official testified that he "never would have more than one local at the same mine site," and each mine had its own union officers who were paid by the respective local.

Finally, each mine had its own facilities, with a separate gate, parking lot, office building, and bath house.

The UMW unsuccessfully argued that JWR's headquarters exercised sufficient control and authority over the mines to establish them as a single site of employment. The circuit court ruled as follows:

> These allegations relate to overall corporate management, not to the essence of WARN—the day-to-day management and personnel. JWR corporate management ordered mine management to reduce coal tonnage and cost per ton. … There was no further guidance given. Corporate management issued no instructions regarding layoffs. The layoff decisions were made by individual mine management.

Finding that "the day-to-day management and employee structures at the four mines [were] fundamentally distinct," the Eleventh Circuit affirmed the district court's grant of summary judgment in favor of JWR.

Another case worth noting is *Carpenters Dist. Council of New Orleans & Vicinity v. Dillard*[4], where the Fifth Circuit concluded that two separate business offices constituted a single site of employment because the two offices had once functioned as one, but had been split up based purely on space considerations. The court reached that conclusion in spite of the fact that the two offices had little actual interaction between them.[5]

However, in *Williams v. Phillips Petroleum Co.*,[6] the Fifth Circuit reached a different conclusion, distinguishing its result in *Carpenters* as pertaining to a situation that had "unusual circumstances." *Williams,* on the other hand, involved layoffs that occurred at two separate plants located several hundred miles away from each other in different states. In particular, the court noted that "[e]mployees were not rotated

between the different sites, and the locations did not share staff and equipment." Stating that there were "[n]o other 'unusual circumstances' " supporting the contention that the two plants were a single site of employment, the court held that the layoffs could not be aggregated in order to meet "the minimum employee requirements of WARN."

Similarly, in *Teamsters Local Union 413 v. Driver's, Inc.,*[7] the Sixth Circuit concluded that the sixty-day notice of a mass layoff under the WARN Act was not triggered when Driver's laid off eighty-five employees at eleven different sites.

Three local unions sued Driver's, alleging that the layoffs constituted a WARN Act event requiring notification to all affected employees. The circuit court began its analysis by stating that "[i]n order to trigger the Act, fifty employees must be affected at a 'single site.' " Focusing on the regulations, the court noted:

> Although no bright line test exists, the plain language of the statute and regulations makes clear that geographic proximity provides the touchstone in determining what constitutes a "single site." Contiguous facilities or those in close geographic proximity are generally single sites of employment and geographically separate facilities are generally separate sites …. The statute and regulations plainly focus on whether the resulting job loss will be concentrated in one geographic area. [Citation omitted.]

It went on to cite the DOL's dual emphasis on "a sufficient degree of geographic continuity as well as an operational connection." With that in mind, the court held as follows:

> We agree with the district court that the eleven terminals do not constitute a "single site" for purposes of the Act. Several factors influence that decision. First, and most importantly, … the terminals are not contiguous. To the contrary, they are hundreds of miles apart spread over six states. Each trucker starts and ends his or her work week from the same terminal—one that is near his or her residence. This terminal is the trucker's "home base." Second, the truckers were assigned to a certain location, and the terminals did not share equipment or the service of the truckers. Third, the truckers at each terminal were represented by different unions, and each terminal had its own seniority system. Fourth, each terminal was considered separate by one agency of the federal government, as demonstrated by the separate safety logs required by the Occupational Safety and Health Administration.

In addition, the court emphasized that "centralized payroll and certain other centralized managerial or personnel functions are not enough to deem the location a 'single site.' " It, therefore, affirmed the lower court's grant of summary judgment in favor of Driver's.

In an interesting case, *Wiltz v. M/G Transport Services, Inc.*,[8] the court concluded that towboat barges were not separate sites of employment, and, thus, aggregated the total number of employees to determine whether the WARN Act notification requirement was triggered. However, the court also determined that fifty employees did not suffer an employment loss within the meaning of the WARN Act because most "terminated" employees were offered continued employment by the buyer after the employer sold its assets.

It is important to note that while the numerical thresholds for a plant closing or a mass layoff must be reached at a single site, once those thresholds are reached, notice must go to all employees at all sites who lose their jobs as a result of the plant closing or mass layoff.[9]

In *Meson v. GATX Technology Services Corp.,*[10] the plaintiff was terminated from her position in connection with the sale of the defendant's assets. She did not receive a WARN Act notice of the termination. The defendant worked out of and managed one of the defendant's sales offices with fewer than fifty employees, but she engaged in significant work-related travel and reported to, and received work assignments from, one of defendant's larger offices. The plaintiff argued that the larger office should be considered as her "single site of employment" for purposes of evaluating the 50-employee minimum required under the Act, citing Department of Labor regulations which provide:

> For workers whose primary duties require travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employer's regular employment sites (*e.g.,* railroad workers, bus drivers, salespersons), the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report will be the single site in which they are covered for WARN purposes.

The court, however, rejected the plaintiff's broad interpretation of this regulation.

> Although subpart (6) could be read literally to cover almost any employee who leaves her of-

fice, we believe it was intended to apply only to truly mobile workers without a regular, fixed place of work. A close scrutiny of the provision's language supports this conclusion. The terms "travel … from point to point," "outstationed," and "home base," all connote the absence of a fixed workplace. *See Ciarlante,* 143 F.3d at 146 (defining "home base" as "a site that the employee visits during the course of a typical business trip"); *Bader,* 503 F.3d at 819 ("The term [outstationed] most logically connotes a situation where employees live for a short period of time at a certain site, departing for home when the work is done."). The examples provided in subpart (6) also support this view. Bus drivers and railroad workers have no fixed workplace or office. Indeed, their jobs are characterized by travel and mobility. Although the provision includes "salespersons" as examples, the context suggests that this reference is to traveling salespersons who work primarily out of their homes or cars, rather than those who work out of fixed offices.

…

[W]e find that the purposes of the WARN Act, the provisions's language, and the Department of Labor commentary make it plain that subpart (6) was not intended to cover employees like Meson. Meson was not a "mobile worker": she "work[ed] out of a particular office" in Falls Church, Virginia and also managed the two other employees in that office. Though she traveled to visit clients in her region and reported to officials located at the Tampa office, her position was similar to that of most other branch managers who receive work assignments from, and report to, their company's headquarters. Were we to construe subpart (6) to apply on these facts, every such regional manager or chief executive could claim the corporate headquarters—in lieu of the office she manages—as her "single site of employment." *See Moore,* No. 92 C 1563, 1993 WL 244902, at *5 (N.D. Ill. Apr. 13, 1993). We do not believe that Congress or the Department of Labor intended the provision to possess such a potentially limitless scope.

In *Alberts v. Nash Finch Co.*,[11] the defendant closed two of its retail grocery stores. The stores were located approximately six miles apart, and each employed less than fifty employees. The plaintiffs were formerly employed at one or the other of the closed stores and filed an action against the defendant for failure to provide the notice required under the Act. The defendant moved for summary judgment, arguing that the closures were not covered under the Act because each site employed less than fifty employees. The plaintiffs responded that the number of employees at each of the stores should be aggregated for purposes of establishing the fifty employee threshold.

The court recognized that aggregation is permitted under the Act in certain circumstances.

> Location is a critical factor in determining whether two facilities are a single site under the WARN Act. "As a general rule, … geographically separate facilities are separate sites." *Rifkin v. McDonnell Douglas Corp.,* 78 F.3d 1277, 1280 (8th Cir. 1996); *see also Teamsters Local Union 413 v. Driver's, Inc.,* 101 F.3d 1107, 1110 (6th Cir. 1996) ("[G]eographical considerations are the strongest factors in determining whether separate facilities … are considered single or separate sites under the Act."); *Frymire v. Ampex Corp.,* 61 F.3d 757, 766 (10th Cir. 1995) ("[P]roximity and contiguity are the most important criteria for making single site determinations."); *McClain v. Laurel Street Art Club, Inc.,* 925 F. Supp. 496, 498–99 (E.D. Ky. 1995) ("[T]he statute is to be narrowly construed in favor of finding separate sites of employment where there is geographical separation."), *aff'd,* 106 F.3d 401 (6th Cir. 1997) (unpublished table decision). Thus, because the three Econofoods stores were separated by six miles (in the case of North and South) or 50 miles (in the case of Winona and the other two stores), the presumption is that none of the stores combined with another to form a single site for purposes of the WARN Act.
>
> That presumption is rebuttable, though. Geographically separate facilities may be considered a single site under the WARN Act "if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment." 20 C.F.R. § 639.3(i)(3). For example, when an employer "manages a number of warehouses in an area but … regularly shifts or rotates the same employees from one building to another," the warehouses will be considered a single site. *Id.* This exception to the general rule is limited, however, to the "rare situations in which two separate buildings share staff, equipment and functions" to such an extent that there is an "inextricable operational connection" between the sites. Department of Labor ("DOL") Comments, 54 Fed. Reg. 16042, 16049 to 50 (Apr. 20, 1989); *see also Rifkin,* 78 F.3d at 1281 (explaining that "sharing of staff and equipment, and sharing the same operational purpose are appropriate criteria for determining whether two non-contiguous sites comprise a 'single site' under the WARN Act").
>
> Common ownership is not sufficient in itself to render two separate facilities a single site under the WARN Act. *Rifkin,* 78 F.3d at 1280. Thus, "assembly plants which are located on opposite sides of a town and which are managed by a single employer are separate sites if they employ different workers." 20 C.F.R.

§ 639.3(i)(4). Even the occasional sharing of staff between separate facilities is not sufficient to bring them within the single-site exception. DOL Comments, 54 Fed. Reg. at 16049 to 50; *cf. Viator v. Delchamps Inc.,* 109 F.3d 1124, 1127–28 (5th Cir. 1997) (evidence that up to 20% of employees were transferred to other stores on a temporary basis was insufficient to render stores a single site); *Int'l Union, United Mine Workers v. Jim Walter Resources, Inc.,* 6 F.3d 722, 726 (11th Cir. 1993) ("While some exceptions exist, employees do not rotate among mine sites, nor do they work regularly at more than one mine."). Similarly, the fact that an employer permits cross-plant bumping, or transfers workers among geographically separate facilities, does not render the facilities a single site. DOL Comments, 54 Fed. Reg. at 16050. Nor is obtaining supplies from a common source considered a sufficient "operational connection" to trigger the exception. *Id.* at 16049–50. Yet each of these factors, though not determinative, is certainly relevant in determining whether two facilities are a single site for purposes of the WARN Act.

The court denied the defendant's request for summary judgment, noting that unresolved factual issues remained unresolved concerning the relationship between the two store locations.

In *Austen v. Catterton Partners V, LP,*[12] the plaintiffs sought class certification for affected employees at all of the closed plants to pursue a claim against the defendant for violation of the WARN Act. The defendant opposed the plaintiffs' motion, arguing that many of the employees that the plaintiffs sought to include worked at facilities employing less than the fifty employees necessary for the Act provisions to apply.

The court identified the Department of Labor guidance and case law precedent for evaluating an attempt to aggregate the employees at remote locations into a single site for purposes of meeting the Act's threshold requirement.

> [I]n order to trigger WARN Act liability, a plant closing or mass layoff must occur at a site with at least 50 employees. However, in certain limited circumstances, sites or employees can be aggregated together to reach that threshold. The United States Department of Labor (DOL) WARN Act regulations provide some guidance on when locations can be aggregated together into a "single site" for purposes of triggering liability under the Act:
>
> (1) A single site of employment can refer to either a single location or a group of contiguous locations. Groups of structures which form a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment.
>
> (2) There may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within such a building. For example, an office building housing 50 different businesses will contain 50 single sites of employment. The offices of each employer will be its single site of employment.
>
> (3) Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment. An example is an employer who manages a number of warehouses in an area but who regularly shifts or rotates the same employees from one building to another.
>
> (4) Non-contiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site. For example, assembly plants which are located on opposite sides of a town and which are managed by a single employer are separate sites if they employ different workers.
>
> (5) Contiguous buildings owned by the same employer which have separate management, produce different products, and have separate workforces are considered separate single sites of employment.
>
> …
>
> (8) The term "single site of employment" may also apply to truly unusual organizational situations where the above criteria do not reasonably apply. The application of this definition with the intent to evade the purpose of the Act to provide notice is not acceptable.

20 C.F.R. § 639.3(I).

There is no Second Circuit case addressing the DOL regulations, but the Sixth Circuit has offered a useful interpretation:

> Although no bright line test exists, the plain language of the statute and regulations makes clear that geographic proximity provides the touchstone in determining what constitutes a "single site." Contiguous facilities or those in close geographic proximity are generally single sites of employment and geographically separate facilities are generally separate sites …. The statute and regulations plainly focus on whether the resulting job loss will be concentrated in one geographic area.

Teamsters Local Union 413 v. Driver's, Inc., 101 F.3d 1107, 1109 (6th Cir. 1996) (internal citation

omitted). "Once the contiguous/noncontiguous geographic determination is made, the operational, managerial and labor variables can defeat or reinforce the presumptions established by the proximity and contiguity factors …. Noncontiguous facilities may be single sites only if there is some connection between the sites beyond common ownership, such as a regular practice of sharing of equipment or employees." *Id.* at 1110 (internal citation omitted); *see also Bledsoe v. Emery Worldwide Airlines,* No. 3:02cv069, slip op. at 12-15 (S.D. Ohio Mar. 24, 2008). In general, other circuits appear to use the same approach as the Sixth Circuit. *See, e.g., Bader v. N. Line Layers, Inc.,* 503 F.3d 813, 817-19 (9th Cir. 2007).

The plaintiffs argued that once the WARN Act was triggered by a plant closing or mass layoff, any "downstream" employee who loses his or her job as a result of that closing or layoff is covered by the Act's notice requirements, whether or not the employee actually worked at the facility where the closing or layoff occurred. The court noted that there are conflicting decisions on this position.

> [T]he Second Circuit has not addressed this question, and the few courts that have considered this issue have reached divergent conclusions. *Compare In re Jamesway Corp.,* No. 95B44821 (JLG), 1997 Bankr.LEXIS 825, at *53 (S.D.N.Y. Bankr. June 11, 1997) ("We find that the statute contemplates that notice be given to employees at the site of the mass layoff, and not to employees of other facilities who were not 'bumped' and who are not the object of a 'mass layoff' even though they were terminated as a consequence of the same conditions that caused the 'mass layoff' or 'plant closing.' "); *Williams v. Phillips Petroleum Co.,* 23 F.3d 930, 934-35 (5th Cir. 1994); *and In re APA Transp. Corp. Consol. Litig.* (" *APA Transport II* "), Civ. No. 02-3480(GEB), 2006 WL 3534029, at *5 (D.N.J. Dec.7, 2006), *with In re APA Transport Corp. Consolidated Litig.* (" *APA Transport I* "), No. Civ. 02-3480 WGB, 2005 WL 3077916, at *3 (D.N.J. Nov. 16, 2005); ("[T]here is support for Plaintiffs' counter-argument that employees at facilities with less than 50 full-time employees may be protected by the WARN Act. Where those employees are terminated as the consequence of layoffs at facilities with 50 or more employees, employees at the smaller facilities may be included in the plaintiff class."); *Amatuzio v. Gandalf Sys. Corp.,* 994 F. Supp. 253, 276 n. 23 (D.N.J. 1998) ("The only legal requirement is that there be a causal link between the employee's termination and the plant closing. Neither does WARN limit 'affected' employees to those included in the fifty or more employees used to define a 'plant closing.' Once that definition is satisfied, any employee may qualify as an 'affected' employee, whether or not included in the group of employees used to define a 'plant closing.' "); *and Kirkvold v. Dakota Pork Indus., Inc.,* No. Civ. 97-4166, slip op. at 6-7 (D.S.D. Dec. 15, 1997) ("Applying the plain language of the statutes, the Court agrees with plaintiff that the determination of what constitutes 'a single site of employment' is pertinent only to calculating whether a sufficient number of employees suffered an employment loss to satisfy the definition of a 'plant closing' for purposes of triggering WARN Act protection.").

The court, however, concluded that taking a side on the issue was not necessary to resolve the plaintiffs' motion. The court noted that the plaintiff did not presently have sufficient facts concerning the status of these remote sites and their employees to support its class certification request. As a result the court denied the plaintiffs' motion without prejudice to provide the plaintiffs with the opportunity to conduct discovery on the issue.

■

NOTES

1. 29 U.S.C.A. §§2101 et seq.
2. 20 C.F.R. §639.3(i). Salyer v. Universal Concrete Products, 940 F.2d 662, 7 I.E.R. Cas. (BNA) 1322 (6th Cir. 1991).
3. International Union, United Mine Workers v. Jim Walter Resources, Inc., 6 F.3d 722, 8 I.E.R. Cas. (BNA) 1601, 126 Lab. Cas. (CCH) P 10915 (11th Cir. 1993).
4. Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dept. Stores, Inc., 15 F.3d 1275, 9 I.E.R. Cas. (BNA) 289, 127 Lab. Cas. (CCH) P 11024 (5th Cir. 1994).
5. *But see* Rifkin v. McDonnell Douglas Corp., 78 F.3d 1277, 11 I.E.R. Cas. (BNA) 741, 131 Lab. Cas. (CCH) P 11510 (8th Cir. 1996).
6. Williams v. Phillips Petroleum Co., 23 F.3d 930, 29 Fed. R. Serv. 3d 812 (5th Cir. 1994).
7. Teamsters Local Union 413 v. Driver's, Inc., 101 F.3d 1107, 1996 FED App. 0370P (6th Cir. 1996).
8. Wiltz v. M/G Transport Services, Inc., 128 F.3d 957, 1997 FED App. 0322P (6th Cir. 1997).
9. *See also* Ciarlante v. Brown & Williamson Tobacco Corp., 143 F.3d 139, 13 I.E.R. Cas. (BNA) 1569, 135 Lab. Cas. (CCH) P 10150 (3d Cir. 1998) (traveling employee's home base must be a site that he or she regularly visits during the course of a typical business trip).
10. Meson v. GATX Technology Services Corp., 507 F.3d 803, 26 I.E.R. Cas. (BNA) 1418, 155 Lab. Cas. (CCH) P 10936 (4th Cir. 2007).
11. Alberts v. Nash Finch Co., 245 F.R.D. 399, 69 Fed. R. Serv. 3d 1 (D. Minn. 2007).
12. Austen v. Catterton Partners V, LP, Austen v. Catterton Partners V, LP, 268 F.R.D. 146, 159 Lab. Cas. (CCH) P 10256 (D. Conn. 2010).

■

TERMINATION OF EMPLOYMENT

FIRING THE VIOLENT EMPLOYEE?

Marty Denis

The newspapers are filled with news reports about disgruntled employees who turn violent in the workplace. Employees bring hand guns into the workplace. They attend counseling or termination sessions with their supervisors. And then, like part of an Old West six gun movie, they draw their six shooter and start blasting.

Is an employer expected to strip search its employees before they enter the workplace? Or maybe employers should install airport technology and scanners at their front entrance? Whatever the technology, consider the more mundane questions that may arise in the workplace when reports circulate about an employee having guns at home or conversations about violence or potential threats of violence. Are there any clear lines when these situations arise? Or, like many situations in the workplace, are these all grey areas, murky as murky may be?

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Consider, for example, a conversation I had a couple of months back with Sam Waters, the Executive Vice-President for XYZ Inc., the preeminent manufacturer of dancing musical widgets. Sam called one morning and posed a question about potential violence in the workplace.

"Good morning," Sam announced, "we have a situation that has developed where we need to run something by you. We have an employee, Roger, who runs our tool crib. Yesterday afternoon, he said he was not feeling too well, and he asked his supervisor, Lizzy to take him to the hospital. So Lizzy took Roger to the hospital. She waited around for two hours, and they kept Roger overnight for observation."

STRESSED OUT AND COMPLAINTS ABOUT TOO MUCH WORK

"From what Lizzy could make out," Sam added, "it looks like Roger reported that he was stressed out from work. He has been moaning and groaning these past couple of months that we have been giving him too much work, about working too many extra hours, and about how we have been piling on the work since we cut his two tool room assistants last year back in 2009 when we had lay offs due to the economy tanking."

"Now, it is three days later," Sam continued, "Roger is back at work, and we get a report from the hospital that this is somehow work-related."

"Work-related?" I interjected, "What makes it work-related?"

THREATS OF HARM?

"Ah, well," Sam replied, "you know that in our state practically everything is work-related when we take an employee to the hospital. I guess the doctors assumed that it was work-related because we took him to the hospital, but that is the least of our worries. The reason I called you is that when Roger was examined by the hospital's doctors it

looks like he was depressed, and the doctor wrote something on the report that says – I can hardly read his handwriting, but it says something about Roger feeling depressed and wanting to ram his head against the tool crib. Here, let me read it to you," Sam interjected, "and this is the doctor speaking, 'Patient reports being depressed, having money problems, spousal conflicts, work conflicts, work pressures, and wanting to ram his head against the tool crib, and feeling like he has been pushed off a cliff. Talked to patient further. He is overly pressured at work. Can't get help at work. Feels like his legs have been cut off at the knee cap by his manager and feels like blasting off the knee caps and doing the same to her. Calm now. Little risk of harm to others."

"Read that again?" I asked, "particularly that last part about his wanting to cut his manager's legs off at her knee caps."

"Yeah," Sam said, "it reads, 'feels like his legs have been cut off at the knee caps by his manager and feels like doing the same to her and blasting off her knee caps.' That's how it reads, and then there is this last part, kinda like a checklist where they ask if the patient presents any risk of harm to himself or others, and the doctor circled the answer 'little risk' to others, but "moderate" for himself.' I mean that's what it says, and I got this late last night. Our local plant manager is a bit uncomfortable about this, and he wants to fire Roger,"

"Fire Roger?" I queried.

"Yeah, fire him," Sam replied. You know we heard about that situation up in Connecticut, and we do not want to take any risks. So with this doctor's report, and I was hoping that …Well, here, let me get Joe, the Plant Manager, on the phone. Let me conference him in. There are a few more things you ought to hear because we take these things quite seriously."

"So Sam conferenced in Joe, the Plant Manager, on the phone and after we were hooked up together, Sam asked Joe to explain the situation.

A DEPRESSED EMPLOYEE

"Hi, this is Sam," Sam explained, "listen Joe, I have Marty, our outside counsel on the phone, can you explain this Roger situation. I want to hear it from the horse's mouth what has been going on out there. Just give it to us straight."

"Sure, sure," said Joe, "well, Roger is pretty messed up. This has been going on for months now. And this is the last straw, we gotta get Roger out of here. I ain't going to tolerate him hurting any of our managers. I don't care how stressed out he is. I have several other managers who are stressed out, and we need to set an example with Roger and fire him. And fire him pronto. That is what we need to do."

"What exactly is this situation with Roger?" I asked.

"Well, I don't know if Sam has told you," Joe said, "but Roger has been pretty down for about a year now. Ever since that big layoff we had last year. It kinda coincided with his wife getting laid off from her job there too. Then his father died. That wasn't unexpected, but Roger took it pretty hard when his father died. Then Roger's son was in a car accident. Something about drunk driving and stuff. But his son was pretty mangled up. He hung around for a few weeks in a coma, and then he also died. Roger was feeling pretty low at that point. He started talking about blowing himself away. But, you know, I have heard Roger talk about these same things over the years. Roger is always mouthing off about his guns. He collects them. And in the hunting season, he is out there shooting deer. But, you know, I only figured that Roger was joking. Why, half our employees have guns here, and they are always talking about shooting turkeys, shooting deer, and, of course, shooting those flipping terrorists. So, none of this ain't something I haven't heard before. But this stuff about shooting Lizzy and blowing her away because she is piling the work on him, well, that is another thing. Lizzy feels uncomfortable working with Roger now. I mean, Roger is not crazy or anything like that. He is probably a bit depressed. You know, if I had my dad die and then my son pass away after a drunk driving accident, well, I might feel a bit half-cooked upstairs and a bit depressed. Did I tell you that in that auto accident Roger's son banged into another car filled with young folks and two of them ended up as quadriplegics? Wow, that was all over the news. So Roger has a lot on his plate. Now I am not saying that Roger's brain is fried, but, then, again, he goes around saying half-baked things like he ought to go postal. So, you know, I have to take these things seriously, and we ought to let Roger go before he does go off the cliff and starts using Lizzy as a shooting gallery."

"GOING POSTAL" COMMENTS

"Wait a second," I interjected. "When was this comment by Roger saying he ought to go postal?"

"Oh, that was a while back," said Joe, "probably six, eight months back."

"Did you hear Roger say that?" I asked.

"No, no, I didn't hear that," Joe said. "Some of the guys were shooting the breeze, you know, just idle chatter. That's how it got reported to me."

"Did you talk to Roger about those comments?" I asked.

"No, no, not me," Joe replied. "Why should I? I don't think he meant anything by it. You know, he was just funning around with the other guys over lunch. I didn't take it seriously at the time. But now, when I hear that he wants to shoot Lizzy in the knee caps, that is something different, and I am putting two and two together. We can't have that talk in our workplace. Roger is a danger to himself, and a danger to others. We ought to get rid of him before he brings his hunting guns into our plant and starts shooting. That is too much of a risk. We can't tolerate that. After all, we have a no violence policy, and we ought to enforce it."

"Has anyone else been making these 'go postal' comments in the workplace?" I asked.

TALKING ABOUT GUNS?

"Sure, sure, lots of folks talk that way. They are only funning. I hear that stuff all the time. That is the way they talk - guns, booze, and yeah, sex. But they ain't serious. Least ways, I don't take them seriously. Yeah, sure, I have some other folks who talk that way. But what of it? What am I supposed to do? Fire every cotton pickin' employee who talks about packing a shotgun and blowing away his neighbor whose dog is barking too loud?"

"Wait a second," interjected Sam, "Joe, you want us to fire Roger because he made some 'go postal' comment six months back and you never reported it? Why didn't you tell us back then? How come this is the first time I am hearing about this?"

LOTS OF EMPLOYEES WITH SHOTGUNS

"Like I said," said Joe, "we have lots of folks with shotguns. We have lots of folks with six shooters. That is all they talk about. What am I supposed to do? I would be firing half my staff if each time they made some salty comment about blowing away their neighbor or co-worker. I can't ride herd on all these cowboys. But isn't Roger a special case now? Don't we have him by his big toe? Why can't we get rid of him? After all, it just ain't because he has been depressed. Why, his depression is contagious for the rest of my staff. He is disruptive. I mean, his constant talk about dying, and death, and more death, that's all he talks about. He hardly gets any work done. Let's grab the bull by the horns and get rid of him. Aren't you always telling us managers, Sam, how we should seize the day? Well, that's what I suggest."

"Wait, wait," I said, "how long has Roger been with us?"

"Ah, I have it right here," Sam said, "twenty-two, going on twenty-three years."

"And how is his job performance reviews?" I asked.

"Rotten," Joe said, "downright deplorable. He sits around all day moaning and groaning about attending funerals. He gets nothing done. He should have been let go when we had a chance with that layoff last year."

"Let me look them up," said Sam. "Let's see, 2007, meets expectations. 2008, meets expectations. 2009, meets expectations. What are you talking about, Joe? You rated him as meets expectations, what are we supposed to do?"

"Look, let's back up here," I interjected. "These comments about Roger wanting to shoot Lizzy in the knee caps, that's not quite what he is saying. As for Roger's 'going postal' comments a few months back, you probably do not want that to be a basis for firing Roger, particularly, as you say Joe, you tolerate that kind of talk from his co-workers."

"What concerns me," I added, "is this latest doctor report saying that he feels like blasting Lizzy's knees off at the knee caps. That is arguably a threat, and the question is what you ought to do about it."

"Fire him! That's what I say," said Joe. "And do it sooner than later. We can't wait for Roger to explode. He is a ticking time bomb. He is mentally off the wall. Oh, I know about all this psychiatric stuff about how he might be mentally unbalanced because his dad passed away. But I have lost my parents too, and I don't go around saying I want to 'go postal.' This guy is off the wall. He is a threat, and a dangerous threat at that. You don't have to be certifiably crazy to bring in a six shooter. Lizzy, you have to think of Lizzy. She is afraid to work with Roger. He is a looney tune. He keeps muttering to him-

self. I don't know if he is schizoid or paranoid, but he takes these pills. And I know. I can see it in his eyes. He is a wacko."

"Well, that is part of the potential problem," I said, "All this talk about Roger being schizoid, or paranoid, or wacko, we do not want to create the basis for a discrimination claim that XYZ considered him as having a mental disability or handicap."

"What do you mean by that?" Sam asked.

"Well, so far we have an employee whose job performance reviews rate him as meeting expectations," I said. "Joe's comments or thinking reflects that we may be crossing the line and treating him as, or worse yet, creating communications that XYZ has been regarding or perceiving him as if he suffers from a mental handicap or disability. We ought to be careful what we say. Joe's comments - and I realize, of course, that Joe, you are saying this with the utmost solicitude for Roger's health…"

"Yes, yes, of course," Joe said, "I didn't mean anything by these comments. Why Roger and I are best of friends, and we go way back."

A FITNESS FOR DUTY EXAMINATION

"Maybe the way to approach this," I suggested, "is to follow up on the hospital's report and ask Roger to undergo a fitness for duty examination. We could ask him to see our own doctor, an independent doctor, or his own doctor. We probably will need a report from a psychiatrist or a psychologist. That way XYZ makes an individualized assessment, following up on the hospital's report that Roger has made some threats of violence - and threats of violence need not be tolerated in our workplace as long as, of course, we treat others who make such threats in the same manner. It seems to me that you need more input from the medical side, and ought to try to obtain more medical information before jumping on this threat of harm issue."

"No way," said Joe, "I don't want this crackpot back to work. He is too scary. He might blow someone away. I mean, what happens if he passes this fitness for duty test? What happens if he gets a clean bill of health and his doctor releases him to return to work? Do we have to take him back? Why don't we just fire him now?"

"Look," I said, "you can send him to your own doctor. You can send him to an independent doctor, or even his own doctor. But how much do you want to complicate this? Let's try his own doctor first. Moreover, all these comments about Roger being a looney tune or a crackpot, or being schizoid or paranoid are probably not too constructive. These comments sound more like stereotypes that can get XYZ in hot water. And we ought to stay away from those considerations. They ought not be a topic for conversation in the first place. Focus on job-related issues."

"Yes, yes, that seems like a way to approach these things," said Sam. "Let me talk this over internally, and I'll get back to you about which way we want to go. Meanwhile, Joe, could you make sure that you avoid any derogatory comments about Roger's mental health or state. That means, cut out these comments about Roger being schizoid or paranoid. First of all, you ought not to be jumping to such conclusions. And second of all, those probably are not helpful comments. I don't want to get any feedback that at manager meetings you have been feeding the fire with similar comments or observations. Do you hear me Joe?"

"Yes sir, I hear what you are saying," Joe responded.

SOME PRACTICAL ISSUES

So what do you do when you hear employees mouthing off about "going postal" or wanting to use their shotguns for other things aside from deer hunting or possum shooting? Do you tolerate such comments? Do you investigate? Or do you immediately assume the bad side of human nature and concoct a reason for firing the employee?

And what do you do about your supervisors or managers like Joe? Do you, again, tolerate such blatherings? Do you credit such comments to merely Joe's "rough edges?" Or do you send Joe for more training?

Of course, you need to be on the look out for any Rogers in your workplace. By the same token, maybe you should also check to see if any of your supervisors or managers resemble Joe's management approach. ■

THE HR TROUBLESHOOTER

EMPLOYER'S OPTIONS WHEN EMPLOYEE DEMANDS ACCOMMODATIONS OR LEAVE

Gerard P. Panaro

A couple of weeks ago, a client asked me these questions: An employee was requesting a change in her work schedule to accommodate sleep apnea "issues" she was having. Did the employer have to grant the request? Were there any FMLA issues? This article will outline the process one should engage in to answer these questions, whether the condition is sleep apnea or something else.

ADA ISSUES: DISABILITY AND REASONABLENESS

The two questions that have to be answered under the Americans with Disabilities Act are: 1) does the condition, in this case, sleep apnea, meet the definition of "qualified disability"? If the answer is no, there is no coverage under the ADA and no duty to accommodate. If the answer to the first question is yes, then the second question that must be addressed is this: Is the requested accommodation reasonable? Again, if the answer is no – and further, if there is *no* reasonable accommodation that will work – then there is no coverage and no duty to accommodate. But if the answer is yes, then the employer would have a duty to grant the accommodation. However, it does not necessarily have to be the accommodation requested by the employee.

FMLA ISSUE: IS THE CONDITION A "SERIOUS MEDICAL CONDITION"?

To be entitled to FMLA leave, the employee must demonstrate that she has a "serious medical condition." If she does, then the entitlement under the FMLA is to leave, not accommodation, and the entitlement to leave is limited – 12 weeks in a 12-month period – not indefinite and open-ended as is the duty to accommodate under the ADA. Although the definition of "serious medical condition" under the FMLA is broader than the definition of "disability" under the ADA, not every medical condition will automatically or necessarily meet the definition of "serious medical condition." Also, the employee must be "eligible" for FMLA leave – that is, she must have worked for the employer for at least 1,250 hours in the preceding 12 months and she must not have exhausted her 12 weeks of leave.[1]

"Disability" under the ADA

One option the employer has in the case under discussion – an employee asks to change her work schedule due to sleep apnea – is to challenge whether the employee's sleep apnea is a "qualified disability" for ADA purposes. If it isn't, there is no duty to accommodate.

One should take a practical approach to this option. For example, if the employee's normal work hours are 9 to 5, and she wants to work from 10 to 6, and the employer doesn't really care whether she does or not, then it hardly seems worthwhile to con-

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test whether or not this employee is a "qualified individual with a disability" entitled to a reasonable accommodation. Challenging the employee's request will likely entail legal fees, because the employer will likely want its counsel to research whether sleep apnea is a disability and that could take some time. What is more, even a well-researched legal memo concluding that in this case, the employee's sleep apnea does not qualify as a "disability" for ADA purposes will not necessarily dissuade the employee from filing a charge with the EEOC or from engaging her own counsel if her request is refused and if that happens, it just means more legal fees for the employer.

But if the employer does not want to grant the accommodation requested by the employee for whatever reason, then it will have to exercise the option of disputing that the sleep apnea qualifies as a disability that is entitled to accommodation. Remember that under the ADA, there is no exhaustive, definitive, exclusive list of "approved disabilities;" no given condition is automatically deemed to be a disability.[2] Instead, the ADA defines a disability as a physical or mental impairment that substantially limits a major life activity. Under this definition, sleep apnea may or may not be a "disability" for ADA purposes.

For example, in *Jones v. AKKO Fastener, Inc.*,[3] the plaintiff stated that he was diagnosed with sleep apnea in 1998, which was related to his cardiovascular condition. His condition was not satisfactorily controlled with a prescribed CPAP machine, and left him often feeling sleepy and fatigued. However, because the plaintiff was evidently able to function with sleep apnea since 1998, the court held that it did not constitute a disability. The court said: "While sleep apnea may well constitute a disability for some individuals, [the plaintiff's] descriptions of the effects of his condition are insufficient to establish the level of severity required to qualify as a 'substantial limitation' on major life activities. See, e.g., *Boerst v. Gen. Mills Operations,* 25 Fed. Appx. 403, —-12 (6th Cir. 2002) (unpublished), noting that the inability to get more than two to four hours sleep at night, while inconvenient, lacks the kind of severity required to qualify the ailment as a substantial limitation."

Reasonable accommodation and undue hardship

Even if it is conceded or determined that the employee is a "qualified individual with a disability" and therefore covered by the ADA and entitled to accommodation, remember two things: first, the employer is required to make only *reasonable* accommodations to the disability of an employee; and two, the employee is not necessarily entitled to the accommodation that s/he wishes.[4]

An accommodation is not "reasonable," and therefore not required, if it will create an "undue hardship" for the employer.[5] Sec. 1630.2(p) of the EEOC ADA regulations defines "undue hardship" as meaning, "with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of" the definition. These factors are: 1) the nature and net cost of the accommodation; 2) the overall financial resources of the facility, the number of employees, and the effect on expenses and resources; 3) the overall financial resources of the employer, the overall size of the business, and the number and location of facilities; 4) the type of operations of the employer; and the impact of the accommodation on the operation of the facility, including its impact on other employees and on the facility's ability to conduct its business.

Case study

In Elkins v. North Seattle Community College, 2009 WL 3698516 (W.D. Wash. 2009), the court held that even if it were assumed that the plaintiff's sleep apnea qualified as a disability under the ADA, the changes in work scheduling that the plaintiff sought were not a reasonable accommodation. The plaintiff was employed as a janitor since 1977. He had a history of chronic tardiness and absenteeism. He requested an accommodation for his sleep disorder (sleep apnea): a shift change from his current 7:30 a.m. to 4:.30 p.m. schedule to an 11:00 a.m. to 7:00 p.m. schedule. The college offered to allow him to start work at 8:00 a.m., coinciding with a mandatory staff safety meeting and asked him to provide paperwork from his physician to determine if he were entitled to an accommodation and/or leave under the FMLA. In response, the college received an FMLA form from the doctor stating that the plaintiff had sleep apnea and was required to start his workday at irregular times and at a later time.

The college determined that if it allowed the plaintiff to work from 11 a.m. to 7:30 p.m., he would work unsupervised for three hours at the end of his shift and would miss the safety meeting. Based on the plaintiff's history of performance problems, tardiness and absenteeism, the college determined that he could not work unsupervised. So the college did allow him to start at 11:00 a.m., but to finish at 4:30. He was allowed to work on this schedule for five weeks on a trial basis. At the end of this trial period, the college determined that his late start time was unworkable because he missed the 8:00 a.m. safety meeting. Also, supervision was not often available when the adjusted shift started. Third, even with the later start time, the plaintiff was still late or absent. As a result, the plaintiff was reclassified and put on the night shift, which resulted in a lower pay grade.

Although the court noted that the plaintiff had failed to prove that he was disabled for ADA purposes, the court nonetheless assumed that his sleep apnea was an impairment. Even if the plaintiff were disabled, the court found, he did not prove that the college failed to accommodate him. The college "reasonably determined that based on plaintiff's history of performance problems, which plaintiff does not dispute, he could not work a significant portion of his shift unsupervised." Nor did the plaintiff rebut the college's argument that an essential function of the position was attending the mandatory morning safety and coordination meeting, the court added. For these reasons, the court granted the college's motion for summary judgment and ruled in its favor and against the plaintiff.

Effect of the 2008 amendments to the ADA on the analysis

As noted, the ADA was amended in 2008 (effective January 2009) to broaden the scope of the ADA (Americans with Disabilities Act Amendments Act of 2008, Sep. 25, 2008). The amendments emphasize that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis. The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.

The amendments retain the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, they change the way that these statutory terms should be interpreted in several ways. The amendments also state that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability and clarify that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.[6]

Assuming, however, that the employee is "disabled" for ADA purposes, or that the employer did not wish to dispute that she is, the 2008 amendments do not change the analysis.

FMLA analysis

Whether or not sleep apnea qualifies as a disability for ADA purposes, I don't think there's much doubt or question that it meets the FMLA definition of a serious health condition. The definition of "serious medical condition" in the FMLA is much broader than the definition of "disability" in the ADA. That term – "serious health condition" – is defined in §825.800 of the FMLA regulations (Title 29 Code of Federal Regulations) as "an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in §825.114 or continuing treatment by a health care provider as defined in §825.115."

Section 825.114, in turn, defines inpatient care as an overnight stay in a hospital or other care facility; §825.115 states that "[a] serious health condition involving continuing treatment by a health care provider includes any one or more of" six enumerated situations, the relevant ones here being (a) *Incapacity and treatment*. A period of incapacity of more than three consecutive, full calendar days; (c) *Chronic conditions*. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition; (d) *Permanent or long-term conditions*. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective; and/or (e) *Conditions requiring multiple treatments*. Any period of absence to receive multiple treatments.

Moreover, in *Tapia v. Michaels Stores, Inc.*,[7] the court seemed to recognize sleep apnea as a serious medical condition covered by the FMLA. The plaintiff's doctor diagnosed her with obstructive

sleep apnea. Her medical condition required treatment on a daily basis with supervision and periodic reassessment. On these facts, the employer ended up granting the plaintiff a full 12 weeks of FMLA leave.

However, the issue under the FMLA is not *accommodation* but *leave*: either on an intermittent basis or in blocks. Another FMLA issue may be the adequacy of the medical certification. If the employer has any doubt that its employee's sleep apnea constitutes a serious medical condition then it can demand a second and even third medical opinion.

In the case under discussion, the employee was not requesting any leave. Therefore, the case presented no FMLA issues. If she were, however, the employer could question whether or not her sleep apnea met the definition of "serious medical condition" and could demand certification of the condition from her health care provider.

Intermittent leave or reduced leave schedule

There are two options for intermittent leave. Section 825.202(a) of the FMLA regulations (administered by the Department of Labor) defines "intermittent leave" as "leave taken in separate blocks of time due to a single qualifying reason." It defines a "reduced leave schedule" as "a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday." In either case, under subsection (b), "there must be a medical need for leave and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule."

Under §825.203, "[i]f an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations."

Under §825.204(a) of the regulations, if the employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment, "the employer may require the employee to transfer temporarily, during the period that the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position." Subsection (b) warns that transfer to an alternative position may require compliance with any collective bargaining agreement, other federal law such as the ADA, or state law. Also, under subsection (c), the alternative position must have equivalent pay and benefits, but it does not have to have equivalent duties. The employer may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee's regular job. The employer may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary.

Finally, under subsection (d) of §825.204, there are some limits on what the employer can do:

> An employer may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. For example, a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; an employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location.

SUMMARY AND CONCLUSIONS

In light of the above, therefore:

1. Whether sleep apnea constitutes a "disability" under the ADA is subject to debate.
2. When confronted with a demand for accommodation, the employer may always challenge the employee's premise that her condition constitutes a "disability" under the ADA. The decision whether to challenge or not should be based on practical considerations.
3. If the employer does not wish to contest this issue, then allowing the employee to work a different schedule is a reasonable accommodation under the ADA, provided it does not create an undue hardship for the employer.
4. The employee's sleep apnea probably does meet the definition of a "serious health condition" under the FMLA.
5. While an employee may be entitled to take FMLA leave on an intermittent or reduced leave schedule basis, the employer may also transfer her

to an alternative position with equal pay and benefits.

NOTES

1. Under the FMLA, an eligible employee is entitled to 12 weeks of leave for any one of four reasons – her own serious medical condition; birth of a child; adoption or placement of a child; the serious medical condition of her parent, spouse or child. However, an employee *is not* entitled to 12 weeks of leave *for each reason*. Thus, for example, if the employee in this case had already taken 12 weeks of leave for the birth of a child, she would not be entitled to another 12 weeks for her sleep apnea.
2. However, the EEOC's proposed rules implementing the 2008 amendments to the ADA do list a dozen or so "impairments that will consistently meet the definition of disability" (sleep apnea is not one of them, but deafness, blindness, intellectual disability, missing limbs, mobility impairments, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV, AIDS, MS and MD, depression, bipolar disorder, PTSD, obsessive/compulsive behavior and schizophrenia are all listed).
3. Jones v. AKKO Fastener, Inc., 2010 WL 3365940 (S.D. Ohio 2010).
4. See, for example, Elkins v. North Seattle Community College, 2009 WL 3698516 (W.D. Wash. 2009), discussed above: "As for the alleged failure to accommodate in 2006, the college offered plaintiff an accommodation, an alternate position with a later start time, that was consistent with his physician's statement. *Although plaintiff might have preferred an alternate schedule in his former position, defendants were not required to provide plaintiff with his preferred accommodation. See, e.g.,* Zivkovic v. Southern California Edison Co., 302 F.3d 1080, 1089, 13 A.D. Cas. (BNA) 882, 53 Fed. R. Serv. 3d 1179 (9th Cir. 2002) ("An employer is not obligated to provide an employee the accommodation he requests or prefers, the employer need only provide some reasonable accommodation.") (internal citation and quotation omitted)." Italics added for emphasis.
   What is more, §1630.9(d) of the EEOC ADA regulations states that if an individual rejects a reasonable accommodation, "and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability."
5. *See* the Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act: "An employer or other covered entity is not required to provide an accommodation that will impose an undue hardship on the operation of the employer's or other covered entity's business. The term 'undue hardship' means significant difficulty or expense in, or resulting from, the provision of the accommodation. The 'undue hardship' provision takes into account the financial realities of the particular employer or other covered entity. However, the concept of undue hardship is not limited to financial difficulty. 'Undue hardship' refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business."
6. *See* http://www.eeoc.gov/laws/statutes/adaaa_notice.cfm).
7. Tapia v. Michaels Stores, Inc., 553 F. Supp. 2d 708 (W.D. Tex. 2008).