

Employer Alerts!

By Charles H. Fleischer, Esq.

Cumulative Index, Volume II

A monthly supplement to

EMPLOYER'S SURVIVAL GUIDE – MD / VA / DC Edition

Distributed by EMPLOYERS INFONET, LLC

www.EmployersInfoNet.com

Volume II, No. 1 (June 2001)

Workers' Compensation: the Going-and-Coming Rule, *p. 1*
Maryland Expands Employment Discrimination Protections, *p. 2*
DOL Issues Standardized NMSM for QMCSO's under ERISA, *p. 2*
Tax Treatment of Back Wages, *p. 3*
Supreme Court Clarifies Sexual Harassment Rulings, *p. 4*
Fourth Circuit Says Flu Can Qualify for FMLA, *p. 4*

Volume II, No. 2 (July 2001)

The Computer Fraud and Abuse Act, *p. 1*
Maryland Employers May Now Conduct Drug Tests On-Site, *p. 2*
"Front Pay" Awards in Title VII Suits Not Subject to Damage Caps, *p. 3*
Employer Liability for Unforeseeable OSHA Violations, *p. 3*
Casey Martin Golf Cart Decision May Affect Employers, *p. 4*
New Virginia Legislation Affecting Employers, *p. 5*
Employer Provisions of the New Tax Act, *p. 6*

Volume II, No. 3 (August 2001)

Maryland Rules Tips Are Subject to Garnishment, *p. 1*
Virginia Supreme Court Rejects Non-Compete Covenant as Overbroad, *p. 2*
Contraceptive Coverage and Sex Discrimination, *p. 3*
Disability Harassment, *p. 4*
ADEA Does Not Protect Foreign Nationals Applying Outside U.S., *p. 5*

Government Contractors' New Posting Obligations, *p. 6*
Employee vs. Independent Contractor: Secretary of Labor Loses Overtime Claim, *p. 7*

Volume II, No. 4 (September 2001)

Can Employers Require Direct Deposit of Wages?, *p. 1*
Cash Balance Plans – What's All the Fuss About?, *p. 2*
FMLA's "Equivalent Position" Requirement, *p. 4*
Telecommuting as a Reasonable Accommodation under the ADA, *p. 6*
Temp Agency Liability for Negligence of Temp Worker, *p. 6*
Virginia Weighs in on the Going-and-Coming Rule, *p. 8*

Volume II, No. 5 (October 2001)

Wrongful Termination Update, *p. 1*
Spousal Rights in Pension Plans, *p. 3*
EEOC Changes Policy on Retiree Health Plans, *p. 6*
When is an Employment Action "Adverse" for Title VII Purposes, *p. 6*

Volume II, No. 6 (November 2001)

Job Rights of Employees Called to Active Duty, *p. 1*
SBA Loan Program Helps Businesses Whose Essential Employees Are Called Up, *p. 3*
OSHA's New Record-Keeping and Reporting Requirements, *p. 3*
Employment Cases Pending Before Supreme Court, *p. 4*
D.C. Circuit Deletes Expletive Ruling, *p. 6*
Maryland Court Holds Home Healthcare Registries Liable for Unemployment Insurance, *p. 6*

Volume II, No. 7 (December 2001)

IRS Approves Leave-Based Donation Programs, *p. 1*
EEOC Authorizes Medical Inquiries for Emergency Planning, *p. 2*
Are Bonuses "Wages" under Maryland's Wage and Hour Law?, *p. 3*
Employee Committees and Federal Labor Law, *p. 3*
Security Guard's Sexual Assault – Who's Liable?, *p. 4*
S Corporation Distributions Subject to Employment Taxes, *p. 5*
Maryland's Prevailing Wage Act, *p. 6*
D.C., 4th Circuits Disagree on When Employee Bound by Arbitration Agreement, *p. 7*

Volume II, No. 8 (January 2002)

Right-to-Work Laws, *p. 1*
Employee Benefit Coverage for Domestic Partners, *p. 3*

More on Wages and Treble Damages in Maryland, *p. 5*
California Court Adds New Weapon in War Against Computer Abuse, *p. 6*
FMLA Protects Former Employees, Too!, *p. 7*
Immunity from Liability for Complying with IRS Levy, *p. 8*

Volume II, No. 9 (February 2002)

Supreme Court Limits Disability Discrimination Claims, *p. 1*
EEOC Free to Sue Despite Arbitration Agreement, *p. 3*
Stock Options Threatened with One-Two Punch, *p. 4*
Talking to Attorney as Grounds for Firing, *p. 6*
Labor Law Protections in Non-Union Shops, *p. 6*
IRS Expands Availability of Cash Basis Accounting, *p. 8*
When is Harassment “Sexual”?, *p. 8*

Volume II, No. 10 (March 2002)

When Your Employee Takes the Fifth, *p. 1*
A Noisy Noise Annoys an Employee, *p. 3*
Employer’s Duty to Bargain, *p. 4*
NLRB Jurisdiction Over Religious Institutions, *p. 6*
Social Security (F.I.C.A.) Withholding Changes for 2002, *p. 7*
Mileage Rate and Per Diem Travel Expense Changes for 2002, *p. 7*

Volume II, No. 11 (April 2002)

Sexual Harassment by Non-Employees, *p. 1*
Employer Liable After Canceling Health Plan, *p. 2*
ADA Claimant Has Duty to Follow Doctor’s Advice, *p. 4*
Firing Based on Unsubstantiated Charges of Wrongdoing Not Abusive, *p. 6*
Workers’ Comp Coverage of Business Owners, *p. 7*
Arbitration Dispute Lives On, *p. 8*

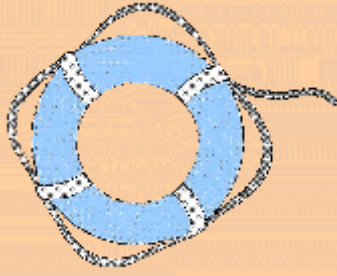
Volume II, No. 12 (May 2002)

Supreme Court Update, *p. 1*
Salts, Testers, and Backpay Awards, *p. 3*
Recent Cases on Pregnancy Discrimination, *p. 5*
Virginia Supreme Court Limits Negligent Hiring and Wrongful Termination Claims, *p. 6*
Like Father, Like Son – ADA Protects Kin from Retaliation, *p. 8*
Burden of Proof in MOSHA Cases, *p. 9*

EMPLOYER'S SURVIVAL GUIDE Cross-Reference Table

ESG §	<i>Employer Alerts! Issue</i>				
1.01	Vol. II, No. 3, p. 7 Vol. II, No. 4, p. 6 Vol. II, No. 7, p. 4 Vol. II, No. 10, p. 3 Vol. II, No. 12, p. 6	8.02	Vol. II, No. 1, p. 3	12.03	Vol. II, No. 1, p. 2 Vol. II, No. 1, p. 4 Vol. II, No. 9, p. 8 Vol. II, No. 11, p. 1
1.03	Vol. II, No. 5, p. 1 Vol. II, No. 9, p. 6 Vol. II, No. 11, p. 6 Vol. II, No. 12, p. 6	8.03	Vol. II, No. 6, p. 6	13.03	Vol. II, No. 7, p. 2
2.02	Vol. II, No. 12, p. 3	9.02	Vol. II, No. 2, p. 6 Vol. II, No. 4, p. 2	13.07	Vol. II, No. 2, p. 2
3.04	Vol. II, No. 10, p. 1	9.03	Vol. II, No. 1, p. 2 Vol. II, No. 5, p. 3 Vol. II, No. 11, p. 2	14.01	Vol. II, No. 2, p. 1 Vol. II, No. 3, p. 2 Vol. II, No. 8, p. 6
4.02	Vol. II, No. 3, p. 7	9.04	Vol. II, No. 8, p. 3 Vol. II, No. 9, p. 4	15.01	Vol. II, No. 12, p. 1
4.03	Vol. II, No. 4, p. 1 Vol. II, No. 7, p. 3 Vol. II, No. 8, p. 5	9.05	Vol. II, No. 2, p. 6	15.02	Vol. II, No. 3, p. 5
5.01	Vol. II, No. 7, p. 1 Vol. II, No. 9, p. 8	10.03	Vol. II, No. 6, p. 3	16.01	Vol. II, No. 3, p. 1
5.02	Vol. II, No. 1, p. 3 Vol. II, No. 2, p. 5 Vol. II, No. 3, p. 7 Vol. II, No. 7, p. 5 Vol. II, No. 10, p. 7	10.04	Vol. II, No. 2, p. 5	16.03	Vol. II, No. 5, p. 3
6.02	Vol. II, No. 1, p. 4 Vol. II, No. 4, p. 4 Vol. II, No. 6, p. 4 Vol. II, No. 12, p. 1	10.04	Vol. II, No. 2, p. 3 Vol. II, No. 12, p. 9	16.04	Vol. II, No. 8, p. 8
6.04	Vol. II, No. 6, p. 1 Vol. II, No. 6, p. 3	11.01	Vol. II, No. 2, p. 3 Vol. II, No. 5, p. 6 Vol. II, No. 8, p. 1 Vol. II, No. 12, p. 3	17.01	Vol. II, No. 6, p. 4
7.01	Vol. II, No. 1, p. 1 Vol. II, No. 10, p. 3	11.02	Vol. II, No. 3, p. 4 Vol. II, No. 3, p. 5 Vol. II, No. 5, p. 6	17.04	Vol. II, No. 3, p. 6 Vol. II, No. 8, p. 1
7.02	Vol. II, No. 2, p. 5 Vol. II, No. 4, p. 8 Vol. II, No. 11, p. 7	11.03	Vol. II, No. 2, p. 4 Vol. II, No. 3, p. 4 Vol. II, No. 4, p. 6 Vol. II, No. 6, p. 4 Vol. II, No. 7, p. 2 Vol. II, No. 9, p. 1 Vol. II, No. 9, p. 3 Vol. II, No. 11, p. 4 Vol. II, No. 12, p. 8	17.05	Vol. II, No. 7, p. 6 Vol. II, No. 10, p. 1
		11.05	Vol. II, No. 1, p. 2	18.02	Vol. II, No. 4, p. 6
		12.02	Vol. II, No. 3, p. 3 Vol. II, No. 12, p. 5	19.01	Vol. II, No. 6, p. 4 Vol. II, No. 7, p. 7 Vol. II, No. 9, p. 3 Vol. II, No. 11, p. 8
				19.02	Vol. II, No. 8, p. 3
				19.06	Vol. II, No. 4, p. 6 Vol. II, No. 7, p. 4 Vol. II, No. 10, p. 3 Vol. II, No. 12, p. 6

19.08	Vol. II, No. 3, p. 6 Vol. II, No. 6, p. 4 Vol. II, No. 6, p. 6 Vol. II, No. 7, p. 3 Vol. II, No. 8, p. 1 Vol. II, No. 9, p. 6 Vol. II, No. 10, p. 4 Vol. II, No. 10, p. 6 Vol. II, No. 12, p. 1 Vol. II, No. 12, p. 3
-------	--



Employer Alerts!

By Charles H. Fleischer, Esq.

Volume II, No. 1 - June 2001

A monthly supplement to

EMPLOYER'S SURVIVAL GUIDE – MD / VA / DC Edition

Distributed by EMPLOYERS INFONET, LLC

www.EmployersInfoNet.com

Workers' Compensation: the Going-and-Coming Rule

Workers' compensation covers employees who sustain injuries "arising out of and in the course of employment." In general, injuries sustained while an employee is going to or coming from work are not covered. The reason is that when an employee is merely commuting, he is not performing any services for his employer and he is not exposed to any hazards associated with his job. The hazards he faces while commuting are the same as those faced by the public generally.

A recent Maryland case shows how this rule applies.

John Young worked as a shipping manager for Globe Screen and Printing Corporation. His typical workday began in the early morning hours as an accommodation to him so that he could return home by early afternoon to care for his sick mother. Young walked to work and did not use the parking lot that Globe provided for employees near its building in downtown Baltimore.

On the morning of May 18, 1998, Young left home

at 2:20 a.m. When he was about 15 feet from the employees' entrance to Globe's building, while on a public sidewalk, Young was attacked by several men. He suffered multiple stab wounds.

Young filed a workers' compensation claim for his injuries, arguing that his situation fell within exceptions to the going-and-coming rule. One exception, known as the "premises" exception, applies when the employee is traveling along or across a public road or other necessary route between two portions of the employer's premises. Here, however, Young was not traveling between Globe's parking lot and its building, since he had walked to work and had not yet arrived at any premises owned by Globe.

Another exception to the going-and-coming rule is the "proximity" or "special hazard" exception. Under this exception, an employee can recover workers' comp benefits if his injury results from exposure to an unusual hazard located near the employer's premises or along an access route to the premises. The hazard must be one that the public generally is not exposed to, but that the employee is necessarily exposed to in getting to work.

The Maryland Court of Special Appeals (Maryland's intermediate appellate court) ruled that this

exception did not apply either, because there was no evidence that Globe's location had a greater crime problem than any other location in the city. Nor was there evidence that Young was in any greater danger than other members of the public walking on any sidewalk in Baltimore.

Statutory reference. Md. Code, L&E § 9-101.

Case reference. *Globe Screen Printing Corp. v. Young*, 2001 WL 418928 (Md.App. No. 117, decided April 25, 2001).

EMPLOYER'S SURVIVAL GUIDE reference. 7.02.

Maryland Expands Employment Discrimination Protections

The Maryland Legislature has passed, and the Governor has signed, two bills significantly expanding discrimination protections for Maryland employees. House Bill 18, signed by the Governor on April 24, prohibits employers from using genetic information in making employment decisions. And Senate Bill 205, signed on May 15, adds sexual orientation to the list of prohibited employment criteria. Both bills become effective October 1.

Genetics. Following Montgomery County's lead (see "Discrimination on the Basis of Genetics," *Employer Alerts!*, Feb. 2001, p. 3), the State has now made it illegal for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual ... because of such individual's ... genetic information." The term "genetic information" is defined as

information about chromosomes, genes, gene products, or inherited characteristics that may derive from an individual or a family member [which is]

obtained for diagnostic purposes ... at a time when the individual to whom the information relates is asymptomatic

Excluded from the definition are routine physical measurements, commonly used chemical, blood and urine analyses, drug tests, and tests for HIV.

Neither Virginia nor District of Columbia law contains any provision regarding genetics.

Sexual Orientation. Senate Bill 205, prohibits discrimination on the basis of sexual orientation, defined as "identification of an individual as to male or female homosexuality, heterosexuality, or bisexuality." The Bill exempts religious organizations from its coverage.

The District's Human Rights Act has long prohibited discrimination on the basis of sexual orientation. Neither Federal nor Virginia law contains a similar provision. See "Sexual Orientation Discrimination under Title VII," *Employer Alerts!*, April 2001, p. 4.

Statutory reference. Md. Code, Art. 49B, § 14.

EMPLOYER'S SURVIVAL GUIDE references. 11.05; 12.03.

DOL Issues Standardized NMSN for QMCSO's under ERISA

Translation: The U.S. Department of Labor, acting pursuant to the Employee Retirement Income Security Act, has issued a standardized National Medical Support Notice form to be used by states as a means of enforcing Qualified Medical Child Support Orders.

An employer-sponsored group health plan that is subject to ERISA (most are), must provide coverage to a participating employee's dependent child *if* ordered to

do so by a Qualified Medical Child Support Order – a state court or administrative agency order issued in connection with a divorce or child support proceeding – and *if* the child would otherwise be eligible for coverage. Employers can be ordered to withhold premiums from an employee's pay to cover the cost of such coverage, unless the employer normally provides such coverage at its own expense. See "Recent Developments in Federal Regulation of Group Health Insurance Plans," *Employer Alerts!*, Jan. 2001, p. 4. Group plans must also have a procedure for determining whether a particular court or agency order is in fact a QMCSO.

By developing a standardized set of forms, the Department of Labor hopes to reduce the burden on group health plans when attempting to determine whether a particular medical support order is or is not qualified under ERISA. State agencies involved in the process – known as "TV-D agencies" – are required to use the forms. The NMSN form, along with related forms and instructions, are available from DOL's website, <http://www.dol.gov/dol/>.

Statutory reference. 29 U.S.C. § 1001.

Regulatory reference. 29 C.F.R. § 2590.609.

EMPLOYER'S SURVIVAL GUIDE reference. 9.03.

Tax Treatment of Back Wages

Suppose that, for whatever reason, you fail to pay your employee the full amount of wages due him for a particular year. He sues or starts an arbitration proceeding against you and eventually, several years later, the matter gets resolved. You then write him a check. But do you treat the wages as paid in the year they should have been paid, or in the year they were actually paid? The answer can make a big difference in

terms of amount of FICA and FUTA taxes owed the government.

The Major League Baseball Players Association filed a grievance against several major league ball clubs over players' free agency rights. The dispute was settled and in 1994 the Cleveland Indians Baseball Company, among other clubs, paid a number of its former players back wages in excess of \$2 million. The payments related to wages due in 1986 and 1987.

The additional \$2 million in wage payments would have generated no additional FICA and FUTA tax if 1986 and 1987 tax laws were used, since the players in question had already received wage payments in excess of the then-applicable FICA and FUTA ceilings. On the other hand, if 1994 tax laws applied, taxes well in excess of \$100,000 would be due.

The Supreme Court unanimously sided with the Internal Revenue Service's long-standing position that wages must be taxed according to the year they are in fact paid, regardless of when they should have been paid. According to the Court, this not only simplifies administration of the employment tax laws, it is also consistent with the rules applicable for income taxes.

The Court acknowledged that its ruling could give employers an opportunity to manipulate the tax impact of its wage payments. But the Court said this concern was overridden by concerns for simplicity in administration and deference due the IRS's long-standing position.

Case reference. *United States v. Cleveland Indians Baseball Co.*, 532 U.S. ____ (No. 00-203, decided April 17, 2001).

EMPLOYER'S SURVIVAL GUIDE references. 5.02; 8.02.

Supreme Court Clarifies Sexual Harassment Rulings

Title VII of the federal Civil Rights Act prohibits sexual harassment only if the harassment is so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment. See "Defending Sexual Harassment Claims," *Employer Alerts!*, April 2001, p. 5. Title VII also prohibits retaliation against persons who exercise their Title VII rights.

Sometimes it may be difficult to decide whether particular conduct is so severe or pervasive as to violate Title VII. But, according to the Supreme Court, the conduct that Shirley Breeden complained about didn't come close.

Breeden worked for a public school system in Nevada. One of her duties was to screen applicants for jobs in the school system. On one particular occasion, she participated in a meeting with her supervisor (a male) and another male employee to review a series of applications. A psychological evaluation for one of the applicants disclosed that the applicant once commented to a co-worker: "I hear making love to you is like making love to the Grand Canyon." Breeden's supervisor read the comment aloud, then looked at Breeden as said, "I don't know what that means." The other male employee then said, "Well, I'll tell you later." Both men then chuckled.

Breeden complained about the incident. Later she was transferred to another position and she then claimed that the transfer was punishment for her complaint, amounting to illegal retaliation.

In considering Breeden's claim, the Supreme Court relied on prior cases to the effect that simple teasing, offhand comments, and isolated incidents (unless extremely serious) do not amount to discriminatory changes in the terms and conditions of employment.

Measured by that standard, the Court said that the single "Grand Canyon" incident could not remotely be considered extremely serious. Furthermore, said the Court, no reasonable person could have believed that the incident violated Title VII, so that Breeden's retaliation claim necessarily fails as well.

Statutory reference. 42 U.S.C. § 2000e (Title VII).

Case reference. *Clark County School District v. Breeden*, 532 U.S. ____ (No. 00-866, decided April 23, 2001).

EMPLOYER'S SURVIVAL GUIDE reference. 12.03.

Fourth Circuit Says Flu Can Qualify for FMLA Leave

The Family and Medical Leave Act requires covered employers to grant up to 12 weeks of unpaid leave to an employee who has a "serious health condition that makes the employee unable to perform the functions of the position of such employee" or who needs to care for spouse, child or parent who has a "serious health condition." (FMLA also applies when an employee needs leave to care for a newborn or adopted child.)

The Act defines "serious health condition" as an illness, injury, impairment, or physical or mental condition that involves either

- ! inpatient care in a hospital, hospice, or residential medical care facility; or
- ! continuing treatment by a health care provider.

Department of Labor regulations expand on this definition. According to DOL regs, in order for a health condition to qualify as "serious" and involve "continuing

treatment” the employee must be incapacitated (unable to work) for “more than three consecutive calendar days” and the condition must involve “treatment two or more times by a health care provider.” “Treatment” is broadly defined to include “diagnostic examinations to determine if a serious health condition exists and evaluations of the condition” as well as the administering of medication or other actions aimed at curing the condition. DOL regs go on to say:

Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.

Kimberly Miller, who was employed at an AT&T facility in West Virginia, had a history of poor attendance. At the time of the events in question she was on probation, having received a final warning letter from AT&T that her next unauthorized absence could result in dismissal. While that letter was outstanding, she took four days off suffering from the flu. During that time off, she visited her physician who, in addition to diagnosing her influenza, also noted an abnormal blood count. After further blood tests on two additional doctor visits, the count had returned to normal.

Miller requested FMLA leave for the four-day absence. Had that request been granted, Miller’s absences could not have been treated as unauthorized and no discipline could have been imposed. However, AT&T refused to grant FMLA leave and it fired Miller.

In Miller’s subsequent suit against AT&T for back pay, AT&T argued that, under DOL regs, flu can never qualify as a serious health condition justifying FMLA leave. The Fourth Circuit, disagreed, ruling that the regulations do not exclude flu per se. Rather, the regs only mention flu as a condition that *ordinarily* does not qualify as serious. However, if an employee meets the two-pronged test of incapacity for more than three days and treatment two or more times by a health care provider, then the condition – even if it is only the flu – qualifies as “serious” for FMLA purposes.

AT&T next argued that Miller’s doctor visits for blood tests did not amount to “treatment” but were only to monitor Miller’s condition. The Fourth Circuit disagreed with this argument as well, ruling that the Department of Labor acted within its authority in defining the term “treatment” to include evaluations. That broader definition said the Court, is consistent with the

purpose of FMLA ... to balance the demands of the workplace with the needs of employees to take leave for eligible medical conditions and compelling family reasons.

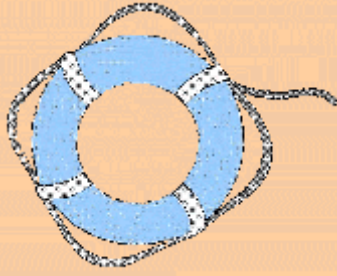
Statutory reference. 29 U.S.C. § 2601.

Regulatory reference. 29 C.F.R. § 825.114.

Case reference. *Miller v. AT&T Corp.*, 2001 WL 475934 (No. 00-1277, decided May 7, 2001).

EMPLOYER’S SURVIVAL GUIDE reference. 6.02.

Employer Alerts! is published monthly as a free supplement to **EMPLOYER'S SURVIVAL GUIDE – MD/VA/DC Edition**, ISBN 0-9703059-0-7. **Employer Alerts!** is also available by e-mail subscription for \$36.00 per year. For further information, contact the publisher, EMPLOYERS INFONET, LLC at 56 Crescent Road, Greenbelt, MD 20770, telephone (301) 441-3809 or <http://www.EmployersInfoNet.com>. Copyright © 2001 Charles H. Fleischer. All rights reserved. This publication may not be reproduced in whole or in part without the express written permission of the author. While every attempt has been made to provide accurate, authoritative and current information regarding the subject matter covered, this publication is for general information only and is not intended as legal or other professional advice. The reader should consult an attorney, accountant, or other appropriate professional regarding specific questions or problems. Neither the author nor the publisher is liable for any errors or omissions.



Employer Alerts!

By Charles H. Fleischer, Esq.

Volume II, No. 2 - July 2001

A monthly supplement to

EMPLOYER'S SURVIVAL GUIDE – MD / VA / DC Edition

Distributed by EMPLOYERS INFONET, LLC

www.EmployersInfoNet.com

The Computer Fraud and Abuse Act

The Computer Fraud and Abuse Act (CRAA) is a potentially powerful weapon in an employer's hands. First enacted in 1984, the CRAA only protected computers used by the U.S. government and by financial institutions. Amendments in 1996 expanded the CRAA's coverage to computers used in interstate and foreign commerce or communications – virtually any computer that is connected to the Internet.

Under the CRAA, it is criminal for anyone to access a protected computer without authority or to exceed authorized access. Trafficking in passwords or similar information is also a crime if done with intent to defraud. Persons or companies injured by violations of the CRAA can sue in civil court for monetary damages.

Employees usually have permission to access their company's computer system, but that access is frequently limited in some way or another. For example, a data entry clerk's password may restrict him to entering a particular type of data in a particular program, but not allow him to change previously entered data or delete records. And of course his password will not allow him

access to company financial data, payroll records, health insurance claims and the like. What makes the CRAA so powerful is that when the data entry clerk takes a peek at his boss's personnel file using an overheard password, he violates the CRAA.

What about a high level employee who has access to the entire computer system? Is there any way he can be charged with a CRAA violation?

A recent federal case from the state of Washington involved two competing companies in the self-storage business. One of them, Shurgood Storage Centers, had developed a business plan and operational methods that made the company an industry leader. Eric Leland, a regional manager for Shurgood, had full access to Shurgood's confidential information.

In 1999, Safeguard Self Storage, a new company, approached Leland and offered him a job. Leland accepted, but while still working for Shurgood he sent e-mails to Safeguard containing confidential information belonging to Shurgood, all without Shurgood's knowledge or approval. When Shurgood learned of this, it sued under the CRAA.

One of the defenses raised to the suit was that

Leland was authorized to access the confidential information he sent to Safeguard, so there could be no CRAA violation. The court disagreed. It said that Leland's authorization to access Shurgood information ended when he started acting on behalf of Safeguard and his transmittal of confidential information therefore violated the CRAA.

In another recent case, this one from a federal appeals court in California, an employee of an internet service provider (ISP) was responsible for installing and maintaining the ISP's computers. Dissatisfied with his job, he quit. He then began accessing the company's computers. On one of his intrusions he changed all the administrative passwords, he deleted the company's entire billing system, and he erased two other internal databases.

The ISP incurred almost \$10,000 in labor, consulting and software costs to fix the damage. When the ISP identified the former employee as the intruder, it had him arrested.

Charged with violating the CRAA, the former employee was convicted and sentenced to three years' probation and 180 days in community confinement, plus ordered to pay full restitution for the costs the ISP incurred. The conviction and sentencing were upheld on appeal.

For all those employees and former employees who think that messing with the company's computer is a good idea, take note: If you get caught, you will pay dearly.

Statutory reference. 18 U.S.C. § 1030.

Case references. *Shurgard Storage Centers, Inc. v. Safeguard Self Storage, Inc.*, 119 F.Supp.2d 1121 (W.D.Wash. 2000); *United States v. Middleton*, 231 F.3d 1207 (9th Cir. 2000).

EMPLOYER'S SURVIVAL GUIDE reference. 14.01.

Maryland Employers May Now Conduct Drug Tests On-Site

Maryland employers who wish to test their applicants and employees for substance abuse have long had to follow complicated and expensive procedures, including use of an outside laboratory. See "Drug and Alcohol Testing," *Employer Alerts!*, Dec. 2000, p. 4. That burden has now been eased a bit.

Effective October 1, 2001, preliminary drug screens of new applicants (but *not* existing employees) may be performed on-site by the employer himself, using portable test devices. The devices must comply with federal Food and Drug Administration guidelines. Tests may be performed on blood, urine or hair, so long as cut-off levels (concentrations of the substances being tested for that trigger a positive result) meet federal substance abuse guidelines. The Department of Health and Mental Hygiene is to adopt additional procedural regulations.

Among the requirements applicable to on-site employer drug testing are that the employer must register with the Department of Health and Mental Hygiene and must use trained personnel to administer and interpret the tests. If a test proves positive, the specimen must be submitted to a certified laboratory for retesting. A medical review officer (a physician knowledgeable about drug abuse and testing) must review the results after the laboratory test is completed.

According to recent newspaper reports, in other states that allow on-site testing upwards of 95% of all applicants pass and can start work immediately.

The new law does not supersede collective bargaining agreements. So any employer who has a

union contract not to do testing, or to limit the testing in certain ways, remains bound by that contract.

Statutory reference. Md. Code, HG § 17-214.

EMPLOYER'S SURVIVAL GUIDE reference. 13.07.

“Front Pay” Awards in Title VII Suits Not Subject to Damage Caps

In an 8-to-0 decision (Justice O'Connor not participating), the Supreme Court has ruled that awards of “front pay” in discrimination suits are not subject to Title VII's damage caps.

“Front pay” is the pay an employee would have earned in the future but for a discriminatory termination of employment. It is awarded in lieu of ordering reinstatement where reinstatement would be impractical or impossible. “Back pay” is pay that the employee would have earned between the date his employment terminated and the date of the court decision that the termination was illegal.

Under Title VII of the federal Civil Rights Act, as originally passed in 1964, the courts were only authorized to award remedies such as injunctions, reinstatement and back pay. Amendments to Title VII in 1972 expanded the available remedies to include front pay in lieu of reinstatement. Additional amendments in 1991 authorized jury trials and awards of non-pecuniary compensatory damages (such as damages for pain and suffering and for emotional distress) and punitive damages, subject to certain caps.

The caps depend on how many employees the particular employer has:

! Between 15 and 100 employees, \$50,000;

! Between 101 and 200 employees, \$100,000;

! Between 201 and 500 employees, \$200,000; and

! More than 500 employees, \$300,000.

In the recent Supreme Court case, Sharon Pollard sued du Pont, her former employer, alleging sexual harassment by her co-workers in violation of Title VII. She won at trial and was awarded \$107,364 in back pay and benefits, \$252,997 in attorneys' fees and \$300,000 compensatory damages. The trial court said in its opinion that it would have awarded her additional front pay, but did not do so because it believed front pay was subject to the \$300,000 cap.

The Supreme Court disagreed. It ruled that front pay is not an element of compensatory damages and therefore the cap was inapplicable. The Court sent Pollard back to the trial court to collect additional amounts from du Pont.

Statutory reference. 42 U.S.C. §§ 1981a, 2000e.

Case reference. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. ____ (2001).

EMPLOYER'S SURVIVAL GUIDE reference. 11.01.

Employer Liability for Unforeseeable OSHA Violations

Suppose an employer establishes a detailed safety program for its employees, which requires strict compliance with OSHA standards. New employees undergo mandatory safety training and get updated training throughout their employment. The employer instructs supervisory employees to enforce safety requirements at job sites and the employer frequently inspects job sites to assure compliance.

Suppose also that despite all the employer's efforts, at one particular job site – a construction project where a new roof is being installed – the foreman fails to install required fall protection devices. And suppose finally that an OSHA inspector happens to observe the violation and cites the employer. Is the employer liable?

No, says the Maryland Court of Special Appeals in a recent decision involving MOSHA (Maryland's version of the federal Occupational Safety and Health Act). According to the court, MOSHA does not impose strict liability on an employer or require an employer to act as an insurer when it comes to safety compliance. Instead, MOSHA only intends to eliminate "preventable hazards." So in determining whether the employer should be cited, the proper inquiry is whether the employer made appropriate efforts to prevent the violation, not simply whether a violation occurred.

The court went on to say that where there is conflicting evidence over whether the employer had an adequate safety program, the burden of proving a violation is on the Commissioner of Labor and Industry. In other words, the Commissioner must prove that the employer's safety program was inadequate; the Commissioner can't just prove a violation and shift the burden to the employer to prove the adequacy of its safety program.

Statutory references. 29 U.S.C. § 651; Md. Code, L&E § 5-101.

Case references. *Maryland Comm'r of Labor and Ind. v. Cole Roofing Co.*, 2001 WL 576485 (Md.App. No. 2025 decided May 30, 2001); *L.R. Wilson & Sons, Inc. v. OSHRC*, 134 F.3d 1235 (4th Cir. ____).

EMPLOYER'S SURVIVAL GUIDE reference. 10.04.

Casey Martin Golf Cart Decision May Affect Employers

When the Supreme Court ruled that the PGA could not bar Casey Martin from competing because he needed to use a golf cart, it may have expanded the ADA's impact on employers as well.

The Americans with Disabilities Act (ADA) is divided into three major sections. Title I prohibits discrimination in employment. Title II deals with the availability of services by state and local governments. And Title III covers access to places of public accommodation, such as office buildings, stores, hotels, and recreational facilities.

While these sections are usually thought of as distinct, they can overlap in certain circumstances. For example, under Title I an employer must make reasonable accommodation for a disabled employee so long as the employee is able to perform the essential functions of the job. At the same time, if the employer invites members of the public to his place of business, he must also meet Title III accessibility requirements, such as having wheelchair ramps.

But in one area at least, the ADA was thought to make a clear distinction: An employer's Title I reasonable accommodation requirement was strictly limited to those individuals with whom he had a true employer-employee relationship. Neither the reasonable accommodation requirement of Title I nor the accessibility requirements of Title III were thought to cover independent contractors or others with whom the employer might have incidental contact.

After the Casey Martin decision, the distinctions are not so clear.

In the Martin case the issue was whether, because of Martin's disability, he should be allowed to use a golf cart in tournament play despite a PGA rule to the contrary.

The case came under Title III of the ADA since golf courses are places of public accommodation. The PGA, while conceding the public accommodation aspect of the courses where it conducted its tournaments, argued that its Title III obligations are only owed to “clients and customers” of the tournaments, that is, to those who attend as spectators. Martin, however, was not a client or customer; instead, he was providing the entertainment, much like an actor in a theater production.

Therefore, according to the PGA, Martin was not covered by Title III because he was on the “provider” side of the transaction, not the consumer side. If Martin was subject to the ADA at all, argued the PGA, it would have to be under Title I – the employment section. But since Martin was an independent contractor, not an employee of the PGA, there could be no ADA violation in prohibiting Martin from using a golf cart and effectively excluding him from the tournament.

The Supreme Court didn’t buy the PGA’s argument. It said even assuming (without necessarily agreeing) that Title III is limited to clients and customers, Martin fell within that group. Although he was not a spectator, he fell within another group of PGA clients and customers – those who sought to compete in the tournament.

Justice Scalia issued a highly critical and biting dissent. In addition to faulting the majority for getting unnecessarily involved in the arbitrary rules that are the hallmark of any sport (in this case, the rule that players must walk during the final competition), Scalia specifically criticized the expansive reading given Title III.

According to Scalia, “painters, electricians, and other independent workers whose services are contracted for from time to time” will now be entitled to ADA protections. For that matter, warned Scalia, even employers who are exempt from Title I (because they have fewer than 15 employees) may now owe Title I obligations to their employees.

Whether Justice Scalia’s fears will prove real remains to be seen. In the meantime, employers need to think twice about whether the ADA applies to their independent contractors

Statutory reference. 42 U.S.C. § 12101.

Case reference. *PGA Tour, Inc. v. Martin*, 532 U.S. ___ (2001).

EMPLOYER’S SURVIVAL GUIDE reference. 11.03.

New Virginia Legislation Affecting Employers

The following laws were enacted by the Virginia General Assembly during its 2001 legislative session:

Retaliation for safety violations. Employees who believe they have been discharged or otherwise discriminated against for reporting a safety violation now have 60 days (up from 30) to file a complaint with the Commissioner of Labor and Industry. The Commissioner is then obligated to investigate and, if he determines that illegal retaliation has occurred, to attempt to conciliate the matter. If a voluntary agreement cannot be obtained, the Commissioner is authorized to file suit against the employer for reinstatement, back pay, or other appropriate relief.

Tax withholding. Effective for annual wage withholding returns filed with the Tax Commissioner after December 31, 2001, employers with 250 or more Virginia employees must file the return electronically.

Workers’ Compensation premiums. Employers who institute and maintain a drug-free workplace program are entitled to a 5% discount on their workers’ compensation insurance premiums.

Statutory references. Va. Code § 40.1-51.2:2; § 58.1-478; § 65-2.813.2.

EMPLOYER'S SURVIVAL GUIDE references. 10.04; 5.02; 7.02.

Employer Provisions of the New Tax Act

President Bush's tax initiative, known as the "Economic Growth and Tax Relief Reconciliation Act of 2001," contains a number of provisions of interest to employers. Among them are –

Child care tax credit. For taxable years beginning after December 31, 2001, employers may claim a credit equal to 25% of expenses to acquire, construct, rehabilitate or expand property to be used as an employee child care facility and a credit equal to 10% of expenses for resource and referral services. In order for a facility to qualify for the credit, the employer must have an open enrollment policy for his employees, and the employer cannot discriminate in favor of highly compensated

employees. The facility must meet all applicable regulatory and licensing requirements.

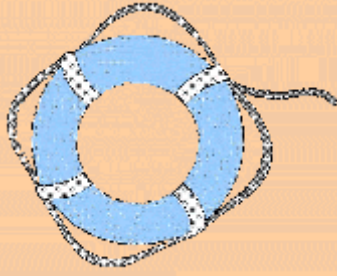
Exclusion for educational assistance. Under present law, certain educational expenses paid for by an employer for its employees are deductible by the employer and are excludible from the employee's gross income. Present law provides that the exclusion does not cover graduate courses, and with respect to undergraduate courses the exclusion expires after December 31, 2001. The new law extends the exclusion to graduate courses and it makes the exclusion for both graduate and undergraduate courses permanent.

Pension plans. The new law significantly increases the amounts that can be contributed to qualified pension plans.

Statutory references. 26 U.S.C. § 45D; § 127; §§ 401-457.

EMPLOYER'S SURVIVAL GUIDE references. 9.02; 9.05.

Employer Alerts! is published monthly as a free supplement to **EMPLOYER'S SURVIVAL GUIDE – MD/VA/DC Edition**, ISBN 0-9703059-0-7. *Employer Alerts!* is also available by e-mail subscription for \$36.00 per year. For further information, contact the publisher, EMPLOYERS INFONET, LLC at 56 Crescent Road, Greenbelt, MD 20770, telephone (301) 441-3809 or <http://www.EmployersInfoNet.com>. Copyright © 2001 Charles H. Fleischer. All rights reserved. This publication may not be reproduced in whole or in part without the express written permission of the author. While every attempt has been made to provide accurate, authoritative and current information regarding the subject matter covered, this publication is for general information only and is not intended as legal or other professional advice. The reader should consult an attorney, accountant, or other appropriate professional regarding specific questions or problems. Neither the author nor the publisher is liable for any errors or omissions.



Employer Alerts!

By Charles H. Fleischer, Esq.

Volume II, No. 3 - August 2001

A monthly supplement to

EMPLOYER'S SURVIVAL GUIDE – MD / VA / DC Edition

Distributed by EMPLOYERS INFONET, LLC

www.EmployersInfoNet.com

Maryland Rules Tips Are Subject to Garnishment

Laura Shanks obtained a \$6,000 judgment against Susan Dolle in Baltimore County court. Shanks then had a garnishment writ issued to Kibby's Restaurant and Lounge, where Dolle worked, in an effort to collect the judgment. Kibby's responded that there were no "attachable wages" subject to garnishment because Dolle's gross wages averaged only about \$100 per week – an amount below the garnishment exemption threshold.

Kibby's calculation ignored tips that Dolle received from customers, which averaged an additional \$100 or more per week. Had Kibby's included tips, Dolle's attachable wages would have been above the exemption threshold and therefore subject to garnishment. Of course, Kibby's could not ignore tips for other purposes, such as federal and state income tax withholding and F.I.C.A., because the law requires employers to take tips into consideration for those purposes. Thus the question facing the Maryland Court of Appeals was whether tips constitute "attachable wages" under Maryland's garnishment law.

The court ruled that tips *do* count in calculating the amount of wages subject to garnishment. In reaching that conclusion, the court pointed out that under both federal and state wage and hour laws, employers may count tips, at least in part, in satisfying their minimum wage requirement. Tips are also considered under unemployment and workers' compensation laws, as well as for federal and state income tax purposes.

The Court did recognize that even though an employer may have to count tips, the tips themselves are usually paid directly from a customer to the employee and don't come into the employer's possession. So even though the garnishment *computation* must include tips, the amount the employer must actually *pay* the garnishee is limited to wages owed by the employer to the employee (less any allowable or required deductions, such as income tax withholding). In other words, the employer has no duty to insist that tips be paid over to the employer for purposes of satisfying a garnishment writ.

Statutory reference. Md. Code, CL § 15-601.

Case reference. *Shanks v. Lowe*, ___ A.2d ___ (Md. No. 103 decided June 25, 2001).

EMPLOYER'S SURVIVAL GUIDE reference. 16.01.

Virginia Supreme Court Rejects Non-Compete Covenant as Overbroad

Non-compete covenants – agreements that restrict the work a former employee may take after leaving his current employer – are disfavored because they interfere with an employee's ability to earn a living. While courts will enforce non-compete covenants if they are reasonable, the burden is on the employer to show reasonableness. Usually that means the covenant must be limited as to time, it must be limited as to geographic area, and it cannot go beyond protecting the employer's legitimate business interests.

In a recent Virginia case, the employer could not meet his burden of proving reasonableness. The employer in that case, Motion Control Systems, Inc. (MCS), manufactured custom-made, high performance brushless motors, motor drives and electronic controls. Its processes and customer lists were treated as confidential, as was information on use of the motors in specific applications.

One of MCS's employees, Gregory East, rose through the company ranks to become Quality and Reliability Engineering Manager. In that position, he had access to a range of confidential information.

Concerned with protecting its trade secrets, MCS asked all its employees, including East, to sign a confidentiality and non-competition agreement. The agreement provided that –

for a period of two years after termination of employment with the Company in any manner whether with or without cause, the Employee will not within a one hundred (100) mile radius of the

Company's principal office in Dublin, Virginia, directly or indirectly, own, manage, operate, control, be employed by, participate in, or be associated in any manner with the ownership, management, operation or control of any business similar to the type of business conducted by the Company at the time of termination.

The term "business similar to the type of business conducted by the Company" was defined to include "any business that designs, manufactures, sells or distributes motors, motor drives or motor controls."

A year after signing the agreement, East quit and went to work for Litton Systems in Blacksburg, Virginia. Litton made brushless motors at its Blacksburg plant.

MCS sued East to enforce the confidentiality and non-competition agreement. East responded that the agreement was overbroad and therefore should not be enforced by the court.

For reasons not discussed in its opinion, the Virginia Supreme Court said that the two-year/100-mile provision of the agreement was not in dispute. The only question was whether the definition of "business similar to the type of business conducted by the Company" went beyond what MCS reasonably needed to protect itself.

In answering that question, the Court first discussed other cases involving non-compete covenants that restricted former employees from working in any business "similar to" the former employer's business. Those covenants, said the Court, were fine.

But the covenant in this case went well beyond a mere "similar to" restriction. This covenant *defined* what was meant by "similar to" in such a way as to cover the entire industry and include companies that were not in competition with MCS. For that reason, the covenant could not be enforced against East.

An additional issue in the case involved MCS's attempt under Virginia's Uniform Trade Secrets Act to enjoin East from revealing confidential information to Litton. The Court refused to issue an injunction, saying that only "actual or threatened" misuse of trade secrets could be enjoined. Here, East had neither disclosed nor threatened to disclose any information covered by the confidentiality provisions of the agreement. The mere fact that East had *knowledge* of trade secrets was not a sufficient basis for an injunction.

Although courts in a few other jurisdictions have granted injunctions under the so-called "inevitable disclosure doctrine," the court in MCS did not mention the doctrine in its opinion. See "Trade Secrets and the Inevitable Disclosure Doctrine," *Employer Alerts!*, July 2000, p. 2.

Statutory reference. Va. Code § 59.1-336.

Case reference. *Motion Control Systems, Inc. v. East*, 546 S.E.2d 424 (Va. 2001).

EMPLOYER'S SURVIVAL GUIDE reference. 14.01.

Contraceptive Coverage and Sex Discrimination

Last December the EEOC ruled that an employer-sponsored health insurance plan that provided comprehensive benefits, including drug coverage, but excluded contraceptive drugs, violated Title VII of the federal Civil Rights Act. See "Recent Developments in Federal Regulation of Group Health Insurance Plans," *Employer Alerts!*, Jan. 2001, p. 4. A federal court in Washington state has now reached the same conclusion.

Title VII, as originally enacted in 1964, simply prohibited discrimination in employment "because of ... sex," without defining what sex discrimination meant.

(The 1964 Civil Rights Act was aimed primarily at race discrimination, although it also covers religion and national origin. Some authorities have argued that "sex" was added to the list of Title VII prohibitions in an effort to kill the legislation entirely.)

In 1976, the Supreme Court had an opportunity to interpret what Congress intended by prohibiting sex discrimination. In *General Electric Co. v. Gilbert*, The Court said that an otherwise comprehensive short-term disability insurance policy maintained by General Electric *did not* discriminate on account of sex, even though the policy excluded pregnancy-related disabilities. The Court reasoned that the insurance policy was gender-neutral on its face, since it provided identical coverage for both men and women.

Justices Brennan, Marshall and Stevens dissented from the Supreme Court's majority decision. They urged that since women are the only gender at risk for pregnancy, they were in fact being discriminated against under GE's disability policy. The dissenters argued that the "facially neutral" test used by the majority was wrong; instead, the Court should have looked at whether the insurance policy was equally comprehensive for both men and women. GE's policy would fail the dissenters' proposed test because, while it provided comprehensive coverage for men, it didn't provide equally comprehensive coverage for women.

Congress responded to the Supreme Court's decision in 1978 by enacting an amendment to the Civil Rights Act known as the Pregnancy Discrimination Act (PDA). The PDA essentially adopts the view of the three dissenters, defining sex discrimination to include discrimination because of pregnancy, childbirth, or related medical conditions."

As a result of the PDA, Title VII has since been interpreted by the courts as requiring employers to provide women-only benefits or otherwise incur additional expenses on behalf of women in order to treat

the sexes the same. For example, an employer cannot provide smaller monthly retirement payments to women just because women on average live longer than men and collect benefits for a longer time.

The most recent case involved a drug company and one of its pharmacist employees. The company's otherwise comprehensive health plan was facially neutral, in that its coverages were equally available to men and women and there were no risks from which one gender was protected and another gender was not. However, the plan excluded coverage for contraceptive drugs – a benefit that would be used primarily, if not exclusively, by women. That exclusion, ruled the Washington state federal court, violated Title VII as amended by the PDA.

The Washington court noted that the PDA's language does not literally apply to the case, since the PDA deals with medical conditions related to pregnancy and childbirth, not the *prevention* of pregnancy. Nevertheless, the reasoning behind the PDA – that an exclusion carving out benefits uniquely designed for women – does apply. In the court's words:

Title VII does not require employers to offer any particular type or category of benefit. However, when an employer decides to offer a prescription plan covering everything except a few specifically excluded drugs and devices, it has a legal obligation to make sure that the resulting plan does not discriminate based on sex-based characteristics and that it provides equally comprehensive coverage for both sexes.

The ultimate fate of this decision remains to be seen. It could be reversed on appeal, or other courts may view the issue differently. The decision also leaves some important questions unanswered. For example, may drugs such as Viagra, that are unique to males, be excluded? Are employers now required to pay for drugs and procedures designed to treat infertility in women?

Statutory reference. 42 U.S.C. § 2000e.

Regulatory reference. EEOC Decision Dec. 14, 2000; 29 C.F.R. § 2520.

Case references. *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983); *Erickson v. Bartell Drug Co.*, 141 F.Supp.2d 1266 (W.D.Wash. 2001).

EMPLOYER'S SURVIVAL GUIDE reference. 12.02.

Disability Harassment

When we think of "harassment" we usually think in terms of sex discrimination. But harassment is not limited to that form of discrimination. Title VII covers race, color and national origin as well as sex, and harassment in the workplace based on any of those criteria is illegal.

Age and disability discrimination are not covered by Title VII. Instead, Congress passed separate statutes to address those matters – the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA). Is harassment based on age or disability also illegal? The answer appears to be yes.

In two recent cases, the U.S. Courts of Appeals for the Fourth Circuit (which includes Maryland and Virginia) and the Fifth Circuit (which covers the south-central United States) ruled that employees who are forced to suffer hostile work environments because of harassment over their disabilities can recover damages under the ADA.

Robert Fox worked for General Motors in Martinsburg, West Virginia. After suffering a back injury

unrelated to his job, he returned to work under light duty restrictions. His co-workers resented what they viewed as special treatment for Fox, as apparently did Fox's supervisors. On a number of occasions Fox was instructed to perform tasks that were beyond his ability and inconsistent with his light duty restrictions. On one of these occasions, when Fox responded that he could not do what was asked, a supervisor responded, "Why the f — can't you do it?" and "I don't need any of you handicapped m — f — 's."

At a meeting that Fox requested to protest his treatment, another supervisor told Fox he would like to know "how in the f — do you take a s — with these restrictions?" Other officials at the meeting then began to make fun of Fox. Fox also described numerous other instances of harassment, including being forced to work at a table that was too low for him and that aggravated his back.

Noting the similarity in statutory language between the ADA and Title VII, the Fourth Circuit concluded that the ADA, like Title VII, creates a right of suit for hostile work environment harassment. The court then upheld the jury's award of \$200,000 in compensatory damages to Fox.

In the Fifth Circuit case, Sandra Flowers worked as an assistant at a medical facility. She began to suffer harassment when her supervisor discovered she was HIV-positive. For example, the supervisor stopped having lunch with Flowers and ended other social contacts. The supervisor also began eavesdropping on Flowers' conversations and telephone calls.

Other evidence of harassment included subjecting Flowers to frequent random drug tests, criticizing her work (when previous evaluations were more than satisfactory), and placing her on probation. Eventually she was fired.

This evidence, said the Fifth Circuit, was more than

enough to hold the employer liable under the ADA. Ironically, however, Flowers failed to offer sufficient proof of the damages she suffered, so the Fifth Circuit ruled that she was entitled only to a nominal award.

Several years ago the Sixth Circuit (covering Michigan, Ohio, Tennessee and Kentucky) reached the same conclusion in a case involving claims of age harassment. Although the court said that an employee could sue for age harassment under the ADEA, the court went on to rule that the facts in that particular case were not sufficient to show the hostile working environment had anything to do with age discrimination.

Statutory references. 29 U.S.C. § 621; 42 U.S.C. § 12102.

Case references. *Fox v. General Motors Corp.*, 247 F.3d 169 (4th Cir. 2001); *Flowers v. Southern Regional Physician Services, Inc.*, 247 F.3d 220 (5th Cir. 2001); *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830 (6th Cir. 1996).

EMPLOYER'S SURVIVAL GUIDE references. 11.02; 11.03.

ADEA Does Not Protect Foreign Nationals Applying Outside U.S.

The Age Discrimination in Employment Act (ADEA) and other federal anti-discrimination laws – such as Title VII and the Americans with Disabilities Act – have long been applied to protect foreign nationals who are legally employed in the United States. But what about a foreigner who has not yet come to the U.S.? When he applies from overseas to work for a U.S. company in the U.S., is he entitled to civil rights protection as well?

The Fourth Circuit (the court that hears appeals of federal cases from Maryland and Virginia) recently ruled

that the ADEA does not apply in such situations.

The case involved the North Carolina Growers Association (NCGA), an American corporation that assists agricultural businesses in North Carolina in obtaining farm labor under the federal government's H-2A visa program. Plaintiff Luis Reyes-Gaona, a Mexican national over the age of 40, applied to NCGA through an NCGA agent in Mexico to work in the U.S. When his application was rejected because of his age, he sued.

In its opinion, the Fourth Circuit reviewed the history of the ADEA, including particularly a 1984 amendment to the act. That amendment expanded the ADEA's coverage to U.S. citizens employed by a U.S. company in a foreign country. Significantly, however, the amendment *did not* add any language covering foreign workers who, while still outside the U.S., apply to U.S. companies, even if the intended worksite is within the U.S.

The court said that absent a clear statement from Congress making the ADEA applicable to persons like Reyes-Gaona, there is a long-standing general presumption that federal statutes only apply within the U.S. and do not have any extra-territorial affect. This is appropriate, said the court, because it avoids clashes between our laws and the laws of other countries.

Statutory reference. 29 U.S.C. § 621.

Case reference. *Reyes-Gaona v. North Carolina Growers Ass'n, Inc.*, 250 F.3d 861 (4th Cir. 2001).

EMPLOYER'S SURVIVAL GUIDE reference. 11.02; 15.02.

Government Contractors' New Posting Obligation

In February President Bush signed a new Executive Order – EO 13201 – requiring most government contractors to post a notice informing non-union employees of their right to opt out of dues payments for certain purposes. The order became effective April 18, 2001.

Under federal “right-to-work” laws, government contractors who are unionized cannot require their employees to be union members to keep their jobs. However, a collective bargaining agreement *can* require non-union employees to pay their share of costs relating to collective bargaining, contract administration and grievance adjustment.

If an employer deducts dues from non-union employees and the dues are used for purposes *in addition to* collective bargaining, contract administration and grievance adjustment, the employee is entitled to a refund to the extent of such other use. The employee may also be entitled to a future reduction in dues. The new Executive Order requires employers to post a notice explaining these rights.

The Executive Order, as well as the text of the notice itself, is available at

http://www.dol.gov/dol/esa/public/ofcp_org.htm

Regulatory reference. EO 13201.

EMPLOYER'S SURVIVAL GUIDE references. 17.04; 19.08.

Employee vs. Independent Contractor: Secretary of Labor Loses Overtime Claim

In another battle in the employee-independent contractor war, the Fourth Circuit has ruled that cable TV installers for Comcast are not employees and are therefore not entitled to overtime wages under the Fair Labor Standards Act (FLSA). The U.S. Department of Labor brought the suit, alleging that the installers were employees and therefore were owed time-and-a-half pay according to FLSA. But after weighing the various factors, the court came down on the side of independent contractors.

The court recognized that there is no formula for determining employee vs. independent contractor, nor is any single factor determinative. Instead, the court looked at all relevant factors to determine the true “economic reality” of the employer-worker relationship. The factors include –

- ! whether the employer can control the manner in which the work is performed;
- ! whether the worker’s managerial skills affect his profit or loss;
- ! whether the worker has invested his own funds in equipment and materials;
- ! whether the worker is free to employ others to help in accomplishing the work;
- ! whether the work requires special skills;
- ! whether the relationship between the employer and

the worker is more or less permanent; and

- ! whether the work being performed is an integral part of the employer’s business.

The court found that the factors in this case were mixed. For example, the installers were free to complete the jobs within their assigned routes in any order they chose. The installers also bought their own trucks and equipment and they were free to hire their own employees, work with other installers, or work alone. These factors pointed toward an independent contractor relationship. On the other hand, the installers tended to have long-term relationships with the employer, suggesting an employer-employee relationship.

The court ruled that on balance the factors weighed in favor of independent contractor status. It therefore rejected the Department of Labor’s overtime claim.

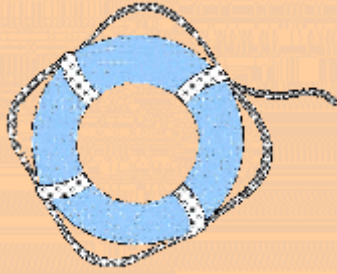
It should be noted that the factors the Fourth Circuit considered for FLSA purposes are similar to, but not necessarily the same as, factors applicable for other purposes, such as workers’ compensation coverage, benefit plan participation, and payroll tax withholding. See, for example, “Safe Harbor for Independent Contractors,” *Employer Alerts!*, March 2001, p. 3.

Statutory reference. 29 U.S.C. § 201.

Case reference. *Chao v. Mid-Atlantic Installation Services, Inc.*, 2001 WL 739243 (4th Cir. No. 00-2263, decided July 2, 2001).

EMPLOYER’S SURVIVAL GUIDE reference. 1.01; 4.02; 5.02.

Employer Alerts! is published monthly as a free supplement to **EMPLOYER'S SURVIVAL GUIDE – MD/VA/DC Edition**, ISBN 0-9703059-0-7. *Employer Alerts!* is also available by e-mail subscription for \$36.00 per year. For further information, contact the publisher, EMPLOYERS INFONET, LLC at 56 Crescent Road, Greenbelt, MD 20770, telephone (301) 441-3809 or <http://www.EmployersInfoNet.com>. Copyright © 2001 Charles H. Fleischer. All rights reserved. This publication may not be reproduced in whole or in part without the express written permission of the author. While every attempt has been made to provide accurate, authoritative and current information regarding the subject matter covered, this publication is for general information only and is not intended as legal or other professional advice. The reader should consult an attorney, accountant, or other appropriate professional regarding specific questions or problems. Neither the author nor the publisher is liable for any errors or omissions.



Employer Alerts!

By Charles H. Fleischer, Esq.

Volume II, No. 4 - September 2001

A monthly supplement to

EMPLOYER'S SURVIVAL GUIDE – MD / VA / DC Edition

Distributed by EMPLOYERS INFONET, LLC

www.EmployersInfoNet.com

Can Employers Require Direct Deposit of Wages?

The direct deposit of wages into employees' bank accounts is a significant convenience for employer and employee alike. Assuming the employer uses a payroll service, the employer simply phones in his payroll a day or two ahead of time. Magically, net pay is then deposited in each employee's bank account on payday without the employee having to take time off or use his lunch hour to stand in a long line at the teller window. A pay stub showing the transaction is then furnished to each employee and the employer receives a written payroll report.

What could be easier? And who could complain if the employer required all employees to participate in the program?

The short answer is that employees cannot be forced into a direct deposit arrangement.

The wage and hour laws of most states closely regulate how and when an employer pays wages to his employees. Those regulations cannot be disregarded by private agreements between an employer and an employee. So, for example, even if a non-exempt employee is perfectly willing to work for less than the minimum wage, or to take comp time instead of time-and-a-half for overtime, the employer violates the law if he agrees.

Maryland, Virginia and the District of Columbia have wage and hour laws requiring employers to pay their employees by cash or check. The laws of Maryland and Virginia (but not the District) go on to say that direct deposit of wages is permitted *if authorized by the employee*. In other words, Maryland and Virginia

In this issue ...

G	Can Employers Require Direct Deposit of Wages?	p. 1
G	Cash Balance Plans – What's All the Fuss About?	p. 2
G	FMLA's "Equivalent Position" Requirement	p. 4
G	Telecommuting as a Reasonable Accommodation Under the ADA	p. 5
G	Temp Agency Liability for Negligence of Temp Worker	p. 6
G	Virginia Weighs in on the Going-and-Coming Rule	p. 8

employees can *request* their employees to participate in a direct deposit program, but they cannot *require* participation.

In the District, there is no statutory provision specifically authorizing or prohibiting direct deposit of wages due by private employers. (By statute, the D.C. Government may pay its employees by direct deposit.) While it is possible that even a strictly voluntary direct deposit program would be viewed as a violation of the District's wage and hour law, it is unlikely that D.C. wage and hour officials would object to a voluntary program so long as there were no adverse consequences to employees who elected not to participate.

Statutory references. Md. Code, L&E § 3-502; Va. Code § 40.1-29; D.C. Code § 36-102.

Regulatory reference. Md. Atty. Gen. Op. No. 94-011.

EMPLOYER'S SURVIVAL GUIDE reference. 4.03.

Cash Balance Plans – What's All the Fuss About?

When a number of companies, most notably IBM, converted their more traditional "defined benefit" pension plans to "cash balance" plans, a lot of older workers complained. They felt the switch was unfair and possibly a violation of the Age Discrimination Act. The EEOC took note, but to date it has not issued any rulings. The ERISA Advisory Council, which advises the Secretary of Labor on pension plan matters, made a number of recommendations in its November 1999 report, but it took no position on the legal issues involved.

So who's right? Are conversions to cash balance

plans discriminatory against older workers? or are companies free to convert whenever, and on whatever terms, they choose? In order to answer those questions, a brief review of the two basic types of pension plans is necessary:

Defined contribution plan. In a defined contribution plan, a separate account is established for each employee, to which the employer (and sometimes the employee) make regular contributions according to an established formula, such as a percentage of salary. When it comes time for an employee to retire, the employee's retirement benefit is whatever has been contributed to his account, plus any income the account has earned through investments (but less any investment losses the account has suffered). 401(k) plans are a type of defined contribution plan.

Defined benefit plan. In a defined benefit plan, there are no separate accounts for employees. Instead, there is simply a common fund out of which each retiring employee is entitled to a specified monthly benefit. The amount of the benefit is usually based on a formula, such as years of service, times highest annual income, times some factor such as 1.5%, divided by 12. So for an employee earning \$50,000 who retires after 30 years, his monthly benefit is $30 \times 50,000 \times .015 / 12 = \1875 . The employer is obligated to keep sufficient assets in the fund, based on actuarial computations, to enable him to pay the benefits when they come due.

In addition to the existence or absence of a separate account, other major differences between defined contribution and defined benefit plans include:

! *Investment risk.* In a defined contribution plan, the employee wins if the market goes up and loses if the market goes down. In a defined benefit plan, the employer bears the investment risk.

! *Mortality risk.* If the employee lives for many years after retirement, he may use up all the funds in his

defined contribution account. But if he had a defined benefit plan, his monthly annuity continues for life. In short, the employer bears the mortality risk in a defined benefit plan; the employee usually bears that risk in a defined contribution plan.

! *Insurance.* Defined benefit plans are insured by the federal Pension Benefit Guaranty Corporation, for which the employer pays an insurance premium. Defined contribution plans are not insured because there is no guaranteed benefit at retirement.

! *Settlement options.* Defined benefit plans simply pay the prescribed monthly benefit. In a defined contribution plan, the retiring employee can usually use the amount in his account to purchase an annuity or, optionally (and subject to his spouse's consent) take the account in a lump sum or roll it over to an individual retirement account (IRA) from which he may make periodic withdrawals.

! *Funding.* Defined contribution plans are always fully funded (assuming the employer actually makes the contribution he has promised to make), because the benefit is based on whatever is in the account. Defined benefit plans may become underfunded if, for example, investments don't turn out as expected, or if retirees live longer than their life expectancies. For that reason, the employer must do an annual actuarial study of the plan and cover any shortfalls. Of course, if investments have performed better than expected, the employer's funding obligation will be reduced.

! *"Loading."* Defined benefit plans which use a years-of-service/highest-pay formula to determine benefits are said to be "back-loaded" because the size of the benefit produced by the formula tends to increase significantly in the last few years of employment. Defined contribution plans tend to be more "front-loaded" because the benefit amount grows at a more even rate.

A cash balance plan is technically classified as a

defined benefit plan. However, cash balance plans have characteristics of both defined benefit and defined contribution plans. For that reasons they are sometimes called "hybrid" plans.

In a cash balance plan, the employee establishes a hypothetical account for each employee. The account is hypothetical because there are no actual specific assets that belong to the employee; the "account" is really just a bookkeeping entry.

The employer credits the hypothetical account with a specific dollar amount each year, usually based on a percentage of the employee's salary. In addition, the employer credits the account with interest earned on the account balance – either a fixed interest rate or a rate tied to Treasury bills or some other index. For example, suppose an employer establishes a cash balance plan under which he credits 8% of salary and which is deemed to earn interest at 7% per year. For an employee who earns \$35,000 per year, the balance in the hypothetical account will be \$2,800 at the end of the first year (8% of \$35,000). At the end of the second year, the balance in the account will be \$5,796: the original \$2,800, plus 7% interest on that amount (\$196), plus another \$2,800 credited at the end of the second year. When the employee retires, his benefit is based on whatever is then in the hypothetical account.

Because each employee does have an account – albeit hypothetical – and because the amount of the ultimate benefit depends on what's in the account at retirement, cash balance plans look like defined contribution plans. Other characteristics, however, make them look like defined benefit plans. For example, the employer bears the investment risk since if the fund earns more than the interest rate promised to employees (7% in the above example), the employer's funding obligation is reduced.

For purposes of this discussion, the most important characteristic is loading. Cash balance plans are not

back-loaded since, like defined contribution plans, the benefit amount tends to grow at an even rate over the years.

And that's the problem. As the ERISA Advisory Council observed in its report, cash balance plans in and of themselves are neither good nor bad. They just have their own particular characteristics. But when an employer *converts* from a defined benefit plan to a cash balance plan, older workers who are nearing retirement miss out on the back-loaded jump in benefit amount they had expected.

Another problem with conversions is what is referred to as "wear away." Suppose an employer converts from a defined benefit to a cash balance plan and, at the time of the conversion, the benefit then accrued under the defined benefit plan for some employees is higher than the benefit the employer is offering under the cash balance plan. (This is more likely to be the case with older, more senior workers than with younger ones.) In some instances, the employer will simply freeze all future contributions until the employee's benefit amount under the new plan has reached ("worn away") the benefit amount under the old one.

There are several approaches to solving the conversion problem for more senior employees. One might be to credit the employee's hypothetical cash balance account with the actuarial equivalent of his benefit under the defined benefit plan. This solves the wear-away problem, but it does not really address the loss of the back-loaded jump.

Other transition arrangements target the specific employees who are being disadvantaged. With thoughtful plan design, employers can, for example, provide special benefit formulas for them that mimic the benefit they would have received but for the conversion.

There is no clear answer yet on whether conversions are discriminatory or violate the ADEA. But even if a

conversion is perfectly legal, employers should be mindful of the effect on older workers. Employers should also be mindful of the ERISA requirement that employers give at least 15 days' advance notice to each plan participant of any plan amendment that will cause a significant reduction in future benefit accruals.

Statutory references. 26 U.S.C. § 401; 29 U.S.C. § 1001.

Regulatory reference. 26 C.F.R. § 1.401; 29 C.F.R. § 2509.

EMPLOYER'S SURVIVAL GUIDE reference. 9.02.

FLMA's "Equivalent Position" Requirement

When an employee returns to work after being out on leave under the Family and Medical Leave Act, the employer is required to restore the employee to the same position he held before taking leave, or to an equivalent position. What does FMLA mean by "equivalent"? A recent case from the U.S. Court of Appeals for the Eighth Circuit (which hears appeals from federal courts in the Dakotas, Iowa, Nebraska, Minnesota, Missouri, and Alabama) helps answer that question.

Linda Cooper worked for the Olin Corporation at a plant in Independence, Missouri, making ammunition for the U.S. Army. Cooper was part of a crew that ran a locomotive from one part of the plant to another, transporting raw materials and finished products. Her primary job was to operate the locomotive, which she had no trouble performing.

Cooper had a long history of depression, exacerbated in the fall of 1996 by personal problems unrelated to her work. She took a several leaves of

absence under the advice of her personal physician and social work counselor. By mid-November both her physician and counselor recommended that she return to work without restriction.

In accordance with standard Olin policy, Cooper reported to the company doctor for clearance to resume her job. After considering Cooper's condition and medication, the company doctor said that, despite the recommendation of Cooper's personal physician, he would not clear her until he was satisfied she could safely drive the train. Unfortunately, the company doctor made little effort to contact Cooper's private physician or otherwise resolve the question of Cooper's fitness. In the meantime, Cooper was assigned office work, but she kept the same title, pay and benefits as her locomotive job.

Over the next few weeks, Cooper suffered several relapses of her depression, which she attributed to the company doctor's refusal to clear her for return to the locomotive job. In early January, the company doctor placed her on permanent restriction and told her to find another job within the plant. Eventually, Cooper went on long-term disability and sued Olin for violating FMLA.

No one disputed that Cooper's depression was a "serious health condition" under FMLA and that her leave therefore qualified as FMLA leave. And Cooper herself conceded that upon return to work she continued to retain her job title and that her pay and benefits were the same. She argued, however, that the duties and functions of her office assignment were so different from those of a locomotive engineer that, as a practical matter, she was not assigned to the same or an equivalent position as required by FMLA.

The Court first reviewed FMLA's statutory language, which provides –

Any eligible employee who takes [FMLA] leave ... shall be entitled, on return from such leave ... to

be restored by the employer to the position of employment held by the employee when the leave commenced [or] to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

Citing Department of Labor regulations that define "equivalent position" as –

one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status

the Court ruled that mere restoration of salary, title and benefits "does not necessarily constitute restoration to the same position ... when the job duties and essential functions of the newly assigned position are materially different from those of the employee's pre-leave position."

Accordingly, the Court sent the case back to the district trial court for a determination whether Cooper's position as an office assistant was equivalent in terms of duties, functions, privileges, perquisites and status as her prior job as locomotive engineer.

Statutory reference. 29 U.S.C. § 2601.

Regulatory reference. 29 C.F.R. § 825.

Case reference. *Cooper v. Olin Corp.*, 246 F.3d 1083 (8th Cir. 2001).

EMPLOYER'S SURVIVAL GUIDE reference. 6.02.

Telecommuting as a Reasonable Accommodation Under the ADA

In another decision from the Eight Circuit, the Court ruled that an employee could not insist upon working at home as a reasonable accommodation under the Americans with Disabilities Act.

Toro, the employer in the case, hired Lynn Heaser as an administrative secretary in 1990. Within a year or so, Heaser developed a variety of health problems, including multiple chemical sensitivity, fibromyalgia and allergies. Heaser suspected that her problems were connected to air quality at the office and she alerted Toro management. The company attempted to accommodate her by allowing her to work from home on a temporary basis. Later, the company moved her to a different office, but her health problems persisted.

Eventually, Heaser went on temporary disability. When that benefit expired, she requested that she be allowed to work at home indefinitely. Her request was supported by a treating physician, who stated in a letter to Toro that Heaser must avoid plastics, carbonless paper forms (which Heaser had to handle as a routine part of her job), perfumes, colognes, exhaust fumes, etc. Toro refused the request and terminated her.

For purposes of the case, Toro admitted that Heaser was disabled within the meaning of the ADA, and Heaser admitted that, without reasonable accommodation, she was not qualified to do her job. The question, then, was whether at-home work was a reasonable accommodation.

In answering the question, the court assumed that working at home *may, in certain circumstances*, be a reasonable accommodation. The court concluded, however, that this was not one of those circumstances. In order to accommodate Heaser, Toro would have to computerize its inventory and invoicing system – a step it was then preparing to take but had not yet accomplished

– and then arrange for Heaser to obtain remote access to the computer system. Toro would also have to eliminate the carbonless paper forms it used. These actions, said the court, would have amounted to an overall change in Toro's manner of conducting its business, and Toro had no obligation to do that in order to accommodate a disabled employee.

Statutory reference. 42 U.S.C. § 12102.

Case reference. *Heaser v. Toro Co.*, 247 F.3d 826 (8th Cir. 2001).

EMPLOYER'S SURVIVAL GUIDE reference. 11.03,18.02.

Temp Agency Liability for Negligence of Temp Worker

Who is liable for damage caused by a temp worker's negligence – the temp agency who supplied the worker or the employer at the worksite where the temp was working? On the facts described below, the federal trial court in Maryland recently ruled that the worksite employer had to bear its own loss and could not look to the temp agency for reimbursement.

The well-known home builder NVR, Inc. (which does business as Ryan Homes) had a contract with Just Temps to supply temporary laborers on an as-needed basis. The contract provided that the laborers would be independent contractors and not employees of NVR. The contract also said that Just Temps would provide a foreman at all worksites where Just Temps laborers were working and that the laborers would do their work in a neat and workmanlike manner. Finally, the contract said that Just Temps would indemnify NVR for any injury or property damage arising from work done by the laborers, but the indemnity obligation would not apply to any losses attributable solely to the negligence of NVR.

In the spring of 1999, an NVR supervisor at a condominium construction project placed an order with Just Temps for two laborers the following day. He did not specify the particular work that would be involved and he did not request that Just Temps provide a foreman.

The NVR supervisor had two propane tanks set up at the project, each of which was connected to a heater to dry out some construction materials. When the Just Temps laborers arrived, the supervisor first instructed them to move some bricks. Later in the day, he instructed them to move some other propane tanks that were also located at the site. The supervisor then left the worksite.

The laborers began moving the tanks but found them to be very heavy. One of the laborers had the less than brilliant idea of letting some gas out of the tanks to make them lighter. When he did so, a nearby heater ignited the gas, the propane tank exploded, and a resultant fire caused extensive damage to the condominium project.

NVR sued Just Temps for the damage to its project, claiming –

- ! that Just Temps had failed to provide a foreman per the contract;
- ! that Just Temps also was in breach of contract because its laborers failed to work in a neat and workmanlike manner; and
- ! that in any event the laborers were Just Temps employees, so that Just Temps was liable for their negligence and was liable under the indemnity provision of the contract.

The court rejected all these claims. As to the lack of a foreman, the court ruled that NVR had not requested a foreman and in fact had *never* requested a foreman, even though it apparently had a contractual right to do so.

As to the claim that the laborers had not done their work properly, the court said that NVR knew they were unskilled. Having failed to specify to Just Temps what particular work they would be required to do, NVR could not complain that the laborers were unfamiliar with propane tanks and their associated dangers.

Finally, the court ruled that at the time of the fire the laborers were employees (“borrowed servants”) of NVR, not employees of Just Temps. This was so despite the contract provision making the laborers independent contractors, since it is the relationship in fact, not contract language, that governs. The facts here showed that NVR’s on-site supervisor had the power to request particular laborers, to discharge them if he was dissatisfied, and to control the work assigned to them. That made them employees of NVR.

Because the laborers were NVR’s, not Just Temps’ employees, their negligence was attributable to NVR, not Just Temps. Therefore, NVR could not recover under its negligence or indemnity claims, either.

While court’s decision may at first blush appear to disregard a perfectly legal contract between the two parties, the result was fair under the circumstances. The contract was heavily slanted in NVR’s favor, probably due to NVR’s superior bargaining power with the temp agencies it uses. That alone is not enough to overturn a contract. But the fact that the parties themselves didn’t follow the contract in their day-to-day dealings freed the court to place liability in accordance with ordinary legal principles.

Case reference. *NVR, Inc. v. Just Temps, Inc.*, ___ F.Supp.2d ___ (D.Md. No. 00-2991, decided July 31, 2001).

EMPLOYER’S SURVIVAL GUIDE references. 1.01; 19.06.

Virginia Weighs in on the Going-and-Coming Rule

The June 2001 issue of *Employer Alerts!* reported on a Maryland decision applying the going-and-coming rule in workers' compensation cases. "Workers' Compensation: The Going-and-Coming Rule," *Employer Alerts!*, June 2001, p. 1. Virginia has now addressed the issue as well.

Barbara Blaustein, who lived in Silver Spring, Maryland, was hired by the Mitre Corporation in 1992 to work at its Tysons Corner, Virginia facility. Blaustein commuted from Silver Spring to Tysons Corner by car, using the free parking Mitre provided its employees.

In 1995, Mitre entered into an Inter-governmental Personnel Assignment Agreement, pursuant to which Blaustein began working at the National Science Foundation in Arlington. The NSF did not have free parking, so Blaustein had to pay for parking in a public garage under NSF's building, or take the Metro subway. When Blaustein accepted the NSF assignment, Mitre agreed to reimburse her for the cost of parking, or the subway fare, whichever she chose to use.

One February morning in 1997, after Blaustein had parked her car at the Wheaton metro station and was walking to the subway entrance, she was struck by another car.

Blaustein filed a workers' compensation claim for her injuries. Recognizing that under the going-and-coming rule injuries received while commuting are generally not covered, she argued that because Mitre reimbursed her for her transportation costs, and because she was a Mitre employee assigned to the NSF, the incident fell within one or more exceptions to the rule.

The Virginia Court of Appeals, which hears appeals from the Virginia Workers' Compensation Commission, first identified three exceptions to the rule –

- ! *the "transportation" exception* – where the means of transportation are provided by the employer or the time consumed by travel is paid for and included in the employee's wages;
- ! *the "proximity/special hazard" exception* – where the way used by the employee to get to and from employment is the sole and exclusive means of ingress and egress; and
- ! *the "special errand" exception* – where the employee is engaged in some duty or task in connection with his or her employment.

Since the "proximity/special hazard" exception clearly did not apply, the court limited its discussion to the first and third exceptions.

As to the transportation exception, the court pointed out that Mitre's only agreement was to pay for parking or Metro fare. It had not agreed to pay for her time en route or to reimburse her for gas, mileage, or parking at the Metro lot. In other words, Blaustein's injury occurred *before* the transportation exception had become applicable that morning.

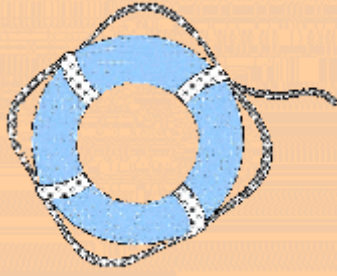
The court stated in a footnote that it was not deciding whether Blaustein would have been covered if the injury had occurred while she was standing on Metro platform. Presumably she would have been covered under the transportation exception if she had been injured while actually in a Metro car, since Mitre was paying for that portion of the commute.

As to the special errand exception, the court said that there was nothing special about Blaustein's going to work as NSF. She had been detailed to that agency for over 15 months preceding the accident, so that commuting to NSF was for Blaustein a daily, not a special occurrence.

Case reference. *Blaustein v. Mitre Corp.* (Va. App. No. 2860-00-4, decided Aug. 7, 2001).

EMPLOYER'S SURVIVAL GUIDE reference.
7.02.

Employer Alerts! is published monthly as a free supplement to **EMPLOYER'S SURVIVAL GUIDE – MD/VA/DC Edition**, ISBN 0-9703059-0-7. *Employer Alerts!* is also available by e-mail subscription for \$36.00 per year. For further information, contact the publisher, EMPLOYERS INFONET, LLC at 56 Crescent Road, Greenbelt, MD 20770, telephone (301) 441-3809 or <http://www.EmployersInfoNet.com>. Copyright © 2001 Charles H. Fleischer. All rights reserved. This publication may not be reproduced in whole or in part without the express written permission of the author. While every attempt has been made to provide accurate, authoritative and current information regarding the subject matter covered, this publication is for general information only and is not intended as legal or other professional advice. The reader should consult an attorney, accountant, or other appropriate professional regarding specific questions or problems. Neither the author nor the publisher is liable for any errors or omissions.



Employer Alerts!

By Charles H. Fleischer, Esq.
Volume II, No. 5 - October 2001

A monthly supplement to
EMPLOYER'S SURVIVAL GUIDE – MD / VA / DC Edition

Distributed by EMPLOYERS INFONET, LLC

www.EmployersInfoNet.com

Wrongful Termination Update

Although at-will employees can be fired for any reason or for no reason, they can't be fired for a "bad" reason. Firing an employee because of his or her gender, age, race, etc., is one of those bad reasons. So, too, is retaliating against an employee for exercising statutory rights granted under anti-discrimination and similar laws.

Separate from the anti-discrimination laws is a body of judge-made law that protects at-will employees from so-called "wrongful" or "abusive" discharges. In essence, employees cannot be fired when doing so would be contrary to some important public policy.

All three local jurisdictions allow fired employees to sue for wrongful discharge, but they differ on what constitutes a sufficiently important public policy to allow damage awards. Recent cases in Maryland and Virginia illustrate just how strong a showing an employee must

make to succeed with a wrongful discharge suit in those states.

Maryland. Edward Wholey had worked as a Sears, Roebuck security officer for 24 years. He was also, coincidentally, a part-time deputy sheriff for Anne Arundel County. In 1994 Sears hired a new manager for its Glen Burnie store and Wholey observed him on a number of occasions taking merchandise from the display floor and placing it in the manager's office. Wholey suspected that the manager was stealing.

Wholey contacted his own security supervisor and got permission to set up a surveillance van from which he could observe the manager's office. Unfortunately, the van could not be positioned to get an adequate view, so Wholey requested and obtained permission to search the manager's office. During the search, Wholey found some but not all the merchandise he had seen the manager take. Wholey could not say one way or the other, however, what happened to the missing merchandise, later admit-

In this issue ...

G	Wrongful Termination Update	p. 1
G	Spousal Rights in Pension Plans	p. 3
G	EEOC Changes Policy on Retiree Health Plans	p. 6
G	When is an Employment Action "Adverse" for Title VII Purposes?	p. 6

ting that the merchandise could have been returned to the display floor.

Shortly after the office search, Wholey learned that the manager had made an inquiry about the time a particular security guard would be coming on duty. This fueled Wholey's suspicion about the manager, so Wholey requested and obtained permission to install surveillance cameras in the manager's office. The next day Wholey's supervisor called Wholey and instructed him to remove the cameras based on instruction from another Sears official that the store manager "deserved more respect." Wholey did so and discontinued his investigation of the manager.

A few weeks later, Wholey was told that Sears officials disapproved his handling of the investigation, particularly the installation of surveillance cameras. Wholey was asked to quit. When he refused, he was fired.

In his subsequent wrongful discharge suit against Sears, Wholey claimed that Maryland favors the investigation and prosecution of crimes and that, in firing him, Sears violated a clear mandate of Maryland public policy.

The Maryland Court of Special Appeals (Maryland's intermediate appellate court) disagreed. While acknowledging that, in proper circumstances, an employee may bring a claim for wrongful discharge, the Court stressed that this constituted "a narrow exception to [the] well-established principle" that "an at-will employee may be discharged by his employer for any reason or for no reason." Here, Wholey failed to show that his grievance was anything more than a private dispute regarding the employer's execution of normal management operating procedures.

More generally, the Court observed that a claim for wrongful discharge must be grounded on either (1) an employee's refusal to violate the law or the legal rights of

a third party, or (2) an employee's exercising a specific legal right or duty. Mere whistleblowing – reporting criminal activity as a volunteer where there is no legal duty to report – does not involve a clear mandate of public policy.

Virginia. The Virginia Supreme Court recently considered a case involving a police officer, Brendhan Harris, who was employed by the City of Virginia Beach. While responding to a residential burglary report, Harris got into an altercation with the burglary *victim* and the victim's sister. He subdued the sister with pepper spray, arrested her, and transported her to a nearby hospital – a standard procedure when pepper spray has been used. While transporting the sister, Harris reported the incident to his supervisor.

Harris's partner also reported the incident, but the partner related a somewhat different version which suggested that Harris had mishandled the situation and caused it to escalate. Having received conflicting reports, the supervisor concluded that, pending further investigation, formal charges should not be placed against the sister. The supervisor instructed Harris to release the sister.

Harris complied with his supervisor's order, but he then obtained arrest warrants against both the victim and the sister. He had a fellow police officer serve the warrant against the sister, keeping the other warrant in his possession.

When the supervisor learned of the warrants, he ordered Harris to surrender the one still in his possession, and he took steps to have the charges against the sister dismissed. Harris's precinct captain then sent Harris a letter instructing him to take no further action in the matter in his capacity as a police officer.

Not willing to let the matter drop, Harris next appeared in uniform before a magistrate and obtained a warrant against his *supervisor*, charging him with

obstruction of justice – a statutory crime. By that time the City of Virginia Beach had had enough, and it fired Harris.

Harris then sued for wrongful discharge. He claimed that, as a police officer, he had a sworn duty to arrest people who violate the law and that no one, including a superior, may lawfully order a police officer to refrain from performing his duty. Thus, reasoned Harris, his termination for obtaining a warrant against his supervisor was in violation of Virginia public policy.

The Court began with a brief discussion of the wrongful discharge exception to the employment-at-will doctrine. As in Maryland, the Virginia exception is “narrow.” With reference to Harris’s claim that the Virginia statute against obstruction of justice expresses that state’s public policy, the Court said:

While all statutes of the Commonwealth reflect public policy to some extent, since otherwise they presumably would not have been enacted by our General Assembly, termination of an employee in violation of the policy underlying any one of them does not automatically give rise to a common law cause of action for wrongful discharge.

The Court then observed that in only two instances will the public policy underlying a statute support a wrongful discharge claim: first, where the statute contains explicit statements of public policy; and second, where the statute is designed to protect the property rights, personal freedoms, health, safety, or welfare of the people in general. Further, the employee must be a member of the class of individuals that the specific public policy is intended to benefit.

Harris’s claim, said the Court, does not satisfy these requirements. Harris attempted to invoke the obstruction of justice statute not to protect the public, but only to justify his decision to disregard his superior’s instructions. If Harris’s claim were allowed to succeed, then virtually

any police officer who believed a personnel action interfered with enforcement of the law could ignore his supervisor’s instructions with impunity.

Case references. *Sears, Roebuck & Co. v. Wholey*, 2001 WL 985080 (Md. App. No. 1490, decided August 29, 2001); *City of Virginia Beach v. Harris*, 523 S.E.2d 239 (Va. 2000);

EMPLOYER’S SURVIVAL GUIDE reference. 1.03.

Spousal Rights in Pension Plans

The May 2001 issue of *Employer Alerts!* reported on a Supreme Court case that invalidated a Washington State law because it interfered with uniform, nationwide rules governing pension plans under ERISA. “ERISA Preemption of State Law,” *Employer Alerts!*, May 2001, p. 2. The Court’s decision came as a boon to plan administrators because it relieved them from tracking the laws of multiple states where plan sponsors do business or where plan participants or beneficiaries live.

In a decision that seems to ignore federal law, the Maryland Court of Special Appeals has now muddied the waters for local employers. Some background will help put the decision in context.

ERISA – the Employee Retirement Income Security Act – is a federal statute that applies to virtually all employer-sponsored benefit plans. Among Congress’s goals in enacting ERISA was the creation of a uniform body of federal law to protect employees and retirees from widespread abuse of benefit plans.

The Internal Revenue Code contains a number of requirements that parallel ERISA and that must be satisfied in order for employee benefit plans to be recognized as “qualified plans” and receive favorable tax

treatment. But even if a plan is not qualified or is not otherwise subject to Internal Revenue Code requirements, it can still be subject to ERISA.

ERISA intentionally makes it difficult for plan participants to divert benefits from their spouses. The law requires that when a plan participant retires and he or she has a spouse, benefits must be payable in the form of a joint and survivor annuity – an annuity that will be paid to husband and wife jointly and that will continue to be paid (at a reduced rate) to the surviving spouse if the plan participant dies first. In order for benefits to be paid in some other fashion, such as to a different beneficiary or in a lump sum, the spouse must consent in writing. Spousal consents must satisfy the following statutory requirements:

- ! they must be in writing;
- ! they must designate some other beneficiary, which may not be changed without the spouse's further consent (unless the consent expressly permits further changes without consent);
- ! they must acknowledge the effect of the change; and
- ! they must be witnessed by a plan representative or notary public.

ERISA requires plans to contain an “anti-alienation” provision – a provision that plan participants cannot assign their interests in the plan and creditors cannot reach those interests. However, ERISA contains an exception for spouses of plan participants in divorce proceedings. Under ERISA, a divorce court can issue a “qualified domestic relations order” – QDRO – awarding one spouse a portion (or all) of the other spouse's pension plan as alimony, child support, or simply as a division of marital property.

The Supreme Court case mentioned above dealt with a Washington statute that said a divorce decree had

the effect of automatically revoking a beneficiary designation in favor of a former spouse. Presumably, the Washington legislature felt that after a plan participant gets divorced, he probably does not want his ex-spouse to receive plan benefits, even if he forgets to submit a beneficiary change. The Supreme Court said that such a statute is preempted by ERISA, which states that the plan documents themselves govern determination of who is the right beneficiary.

The Supreme Court may have relieved plan administrators from the vagaries of state law, but the Court did not address the effect of private agreements between the spouses themselves.

Suppose that a divorcing couple is able to reach an agreement that the husband will keep his pension plan, the wife will keep hers, and neither will claim any interest in the other's plan. Or suppose that even *before* the parties are married they enter into a prenuptial agreement by which each party gives up in advance any rights to pension benefits from the other party. (Prenuptial agreements commonly have such provisions where, for example, each party has previously been married, each party is financially secure, and each party wants to leave his entire estate to children of a prior marriage.)

A typical problem the plan administrator faces is this: a plan participant dies, the participant's children claim benefits based on a separation agreement or prenuptial agreement which waives all spousal rights, and the surviving spouse or ex-spouse (who has had a change of heart) also claims benefits, arguing that the waiver is invalid. If the plan administrator pays one of the claimants, the other might sue and force the administrator to pay again. So the administrator is forced to ask a court for guidance.

A number of federal courts have addressed just such questions. Some of those courts have ruled that a separation agreement or prenuptial agreement that fails to satisfy ERISA's specific requirements is ineffective. One

federal trial court in New York went so far as to say that a prenuptial agreement can never satisfy ERISA's requirements since, by its very nature, it is between *fiancées*, not spouses. (On appeal, the Court of Appeals for the Second Circuit said it was leaving the fiancée question open.)

Other federal courts, including the Fourth Circuit (which hears appeals from federal courts in Maryland and Virginia) appear to take the view that ERISA's statutory requirements are not applicable in a divorce context. According to those courts, a voluntary separation agreement in which one spouse gives up any claim against the other's pension is effective so long as it specifically refers to the plan involved.

The Maryland Court of Special Appeals has now gone even further. In an opinion released August 31, the court considered the effect of the following provision in a prenuptial agreement, signed before the parties were married:

The parties hereby expressly waive any legal right either may have under any Federal or state law as a spouse to participate as a payee or beneficiary under any interest the other may have in any pension plan, profit sharing plan, or any other form of retirement or deferred income plan, including, but not limited to, the right either spouse may have to receive any benefit in the form of a lump sum death benefit, joint and survivor annuity or pre-retirement survivor annuity pursuant to any state or Federal law.

Attached to the prenuptial agreement were written disclosures of the parties' respective assets. The husband's disclosure specifically mentioned the plan at issue in the case.

After the husband died, his surviving spouse made a claim for benefits. The husband's *former* spouse, who was the named beneficiary under the plan per an earlier separation agreement, also made claim. The Court of

Special Appeals ruled in favor of the former spouse, holding that the waiver language in the prenuptial agreement was effective. The Court dismissed Internal Revenue Code provisions as to what constitutes an effective waiver, saying that those provisions only deal with whether a plan qualifies for favorable tax treatment; they don't create any substantive rights to plan benefits. (Either the attorneys in the case failed to argue, or the Court simply ignored, the parallel provisions of ERISA which *do* create substantive rights.) The Court did not even acknowledge the existence of federal cases that have wrestled with questions as to the validity of waivers in separation and prenuptial agreements.

The bottom line for local administrators is that they cannot rely just on plan documents, on-file beneficiary designations and QDRO's. They must also consider prenuptial agreements, separation agreements (even if they don't qualify as QDRO's), and any other contractual arrangement that purports to affect pension plan rights. And if they guess wrong, they may have to pay twice.

Perhaps the Supreme Court will revisit the question and, as it did in the Washington State case, confirm that ERISA alone answers the question of whom to pay.

Statutory references. 26 U.S.C. § 417(a); 20 U.S.C. §§ 1055, 1056.

Case references. *Egelhoff v. Egelhoff*, ___ U.S. ___ (No. 99-1529, decided March 21, 2001); *Hurwitz v. Sher*, 789 F.Supp. 134 (S.D.N.Y. 1992), *aff'd*, 982 F.2d 778 (2d Cir. 1992); *Lasche v. George W. Lasche Basic Profit Sharing Plan*, 111 F.3d 863 (11th Cir. 1997); *Iron Workers v. O'Brien*, 937 F.Supp. 346 (D.Del. 1996); *Pedro Enterprises, Inc. v. Perdue*, 998 F.2d 491 (7th Cir. 1993); *Estate of Altobelli v. IBM*, 77 F.3d 78 (4th Cir. 1996); *Heineman v. Bright*, ___ A.2d ___ (Md.App. No. 602, decided Aug. 31, 2001).

EMPLOYER'S SURVIVAL GUIDE references. 9.03; 16.03.

EEOC Changes Policy on Retiree Health Plans

As a general rule, Medicare rules and the Age Discrimination in Employment Act (ADEA) require employers to offer current employees who are 65 or older the same health care benefits they offer current employees younger than 65. In other words, employers cannot take advantage of Medicare eligibility by reducing benefits for their Medicare-eligible employees.

Medicare does not require the same parity between *retirees* who are 65 or older and retirees who are younger than 65. But until recently the EEOC did have such a rule.

Section IV-B of the EEOC's Compliance Manual used to provide that since Medicare eligibility is simply a "proxy for age," an employer could not arbitrarily reduce a retiree's health benefits once the retiree became Medicare-eligible – that is, once he reached 65. According to the Manual provision, any such reduction would have to be justified under one of the "safe harbor" provisions of the ADEA.

The EEOC's rule was based on a decision last year by the U.S. Court of Appeals for the Third Circuit (which covers Pennsylvania). The Third Circuit held that the ADEA's protection of "employees" should be read to include retirees as well.

On August 20 of this year, the EEOC announced that it was rescinding Section IV-B of its Manual and would review the entire question. The EEOC's action appeared to be prompted by concerns that employers were refusing to provide full health coverage to early retirees for fear that they would be locked into continuing those benefits once the early retirees reached 65.

The EEOC's action does not, of course, overrule the Third Circuit case. So at least in Pennsylvania, and

perhaps in other states as well, employers violate the ADEA by reducing employer-sponsored health benefits for retired employees when they become eligible for Medicare.

Regulatory references. EEOC Compliance Manual; EEOC Press Release, "EEOC Rescinds Guidance; Will Review Policy on Retiree Health Plans," Aug. 20, 2001.

Case reference. *Erie Cnty. Retirees Ass'n v. County of Erie*, 220 F.3d 193 (3d Cir. 2000).

EMPLOYER'S SURVIVAL GUIDE reference. 11.02.

When is an Employment Action "Adverse" for Title VII Purposes?

An employer is always liable under Title VII of the federal Civil Rights Act for the discriminatory conduct of its supervisory personnel if the conduct amounts to a "tangible employment action." The theory is that when a supervisor hires, fires, promotes, demotes, etc., he is exercising his employer's authority; if he does so in a discriminatory way, the employer ought to be held accountable. (The employer may or may not be liable for hostile environment-type discrimination by a supervisor, depending on the circumstances. See "Defending Sexual Harassment Claims," *Employer Alerts!*, April 2001, p. 5.)

For an employee to have a discrimination claim under Title VII, the tangible employment action must be "adverse." Obviously, an applicant who is rejected for discriminatory reasons, or an existing employee who for discriminatory reasons is fired, demoted, or reassigned to a less desirable position, has suffered an adverse job action. On the other hand, trivial or inconsequential workplace actions will not support a Title VII claim. As one court put it, not everything that makes an employee unhappy is an actionable adverse action.

When does an action rise above the trivial or inconsequential and qualify as adverse? The Supreme Court has said that the job action must amount to a “significant change in employment status.” The action must also be objectively detrimental, not just something that a particular employee dislikes. Two recent cases from the U.S. Court of Appeals for the District of Columbia help explain these rules.

In one case, Regina Brown sued her employer, the Export-Import Bank, for race and sex discrimination. The adverse action Brown cited included both an evaluation of “fully satisfactory” which she claimed should have been “outstanding” or “superior,” and a transfer which, though not affecting her pay or benefits, was less desirable from her viewpoint.

The Court found no evidence that the Bank’s actions were motivated by discriminatory intent. The Court went on to say, however, that even if the Bank’s motives were improper, the actions it took were not adverse.

As to the evaluation, the Court said that formal criticism or poor performance evaluations are not necessarily adverse for Title VII purposes. They are only interim actions that usually have no immediate effect on salary or position. As to the transfer, the Court ruled that a transfer that is truly lateral and does not involve a demotion in form or substance cannot amount to a materially adverse employment action. The Court pointed out that to rule otherwise would be to involve courts in “micromanagement of business practices.”

The second case shows, however, that while a poor performance evaluation alone is not an adverse employment action, a reduced bonus based on the evaluation can support a Title VII claim.

Lisa Russell, a white employee of the Department of Veterans Affairs received an “excellent” rating for the period in question and a bonus of \$807, while a black employee named Sherry Patton received an “outstanding” rating and a \$1,355 bonus. Believing the differential to be racially based, Russell sued.

The VA defended its evaluation based on the Court’s earlier decision involving Regina Brown. The VA went on to argue that bonuses were discretionary and that since Russell actually received a bonus, she suffered no adverse employment action. The Court disagreed with the VA and ruled in Russell’s favor. It held that discriminatory bonus awards violate Title VII and that a discriminatory evaluation *accompanied by a bonus differential* based on the evaluation also violates Title VII.

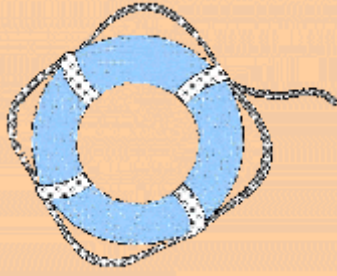
Although the Court did not directly say so, it ruled by implication that the \$548 difference between Russell’s and Patton’s bonuses rose above the trivial and inconsequential and was “significant” for Title VII purposes. If that small difference can justify a federal civil rights suit, the courts may indeed be involved in micromanagement of business practices.

Statutory reference. 42 U.S.C. § 2000e.

Case references. *Brown v. Brody*, 199 F.3d 233 (D.C.Cir. 1999); *Russell v. Principi*, 257 F.3d 815 (D.C.Cir. 2001).

EMPLOYER’S SURVIVAL GUIDE reference. 11.01.

Employer Alerts! is published monthly as a free supplement to *EMPLOYER'S SURVIVAL GUIDE – MD/VA/DC Edition*, ISBN 0-9703059-0-7. *Employer Alerts!* is also available by e-mail subscription for \$36.00 per year. For further information, contact the publisher, EMPLOYERS INFONET, LLC at 56 Crescent Road, Greenbelt, MD 20770, telephone (301) 441-3809 or <http://www.EmployersInfoNet.com>. Copyright © 2001 Charles H. Fleischer. All rights reserved. This publication may not be reproduced in whole or in part without the express written permission of the author. While every attempt has been made to provide accurate, authoritative and current information regarding the subject matter covered, this publication is for general information only and is not intended as legal or other professional advice. The reader should consult an attorney, accountant, or other appropriate professional regarding specific questions or problems. Neither the author nor the publisher is liable for any errors or omissions.



Employer Alerts!

By Charles H. Fleischer, Esq.
Volume II, No. 6 - November 2001

A monthly supplement to
EMPLOYER'S SURVIVAL GUIDE – MD / VA / DC Edition

Distributed by EMPLOYERS INFONET, LLC

www.EmployersInfoNet.com

Job Rights of Employees Called to Active Duty

Responding to the September 11 terrorist attacks, the President has called up thousands of reservists and other members of the uniformed services. Employers should be aware that federal law grants broad job protections to those called to active duty.

The Uniformed Services Employment and Reemployment Rights Act (USERRA), adopted in 1994, requires employers to carry service members on leave status for benefit and seniority purposes while on active duty, and to reemploy them when they return. USERRA also prohibits employers from discriminating against veterans and persons in the uniformed services. USERRA applies to all service members except those

who receive dishonorable or bad conduct discharges or who are discharged under less than honorable conditions. To be eligible for USERRA protection, the service member must notify his employer that he has been called to active duty, unless he is precluded from doing so by military necessity or unless it is otherwise impossible or unreasonable to do so.

Leave Status. Employees on active duty are considered to be on furlough or leave of absence. As such, they are entitled to whatever benefits other similarly situated employees receive. In addition, an employee on active duty –

- ! May (but cannot be required to) use any accrued vacation or other leave with pay while on active duty.
- ! May elect to continue any employer-sponsored

In this issue ...

G Job Rights of Employees Called to Active Duty	p. 1
G SBA Loan Program Helps Businesses Whose Essential Employees Are Called Up	p. 3
G OSHA's New Record-Keeping and Reporting Requirements	p. 3
G Employment Cases Pending Before Supreme Court	p. 4
G D.C. Circuit Deletes Expletive Ruling	p. 5
G Maryland Court Holds Home Healthcare Registries Liable for Unemployment Insurance	p. 6

health insurance coverage for up to 18 months. (For employees on active duty for less than 31 days, the employee can only be required to pay the portion of the premium normally charged to employees. For employees on active duty for more than 30 days, the employee can be charged up to 102% of the full premium.)

- ! May continue to contribute to any retirement plan to which he was contributing prior to active duty.
- ! Must be treated as continuing to work for his employer for purposes of computing the employer's pension plan funding obligation and benefits under any pension plan in which he participated. (This would be significant for defined benefit plans which use a formula that includes a years-of-service component.)

Reemployment. A returning service member is entitled to be reemployed unless the employer can show that the employer's circumstances have so changed as to make reemployment impossible or unreasonable or that reemployment would impose an undue hardship. This right applies to service members who have been on active duty for as long as five years, and in some cases even longer.

The returning service member is entitled to be placed in the position he would have been employed in but for the call to active duty (or in a position with equivalent seniority, status and pay). Under this "escalator" provision, the employer must take into consideration any promotions or advancements the member would have received if he had continued to work.

If a member who has been on active duty for more than 90 days is not qualified for an escalated position, the employer must make reasonable efforts to help the member become qualified. For returning service members who became disabled while on active duty, the employer must make reasonable efforts to accommodate

the disability.

To be eligible for reemployment, the returning service member must, after release from active duty, notify his employer of his intent to return to work. Strict time limits apply to this notice requirement –

- ! If the period of active duty was less than 31 days, the returning member must report to work on the first regular workday after his release from duty (after allowing for an 8-hour rest period and safe transportation home);
- ! If the period of active duty was between 31 and 181 days, the returning member must apply for reemployment within 14 days after release from duty; and
- ! If the period of active duty was more than 180 days, the returning member must apply for reemployment within 90 days after release from duty.

These time limits can be extended for up to two years or more in cases of returning members who are hospitalized or convalescing from an illness or injury suffered while on active duty.

Once the employer has reemployed a returning service member, the employer is restricted in his ability to discharge the member. Except for discharges for cause, members who have been on active duty for 180 days or less cannot be fired for a period of 180 days after reemployment. Members who have been on active duty for more than 180 days cannot be fired for one year.

Discrimination. Persons who are members of the uniformed services, who have applied to become members, or who have obligations to one of the uniformed services are protected against discrimination in hiring, retention, reemployment, promotion, or the granting of any employment benefit.

The Small Business Administration has a disaster loan program for small businesses whose essential employees are called up for duty. See following article.

Statutory reference. 38 U.S.C. § 4301

EMPLOYER'S SURVIVAL GUIDE reference. 6.04.

SBA Loan Program Helps Businesses Whose Essential Employees Are Called Up

For military conflicts occurring after May 1999, the Small Business Administration makes low-interest loans available in amounts up to \$1.5 million to cover the on-going needs of small businesses whose essential employees have been called to active duty.

The program, known as the Military Reservist Economic Injury Disaster Loan program (MREIDL), provides working capital to pay necessary obligations as they mature. It is not intended to cover lost income or lost profits. An essential employee is an individual (whether or not an owner of the small business) whose managerial or technical expertise is critical to the successful day-to-day operations of the business. For loan amounts of \$5,000 or less, no collateral is required. Higher amounts require collateral, if available.

Loan applications may be filed beginning on the date the essential employee is ordered to active duty and at any time thereafter up to 90 days after the employee is released from active duty.

For more information, go to

<http://www.sba.gov/disaster/mreidlall.txt>

Regulatory reference. 13 C.F.R § 123.500.

EMPLOYER'S SURVIVAL GUIDE reference. 6.04.

OSHA's New Record-Keeping and Reporting Requirements

On President Clinton's last day in office, the Occupational Safety and Health Administration issued final regulations covering employer record-keeping and reporting requirements, effective January 1, 2002. On the first day of the new Bush administration, the White House directed agency heads appointed by President Bush to review pending regulations and to delay their effective dates until such reviews were completed.

OSHA undertook the required review and, in July, issued a notice that the record-keeping and reporting requirements would take effect as scheduled, with two exceptions. The two exceptions relate to hearing loss and to musculoskeletal disorders (MSDs), both of which are being studied further by OSHA.

The regulations issued by the Clinton administration included a new set of forms and instructions. They are available at

<http://www.osha-slc.gov/recordkeeping/OSHArecordkeepingforms.pdf>

Since these forms call for information relating to hearing loss and MSDs, OSHA expects to issue new forms before the January 2002 effective date, deleting requirements for hearing loss and MSD information.

The set of forms includes –

- ! *Form 300*, Log of Work-Related Injuries and Illnesses;
- ! *Form 300A*, Summary of Work-Related Injuries

and Illnesses; and

! *Form 301*, Injury and Illness Incident Report.

The set also includes specific instructions and worksheets.

Regulatory reference. 29 C.F.R. § 1904.

EMPLOYER'S SURVIVAL GUIDE reference. 10.03.

Employment Cases Pending Before Supreme Court

The Supreme Court's new term, which began October 1, promises to be an important one for employers. Among the issues the Court will likely rule upon are –

Arbitration. Last term the Court ruled that arbitration clauses in employment contracts are enforceable, even where federal statutory rights such as discrimination and sexual harassment are at stake. This term the Court will consider just how an arbitration clause affects the EEOC's authority to pursue discrimination claims in the courts.

The case grows out of a suit by an employee of Waffle House who claimed the company violated the Americans with Disabilities Act when it fired him without attempting to accommodate his seizure disorder. The U.S. Court of Appeals for the Fourth Circuit (which hears appeals of federal cases from Maryland and Virginia) ruled that the arbitration agreement the employee had signed not only was binding on the individual employee, it also barred the EEOC from pursuing remedies on behalf of the employee, such as back pay, reinstatement, etc. However, the EEOC was not barred from pursuing so-called public remedies not specifically aimed at benefitting any individual employee, such as an injunction prohibiting Waffle House from future

violations of the ADA.

The Supreme Court heard oral argument in the case on October 10, 2001.

Disability. The Court has agreed to hear two cases this term interpreting the Americans with Disabilities Act. One case, against U.S. Airways, deals with whether an employer is required to reassign a disabled employee to a different position as a reasonable accommodation under the ADA, even though another employee is entitled to hold the position under the employer's seniority system. Argument in that case is scheduled for December 4, 2001.

In the second case, set for argument on November 7, 2001, a Toyota assembly plant in Tennessee has asked the Supreme Court to review a decision of the Sixth Circuit that Toyota is required to accommodate an employee with carpal tunnel syndrome and tendinitis. Toyota argued that those conditions do not amount to disabilities under the ADA, but the Sixth Circuit said they are equivalent to have missing fingers or damaged or deformed limbs, effectively preventing the employee from performing a wide range of manual tasks.

Affirmative action. Of particular interest to employers in the Washington region are the affirmative action obligations of federal contractors. Back to the Supreme Court for a third time is a would-be subcontractor on a federally-financed highway construction project in Colorado.

Although the subcontractor submitted the low bid for certain guardrail work, the prime contractor hired another subcontractor. The prime contractor went with the higher bid only because that subcontractor was a certified small business controlled by socially and economically disadvantaged individuals, under a program similar to the Small Business Administration's 8(a) program. Under the prime's contract with the federal government, the prime received extra compensation for hiring certified small

businesses.

Concluding that the program (which has undergone a number of changes over the ten years the case has been pending) met the appropriate “strict scrutiny” test applicable to race-based classifications, the Tenth Circuit upheld the program as constitutional. Oral argument before the Supreme Court is scheduled for October 31, 2001.

Family and medical leave. Department of Labor regulations state that unless an employer specifically designates time off as FMLA leave, the twelve weeks’ leave that employees are entitled to under the Family and Medical Leave Act does not begin to run. According to the DOL, even if employer’s leave policies are more favorable to an employee than FMLA requires, the employer must still designate the leave as FMLA in order to satisfy the statute.

Relying on DOL regs, Tracy Ragsdale claimed that after being on leave from Wolverine Worldwide for six months for cancer treatment, she was still entitled to another twelve weeks under FMLA. The Eighth Circuit disagreed with Ragsdale, holding that where an employer grants greater leave rights than mandated by FMLA, the employer’s FMLA obligations are satisfied. Oral argument has not yet been scheduled.

Undocumented aliens. May back pay be awarded to an undocumented alien who is subject to an unfair labor practice? After Hoffman Plastic illegally fired several workers for union organizing efforts, the National Labor Relations Board ordered it traditional remedy – reinstatement with back pay. However, because one of the fired workers was an undocumented alien, the NLRB limited the back pay award to him to the period prior to Hoffman’s discovery of the worker’s lack of documentation.

Hoffman appealed the award to the U.S. Court of Appeals for the D.C. Circuit, arguing that it should not

have to pay anything to an undocumented alien. The D.C. Circuit rejected Hoffman’s argument and upheld the NLRB. The Supreme Court has agreed to hear the case but has not set a date for oral argument.

Religious discrimination. The Supreme Court has refused to hear a Fourth Circuit decision involving an employee of Alamo Rent-a-Car who insisted on wearing a head scarf along with her Alamo uniform. The employee, Zeinab Ali, claimed wearing the scarf was in accordance with her Islamic religion. Her supervisor at Alamo told her either to stop wearing the scarf or be transferred to a position in which she would have less frequent contact with customers. When Ali refused to stop wearing the scarf she was transferred.

Claiming that the transfer amounted to religious discrimination under Title VII, Ali sued. The Fourth Circuit rejected Ali’s claim, ruling that the job transfer did not amount to an adverse employment action – a requirement for Title VII claims.

Case references. *EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999), *cert. granted*, ___ U.S. ___ (No. 99-1823, March 26, 2001); *Williams v. Toyota Motor Mfg.*, 224 F.3d 840 (6th Cir. 2000), *cert. granted*, ___ U.S. ___ (No. 00-1089, Apr. 16, 2001); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000), *cert. granted*, ___ U.S. ___ (No. 00-1250, Apr. 16, 2001); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *cert. granted*, ___ U.S. ___ (No. 00-730, Mar. 26, 2001); *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933 (8th Cir. 2001), *cert. granted*, ___ U.S. ___ (No. 00-6029, June 25, 2001); *Hoffman Plastic Compound, Inc. v. NLRB*, 237 F.3d 639 (D.C. Cir. 2001), *cert. granted*, ___ U.S. ___ (No. 00-1595, Sept. 25, 2001); *Ali v. Alamo Rent-a-Car, Inc.*, ___ F.3d ___ (4th Cir. 2001), *cert. denied*, ___ U.S. ___, (No. 00-1813, Oct. 1, 2001).

EMPLOYER’S SURVIVAL GUIDE references. 6.02; 11.03; 17.01; 19.01; 19.08.

D.C. Circuit Deletes Expletive Ruling

Would you be surprised to learn that abusive and threatening language is an essential part of any union organizing campaign and that an employer rule against such language is an unfair labor practice? So was the U.S. Court of Appeals for the D.C. Circuit.

The case grew out of a provision in the employee handbook of Adtranz ABB Daimler-Benz Transportation, a company that refurbishes rail cars for the Bay Area Rapid Transit System in California. The handbook classified use of “abusive or threatening language to anyone on Company premises” as “serious misconduct” warranting suspension for a first offense and possible termination for subsequent offenses.

Adtranz was not unionized and the Machinists and Aerospace Workers union (part of the AFL-CIO) began organizing efforts in 1998. In December of that year an election was held, which the union lost. The union then filed unfair labor practice charges against Adtranz citing, among other things, Adtranz’s abusive and threatening language rule. The union argued that vulgar expletives and racial epithets are “part and parcel of a vigorous exchange that often accompanies labor relations.” Incredibly, the National Labor Relations Board agreed and voided the election.

The D.C. Circuit reversed the NLRB and strongly criticized the Board in the process. The Court ruled that unions were perfectly capable of acting civilly while conducting organizing campaigns. The Court also pointed out that an employer may be exposed to claims if it *fails* to maintain a minimal level of civility in the workplace and allows racial, gender, or similar forms of harassment.

Statutory reference. 29 U.S.C. § 158.

Case reference. *Adtranz ABB Daimler-Benz Trans.*,

N.A. v. NLRB, 253 F.3d 19 (D.C.Cir. 2001).

EMPLOYER’S SURVIVAL GUIDE reference. 19.08.

Maryland Court Holds Home Healthcare Registries Liable for Unemployment Insurance

In a decision that will likely send shockwaves through Maryland’s home healthcare industry, a circuit court in Baltimore has ruled that, for unemployment insurance (UI) purposes, home healthcare workers must be treated as employees of the agencies that refer them. Such agencies, which often operate as employment registries, traditionally treat their workers as independent contractors. Independent contractors do not have taxes and other withholdings deducted from their pay and they are not covered by workers’ compensation or UI laws.

The case involved the Elizabeth Cooney Personnel Agency, two of whose home healthcare workers claimed UI benefits under Maryland law. The Office of Unemployment Insurance first ruled that the workers were entitled to benefits and that the personnel agency was their base employer. However, the Unemployment Insurance Board of Appeals reversed and classified the workers as independent contractors. The circuit court has now reversed the Board and said the workers are employees of the personnel agency for UI purposes.

The circuit court’s decision sets out in detail the relationship between the personnel agency and its workers, who include registered nurses, LPN’s, companions, and other care providers. For example, the agency does a credit and background check on applicants, as well as verifying credentials. Although workers sign an independent contractor agreement with the agency, they must pay 20% of all fees they receive to the agency. Clients are typically asked to make checks payable to both the worker and the agency, and workers

are required to endorse the checks over to the agency, which then deducts its 20% and pays the balance to the workers. These and other factors led the circuit court to conclude that, at least for UI purposes, the workers should be classified as employees.

The decision, which is subject to appeal, raises a number of thorny questions. For example, the personnel agency involved in the case asks workers listed on its registry to call in on Monday mornings to indicate whether they are available for work that week. The agency then matches available workers with the job assignments they have. If a worker calls in to indicate her

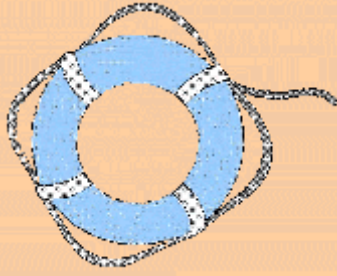
availability but the agency does not place her, is that worker then considered unemployed and entitled to UI benefits? These and other questions will need to be answered if the decision stands as the law of Maryland.

Statutory reference. Md. Code, L&E § 8-101.

Case reference. *O'Connor v. Dept. of Labor, Licensing & Regulation*, Balt. City Cir. Ct. No. 24-C-00-005405, decided Oct. 4, 2001.

EMPLOYER'S SURVIVAL GUIDE reference. 8.03.

Employer Alerts! is published monthly as a free supplement to *EMPLOYER'S SURVIVAL GUIDE – MD/VA/DC Edition*, ISBN 0-9703059-0-7. *Employer Alerts!* is also available by e-mail subscription for \$36.00 per year. For further information, contact the publisher, EMPLOYERS INFONET, LLC at 56 Crescent Road, Greenbelt, MD 20770, telephone (301) 441-3809 or <http://www.EmployersInfoNet.com>. Copyright © 2001 Charles H. Fleischer. All rights reserved. This publication may not be reproduced in whole or in part without the express written permission of the author. While every attempt has been made to provide accurate, authoritative and current information regarding the subject matter covered, this publication is for general information only and is not intended as legal or other professional advice. The reader should consult an attorney, accountant, or other appropriate professional regarding specific questions or problems. Neither the author nor the publisher is liable for any errors or omissions.



Employer Alerts!

By Charles H. Fleischer, Esq.

Volume II, No. 7 - December 2001

A monthly supplement to

EMPLOYER'S SURVIVAL GUIDE – MD / VA / DC Edition

Distributed by EMPLOYERS INFONET, LLC

www.EmployersInfoNet.com

IRS Approves Leave-Based Donation Programs

As a result of the September 11 attacks, a number of employers are considering programs allowing their employees to forgo leave they have earned in exchange for their employers' contributing the value of that leave to charity. The Internal Revenue Service has now clarified the tax treatment of these contributions.

Under "assignment of income" and "constructive receipt" tax principles, an employee is taxed on income he has earned and has a right to receive, even if he doesn't actually receive the income or he assigns it to a third person. Once an employee has earned paid leave, those same principles may subject the employee to tax on the

leave payments, even if the employee authorizes his employer to pay the value of the leave to a qualified charity. Of course, the employee can also claim a charitable deduction for the contribution, but he must itemize his deductions in order to do so. In addition, charitable deductions are subject to various limits and restrictions.

It would be much easier if the employee could simply ignore leave payments that are contributed in his name to designated charities. And that's exactly what the IRS has now approved. For any contribution made to a qualified charity before January 1, 2003, the IRS has agreed not to assert that the payment constitutes taxable income to the employee. Further, employers are permitted to exclude those payments from the W-2 forms they issue to

In this issue ...

G	IRS Approves Leave-Based Donation Programs	p. 1
G	EEOC Authorizes Medical Inquiries for Emergency Planning	p. 2
G	Are Bonuses "Wages" under Maryland's Wage and Hour Law?.....	p. 3
G	Employee Committees and Federal Labor Law	p. 3
G	Security Guard's Sexual Assault – Who's Liable?	p. 4
G	S Corporation Distributions Subject to Employment Taxes	p. 5
G	Maryland's Prevailing Wage Act	p. 6
G	D.C., 4 th Circuits Disagree on When Employee Bound by Arbitration Agreement	p. 7

employees. Of course, the employee cannot then claim a charitable deduction on his individual tax return.

Amounts paid to charities through a leave-based donation program are usually deductible by the employer, either as a charitable contribution or a business expense.

The IRS announcement does not address practical issues an employer will have to face in administering a leave-based donation program. For example –

- ! Who will determine which charities are entitled to receive contributions?
- ! Will employees be allowed to contribute all accrued leave, including sick leave, personal leave, etc., or be limited just to vacation?
- ! How will the value of the leave be determined?
- ! Will employees who have contributed paid leave continue to work, or will they take leave without pay?

Presumably, most employees who participate in a leave-based donation program will want to work through their leave, rather than take leave without pay. But this creates potential problems for the employer who may not have sufficient work to keep those employees busy. Worse, the employer will now face an increased cash drain, paying the employee his regular compensation while the employee works through his leave, *and* making an additional charitable contribution in the employee's name.

Regulatory reference. IRS Notice 2001-64.

EMPLOYER'S SURVIVAL GUIDE reference. 5.01.

EEOC Authorizes Medical Inquiries for Emergency Planning

The events of September 11 have implications for the Americans with Disabilities Act as well. While employers should generally not ask their employees about disabilities (unless the disability is obvious), they may, according to a recent Equal Employment Opportunity Commission ruling, ask whether employees will need assistance in an emergency evacuation because of a disability or medical condition.

It remains up to the employee to decide whether assistance is needed. Employers should not assume that everyone with a disability will require assistance since, in the EEOC's words, people with disabilities are in the best position to assess their particular needs.

Along with the right to collect such information comes an obligation to keep the information confidential. See "Privacy of Medical Records under HIPAA and ADA," *Employer Alerts!*, Feb. 2001, p. 2. But the ADA's general confidentiality provision has an exception permitting employers to share medical information with first aid and safety personnel. For emergency evacuation purposes, this includes security officers and other non-medical persons who are responsible for assuring safe evacuation. Beyond that, however, employers must safeguard the confidentiality of disability information.

Statutory reference. 42 U.S.C. § 12102.

Regulatory reference. EEOC Fact Sheet dated October 31, 2001.

EMPLOYER'S SURVIVAL GUIDE references. 11.03; 13.03.

Are Bonuses “Wages” under Maryland’s Wage and Hour Law?

Under Maryland’s wage and hour law, an employer can be sued for up to three times the amount of any wages he improperly withholds from his employee, and be forced to pay the employee’s attorney’s fees as well. See “Maryland’s Treble Damage Law for Wage Violations,” *Employer Alerts!*, Oct. 2000, p. 4. And although the statute includes bonuses in its definition of “wages,” not all bonuses qualify for treble damage awards.

Joe Fitzpatrick was a project engineer for the Whiting-Turner Contracting Company. He was a salaried employee and, had he stayed with the company for two years, he would have qualified to participate in the company’s bonus program.

After working for the company for about a year, Fitzpatrick was offered an opportunity to leave the company for a job involving less travel. Before mentioning the matter to the company, he learned that several people in his work group had received bonuses. So when he met with his supervisor to discuss the possibility of leaving, he also asked about a bonus check. The supervisor responded, “I have a check for you in my pocket. All you have to do is tell me you are staying.”

Fitzpatrick gave further thought to his situation, but he eventually decided to take the other job. When the company refused to pay him the bonus, he sued, arguing that the company’s statutory obligation to pay him all wages earned included the bonus.

The Maryland Court of Appeals disagreed. Observing that “once a bonus, commission or fringe benefit has been promised as a part of the compensation for service, the employee would be entitled to its enforcement as wages.” Here, however, the company had decided to give a bonus *before* Fitzpatrick had met his two-year employment requirement. Therefore, the bonus was not

part of a promised compensation package. Instead, it was merely a gift or gratuity revocable at any time before the check was delivered.

Statutory reference. Md. Code, L&E § 3-507.1.

Case reference. *Whiting -Turner Contracting Co. v. Fitzpatrick*, ___ A.2d ___ (Md. No. 9, decided Oct. 17, 2001).

EMPLOYER’S SURVIVAL GUIDE reference. 4.03.

Employee Committees and Federal Labor Law

Historically, a favorite way for employers to keep out, or at least keep control of, unions was to form an organization for its employees which appeared to, but in reality did not, give employees a voice in their conditions of employment. Many of these so-called employee committees were outlawed by the National Labor Relations Act, which makes it an unfair labor practice for an employer to dominate or interfere with a labor organization. The Act defines “labor organization” as any organization of employees that exists to “deal with” the employer concerning grievances, wages, hours, or working conditions.

Not all employee committees are illegal, however. A recent decision by the National Labor Relations Board shows where the line should be drawn.

Crown Cork & Seal Company employs some 150 people at its aluminum can manufacturing plant in Texas. At the time of the NLRB decision, the Company was not unionized and there was no organizational effort underway.

Ever since the plant opened in 1984, the Company has used a management system in which it delegates substantial operational authority to its employees. It

accomplishes this through numerous committees in which employees and management participate. These committees make decisions by consensus on a wide variety of workplace issues such as production, quality, training, attendance, safety, maintenance, and even discipline short of suspension or discharge. Although senior management retains ultimate authority, it routinely approves all committee recommendations.

The NLRB ruled that these committees are not “labor organizations” within the meaning of the Act, because they do not exist to “deal with” management. Instead, the committees themselves perform management functions. In the NLRB’s view, each committee exercises as a group authority that, in the traditional plant setting, would be considered supervisory. So when a committee interacts with company officials, the interaction is really between two management bodies. In effect, Crown Cork & Seal’s committees do not *deal with* management, they *are* management.

Statutory reference. 29 U.S.C. § 151.

Case reference. *Crown Cork & Seal Co.*, NLRB Case No. 16-CA-18316, decided July 20, 2001.

EMPLOYER’S SURVIVAL GUIDE reference. 19.08.

Security Guard’s Sexual Assault – Who’s Liable?

Argenbright Security not only provides airport screeners, it also does less publicized contract security work at retail stores. One of its customers was a Safeway supermarket in southeast Washington. There, according to a recent lawsuit, an Argenbright security guard stopped a twelve-year old girl suspected of shoplifting and, in the process, allegedly fondled her.

The girl’s mother sued both Safeway and Argenbright on the girl’s behalf. Her suit was based on the legal doctrine of *respondeat superior*, under which an employer can be held vicariously liable for the acts of its employees committed within the scope of their employment. See “Employer Liability for Sexual Assaults by Employees,” *Employer Alerts!*, Nov. 2000, p. 5.

The questions presented to the D.C. Court of Appeals were: Who was the guard’s employer – Safeway, Argenbright, or both? and, Was the guard’s alleged criminal conduct within the scope of his employment?

As to the first question, the court ruled that only Argenbright, not Safeway, had the right to control the guard’s performance of his work. All Safeway did was monitor the work of the guards Argenbright sent, and presumably, complain to Argenbright if a particular guard was unsatisfactory.

The second question was more difficult. The court reasoned that scope-of-employment (and vicarious liability) usually turn on whether the employee’s actions are actuated, at least in part, by a desire to serve the employer’s interests. While acknowledging that most sexual assaults are solely for the employee’s personal benefit and have nothing to do with the employer’s interests, the court viewed the alleged assault here as so closely connected with the guard’s assigned duties that it could have occurred within the scope of the guard’s employment. Therefore, said the appeals court, the question should have been submitted to a jury rather than dismissed out of hand by the trial court.

Case reference. *Brown v. Argenbright Security, Inc.*, 2001 WL 1167464 (D.C. No. 99-CV-1603, decided Oct. 4, 2001).

EMPLOYER’S SURVIVAL GUIDE references. 1.01; 19.06.

S Corporation Distributions Subject to Employment Taxes

Federal tax laws generally recognize two types of corporations – “C” and “S” corporations (so named because of the Internal Revenue Code chapters they are covered by). Most ordinary business corporations, from Microsoft on down, are C corporations. C corporations are taxable entities. They not only file corporate tax returns, they must pay tax on any net income. Net income is also taxed again when it is distributed to shareholders in the form of dividends.

One way for a small corporation with one or only a few shareholders to alleviate the burden of double taxation is to elect S corporation status. For federal income tax purposes, an S corporation is treated in many respects like a partnership, in that net income is passed through to the owners and is taxed only once at the individual level.

Regardless of how a corporation’s own net income is taxed, however, all corporations are subject to employment taxes (F.I.C.A., F.U.T.A. and Medicare) on compensation paid to their employees. Recently, two enterprising individuals thought they had figured out a way around any employment tax obligations.

In one case, Dr. Kenneth Sadanaga, a veterinarian, formed an S corporation in which he was the president and sole shareholder. The corporation’s only business was providing consulting and surgical services to other veterinarians. All those services were rendered by Dr. Sadanaga. Because of its “S” status, the corporation did not pay any income tax. Instead all net income was distributed to Dr. Sadanaga. Dr. Sadanaga, in turn, reported the income on his individual income tax returns as income from an S corporation.

The problem the IRS had with this arrangement was that no employment taxes were being paid on Dr.

Sadanaga’s earnings. Dr. Sadanaga’s response was that the earnings were not subject to employment taxes because they were merely distributions from an S corporation to its sole shareholder.

Eventually the matter ended up in U.S. Tax Court. The Court sided with the IRS, relying on a provision of the tax code that defines “employee” as including any officer of a corporation. The only exception to that tax code definition is officers who do not perform any services and who neither receive nor are entitled to receive remuneration. The form of the remuneration, said the Tax Court is immaterial, the only relevant factor being whether the payments were received as compensation for employment.

On nearly identical facts, the Tax Court also ruled that payments to the principal owner and president of a drywall construction business were not distributions to a shareholder, but instead were compensation subject to federal employment taxes.

The so-called “safe harbor” provision of the tax code (see “Safe Harbor for Independent Contractors,” *Employer Alerts!*, March 2001, p. 3) was no help either. The Tax Court held that there was no reasonable basis for the veterinary consulting firm’s and the drywall company’s failure to treat the veterinarian and the dry wall mechanic as employees.

Statutory reference. 26 U.S.C. §§ 1366, 3121, 3306.

Case references. *Veterinary Surgical Consultants, P.C. v. Commissioner*, 117 T.C. ___ (No. 2500-99, decided Oct. 15, 2001); *Yeagle Drywall Co. v. Commissioner*, T.C. Memo. 2001-284 (No. 3908-00, decided Oct. 15, 2001).

EMPLOYER’S SURVIVAL GUIDE reference. 5.02.

Maryland's Prevailing Wage Act

Public works projects of \$500,000 or more in Maryland are subject to Maryland's Prevailing Wage Act. In general, the Act requires all contractors and subcontractors on the project to pay their employees the "prevailing wage" for each job classification, as determined by the Commissioner of Labor and Industry. The prevailing overtime rate must also be paid for time in excess of 10 hours per day or 40 hours per week, and for Sunday or holiday work. Contractors must post bonds to assure compliance with the Act.

The Act allows the public agency involved in the contract to collect "liquidated damages" for each day an employee is paid less than the prevailing wage. The public agency may also require the employer to make restitution to the underpaid employee. (In addition, the Act allows employees themselves to sue for the difference between wages paid and the prevailing rate – and, presumably, for treble damages and attorney fees under Maryland's wage and hour law. See "Maryland's Treble Damage Law for Wage Violations," *Employer Alerts!*, Oct. 2000, p. 4.)

The question before the Maryland courts in a recent case was: When a subcontractor's employee is underpaid, who, as between the prime contractor and a subcontractor, is liable for liquidated damages and for restitution to the employee?

Triangle General Contractors was hired to build the new Computer & Space Sciences Building at the University of Maryland's College Park campus. Triangle in turn hired Irocc Masonry as its masonry subcontractor. The entire project was subject to Maryland's Prevailing Wage Act.

In the summer of 1994 an investigator from the Maryland Division of Labor and Industry visited the construction site to verify compliance with the Act. His investigation revealed that Irocc was underpaying one of

its employees. The investigator then issued a notice to both Triangle and Irocc, imposing liquidated damage and restitution requirements on each, based on the following provision of the Act –

Liability for failure to pay prevailing wage rate.

(a) *Liquidated Damages.* – A contractor under a public works project is liable to the public body [i.e. the contracting agency] for liquidated damages of \$10 [since raised to \$20] for each laborer or other employee for each day for which ... the employee is paid less than the prevailing wage rate.

(b) *Restitution.* – If a contractor or subcontractor pays an employee less than the amount the employee is entitled to receive for the work performed, the contractor or subcontractor shall make restitution to the employee.

Irocc eventually left the project and declared bankruptcy, so the Commissioner of Labor and Industry tried to hold Triangle, the prime contractor, liable for both liquidated damages and restitution to Irocc's employee. The Circuit Court for Anne Arundel County agreed that Triangle was liable for liquidated damages, but it ruled that Triangle had no liability to make restitution for an employee of one of its subcontractors.

Only the restitution issue went up on appeal, since Triangle chose not to fight the Circuit Court's liquidated damages ruling. On appeal, the Maryland Court of Appeals agreed that Triangle should not have to make restitution. The Court pointed out that subsection (b) of the Act imposes liability on a "contractor *or* a subcontractor" for failure to pay wages at the prevailing rate. Subsection (a), in contrast, makes no distinction between contractors and subcontractors. Instead, subsection (a) makes the contractor liable for liquidated damages without regard to who the employer is.

Statutory reference. Md. Code, SF&P § 17-201.

Case reference. *Maryland Division of Labor & Indus. v. Triangle Gen'l Contractors, Inc.*, ___ A.2d ___ (Md. No. 25, decided Nov. 6, 2001).

EMPLOYER'S SURVIVAL GUIDE reference. 17.05.

D.C., 4th Circuits Disagree on When Employee Bound by Arbitration Agreement

Arbitration agreements are voluntary contracts between parties in which the parties agree, in advance, that any future disputes between them will be settled by arbitration, rather than in court. As with other types of contracts, an arbitration agreement requires just that – an *agreement* to abide by the provisions of the contract. In legal terms, one party *offers* to be bound by a contract, and the other party *accepts* the offer. Normally, one party cannot unilaterally impose a contract obligation on another.

Last year the D.C. Circuit ruled that when the Federal National Mortgage Association (Fannie Mae) adopted a mandatory arbitration policy for workplace disputes, Fannie Mae's employees were not bound by the policy unless they affirmatively agreed to be bound. The fact that an employee who had knowledge of the policy continued to work for Fannie Mae was not, without more, a sufficient indication that the employee agreed to be bound. See "Agreements to Arbitrate," *Employer Alerts!*, July 2000, p. 1.

Now the Fourth Circuit, applying North Carolina state law, has ruled that when an employee is informed that the company has adopted a mandatory arbitration policy, his continuing to work for the company *can* amount to an agreement to be bound by the policy.

In March 1998 Eddie Hightower began working for the Olive Garden restaurants, which are owned and operated by GMRI, Inc. In August 1998 he attended a mandatory staff meeting, one of the purposes of which was to inform employees about a new arbitration policy that GMRI had adopted. Hightower signed an attendance sheet for the meeting and acknowledged in writing that he had received written materials about the arbitration policy. As a manager, Hightower also had responsibility for informing other employees about the policy.

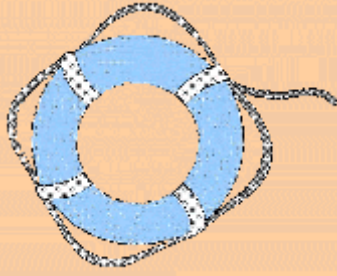
Hightower was fired in November 1998. Claiming his firing was motivated by racial and religious discrimination, Hightower filed discrimination charges with the EEOC, refusing to submit to arbitration in accordance with company policy. Later, with EEOC approval, he filed a lawsuit against GMRI in federal district court in North Carolina, where he had been employed by GMRI. When the district court ruled that Hightower was not bound by any arbitration agreement and it refused to suspend the lawsuit in favor of arbitration, GMRI appealed.

The Fourth Circuit (which hears appeals from federal courts in Maryland and Virginia, as well as North Carolina), reversed, saying there was an arbitration agreement after all. The Court said that, under North Carolina law, Hightower's knowledge of the arbitration policy (established by his attendance at the staff meeting and signing for written materials), coupled with his continuing to work for GMRI for approximately three months, demonstrated acceptance of the policy. Therefore, Hightower was bound to arbitrate his discrimination complaint and he could not proceed in court.

Case reference. *Hightower v. GMRI, Inc.*, ___ F.3d ___ (4th Cir. No. 01-1302, decided Nov. 14, 2001).

EMPLOYER'S SURVIVAL GUIDE reference. 19.01.

Employer Alerts! is published monthly as a free supplement to **EMPLOYER'S SURVIVAL GUIDE – MD/VA/DC Edition**, ISBN 0-9703059-0-7. **Employer Alerts!** is also available by e-mail subscription for \$36.00 per year. For further information, contact the publisher, EMPLOYERS INFONET, LLC at 56 Crescent Road, Greenbelt, MD 20770, telephone (301) 441-3809 or <http://www.EmployersInfoNet.com>. Copyright © 2001 Charles H. Fleischer. All rights reserved. This publication may not be reproduced in whole or in part without the express written permission of the author. While every attempt has been made to provide accurate, authoritative and current information regarding the subject matter covered, this publication is for general information only and is not intended as legal or other professional advice. The reader should consult an attorney, accountant, or other appropriate professional regarding specific questions or problems. Neither the author nor the publisher is liable for any errors or omissions.



Employer Alerts!

By Charles H. Fleischer, Esq.

Volume II, No. 8 - January 2002

A monthly supplement to

EMPLOYER'S SURVIVAL GUIDE – MD / VA / DC Edition

Distributed by EMPLOYERS INFONET, LLC

www.EmployersInfoNet.com

Right-to-Work Laws

Federal law

The collective bargaining agreement (CBA) between your company and one of its employee unions is about to expire, and representatives from both sides are negotiating a replacement. The union is not pushing for higher wages, better health coverage, or any of the other benefits it usually wants. Instead, this time it is asking for a “union security” clause in its CBA. What is this request all about? Can you agree to it? Should you?

Union security clauses are designed to protect union membership, or at least union revenue. For example, under a union shop arrangement, all eligible employees must join the union on being hired and must maintain membership as a condition of continued employment. In an agency shop, employees need not be union members but they must pay the same union dues that members pay.

Federal labor law permits union shop and agency shop agreements between employers and unions. However, since 1947 when the National Labor Relations Act was amended by the Taft-Hartley Act, federal labor law has also permitted individual states to enact so-called “right-to-work” laws making union security agreements illegal in those states. The two relevant provisions of the NLRA say –

Nothing in this [Act], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization ... to require as a condition of employment membership therein.

But –

In this issue ...

G	Right-to-Work Laws	p. 1
G	Employee Benefit Coverage for Domestic Partners	p. 3
G	More on Wages and Treble Damages in Maryland	p. 5
G	California Court Adds New Weapon in War Against Computer Abuse	p. 6
G	FMLA Protects Former Employees, Too!	p. 7
G	Immunity from Liability for Complying with IRS Levy	p. 8

Nothing in this [Act] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which execution or application is prohibited by State or Territorial law.

Although the statutory language is rather convoluted, the Supreme Court made clear in a 1949 decision interpreting the statute that “states are left free to pursue their own more restrictive policies in the matter of union-security agreements.”

State “opt-out” laws

Some 22 states have done exactly that. Oklahoma most recently joined the list, adopting a right-to-work law this past fall. (Oklahoma’s law is under attack in the courts.) A right-to-work bill was recently introduced in the Pennsylvania legislature, but as of this writing it has not been enacted.

Among the three local jurisdictions, only Virginia has a right-to-work law. First enacted in 1947, the Virginia statute says –

It is hereby declared the public policy of Virginia that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in a labor union or labor organization.

The statute goes on to make illegal any agreement between an employer and a labor organization which conditions employment on membership in a union or payment of union dues.

Neither Maryland nor the District of Columbia has any similar statute, so employers and unions in those jurisdictions are free to include union security clauses in their collective bargaining agreements. In fact, in states that do not have right-to-work laws, when a union

wishes to bargain for a union security clause, the employer *must* negotiate the issue in good faith. An employer commits an unfair labor practice when he unconditionally refuses to bargain with his union over a proposed union security clause.

Religious discrimination

Suppose an employee in a union or agency shop holds religious or moral convictions against union participation? Federal law provides a limited escape clause. It says that any employee

who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations

may, instead of paying union dues, pay an equal amount to a designated charity.

Government contractors

As reported in the August 2001 issue of *Employer Alerts!* (see “Government Contractors’ New Posting Obligation,” p. 6), special rules apply to government contractors. On February 17, 2001, President Bush signed Executive Order 13201, requiring all federal government contracts to contain a provision that the contractor will post a notice informing employees of their rights not to join a union and to limit their dues payments only to specified union functions. The notice must include the following provision –

Under federal law, employees cannot be required to join a union or maintain membership in a union in order to retain their jobs. Under certain conditions, the law permits a union and an employer to enter into a union-security agreement requiring employees to pay uniform periodic dues and initiation fees. However, employees who are not union members

can object to the use of their payments for certain purposes and can only be required to pay their share of union costs relating to collective bargaining, contract administration, or grievance adjustment.

Conclusion

Needless to say, right-to-work issues are highly contentious. Unions vigorously opposed Oklahoma's new law, and they got some support from academia. The Economic Policy Institute's website, <http://www.epinet.org>, contains briefing papers suggesting that such laws have a negative effect on wages and economic growth. On the other hand, the National Right to Work Foundation strongly supports such laws. Its website, <http://www.nrtw.org>, focuses on the rights of individual employees in right-to-work and non-right-to-work states. Employers faced with union demands for a security clause would do well to visit these websites and get a feel for the controversy.

Of course, employers doing business in right-to-work states, like Virginia, have little choice in the matter: they cannot negotiate or include a union security clause in their CBA's. On the other hand, employers in Maryland, the District, and other non-right-to-work states must negotiate such clauses in good faith if requested to do so by their unions. Whether they ultimately adopt such clauses depends on the course of those negotiations.

Statutory references. 29 U.S.C. §§ 158, 164, 169; Va. Code § 40.1-58.

Regulatory references: EO 13201 (Feb. 17, 2001); DOL Interim Procedural Notice, 66 F.R. 19988 (Apr. 18, 2001).

Case references. *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301 (1949); *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).

EMPLOYER'S SURVIVAL GUIDE references. 11.01; 17.04; 19.08.

Employee Benefit Coverage for Domestic Partners

More and more employers, both public sector and private, are offering benefit coverage for the domestic partners of their employees. According to a recent report by Wm. M. Mercer, Inc., some 16% of large employers (500 or more employees) allow same-sex domestic partners to participate in health insurance, and over a third of the largest employers (20,000 or more employees) cover domestic partners.

Since 1992, District law has provided domestic partner coverage for D.C. government employees, although until just this month the law had not been implemented for lack of funding by Congress. The District of Columbia Appropriations Act of 2002, which was sent to President Bush for signature on December 13, for the first time provides funds to implement the program.

An April 2000 decision by the Virginia Supreme Court struck down an Arlington County ordinance that would have provided health insurance coverage to domestic partners of County employees. The Court ruled that, in enacting the ordinance, the County exceeded its authority under state law.

Employers agree to provide domestic partner coverage because they see it as fair and equal treatment for their employees. Or they may agree to domestic partner coverage to stay competitive with other employers. Whatever the reason, domestic partner coverage poses a number of legal and practical issues that need to be addressed.

Who qualifies as a domestic partner? Employers need to develop a clear definition of "domestic partner."

The definition might, for example, include some or all of the following requirements –

! Both persons in the relationship must be legally competent adults.

! The persons cannot be so closely related to each other that (aside from gender) they would be forbidden to marry under state law.

! The persons must have a committed, exclusive relationship.

! The persons must live together and/or be financially interdependent.

! Neither person can be married.

The employer will also need to decide whether to cover only same-sex partners or include opposite-sex couples as well. In jurisdictions that prohibit sexual orientation discrimination – including the District and Maryland – failure to cover both same-sex and opposite-sex couples could be discriminatory.

What proof will be required? Once the definition of domestic partner is settled, the employer will have to specify what documentation will be required to recognize a person as a domestic partner. Is an affidavit from the two partners sufficient? Or will the employer also want to see such items as deeds or leases showing that the partners jointly own or lease their residence?

The District permits domestic partners to register by filing an affidavit stating that the District's definitional requirements are met. Either partner may terminate the registration by filing a termination statement. Registration is required for D.C. government employees who seek domestic partner benefits and is permitted for private sector employees.

What benefits will be offered? District law already

requires employers to provide extended leave to an employee who needs to care for a domestic partner. (The federal extended leave law, known as FMLA, does not include domestic partners. Neither Maryland nor Virginia has an extended leave law.)

The Americans with Disabilities Act also protects applicants and employees from discrimination on the basis that they are known to be in a relationship with or associated with someone who has a disability. This provision is broad enough to cover domestic partners as well as spouses, fiancées, etc.

In addition to these protections, employers can offer a variety of low-cost benefits such as sick leave or bereavement leave and participation in employer-sponsored recreational functions. Other benefits are problematic. For example –

! Health insurance is certainly one of the most important benefits that an employee would want for his or her domestic partner. To offer the benefit, the employer will need to work out plan arrangements and costs with its health insurance provider. In an era of rising health care costs, employers may feel they cannot afford this additional coverage, or they may cut back on other benefits, such as coverage of retirees.

! COBRA benefits can include a domestic partner *if* the employee has elected COBRA, but a domestic partner has no independent right to elect COBRA benefits for him- or herself.

! Most retirement plans are subject to federal law. While spouses have certain statutory rights to pension plan benefits (see “Spousal Rights in Pension Plans,” *Employer Alerts!*, Oct. 2001, p. 3), the federal Defense of Marriage Act (DOMA) limits “spouse” to a person of the opposite sex.

Must an employer recognize same-sex marriages legally performed in other states? The answer to this

question appears to be “no,” at least for the time being. To date, only Vermont has a law recognizing civil unions between same-sex partners. While each state is generally required by the U.S. Constitution to give “full faith and credit” – that is, to recognize – the laws of every other state, the DOMA gives states the choice not to recognize another state’s same-sex marriage. So if you are an employer in a state that does not recognize same-sex marriages, you need not do so either. (It remains to be seen whether this provision of the DOMA is constitutional.)

What are the tax implications of providing domestic partner benefits? In general, an employer may claim an income tax deduction for the costs of a qualified benefit plan. And in the case of health insurance provided to employees, or to employees and their spouses or dependents, the employee need not treat the benefit as taxable income.

However, the cost of providing health insurance to a domestic partner *is* taxable income to the employee, since the domestic partner is not a spouse and, in most cases, cannot qualify as a dependent. Therefore, the cost of such coverage must be included in the W-2 form issued by the employer and it must be reported on the employee’s income tax return.

Statutory references. 1 U.S.C. § 7; 28 U.S.C. § 1738C; D.C. Code § 32-701 (2001).

Regulatory references. PLR 9603011; PLR 9850011.

Case references. *Arlington County v. White*, 528 S.E.2d 706 (Va. 2000).

EMPLOYER’S SURVIVAL GUIDE references. 9.04; 19.02.

More on Wages and Treble Damages in Maryland

Just last month, we reported a Maryland Court of Appeals decision on whether bonus payments constitute wages. “Are Bonuses ‘Wages’ Under Maryland’s Wage and Hour Law?” *Employer Alerts!*, Dec. 2001, p. 3. Now the Court of Special Appeals (Maryland’s intermediate appellate court) has addressed the same question applied to commissions.

Timothy McCabe earned an annual base salary of \$49,000 as a sales representative for Medex. His compensation also included a commission on annual sales, but the company’s employee handbook provided that all commissions are conditional on the employee’s being employed at the time of actual payment. Each year the company decided when to calculate and pay commissions.

For the year in question, McCabe generated sales that would have entitled him to a commission of just under \$33,000. However, he quit before Medex got around to computing commissions and setting a payment date. Claiming that McCabe failed to satisfy the being-employed condition, Medex refused to pay. McCabe then sued for his commission, plus treble damages and attorney’s fees as allowed by Maryland law.

McCabe argued that he had done all work necessary to earn the commission and that, at the time he quit, there was nothing left for him to do to be entitled to the commission. According to McCabe, Medex’ requirement that employees remain employed as of some arbitrary payment date violates Maryland’s wage and hour statute, which says –

Each employer shall pay an employee ... all wages due for work that the employee performed before the termination of employment, on or before the day on which the employee would have been paid the wages if the employment had not been terminated.

Medex countered that the commission was really an incentive payment, timed to encourage employees to remain employed. Since McCabe didn't remain employed, he shouldn't receive the payment.

The Court of Special Appeals rejected Medex' argument and agreed with McCabe. The Court said that under the law, McCabe earned the commission as part of his agreed compensation and that Medex' additional condition of continued employment clearly violated the statute.

In effect, the Court ruled that agreed commissions, just like promised bonuses, are no different from regular wages. Once earned, they must be paid "on or before the day on which the employee would have been paid" but for the termination. The statute simply doesn't permit an employer to impose additional conditions on its obligation to pay wages.

The Court then addressed McCabe's claim for treble damages and attorney's fees. Maryland law does permit such awards where an employer fails to pay wages due, but the law has an exception for bona fide disputes. Here, said the Court, McCabe's entitlement to a commission was hotly contested and required considerable legal analysis. Therefore, it would not award McCabe any damages or fees beyond the commission itself.

Statutory reference. Md. Code, L&E § 3-501.

Case reference. *McCabe v. Medex*, ___ A.2d ___ (Md.App. No. 80, decided Dec. 4, 2001).

EMPLOYER'S SURVIVAL GUIDE reference. 4.03.

California Court Adds New Weapon in War Against Computer Abuse

Intentionally causing damage to a company's computer system by transmission of a program, information, code, or command, is a violation of federal criminal law. Denial-of-service attacks or deletion of valuable data are good examples. So is theft of confidential electronic information. See "The Computer Fraud and Abuse Act," *Employer Alerts!*, July 2001, p. 1. But what about activity that, while annoying and somewhat disruptive to business, does not cause any significant damage?

An intermediate appellate court in California, resurrecting an old legal doctrine called "trespass to chattels," now says that even minimal disruption is enough.

Kouros Hamidi was fired by Intel and promptly began to air his grievances about the company. As the webmaster and spokesperson for FACE-Intel – which stands for "Former And Current Employees of Intel" – he sent e-mails to between 8,000 and 35,000 Intel employees on six separate occasions. Intel requested that Hamidi stop his e-mail barrage, but Hamidi refused and took steps to evade Intel's security measures. When Intel's efforts to block further e-mails from Hamidi proved unsuccessful, Intel asked the court for an injunction against Hamidi.

Invoking "trespass to chattels," the court granted the injunction. Noting that at early common law, a trespass action required proof of a physical touching or an entry on another's land, the court observed that more modern cases permit an indirect touching to suffice. If, for example, dust particles from a cement plant can constitute a trespass, so could electronic signals from Hamidi's computer.

Nor, said the court, was it necessary for Hamidi to so flood Intel's computers that they crashed. The mere

disrupting of Intel's business – by occupying disk space on Intel's computers and by forcing Intel employees to read, or at least delete, the unwanted e-mails – was sufficient.

The court's opinion stresses that Intel had asked Hamidi to stop the barrage before suing for an injunction. That factor is consistent with the law of trespass generally, and is probably an essential ingredient to a trespass-on-chattels claim.

While the decision is only binding in California, and may be subject to further appeal, it offers an additional weapon for employers everywhere to try when under cyber attack.

Statutory reference. 18 U.S.C. § 1030.

Case reference. *Intel Corp. v. Hamidi*, 2001 WL 1563769 (Cal. 3d Dist. No. C033076, decided Dec. 10, 2001); *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F.Supp. 1015 (S.D.Ohio, 1997).

EMPLOYER'S SURVIVAL GUIDE reference. 14.01.

FMLA Protects Former Employees, Too!

The Family and Medical Leave Act (FMLA) requires employers with 50 or more employees to grant eligible employees up to 12 weeks of extended leave –

- ! for serious health conditions,
- ! to care for immediate family members with serious health conditions, or
- ! to care for newborns or newly adopted children.

Under FMLA, it is illegal for an employer to discipline an employee for taking FMLA leave or to interfere in any way with an employee's FMLA rights. But what if an employer simply refuses to rehire a former employee who, when previously employed, took extended leave under FMLA?

Two appellate court decisions, relying on Department of Labor regulations, hold that employers *cannot* refuse to rehire a former employee, any more than they can discipline a current employee, for taking FMLA leave.

This past November the U.S. Court of Appeals for the 11th Circuit (which hears appeals of federal cases from Florida, Georgia and Alabama) ruled that BellSouth violated FMLA when it refused to rehire a former employee solely because of his prior poor attendance. Since those absences were FMLA leave, they were protected and could not be the basis for an adverse employment decision.

In 1998 the U.S. Court of Appeals for the 1st Circuit (which covers Massachusetts, Maine, New Hampshire and Rhode Island) concluded that a former Pratt & Whitney employee could not be rejected for re-employment simply because he had taken FMLA leave during his prior period of employment by Pratt & Whitney.

Both cases began their analysis with FMLA's less-than-helpful definition of "employee" – "any individual employed by an employer." Concluding that the definition is ambiguous, the courts then looked to Department of Labor regulations, which say that FMLA prohibits employers from discriminating against both "employees and prospective employees" who have used FMLA leave or from using FLMA leave "as a negative factor in employment decisions, such as hiring." The courts found these regulations reasonable and deferred to them.

Employers may be able to protect themselves from these types of claims under certain narrow conditions.

When an employee is fired or quits under adverse conditions and threatens to sue for discrimination, wrongful discharge, etc., employers are often willing to offer a severance package in exchange for a release of claims. It is good practice in such situations to include a clause in the release that the employee will never apply to the company for re-employment. That way the employee cannot resurrect the very same claim of discrimination based on rejection of his application for re-employment that he just released in exchange for a severance package. Should the employee nevertheless reapply, the employer can reject the new application simply on the basis that it violates the release, avoiding a renewed claim that the real reason for the rejection was discrimination, poor attendance, or some other illegal factor.

Such a release provision will not, of course, protect employers from claims by new applicants who are rejected based on poor attendance records with *another* employer.

Suppose, for example, that an employee takes extended FMLA leave while working for Company A. He then quits or is laid off and his supervisor makes a notation in his personnel file, "Poor attendance. Do not rehire." The employee then applies to Company B and, when Company B checks references, is told by Company A that the employee had a poor attendance record. May Company B reject the application on this basis? Or must it first attempt to find out whether the employee's absences were protected under FMLA? Does Company A violate FMLA when it gives out an unfavorable reference based on poor attendance, without explaining that the leave qualified for FMLA?

Department of Labor regulations are broad enough not only to cover re-employment by a *previous* employer, but also employment by a *brand new* employer. Therefore, the safest course for any employer is simply to ignore absences protected by FMLA for

hiring, reference, or other employment purposes.

Statutory reference. 29 U.S.C. § 2601.

Regulatory reference. 29 C.F.R. § 825.

Case references. *Smith v. BellSouth Telecommunications, Inc.*, ___ F.3d ___, 2001 WL 1502528 (11th Cir. No. 00-15708 decided Nov. 27, 2001); *Duckworth v. Pratt & Whitney, Inc.*, 152 F.3d 1 (1st Cir. 1998).

EMPLOYER'S SURVIVAL GUIDE reference. 6.02.

Immunity from Liability for Complying with IRS Levy

When your employee fails to pay his federal income taxes, the IRS can collect the unpaid taxes from you, by serving a levy on you. Levies, like garnishments, and wage attachments, require the employer to pay a third party some portion of the wages otherwise due the employee in order to extinguish your employee's debt to that third party.

But what if your employee disputes the validity of the levy and sues you for unpaid wages. Is the fact that you made payments in accordance with an IRS levy a good defense to your employee's suit against you?

Yes, says a recent decision of the federal district court in Hawaii. The employer in that case, Hilton Grand Vacations Club, was held immune from suit by its employee, Jonathan O'Neill, under the plain language of section 6332(e) of the Internal Revenue Code, which says:

Any person in possession of ... property or property subject to levy upon which a levy has been made who, upon demand of the Secretary [of the

Treasury] surrenders such property or rights to property ... shall be discharged from any obligation or liability to the delinquent taxpayer ... with respect to such property or rights to property arising from such surrender.

Had Hilton ignored the levy, or agreed with O'Neill's claim that the levy was improper, and paid O'Neill directly, the IRS could still have enforced the levy. In effect, Hilton could be forced to pay twice. Worse, responsible Hilton officials could have had *personal* liability for amounts subject to the levy. But by

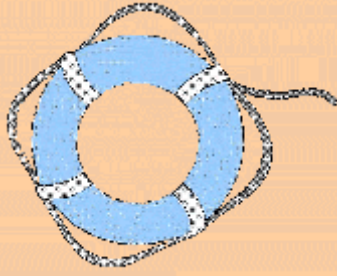
honoring the levy and paying IRS, Hilton and its officials were protected from O'Neill's claims.

Statutory reference. 26 U.S.C. § 6332.

Case reference. *O'Neill v. Hilton Grand Vacations Club* (D.Hawaii No. CV 01-453 decided Oct. 16, 2001).

EMPLOYER'S SURVIVAL GUIDE reference. 16.04.

Employer Alerts! is published monthly as a free supplement to **EMPLOYER'S SURVIVAL GUIDE – MD/VA/DC Edition**, ISBN 0-9703059-0-7. *Employer Alerts!* is also available by e-mail subscription for \$36.00 per year. For further information, contact the publisher, EMPLOYERS INFONET, LLC at 56 Crescent Road, Greenbelt, MD 20770, telephone (301) 441-3809 or <http://www.EmployersInfoNet.com>. Copyright © 2001 Charles H. Fleischer. All rights reserved. This publication may not be reproduced in whole or in part without the express written permission of the author. While every attempt has been made to provide accurate, authoritative and current information regarding the subject matter covered, this publication is for general information only and is not intended as legal or other professional advice. The reader should consult an attorney, accountant, or other appropriate professional regarding specific questions or problems. Neither the author nor the publisher is liable for any errors or omissions.



Employer Alerts!

By Charles H. Fleischer, Esq.

Volume II, No. 9 - February 2002

A monthly supplement to

EMPLOYER'S SURVIVAL GUIDE – MD / VA / DC Edition

Distributed by EMPLOYERS INFONET, LLC

www.EmployersInfoNet.com

Supreme Court Limits Disability Discrimination Claims

An important new decision by the Supreme Court makes it harder for employees to win cases against their employers under the Americans with Disabilities Act. In the Court's words, the ADA needs to be "interpreted strictly" because it creates "a demanding standard for qualifying as disabled."

The case involved Ella Williams, an assembly line worker at Toyota's auto manufacturing plant in Kentucky. Her duties required her to use pneumatic tools, but that work caused pain in her hands, wrists and arms.

Diagnosed with carpal tunnel syndrome, Williams was initially placed on work restriction which precluded her from doing her usual job. Williams was later re-assigned to a quality control team that inspected autos for defects as they moved along the assembly line. Quality control covered four distinct functions, two of which Williams could do without difficulty. However, when Toyota insisted that she rotate through the other two functions as well, Williams requested reasonable accommodation under the ADA, limiting her rotations to just the two functions she had no trouble with. Toyota refused.

Eventually, Williams was placed on a no-work-of-any-kind restriction and was terminated. Williams then sued under the ADA, claiming she was disabled and that Toyota therefore had an obligation to provide her with a

In this issue ...

G Supreme Court Limits Disability Discrimination Claims	p. 1
G EEOC Free to Sue Despite Arbitration Agreement	p. 3
G Stock Options Threatened with One-Two Punch	p. 4
G Talking to Attorney as Grounds for Firing	p. 6
G Labor Law Protections in Non-Union Shops	p. 6
G IRS Expands Availability of Cash Basis Accounting	p. 8
G When is Harassment "Sexual"?.....	p. 8

reasonable accommodation but failed to do so.

The ADA defines “disability” as a physical or mental impairment that substantially limits one or more major life activities. There was no dispute that Williams’ carpal tunnel syndrome was an impairment within the meaning of the statute. However, merely having an impairment does not necessarily make a person disabled for ADA purposes. As the Supreme Court pointed out, carpal tunnel syndrome can produce widely varying symptoms, anywhere from temporary or intermittent numbness and tingling to muscle atrophy and extreme sensory deficits. A person claiming ADA protection must therefore prove not only that he has an impairment but also that the impairment is substantially limiting based on the person’s own experience. It is, said the Court, a case-by-case determination.

To resolve Williams’ claim, the Court needed to decide what the ADA means by “substantially limiting” and “major life activities.” For guidance, the Court looked to EEOC regulations under the ADA and regulations of the former Dept. of Health, Education and Welfare adopted pursuant to the federal Rehabilitation Act (after which the ADA was patterned). The regulations define “substantially limiting” as “unable to perform a major life activity that the average person in the general population can perform” or “significantly restricted as to the condition, manner or duration under which an individual can perform” a major life activity. “Major life activities” include walking, seeing, hearing and performing manual tasks.

Williams claimed that she was substantially limited in performing manual tasks, and as evidence of that, she offered the fact that she could not do the assembly line work that Toyota required of her. Yet she could perform other manual tasks, such as tending to her personal hygiene and carrying out personal and household chores.

The Supreme Court rejected Williams’ evidence as proof of disability. It said that when an ADA claim is based on limitations in performing manual tasks, the test

is

whether the claimant is unable to perform the variety of tasks *central to most people’s daily lives*, not whether the claimant is unable to perform the tasks associated with her specific job... Household chores, bathing and brushing one’s teeth are among the types of manual tasks of central importance to people’s daily lives, and should have been part of the assessment of whether [Williams] was substantially limited in performing manual tasks.

The Court therefore sent the case back to the lower courts for a determination whether Williams qualified under the more demanding standard of “disabled.”

This latest decision, written by Justice O’Connor for a unanimous Court, follows a 1999 opinion, also authored by Justice O’Connor.

The 1999 case (decided 7 to 2), involved twin sisters who applied to United Airlines for employment as commercial airline pilots. United rejected them because they each suffered from severe visual myopia, although with glasses they functioned identically with other individuals who did not have myopia. So the question before the Court in that case was whether mitigating or corrective measures, such as glasses, should be considered in deciding whether a person is disabled.

The Court ruled that mitigating measures *should* be taken into consideration. It said the ADA requires

that a person be presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability. A ‘disability’ exists only where an impairment ‘substantially limits’ a major life activity, not where it ‘might’ or ‘could’ or ‘would’ be substantially limiting if mitigating measures were not taken.

While persons with conditions such as severe myopia may have an impairment, once the impairment is

corrected they are not substantially limited in any major life activity, as required by the ADA.

The two cases sound a consistent theme – that an impairment alone is not proof of disability. Of course, certain impairments, such as total blindness or profound deafness, may inevitably be disabling. But for other impairments, like carpal tunnel syndrome and myopia, their effect on the specific individual involved must be assessed.

In understanding what the ADA does and does not cover, the following summary may be helpful –

- ! An impairment that does not substantially limit any major life activity – **not covered** by the ADA.
- ! An impairment that would substantially limit one or more major life activities but does not in fact because the effects of the impairment are controlled through mitigating or corrective measures – **not covered** by the ADA.
- ! An impairment that substantially limits one or more major life activities, but the individual involved is able to perform all the essential functions of his or her job without any accommodation or with reasonable accommodation – **covered** by the ADA.
- ! An impairment that substantially limits one or more major life activities, and the individual is not able to perform one or more essential functions of his or her job, despite reasonable accommodation – **not covered** by the ADA.

In both the Toyota case and the United Airlines case, the Supreme Court took the opportunity to point out that Congress did not give the EEOC authority to promulgate regulations implementing the ADA. The EEOC has done so anyway, and while the regulations may offer guidance to the courts as to the meaning of federal anti-discrimination statutes, the courts do not owe any special deference to the EEOC's views. In the United Airlines decision, for example, the Supreme Court expressly

rejected the EEOC's view that mitigating or corrective measures should be ignored.

Statutory reference. 42 U.S.C. § 12102.

Regulatory reference. 29 C.F.R. § 1630.

Case references. *Toyota Motor Mfg. Kentucky, Inc. v. Williams*, 534 U.S. ____ (No. 00-1089, decided Jan. 8, 2002); *Sutton v. United Airlines, Inc.*, 523 U.S. 471 (1999).

EMPLOYER'S SURVIVAL GUIDE reference. 11.03.

EEOC Free to Sue Despite Arbitration Agreement

In another recent case, the Supreme Court has ruled that the Equal Employment Opportunity Commission is not limited in its right to pursue court remedies on behalf of a victim of discrimination, just because the victim had previously signed a binding arbitration agreement. Although the case arose in the context of a disability claim, the Court's opinion indicates that the ruling will be applicable to federal civil rights laws generally, including Title VII and age discrimination claims, as well as claims brought under the ADA.

Federal law grants the EEOC broad power to investigate complaints of discrimination, and to resolve them through conciliation if possible. Where no resolution is possible, the EEOC usually issues a "right to sue letter" which then allows the individual employee to bring suit in federal court. However, the EEOC is also empowered to bring its own suit in federal court on behalf of individual victims of discrimination or on behalf of whole groups of employees. The EEOC often does just that in high-profile cases where large numbers of employees will be affected, or if the EEOC wants to resolve a particular issue of concern. While the affected employee has a right to intervene in an EEOC suit, it is up to the EEOC, not the

employee, to decide what remedies will be pursued.

The statutory remedies available to the EEOC include both general injunctive relief prohibiting an employer from discriminating in the future, and so-called victim-specific relief, such as backpay, reinstatement and money damage awards to the individual victim of discrimination.

The question before the Court here was whether EEOC's statutory right to sue in its own name is affected by the employee's having previously signed a binding arbitration agreement. Such agreements received the Supreme Court's full blessing just this past March. See "Supreme Court Approves Arbitration Agreements," *Employer Alerts!*, May 2001, p. 1.

The employee in the case, Erik Baker, worked for Waffle House as a grill operator. At time of hire, he was required to sign an arbitration agreement giving up his right to sue Waffle House in court and limiting any claims against Waffle House, including discrimination claims, to arbitration. After just 16 days on the job, he suffered a seizure and was terminated shortly thereafter. Baker believed that the termination was a violation of the ADA, but instead of bringing an arbitration claim as he had agreed to do, he filed a discrimination charge with the EEOC.

The EEOC investigated and, after an unsuccessful attempt to conciliate the claim, filed an enforcement action in South Carolina federal court. Eventually the case found its way to the Fourth Circuit (which hears appeals from Maryland and Virginia as well as the Carolinas). The Fourth Circuit ruled that the arbitration agreement did affect the remedies the EEOC could pursue. It said that while the EEOC could still try to enjoin Waffle House from future discrimination, it could not seek victim-specific relief, such as reinstatement and backpay, on Baker's behalf. That type of relief, said the Fourth Circuit, belonged in arbitration.

The Supreme Court disagreed. By a 6-to-3 majority (Justices Rehnquist, Thomas and Scalia dissenting), the

Court ruled that arbitration agreements *do not* limit the remedies the EEOC may pursue. This is so, said the high Court, because the EEOC has independent statutory authority to sue and is not merely a proxy for victims of discrimination. Further, the EEOC never signed the arbitration agreement, so it should not be bound by it.

The Fourth Circuit erred, said the Supreme Court, in trying to balance the policies of the federal civil rights laws, on the one hand, with the policies of the Federal Arbitration Act favoring enforcement of arbitration agreements. By "splitting the difference," the Fourth Circuit mistakenly limited the EEOC's ability to vindicate the public interest through whatever remedies that seemed to be appropriate, even victim-specific remedies.

Statutory references. 9 U.S.C. § 1; 42 U.S.C. § 12102.

Case reference. *EEOC v. Waffle House, Inc.*, ___ U.S. ___ (No. 99-1823, decided Jan. 15, 2002).

EMPLOYER'S SURVIVAL GUIDE references. 11.03, 19.01.

Stock Options Threatened with One-Two Punch

Stock options – the favorite way for high-tech, cash-starved companies to pay their employees – are being double-teamed by the IRS and the SEC. While option plans will undoubtedly survive the attack, they may look a bit less attractive in years to come.

Option plans, particularly incentive stock option (ISO) plans, offer a number of advantages. They provide incentives to key employees by enabling them to share in the company's growth. They cost the company little. And they are treated favorably in the employees' hands for income tax purposes. See "Employee Stock Options," *Employer Alerts!*, June 2000, p. 1.

The tax treatment is particularly significant. The grant of the option itself has no tax consequences so long as the option price is equal to the then-current fair market value of the stock itself. And if the option plan qualifies as an ISO, the employee incurs no taxable income even when he exercises the option and acquires the stock. Finally, when the employee eventually sells the stock (after satisfying the holding period applicable to ISO's), any gain is taxed at long-term capital gain rates.

As an example, suppose a key employee is granted an option pursuant to an ISO plan to acquire 5,000 shares of company stock at the fair market value of \$1.00 per share. Over time the value of the stock rises to \$1.50 per share, so the employee exercises his option and acquires the stock. The employee then owns stock worth \$7,500, for which he paid only \$5,000.

The \$2,500 spread (profit) is, in economic terms, additional compensation paid to the employee for his services to the company. Normally, compensation for services is taxable income. But in the case of ISO's, the spread is not immediately subject to income tax, so the employer does not have to withhold income taxes from the employee on account of the spread. (The employer does not have to withhold income tax when the employee sells the stock, either. But under proposed new IRS rules, the employer would be required to report the compensation on a W-2 form.)

But what about payroll taxes? For years, the IRS took the view that the spread was exempt from Social Security (FICA), unemployment (FUTA) and Medicare taxes as well. This made sense while the wage base for payroll taxes remained low and most payroll tax obligations were satisfied out of the cash component of employee wages. But as the wage base for payroll taxes rose and as options became a more significant component of compensation, the IRS began to re-think its position.

In a notice issued December 3, 2001, the IRS proposed new regulations that would subject the spread to payroll taxes. The regulations have a proposed effective date of January 1, 2003, but would not actually

become effective until final regs are issued. The new payroll tax requirement would be triggered by the exercise of the option, so in effect they would apply to currently outstanding options that have not yet been exercised, as well as to options granted in the future.

Congress has been asked to fix the problem. But until Congress acts, employers and employees should anticipate that option spreads will be subject to payroll taxes.

The Securities and Exchange Commission has been busy as well. In an effort to combat what has been called "dilution in the dark," the SEC on December 19, 2001, adopted rules requiring increased disclosure of stock option plans.

In its new rules, the SEC expresses concern that while use of stock options is growing, companies have not always publicly disclosed plan details. This is particularly so when companies adopt option plans at the board of director level without getting shareholder approval. As a result, existing investors suffer a dilution of their holdings without knowing they are at risk.

Under the new rules, which become effective April 1, 2002, companies will have to provide detailed information about their equity compensation plans in their annual reports to the SEC. The information will also have to be included in proxy statements whenever the company is submitting an equity compensation plan for approval by its shareholders.

Regulatory references. IRS Notice 2001-72 (Dec. 3, 2001); IRS Notice 2001-73 (Dec. 3, 2001); SEC Release 2001-149 (Dec. 19, 2001); 17 C.F.R. § 228.201.

EMPLOYER'S SURVIVAL GUIDE reference. 9.04.

Talking to Attorney as Grounds for Firing

Deborah Porterfield worked for Home Instead, a business that provides in-home care to senior citizens in suburban Maryland. In April 1999 she received a mediocre evaluation, and in August of that year she was issued a written report warning that, absent marked improvement, she would be fired.

Porterfield's boss required her to sign the report, but Porterfield refused to do so, believing it contained intentionally false criticisms of her work. Instead, she took the report home for further review. On a day she was scheduled to be off, Porterfield called into work and said she would be consulting with an attorney about the report before responding. Later that day, Porterfield's boss called her back and fired her.

Porterfield sued, claiming that her termination was a wrongful discharge in violation of Maryland public policy. See "Wrongful Termination Update," *Employer Alerts!*, Oct. 2001, p. 1. She argued that everyone should have a reasonable opportunity to obtain legal advice concerning matters of importance, including employment matters – an opportunity the courts should protect by awarding her money damages for being fired.

In a January 3 decision, the Court of Special Appeals disagreed with Porterfield. The Court pointed out that, in order to bring a wrongful discharge claim based on violation of public policy,

the public policy in question must be a preexisting, unambiguous, and particularized pronouncement, by constitution, enactment, or prior judicial decision, directing, prohibiting, or protecting the conduct in question so as to make the public policy on the relevant topic not a matter of conjecture or interpretation.

Citing other cases that have allowed employers to fire at-will employees for exercising a general right of free

speech, or for suing the employer, the Court said the general right to consult with counsel is not such a sufficiently important public policy to support a wrongful discharge claim.

District of Columbia law differs significantly from Maryland's on what constitutes a wrongful discharge. In a 1997 decision, the D.C. Court of Appeals ruled that a nurse who was an at-will employee of Children's Hospital was wrongfully fired because of her advocacy for patients' rights before the City Council and because she served as an expert witness in medical malpractice cases. In her City Council testimony, for example, the nurse took a position on proposed tort reform legislation that was contrary to the interests of the Hospital. The court ruled that the District's public policy includes the right of an employee to speak out publicly on issues affecting the public interest without fear of retaliation.

Case references. *Porterfield v. Mascari II, Inc.*, ___ A.2d ___ (Md.App. No. 379, decided Jan. 3, 2002); *Carl v. Children's Hospital*, 702 A.2d 159 (D.C. 1997) (*en banc*).

EMPLOYER'S SURVIVAL GUIDE reference. 1.03.

Labor Law Protections in Non-Union Shops

Federal labor laws often conjure images of heated union election campaigns, picket lines, around-the-clock bargaining sessions, etc. The common element in these images is a union – either one already in existence, or one seeking to be recognized as the employees' representative. But labor laws offer important protections to employees in non-union settings as well.

The National Labor Relations Act protects employees' "concerted activity," whether or not they are members of a union. The Act gives each employee –

full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, ... free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization *or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.*

This provision has been interpreted as prohibiting employers from interfering with employee efforts to better their wages, hours, and working conditions, even if the employees' activities have nothing to do with the formation of a union. Threats or promises intended to chill concerted activity, or retaliation against employees engaged in concerted activity, are unfair labor practices made illegal under the NLRA.

Examples of protected concerted activity in a non-union context include –

- ! *Witness at disciplinary hearing.* In a July 2000 decision, the NLRB ruled that when an employer seeks to interview an employee in connection with a matter that could reasonably lead to discipline of the employee, and the employee requests the presence of a co-worker, the employer has a choice – he can grant the employee's request and allow a co-worker to be present, or he can decide not to conduct the interview. See "Non-Union Worker's Right to Witness at Disciplinary Hearing," *Employer Alerts!*, Aug. 2000, p. 2. This decision was recently affirmed by the U.S. Court of Appeals for the D.C. Circuit.
 - ! *Company-dominated employee committee.* The National Labor Relations Act makes it an unfair labor practice for an employer to dominate or interfere with a labor organization. The Act defines "labor organization" as any organization of employees that exists to "deal with" the employer concerning grievances, wages, hours, or working conditions. See "Employer Committees and Federal Labor Law," *Employer Alerts!*, Dec. 2001, p. 3. The organization does not necessarily have to be an established or recognized union.
 - ! *Anti-union discrimination.* In an attempt to unionize a non-union shop, a union may "salt" the shop by sending union organizers as applicants for job openings. When an employer refuses to hire, or even consider, such applicants and the employer is motivated, at least in part, by anti-union animus, the employer commits an unfair labor practice. See "Salting of Non-Union Shops," *Employer Alerts!*, Aug. 2000, p. 2.
 - ! *Discussing wages.* Since the right of employees to self-organize and bargain collectively necessarily encompasses the right to communicate with one another, an employer cannot adopt a rule prohibiting employees from discussing wages among themselves.
 - ! *Inquiring about benefits.* Employees can be persistent in pursuing benefit claims so long as their conduct is not flagrant or egregious so as to interfere with company business practices.
 - ! *Complaining about working conditions.* An employee cannot be disciplined for complaining to management about matters of common concern to all employees. Although the employee may initially be acting alone, his actions will be considered "concerted" so long as they are intended to initiate or induce group action. The intent to initiate or induce group action will be assumed if, for example, the complaint is voiced at a group meeting called to discuss working conditions.
- This last example is drawn from a recent decision by the U.S. Court of Appeals for the Second Circuit (which covers New York, Connecticut and Vermont). In that case, Caval Tools, a division of Chromalloy Gas Turbine Corp., decided to change company policy governing employee breaks in an attempt to improve productivity.

The company president announced the policy change at a series of meetings with employees.

At one of the meetings, an employee named Diane Baldessari complained about the change and, in the process, blamed management for poor productivity. In a verbal exchange with the president, Baldessari recommended the firing of all but one manager. At that point, the president suggested that Human Resources come up with a severance package for Baldessari.

After the meeting, Baldessari was placed on suspension without pay for three weeks. She then filed an unfair labor practice charge with the National Labor Relations Board, objecting to the suspension. Both the Board and, later, the U.S. Court of Appeals, agreed that the suspension was unjustified, since the phrase “concerted activity” includes a single employee, acting alone, who intends to initiate group activity. Otherwise, the employer could effectively bar group activity by nipping the bud of individual initiative before it had a chance to come into full bloom.

Statutory reference. 29 U.S.C. § 151.

Case references. *Epilepsy Foundation of Northeast Ohio*, 331 NLRB No. 92 (2000), *aff’d*, 268 F.3d 1095 (D.C.Cir. 2001); *FES*, 331 NLRB No. 20 (2000); *NLRB v. Main Street Terrace Care Center*, 218 F.3d 531(6th Cir. 2000); *Union Carbide Corp. v. NLRB*, ___ F.3d ___ (4th Cir. No. 00-1956, decided Dec. 14, 2001); *NLRB v. Caval Tool Division*, 262 F.3d 184 (2d Cir. 2001).

EMPLOYER’S SURVIVAL GUIDE reference. 19.08.

IRS Expands Availability of Cash Basis Accounting

The IRS is not, of course, always the villain. In an announcement welcomed by many small businesses, the IRS said in December that any

business with gross receipts less than \$10 million can use the cash basis method of accounting. The previous limit was \$1 million. The Service estimates that more than 500,000 businesses are affected by the change.

Although the announcement was issued in the form of a *proposed* Revenue Procedure, the IRS said taxpayers may rely on it for taxable years ending on or after December 31, 2001. So for businesses that account on a calendar year basis, the new procedure is available for 2001.

Regulatory reference. IRS Notice 2001-76; Release No. IR-2001-114.

EMPLOYER’S SURVIVAL GUIDE reference. 5.01.

When is Harassment “Sexual”?

The Supreme Court has made clear that an employer violates Title VII of the federal Civil Rights Act when an employee’s workplace environment is hostile or offensive because of unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. It is also clear that the gender of the players doesn’t matter. It is just as much a violation of Title VII for a female to harass a male because of his sex, as it is for a male to harass a female because of her sex. Even same-sex harassment, is illegal if the harassment is “because of” the victim’s sex.

In 1998, for example, the Supreme Court ruled that a male “roustabout” who worked as part of an all-male crew on an oil platform in the Gulf of Mexico could complain about sexual harassment by his fellow employees.

But not all sexually oriented harassment is “because of sex.” Thus the bi-sexual whose conduct is equally offensive to both sexes does not violate Title VII. See “Title VII and the Bi-Sexual or ‘Equal Opportunity’

Harasser,” *Employer Alerts!*, Nov. 2000, p. 2.

As the Supreme Court said in 1998, workplace harassment is not “automatically discriminatory merely because the words used have sexual content or connotations.” Instead, the courts must look to “a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.”

That is just what the U.S. Court of Appeals for the D.C. Circuit did in a January 11 decision involving what the court described as an “extended and rancorous workplace dispute.” There, a security guard supervisor working under contract at the Environmental Protection Agency disciplined two other guards at the site. The two guards, apparently infuriated by the discipline, launched a retaliatory campaign against the supervisor, which began by repeatedly slashing his tires. Later they taunted him in a sexual manner, which included a variety of lewd gestures and comments.

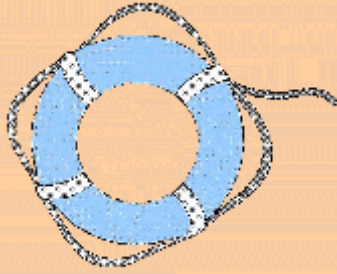
In response to the supervisor’s Title VII claim, the Court of Appeals ruled that the harassment he complained about, although “tinged with offensive sexual connotations,” was not based on his sex. The supervisor did not claim, for example, that the two guards were homosexual or they were seriously proposing to have sex with him. Nor did the supervisor show that the guards were motivated by general hostility to males in the workplace. Instead, according to the Court, the guards were motivated by a workplace grudge having nothing to do with sex.

Statutory reference. 42 U.S.C. § 2000e-2.

Case references. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998); *Davis v. Coastal Int’l Security, Inc.*, ___ F.3d ___, 2002 W.L. 27224 (D.C.Cir. 2002).

EMPLOYER’S SURVIVAL GUIDE reference. 12.03.

Employer Alerts! is published monthly as a free supplement to **EMPLOYER’S SURVIVAL GUIDE – MD/VA/DC Edition**, ISBN 0-9703059-0-7. *Employer Alerts!* is also available by e-mail subscription for \$36.00 per year. For further information, contact the publisher, EMPLOYERS INFONET, LLC at 56 Crescent Road, Greenbelt, MD 20770, telephone (301) 441-3809 or <http://www.EmployersInfoNet.com>. Copyright © 2002 Charles H. Fleischer. All rights reserved. This publication may not be reproduced in whole or in part without the express written permission of the author. While every attempt has been made to provide accurate, authoritative and current information regarding the subject matter covered, this publication is for general information only and is not intended as legal or other professional advice. The reader should consult an attorney, accountant, or other appropriate professional regarding specific questions or problems. Neither the author nor the publisher is liable for any errors or omissions.



Employer Alerts!

By Charles H. Fleischer, Esq.

Volume II, No. 10 - March 2002

A monthly supplement to

EMPLOYER'S SURVIVAL GUIDE – MD / VA / DC Edition

Distributed by EMPLOYERS INFONET, LLC

www.EmployersInfoNet.com

When Your Employee Takes the Fifth

With the collapse of Enron, Congress has invited or subpoenaed a long list of company officials, accountants and others to testify. Some of them have refused to testify, claiming a Fifth Amendment privilege. Others are likely to refuse. Do employers have any role to play in determining whether their employees “take the Fifth?” May employers discipline employees for doing so? For not doing so?

The Fifth Amendment to the U.S. Constitution protects a variety of personal rights. Among them are that no person “shall be compelled in any criminal case to be a witness against himself.” In other words, no one may be compelled, under threat of being held in contempt of court, to answer questions under oath when it is reasonable to assume that his answers could help convict

him of a crime. Although on its face the Amendment is limited to compelled testimony in criminal cases, the Supreme Court has held the protection to apply in a range of situations in which testimony is coerced, including civil cases, grand jury proceedings, and appearances before Congress.

The privilege is limited to testimony and does not extend to compelling physical evidence such as handwriting exemplars, blood specimens, etc. Nor does the privilege protect documents from compelled disclosure, unless by the very act of producing the document the person is admitting the existence of the document and thereby incriminating himself.

Corporations and other organizations have no Fifth Amendment privilege. So if a corporation is served with a subpoena for records, it has no basis, at least under the Fifth Amendment, to resist the subpoena and refuse to

In this issue ...

G	When Your Employee Takes the Fifth	p. 1
G	A Noisy Noise Annoys an Employee	p. 3
G	Employer's Duty to Bargain	p. 4
G	NLRB Jurisdiction over Religious Institutions	p. 6
G	Social Security (F.I.C.A.) Withholding Change for 2002	p. 7
G	Mileage Rate and Per Diem Travel Expense Changes for 2002	p. 7

produce the records. While corporate officials can claim the privilege in order to protect *themselves* from incrimination, they cannot claim privilege to protect their corporate employer.

So what can and can't an employer do when its employees are invited or required to testify?

First, and perhaps most important, an employer *cannot* in any way encourage employees to claim the privilege, threaten them should they fail to, or promise rewards for doing so. This type of conduct could amount to an obstruction of justice – a serious crime that will likely get the prosecutor's attention. Employers also need to avoid indirect encouragement. This can arise, for example, when the employer urges employees to be represented by the same attorney who represents the company, and the attorney in turn advises the employees to claim the privilege.

Employers are generally free, however, to require their employees to testify, and to discipline them if they refuse and claim the privilege. Remember that the Fifth Amendment is designed to protect against *government* coercion, not private coercion. (In jurisdictions like the District of Columbia, where the public policy exception to the employment-at-will doctrine is open-ended, employers should be cautious in firing an employee for claiming the privilege. It is at least conceivable that the District's courts will find a public policy protecting employees' Fifth Amendment rights. See "Wrongful Termination Update," *Employer Alerts!*, Oct. 2001, p. 1; "Talking to Attorney as Grounds for Firing," *Employer Alerts!*, Feb. 2002, p. 6.)

The rules are slightly different for public employers, because they *are* the government. In that situation, two competing principles are at stake. On the one hand, the Fifth Amendment protects public employees from coercion by their employers. On the other hand, the public has an interest in knowing whether public employees have properly discharged their public trust. In balancing these principles the courts have held that –

- ! A public employer may *request* its employees to answer questions about matters that may tend to incriminate them. If the employee responds to the request and answers the questions, any resultant information may be used in a later criminal prosecution against the employee.
- ! A public employer may *demand* that its employees answer questions about matters that may tend to incriminate them, and it may fire any employee who refuses to answer.
- ! However, when a public employee is faced with a choice between answering questions and being fired, and the employee chooses to answer, the resultant information may not be used in a later criminal proceeding against the employee. In other words, a coerced answer effectively immunizes the employee from future prosecution based on his testimony.
- ! A public employee *cannot* be forced, under threat of being disciplined, both to answer questions that may incriminate him *and* to waive immunity from prosecution based on his answers.

A recent case involving an officer of the Maryland Public Safety and Correctional Services Department illustrates how this works. Clifton Shockley was a correctional officer assigned to the Eastern Pre-Release Unit. In 1999, a complaint was filed against him accusing him of using narcotics and of making certain improper threats. A lieutenant assigned to investigate the complaint interviewed Shockley and asked him about the matter, but Shockley refused to respond. The lieutenant reminded Shockley that Department regulations required him to respond. A captain then joined the interview, but Shockley still refused to answer. Shockley was suspended for his lack of cooperation.

The matter ended up before the Maryland Court of Special Appeals (Maryland's intermediate appellate court). That court ruled first, that Shockley's off-duty conduct was just as properly a subject of inquiry as on-duty conduct – particularly when the inquiry involved use

of illegal drugs by a correctional officer.

Next, the appellate court said that public employers have a choice between either demanding a statement from an employee, in which case the statement cannot be used in a criminal prosecution, or prosecuting the employee, in which case it cannot discipline the employee for refusing to give the statement. The bottom line, however, is that a public employer cannot do both: it cannot coerce a statement from its employee on threat of discipline and, when it gets an incriminating statement, use that evidence in a criminal prosecution.

In Shockley's case, it wasn't clear whether the employee had been given a direct order to answer. Therefore, the case had to be remanded for that determination.

The rules applicable to public employment spill over to the government contracting arena. In a 1973 case, the Supreme Court considered the constitutionality of a New York statute that required any person who had a contract with the state to testify concerning the contract and to waive immunity from subsequent prosecution based on his testimony. Under the law, if a contractor refused, his existing contract would be canceled and he would be debarred from doing business with the state for five years.

When an architect refused to testify before a grand jury investigating corruption in New York, he was threatened with loss of his state contract. The architect then challenged the constitutionality of the law. The Supreme Court ruled that loss of state contracts amounted to a sufficient economic sanction that the architect's testimony should be deemed coerced. Therefore, said the Court, New York could insist upon the testimony, but it could not at the same time require a waiver of immunity.

Case reference. *Department of Public Safety & Correctional Services v. Shockley*, __A.2d.__ (Md.App. No. 2081, decided Jan. 31, 2002); *Lefkowitz v. Turley*, 414 U.S. 70 (1973).

EMPLOYER'S SURVIVAL GUIDE reference. 3.04, 17.05.

A Noisy Noise Annoys an Employee

In the category of strange cases, a recent decision by the D. C. Court of Appeals held that Georgetown University could be liable for intentional infliction of emotional distress suffered by one of its employees.

According to the employee, Shoukoufeh Larijani, the distress was caused when Larijani's supervisor, Jane Blumenthal, placed two electrically-operated noisemakers outside Blumenthal's office door aimed at Larijani's work area. Larijani's suit described the devices as emitting an unbearably "loud, static-sounding, piercing, humming and droning noise" every hour of the workday for some nine months. According to Larijani, this constant noise caused extreme emotional distress, resulting in a variety of serious physical symptoms. Despite complaints to her employer, Georgetown University did nothing.

Larijani's suit was initially dismissed by the trial court. On appeal, the higher court first reviewed the elements of a claim for intentional infliction of emotional distress – (1) extreme or outrageous conduct on the part of the defendant, which (2) either intentionally or recklessly (3) causes the plaintiff severe emotional distress. "The conduct," said the court, must be

so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community

Stated another way, a suit for intentional infliction of emotional distress will be permitted if an average member of the community, on having the conduct described to him, would be prompted to exclaim, "outrageous."

Despite the obvious difficulty any plaintiff would have in meeting this high standard, a two-to-one majority of the appellate court reinstated Larijani's suit, saying the trial judge should not have dismissed without first hearing evidence as to just how unbearable the noise was.

The dissenting judge was highly critical of that result. He likened the devices to so-called "white noise" makers used, for example, during a trial to mask certain legal arguments from the jury's hearing. Describing Larijani's suit as a "parody of a claim for intentional infliction of emotional distress," the dissenting judge observed, "Sometimes common sense – or a sense of the ridiculous – should be enough for the court to say 'no.'"

Assuming the conduct of Blumenthal – Larijani's supervisor – was indeed outrageous, a further question arises as to the basis on which Georgetown University could be held liable. The appellate opinion does not make clear whether Georgetown's potential liability is based on its own outrageous conduct in failing to stop Blumenthal, or whether Georgetown might only be *vicariously* liable for the outrageous conduct of one of its employees.

The distinction, though subtle, could make a difference. Remember that workers' compensation laws protect employers from suit for *accidental* injury (which is defined in the District to include "the willful act of third persons directed against the employee because of his employment"). If Georgetown's liability is only vicarious – that is, if it did not itself act intentionally to cause Larijani's emotional distress – Larijani's injury would be considered "accidental" for workers' compensation purposes and Georgetown should be immune from suit.

Statutory reference. D.C. Code § 32-1501 (West 2001).

Case reference. *Larijani v. Georgetown University*, ___ A.2d. ___ (No. 00-CV-1583, decided Feb. 7, 2002).

EMPLOYER'S SURVIVAL GUIDE reference.

1.01, 7.01, 19.06.

Employer's Duty to Bargain

Federal labor law makes it an unfair labor practice for a unionized employer to refuse to bargain collectively with its unions. The term "bargain collectively" is defined as –

the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.

Bargaining over some subjects is mandatory, because those subjects involve "wages, hours, and other terms and conditions of employment." Other subjects are permissive, in that employers and unions are free to bargain over them if they wish, but neither side can insist, to the point of impasse, on inclusion of a mere permissive subject in a collective bargaining agreement.

What are the mandatory subjects over which employers *must* bargain if requested to do so by their unions? According to the Supreme Court, they are subjects that are "directly germane to the working environment." However, a company has a right to run its business without interference. So a company need not bargain over "managerial decisions which lie at the core of entrepreneurial control," such as decisions concerning the commitment of investment capital and the basic scope and direction of the enterprise.

In addition to wages, working hours, and benefits, examples of mandatory subjects include –

- ! Company decisions that directly affect job security, such as a decision to contract out work previously done by union employees. (But decisions that only *indirectly* affect job security, such as a decision to discontinue a particular product line, are not subject

to mandatory bargaining.)

- ! Unilateral changes in working conditions.
- ! Union security clauses, where such clauses are not forbidden under state right-to-work laws. See “Right to Work Laws,” *Employer Alerts!*, Jan. 2002, p. 1).
- ! Seniority rights.
- ! Management rights clauses reserving, for example, the company’s right to sell its business free of liabilities under the collective bargaining agreement, to discontinue operations, to determine the number of hours per day and per week that operations should be carried on, and to suspend, discharge or otherwise discipline employees.
- ! Prices and availability of services at in-plant cafeterias and vending machines.
- ! Hiring practices.
- ! Tardiness policies
- ! Use of company bulletin board.
- ! Drug and alcohol testing. See “Drug and Alcohol Testing,” *Employer Alerts!*, Dec. 2000, p. 4.
- ! Installation of security cameras to deter employee theft.

This last example is drawn from a recent case before the National Labor Relations Board. The case involved National Steel Corp., which had a practice over many years of installing hidden surveillance cameras to investigate specific cases of employee theft or other wrongdoing. Faced with unauthorized, long-distance use of a manager’s telephone, the company placed a camera in the manager’s file cabinet. The camera caught employee Williams, a union member, using the phone, and the company promptly fired him.

Williams’ union filed a grievance over the firing and, at a subsequent hearing, discovered for the first time the company’s practice of using surveillance cameras. The union then asked the company for detailed information about the cameras, indicating that it wanted to bargain with the company over the practice. The company refused to provide the information and it refused to bargain.

The NLRB ruled that the company was wrong on both counts. It said use of surveillance cameras is a subject of mandatory bargaining, just like physical examinations, drug and alcohol testing, and other investigatory tools and methods used by employers to discover employee misconduct. Further, the company must provide pertinent information to the union – or at least bargain over what information would be provided. While the company may have a legitimate concern over keeping confidential such information as the location of the cameras, the company still has a duty to seek an accommodation that will meet the needs of both the union and the company.

Occasionally, though rarely, a company will be ordered to bargain with a union that has *lost* a representation election. Suppose an employer, motivated by anti-union animus, so poisons the atmosphere with unfair labor practices that a would-be union loses the election. Traditionally, the NLRB will order a new election. But if the employer’s actions make it impossible to conduct a fair and reliable new election, the NLRB may simply treat the union as the employees’ legitimate representative.

Just because a subject of negotiation falls in the mandatory category, employers should still remember that their only duty is to *discuss* the subject with an open mind. The duty to bargain does not mean that the employer is obligated to *agree* with the union’s position.

Statutory reference. 29 U.S.C. § 158.

Case references. *Fireboard Corp. v. NLRB*, 379 U.S. 203 (1964); *Ford Motor Co. v. NLRB*, 441 U.S.

488 (1979); *Colgate-Palmolive Co.*, 323 NLRB No. 92 (1997); *National Steel Corp.*, 335 NLRB No. 60 (2001); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Overnite Transportation Co. v. NLRB*, ___F.3d___ (4th Cir. No. 99-2494, decided Feb. 11, 2002) (*en banc*).

EMPLOYER'S SURVIVAL GUIDE reference. 19.08.

NLRB Jurisdiction Over Religious Institutions

The First Amendment to the Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ..." Countless federal statutes have the potential for interfering with religious practices, but either they contain express exemptions, or they have been held inapplicable or unconstitutional when applied to religious organizations.

Federal labor law offers a good example. As discussed in "Right to Work Laws," *Employer Alerts!*, Jan. 2002, p. 1, an employee in a union shop who is a member of a bona fide religion that forbids union membership or union financial support may pay his dues to charity instead of to the union. And a recent appeals court decision re-affirms that religiously-affiliated institutions are not subject to NLRB-supervised collective bargaining.

The recent case grows out of a 1979 Supreme Court decision, known as *Catholic Bishop*, involving parochial schools in Chicago that were the subject of union organizing efforts. Fearing that NLRB-supervised elections would amount to excessive government entanglement in religious matters, the Supreme Court ruled that church-operated schools were exempt from NLRB jurisdiction. The problem with the decision was that the Court did not offer guidance on how to determine whether a school was legitimately "church-operated."

The NLRB soon filled the gap. In a series of decisions involving religiously-affiliated institutions, the NLRB developed its "substantial religious character" test for determining whether a particular institution was subject to its jurisdiction or fell within the *Catholic Bishop* exception. In 1995, for example, the NLRB asserted jurisdiction over attempts by the Montana Federation of Teachers to organize the University of Great Falls.

Although the University was owned and controlled by the Sisters of Providence, a Roman Catholic religious order, the NLRB made the following factual findings: (1) the University's curriculum does not emphasize Catholicism; (2) its board of trustees is not required to establish policies consistent with the Catholic religion; (3) the University's president and other administrators are lay persons who are not required to be members of the Catholic faith; (4) faculty members are not required to be Catholic, to teach Church doctrine, or to support the Church or its teachings; and (5) students may come from any religious background and no preference is given to applicants of the Catholic faith. According to the Board, only about 32 percent of the student body was in fact Catholic. Based on these findings, said the NLRB, the University failed the "substantial religious character" test and it had to bargain with the teachers' union.

The matter eventually ended up before the U.S. Court of Appeals for the D.C. Circuit. In February of this year the Circuit Court rejected the NLRB's "substantial religious character" test as inconsistent with the Supreme Court's *Catholic Bishop* decision. In order to apply the test, said the court, the NLRB necessarily got excessively entangled in religious matters: "Here ... we have the NLRB trolling through the beliefs of the University, making determinations about its religious mission, and that mission's centrality to the primary purpose of the University." According to the court, this is the very type of activity *Catholic Bishop* was intended to avoid.

Instead of the NLRB's "substantial religious character" test, the court adopted a three-pronged test of

its own: (1) whether the institution holds itself out to students, faculty and the community as providing a religious educational environment; (2) whether the institution is organized as non-profit; and (3) whether the institution is affiliated with, operated, or controlled by a recognized religious organization. This test, said the court, is both easy to apply and it avoids excessive entanglement in the institution's beliefs and practices.

Under the Circuit Court's three-pronged test, the University was exempt from NLRB jurisdiction.

Statutory reference. 29 U.S.C. § 158.

Case references. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *University of Great Falls v. NLRB*, ___ F.3d ___ (D.C. No. 00-1415, decided Feb. 12, 2002).

EMPLOYER'S SURVIVAL GUIDE reference. 19.08.

Social Security (F.I.C.A.) Withholding Change for 2002

Effective January 1, 2002, the Social Security wage base goes to \$84,900, up from \$80,400. This means that employers must withhold 6.2% of each employee's pay until the employee has been paid \$84,900. Total F.I.C.A. withholding could therefore reach \$5,263.80. The employer then matches that amount and transmits both amounts – \$10,527.60 in the case of an employee who earns at least \$84,900 – to the IRS.

Withholding for Medicare is 1.45% of all wages paid the employee. Unlike F.I.C.A., the Medicare wage base is unlimited and does not top out at any particular amount. Again, the employer matches the amount withheld and transmits the combined amount to the IRS.

To illustrate, for an employee earning \$100,000 in

taxable wages during 2002, the employee's and employer's shares of F.I.C.A. and Medicare would be –

F.I.C.A.	
Employee's share	\$ 5,263.80
Employer's share	5,263.80
Medicare	
Employee's share	1,450.00
Employer's share	<u>1,450.00</u>
Total	\$ 13,427.60

These and other withholding and remittance obligations are explained in Circular E (Publication 15), available from the IRS at

<http://www.irs.gov/>

Statutory references. 26 U.S.C. §§ 3101, 3111, 3121.

EMPLOYER'S SURVIVAL GUIDE reference. 5.02.

Mileage Rate and Per Diem Travel Expense Changes for 2002

Federal tax laws allow companies to deduct all "ordinary and necessary expenses" of carrying on a trade or business. While companies can reimburse their employees for – and then deduct – *actual expenses* incurred in operating an automobile for business, IRS regulations have long allowed use of *standard mileage rates* in lieu of providing substantiation for actual expenses. Effective January 1, 2002, the standard mileage rate for business use of an automobile has been increased to 36.5¢ per mile, up from 34.5¢.

The IRS takes a similar approach to per diem business travel expenses (meals, lodging and incidental expenses), allowing standard reimbursement/deduction

rates instead of requiring substantiation of actual expenses. Employers may use one of two methods to reimburse employees, either of which will satisfy the substantiation requirement –

- ! The *federal per diem rates* method, based on location-specific rates established by the federal government for cities within the continental U.S. (the “CONUS” rates) and outside the continental U.S. (the “OCONUS” rates). A complete listing of those rates is available at

<http://policyworks.gov/perdiem/>

- ! The *high-low* method, available only for travel within the continental U.S., which allows a deduction of \$204 per day (up from \$201) for specified high-cost areas, and \$125 per day (up from \$124) for all other areas within the continental U.S.

A number of localities have been added to the high-cost list: Nappa, CA; San Mateo/Redwood City, CA; Palm Beach, FL; Kennebunk/Kittery/Sanford, ME; Nantucket, MA; Stateline, NV; Atlantic City, NJ; Edison, NJ; Newark, NJ; Odgen/Layton/Davis County, UT;

Provo, UT; and Salt Lake City, UT. Philadelphia has been moved to the low-cost list.

A full listing of high-cost areas are in IRS Publication 1542, available at

<http://www.irs.gov>

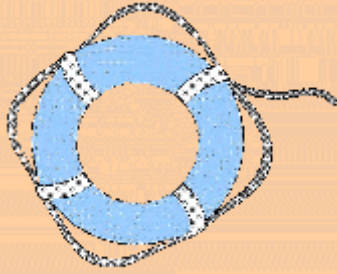
but note that the new rates and locality changes described above are not yet reflected in the publication.

The deduction for *food, beverages and entertainment* (but not lodging) is limited to 65% of the otherwise deductible amount during 2002. That percentage gradually increases to 80% in 2008. Amounts paid to employees in excess of deductible amounts constitute income to the employees and are subject to withholding requirements and payroll taxes.

Regulatory reference. Release No. IR-2001-106; Rev. Proc. 2001-54; Rev. Proc. 2001-47.

EMPLOYER’S SURVIVAL GUIDE reference. 5.02.

Employer Alerts!, ISSN 1538-6228, is published monthly as a free supplement to **EMPLOYER’S SURVIVAL GUIDE – MD/VA/DC Edition**, ISBN 0-9703059-0-7. *Employer Alerts!* is also available by e-mail subscription for \$36.00 per year. For further information, contact the publisher, EMPLOYERS INFONET, LLC at 56 Crescent Road, Greenbelt, MD 20770, telephone (301) 441-3809 or <http://www.EmployersInfoNet.com>. Copyright © 2002 Charles H. Fleischer. All rights reserved. This publication may not be reproduced in whole or in part without the express written permission of the author. While every attempt has been made to provide accurate, authoritative and current information regarding the subject matter covered, this publication is for general information only and is not intended as legal or other professional advice. The reader should consult an attorney, accountant, or other appropriate professional regarding specific questions or problems. Neither the author nor the publisher is liable for any errors or omissions.



Employer Alerts!

By Charles H. Fleischer, Esq.

Volume II, No. 11 - April 2002

A monthly supplement to

EMPLOYER'S SURVIVAL GUIDE – MD / VA / DC Edition

Distributed by EMPLOYERS INFONET, LLC

www.EmployersInfoNet.com

Sexual Harassment by Non-Employees

Suppose you have a well-crafted and well-publicized sexual harassment policy. In addition, you periodically provide sexual harassment training to your employees and supervisors to make sure they are familiar with the policy. Should one of your employees be accused of harassment, you promptly investigate, you take appropriate disciplinary action when warranted, and you never retaliate against a complaining employee or against other employees who provide evidence in support of a complaint. There's no way you could get sued for harassment, right?

Unfortunately, you still face exposure, based on harassing conduct by non-employees like your customers, vendors, and independent contractors who visit the

workplace. The law requires you to provide a working environment that is free from hostile or offensive harassment. The law doesn't necessarily care who is doing the harassing. EEOC Guidelines say, for example, that –

An employer may ... be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the [Equal Employment Opportunity] Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

A number of court cases over the years have upheld

In this issue ...

G Sexual Harassment by Non-Employees	p. 1
G Employer Liable After Canceling Health Plan	p. 2
G ADA Claimant Has Duty to Follow Doctor's Advice	p. 4
G Firing Based on Unsubstantiated Charges of Wrongdoing Not Abusive	p. 6
G Workers' Comp Coverage of Business Owners	p. 7
G Arbitration Dispute Lives On	p. 8

the concept of employer liability for harassment by non-employees –

- ! A female blackjack dealer at a Las Vegas casino was repeatedly harassed by male customers, who stared at her and made comments about her breasts and legs. The dealer complained, but her employer failed to take action, and eventually fired her for being rude to customers. The court refused to dismiss her complaint, citing the EEOC's guidelines.
- ! A manufacturer's representative for Volkswagen was assigned to a Virginia dealership to promote sales of VW's. She was repeatedly harassed by several dealership employees, but when she complained to Volkswagen and asked to be relocated, she was told to "put up with it" for the sake of the company. Eventually, she was fired after being told that she was "too cute" and would likely be harassed wherever she was assigned. The court said that Volkswagen was potentially liable, even though the harassment took place at an independent dealership.
- ! Occidental International, located in Florida, sold electrical and industrial equipment to Puerto Rico Electric Power Authority, its most important customer. Part of Occidental's "business strategy" was to employ attractive young women and instruct them to be "cordial" to customers. When Occidental's office manager rejected sexual advances by a high-level executive of Puerto Rico Power and complained to Occidental, she was fired. The court upheld a \$200,000 damage award.
- ! When a waitress at a Pizza Hut franchise complained about the behavior of two of her customers, the waitress' manager instructed her to continue waiting on the customers and he took no other action. On her return trip to the customers' table, one of the customers grabbed the waitress sexually. The waitress then quit and successfully sued the franchisee.

- ! Employees who were caregivers in a residential home for persons with developmental disabilities were sexually assaulted by one of the resident patients. Managers at the home failed to respond adequately to caregiver complaints, even going so far as to ask one of the caregivers to *allow* the patient to sexually assault her so that the managers could view the conduct. The home was held liable, since it clearly controlled the environment where the patient resided.

These examples show that employers must do more than just prevent or respond appropriately to harassment by supervisors and co-employees. Employers are responsible for the work environment generally, and if they know or should know about harassing conduct, they have a duty to remedy the situation.

Statutory reference. 42 U.S.C. § 2000e (Title VII).

Regulatory reference. 29 C.F.R. § 1604.

Case references. *Powell v. Las Vegas Hilton Corp.*, 841 F.Supp. 1024 (D.Nev. 1992); *Magnuson v. Peak Technical Services, Inc.*, 808 F.Supp. 500 (E.D.Va. 1992); *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848 (1st Cir. 1998); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107 (8th Cir. 1997).

EMPLOYER'S SURVIVAL GUIDE reference. 12.03.

Employer Liable After Canceling Health Plan

Most employer-sponsored group health insurance plans are governed by ERISA – the federal Employee Retirement Income Security Act. See "Recent Developments in Federal Regulation of Group Health Insurance Plans," *Employer Alerts!*, Jan. 2001, p. 4; "ERISA Preemption of State Law,"

Employer Alerts!, May 2001, p. 2. This means that ERISA, not state law, controls a plan participant's right to benefits. So, for example, if a participant's benefit claim is wrongfully denied he can sue for payment, but he cannot ask for non-pecuniary damages (such as pain and suffering), or punitive damages. Why? Because ERISA has no provision for these types of damage awards.

But state law can sometimes affect rights of plan participants. At least that's what a federal trial court in Virginia recently concluded.

June LeBeau was employed by Angelos Restaurant in Virginia Beach and had participated in Angelos' health plan underwritten by Trigon Insurance Company. LeBeau's husband, who apparently was covered under the plan at some point, suffered from lung cancer and underwent chemotherapy and radiation treatment. In May 1999 he went to Sentara Hospital on an outpatient basis for further diagnostic tests and when it was discovered that his tumor had not decreased appreciably, he was admitted for further treatment. The hospital requested and received preauthorization from Trigon for inpatient treatment and it also obtained three subsequent certifications from Trigon for further inpatient treatment. LeBeau's husband died on July 8, 1999.

Sometime during the course of these events, Angelos terminated its health insurance plan, although the court's opinion does not say exactly when. Angelos apparently failed, however, to tell LeBeau that it intended to cancel the plan or that it had in fact done so.

When the husband's hospital bill went unpaid, the hospital sued LeBeau as executor of her husband's estate, and LeBeau in turn sued Angelos and Trigon. Angelos defended on the basis that its former health plan was governed by ERISA – a point on which all parties agreed – and that ERISA only allows suit for plan benefits, which were non-existent here since the plan had been canceled.

LeBeau argued that Angelos should not be permitted to defend on that basis, even though the defense was

factually accurate, since Angelos had failed to inform her about cancellation of the plan. LeBeau's argument was based on a legal doctrine known as "estoppel," which holds that when a party, through his words or conduct, leads another party to believe that a certain state of facts exists, and the second party then acts in reliance on that belief, the first party should not be allowed to deny the existence of those facts. Here Angelos should be estopped, argued LeBeau, because Angelos' conduct led LeBeau and her husband to believe they were still covered when the husband sought medical attention.

The issue before the court was whether, in the face of a comprehensive federal statute like ERISA, the court was free to look outside the statute and apply general legal principles like estoppel. The court ruled that it was free to do just that, and it refused to dismiss LeBeau's claims against Angelos.

The opinion leaves some questions unanswered. The doctrine of estoppel requires that the party invoking the doctrine act *in reliance on* the words or conduct of the other party. But there is no indication in the court's opinion that the LeBeaus relied on the existence of health insurance when the husband was hospitalized. On the contrary, the hospitalization appears to have been medically necessary because of the husband's cancer. Of course, if the LeBeaus could have obtained replacement insurance, but didn't on the mistaken belief that they were still covered, then estoppel might make sense here.

If Angelos had 20 or more employees, then COBRA presumably applied. The opinion does not mention this possibility.

Finally, the opinion does not mention a Virginia state statute that requires employers to notify its employees about a health plan termination within 15 days after termination. While it may be that this statute has been superceded by ERISA, or that the husband's hospitalization fell within the 15-day period after termination, it would have been reasonable to at least address the issue.

Regardless of any deficiencies in the opinion, it is certainly reasonable for employers to keep their employees fully informed about the status of plans in which their employees participate. Failure to do so just seems wrong and courts are likely to come up with a theory – even a strained one – to hold employers liable.

Statutory reference. 29 U.S.C. § 1132; Va. Code §38.2-3542.

Case reference. *Sentara Virginia Beach Gen. Hosp. v. LeBeau*, 182 F.Supp.2d 518 (E.D.Va. 2002) (on motion to dismiss), 2002 WL 362564 (E.D.Va. No. 2:01CV242, decided Feb. 22, 2002) (on motion for summary judgment).

EMPLOYER'S SURVIVAL GUIDE reference. 9.03.

ADA Claimant Has Duty to Follow Doctor's Advice

In an important decision for employers, Judge Andre Davis of the U.S. District Court for Maryland ruled on February 26 that an employee who fails to follow his doctor's advice cannot trigger Americans with Disabilities Act coverage for conditions that might have been alleviated had the advice been followed. In effect, an employer's burden to reasonably accommodate an impaired employee doesn't arise until the employee himself has taken reasonable steps to mitigate the impairment.

The employee in the case, Gary Rose, worked for Home Depot from 1995 to July 1999, when he went on extended leave of absence. He initially worked at Home Depot's store in Oxon Hill, Maryland, rising to supervisor of the millwork department. In 1998 Rose requested and received a transfer to a non-supervisory position in the company's Glen Burnie store in order to reduce job stress.

Throughout his employment period, Rose suffered from severe intermittent headaches and sinus infections. His condition was tentatively diagnosed as chronic vasomotor rhinitis (characterized by nasal congestion, a runny nose, itching, sneezing and post-nasal drainage), although a definitive diagnosis was never actually reached. Headaches are not normally associated with rhinitis, but may be experienced if infection is present.

Rose's symptoms seemed to be exacerbated when he was involved in Home Depot's semi-annual inventory, which required him to work night shifts for several weeks at a time and to handle dusty merchandise in a hot, stuffy warehouse. It was Rose's July 1999 inventory duties that precipitated his extended leave of absence from the company.

By October, Rose felt able to return to work. However, he believed that a transfer to a Home Depot store in Winchester, Virginia, would help relieve his recurring symptoms because, according to Rose, temperature and humidity conditions there were more agreeable. Also, he would experience less job stress if he relocated nearer to his family home in the West Virginia mountains.

From October 1999 through January 2000, Rose sought approval for a transfer to Winchester, Virginia. Through a series of administrative mishaps, the transfer request was not formally acted upon. By February 2000, Rose developed additional symptoms that apparently made him unable to work at all.

Throughout the period of his employment by Home Depot, Rose visited a number of physicians. In July 1999, after experiencing difficulty in scheduling an appointment with a Dr. Schwartz (his then current physician), he contacted Jyothi Gadde, M.D., a board-certified internist and allergist. Dr. Gadde concluded from Rose's immediate symptoms that he had a sinus infection and she prescribed antibiotics. She also told him to quit smoking – Rose was a heavy smoker – and she instructed him to return for a follow-up visit in four weeks. Rose did not keep the follow-up appointment

and he never kicked his tobacco habit.

Later that summer Rose returned to Dr. Schwartz, who suggested that he see an ear, nose and throat (ENT) specialist for a definitive diagnosis. Rose never did.

In March 2000, Rose file a charge of discrimination with the EEOC based on Home Depot's alleged failure to accommodate him by transferring him to the Winchester store. When Home Depot's senior management became aware of the situation, they offered to approve the transfer and to make partial reimbursement for the back pay he had lost. Rose refused both offers. In July 2000, Rose's employment with Home Depot was officially terminated.

Rose then sued, claiming his vasomotor rhinitis was a disability within the meaning of the ADA, since it substantially limited one or more major life activities – in his case, working, sleeping and breathing. Further, according to Rose, he was a qualified individual who could have performed the essential functions of his job despite the disability had Home Depot reasonably accommodated him by transferring him to the Winchester store. The company's failure to do so when he requested that accommodation amounted to a violation of the ADA.

The court dismissed Rose's suit and, in doing so, made a number of significant rulings. First was the question of who – as between the judge and a jury – gets to decide whether Rose's vasomotor rhinitis amounted to a "disability" under the ADA. Judge Davis ruled that the question was for him to decide, since by its nature it is a legal question, not a question of fact. This ruling is important because it means that if an employer can convince a judge that a particular impairment does not constitute a disability, then the case will be dismissed at an early stage and the employer will not incur the burden and expense of a full trial.

Second, Judge Davis ruled that Rose's vasomotor rhinitis was not a disability. At best, his episodic sinus infections, congestion and headaches were only temporary medical conditions not covered by the ADA.

Quoting an earlier Supreme Court opinion, Judge Davis said –

Extending the statutory protections available under the ADA to individuals with broken bones, sprained joints, sore muscles, infectious diseases, or other ailments that temporarily limit an individual's ability to work would trivialize ... [the ADA's] lofty objective.

Here, Rose's condition, though apparently chronic, was manifested only by intermittent flare-ups and did not substantially limit any major life activity.

(In a decision by the U.S. Court of Appeals for the Fourth Circuit, which governs Maryland and Virginia, issued just one day before Judge Davis' decision, the appellate court held that an employee's impairment while recovering from back surgery was not covered by the ADA, since an "impairment's impact must also be permanent or long-term" to trigger ADA coverage.)

Next the court ruled that Rose had a duty to take reasonable measures to mitigate his symptoms. Specifically, Rose should have pursued a final diagnosis by seeing an ENT specialist as recommended, and he should have quit smoking, kept his follow-up appointment with Dr. Gadde, and taken the medicine she prescribed. In so ruling, the court relied on Dr. Gadde's testimony that vasomotor rhinitis – if that is what Rose had – is a common, treatable condition that can be controlled by nasal steroids, antihistamines and decongestants. By following proper treatment regimes, the condition will rarely interfere with a patient's lifestyle.

Finally, the court ruled that there was insufficient evidence to support the accommodation Rose wanted. It is highly unlikely, said the court, that patients with vasomotor rhinitis cannot live in the Baltimore-Washington area. Although Rose claimed to be symptom-free whenever he visited the West Virginia mountains, there was no expert medical evidence to support his claim. In other words, Rose simply failed to prove that a relocation to a more mountainous

environment was medically necessary and the only way he could continue working.

One point not discussed in the opinion revolves around the smoking issue. Although Judge Davis said that Rose should have followed his doctor's advice to quit, an argument might have been made that tobacco addiction is itself a disability under the ADA, requiring reasonable accommodation. While the success of such an argument may be doubtful, the ADA does recognize alcohol and drug addiction as disabilities.

A second point should also be made. Even though the case was decided on summary judgment before any trial, it is evident from Judge Davis' lengthy opinion that the parties were involved in extensive pre-trial discovery, including depositions of a number of doctors. Home Depot's victory, as sweet as it may have been, was undoubtedly obtained at great cost. And if Rose decides to appeal, additional costs are on the horizon.

Statutory reference. 42 U.S.C. § 12102.

Case references. *Rose v. Home Depot U.S.A., Inc.*, 2002 WL 334107 (D.Md. No. AMD 01-229, decided Feb. 26, 2002); *Pollard v. High's of Baltimore, Inc.*, 2002 WL 261556 (4th Cir. No. 01-1342, decided Feb. 25, 2002).

EMPLOYER'S SURVIVAL GUIDE reference. 11.03.

Firing Based on Unsubstantiated Charges of Wrongdoing Not Abusive

In another case involving Home Depot, Judge Deborah Chasanow of the U.S. District Court for Maryland has ruled that firing an employee based on unsubstantiated allegations of employee theft, without proof and without a full investigation, may be foolish, but it does not violate any clear mandate of Maryland public

policy. Therefore, said the Court, it is not an abusive or wrongful discharge under Maryland law.

The employee, David Silvera, had worked as a cashier at Home Depot almost four years. On the day of his termination, the store manager observed a customer remove a security tag from a saw worth several hundred dollars. The customer then proceeded to Silvera's register to check out various merchandise. The saw was not scanned or paid for. After the customer left the store with the saw and the other merchandise, he was confronted by security guards and charged with theft. The customer then accused Silvera of participating in the scheme.

Silvera in turn was confronted, he denied any involvement, but he admitted that the saw was large enough that he should have seen it if it were in the customer's shopping cart. Silvera was also charged with theft and was fired.

The customer eventually pleaded guilty to theft, but Silvera was acquitted after a criminal trial. Silvera then sued Home Depot on a number of claims, including wrongful discharge and false imprisonment.

Judge Chasanow threw out all of Silvera's claims. As to wrongful discharge, she found no Maryland public policy mandate prohibiting employers from firing at-will employees based on unsubstantiated charges.

The false imprisonment claim was unfounded as well, said the judge, because a Maryland statute makes retail merchants immune from suit if they act with probable cause in detaining a person for theft.

Statutory reference. Md. Code, C&JP § 5-402.

Case reference. *Silvera v. Home Depot U.S.A., Inc.*, 2002 WL 392027(D.Md. No. DKC 00-2529, decided March 11, 2002).

EMPLOYER'S SURVIVAL GUIDE reference. 1.03.

Workers' Comp Coverage of Business Owners

Are sole proprietors, partners in a partnership, corporate officers, and members (owners) of limited liability companies entitled to workers' compensation benefits if they are injured on the job? It depends.

Maryland

The Maryland workers' comp statute defines "covered employee" broadly as "an individual, including a minor, while in the service of an employer under an express or implied contract of apprenticeship or hire." The statute then goes on to list a number of exceptions and special provisions.

Sole proprietors and partners in Maryland are generally *not* covered by the statute, but they may *opt in* by submitting to the Workers' Compensation Commission and to the sole proprietor's or partnership's insurer a written notice of their election to be covered.

Corporate officers and members of limited liability companies generally *are* covered by the statute. However, the following officials may *opt out* by submitting a written notice of their election not to be covered to the Workers' Compensation Commission and the company's insurer –

- ! Officers of "close corporations" (small corporations that are incorporated under Maryland's Close Corporation Law);
- ! Officers of corporations engaged in farming, if the officer own at least 20% of the corporation;
- ! Officers of "professional corporations" (corporations that are organized to practice one of the professions, such as medicine, law, architecture, etc.), if the officer owns at least 20% of the corporation; and

- ! Members of limited liability companies, if the member owns at least 20% of the company.

In a recent case involving a sole proprietor, Maryland's Court of Special Appeals ruled that the opt-in provision of Maryland law must be strictly complied with. There, a sole proprietor in the home improvement business purchased a workers' comp policy but he failed to give notice to the Commission that he was electing to be covered. After suffering a work-related injury he made a claim for benefits, but his insurance company refused to pay, citing lack of notice to the Commission.

The sole proprietor argued that the lack of notice shouldn't make any difference, because by purchasing a workers' comp policy for himself, he obviously intended to elect coverage. The Court of Special Appeals disagreed, saying that the proprietor's "obvious intention" could not cure his failure to comply with the notice requirement.

Virginia

Virginia defines "employee" as "every person, including aliens and minors, in the service of another under any contract of hire or apprenticeship, written or implied, whether lawfully or unlawfully employed."

Sole proprietors and partners *are not* covered, but they may opt in by notifying the business' insurer of their election to be covered. Corporate officers and limited liability company members *are* covered. However, "executive officers" (defined as managers of limited liability companies and corporate presidents, vice presidents, secretaries and treasurers) may opt out of coverage for injury or death caused by accident (but not for injury or death caused by occupational disease) by giving notice to their employer and the Workers' Compensation Commission.

District of Columbia

An employee in the District is "every person, including a minor, in the service of another under any

contract of hire or apprenticeship, written or implied.”

The District statute has no special provisions respecting sole proprietors, partners, and corporate or limited liability company officials, so general legal principles apply. Under those principles, sole proprietors are owners, not employees, of their business, so they are not covered by workers' comp. Similarly, partners in a partnership and members of a limited liability company are owners, not employees. On the other hand, officers of a corporation who work for and are compensated by the corporation generally would be considered employees entitled to comp benefits.

Statutory references. Md. Code, L&E § 9-201, Va. Code § 65-2-101; D.C. Code § 32-1501.

Case reference. *Watson v. Twin City Fire Ins. Co.*, 2002 WL 334332 (Md.App. No. 502, decided March 4, 2002).

EMPLOYER'S SURVIVAL GUIDE reference.
7.02

Arbitration Dispute Lives On

Most of us think of the U.S. Supreme Court as the highest court in the land. The U.S. Court of Appeals for the Ninth Circuit, which hears federal appeals in California, apparently has a different view.

Recall that back in 1999, the Ninth Circuit ruled the Federal Arbitration Act (FAA) does not apply to employment contracts. That case involved Saint Clair Adams who, when he was first hired by Circuit City, agreed in writing that any employment disputes between him and the company would be subject to binding arbitration. Later he sued Circuit City in California state court, alleging discrimination. The Ninth Circuit refused to enforce the arbitration agreement because, it said, employment disputes are exempt from FAA coverage.

Eventually the case went to the Supreme Court. In a March 2001, decision, the high court reversed. Not only does the FAA cover employment contracts generally, said the Court, it also specifically covers claims under federal civil rights laws. See “Supreme Court Approves Arbitration Agreements,” *Employer Alerts!*, May 2001, p. 1. The Court remanded the case back to the Ninth Circuit for further action.

In February of this year the Ninth Circuit again invalidated the arbitration agreement, this time on the basis that the agreement was “unconscionable” – so one-sided and unfair that it should not be enforced.

Aside from the merits of the Ninth Circuit's latest ruling, it is unusual for a lower federal court to undo a Supreme Court decision on remand based on a new ground. Sometimes the Supreme Court will take a case a second time to slap a lower court's hand and remind the lower court of its duty to follow Supreme Court decisions. Stay tuned.

Whatever the eventual outcome of the *Circuit City* case, employers need to be aware that arbitration agreements *are* subject to attack for unconscionability. The agreement between Circuit City and Adams, for example, severely limited the remedies that would otherwise have been available to Adams in court. It also required Adams to split the cost of the arbitration, including the arbitrator's daily fees, the cost of a reporter to transcribe the proceedings, and the expense of renting the room where the arbitration would be held. And although Adams' claims against Circuit City were subject to binding arbitration, any claims Circuit City might have had against Adams were not.

Employers who decide to go the arbitration route should make sure that the agreement –

- ! Provides substantially the same rights and remedies to the employee as would be available to him in court;

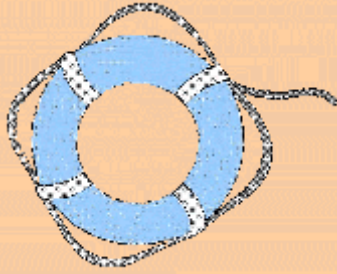
- ! Does not require the employee to incur substantially more costs to arbitrate than the employee would have incurred in a law suit; and
- ! Applies equally to the employer and employee, without giving the employer significantly greater rights and options under the agreement than the employee has.

Statutory reference. 9 U.S.C. § 1.

Case reference. *Circuit City Stores, Inc. v. Adams*, 532 U.S.105 (2001), *on remand*, 279 F.3d 889 (9th Cir. No. 98-15992 (decided Feb. 4, 2002).

EMPLOYER'S SURVIVAL GUIDE reference. 19.01.

Employer Alerts!, ISSN 1538-6228, is published monthly as a free supplement to **EMPLOYER'S SURVIVAL GUIDE – MD/VA/DC Edition**, ISBN 0-9703059-0-7. *Employer Alerts!* is also available by e-mail subscription for \$36.00 per year. For further information, contact the publisher, EMPLOYERS INFONET, LLC at 56 Crescent Road, Greenbelt, MD 20770, telephone (301) 441-3809 or <http://www.EmployersInfoNet.com>. Copyright © 2002 Charles H. Fleischer. All rights reserved. This publication may not be reproduced in whole or in part without the express written permission of the author. While every attempt has been made to provide accurate, authoritative and current information regarding the subject matter covered, this publication is for general information only and is not intended as legal or other professional advice. The reader should consult an attorney, accountant, or other appropriate professional regarding specific questions or problems. Neither the author nor the publisher is liable for any errors or omissions.



Employer Alerts!

By Charles H. Fleischer, Esq.

Volume II, No. 12 - May 2002

A monthly supplement to

EMPLOYER'S SURVIVAL GUIDE – MD / VA / DC Edition

Distributed by EMPLOYERS INFONET, LLC

www.EmployersInfoNet.com

Supreme Court Update

The Supreme Court has been busy with employment cases this term and many (but not all) of its decisions are favorable to employers. In late March two more cases came down, one dealing with whether illegal aliens are entitled to backpay when they have been fired for engaging in union activity, and the other involving employer notification obligations under the Family and Medical Leave Act. In each case, the employee's own behavior was remarkable, to say the least, and may have influenced the result.

Illegal Aliens

In May 1988, Hoffman Plastic Compounds, Inc. hired Jose Castro to work in its Paramount, California plant. In December of that year, an AFL-CIO union

began an organizing campaign at the plant. Castro and several other employees supported the campaign and distributed union authorization cards to their co-workers. In January 1989, in what one justice described as a "crude and obvious violation of the labor laws," Hoffman fired Castro and the other workers who supported the union.

The matter went to the National Labor Relations Board. The Board found that Hoffman had violated the National Labor Relations Act, which prohibits adverse action against an employee in an attempt to discourage union membership. The Board ordered Hoffman to cease and desist from further violations of the Act, it required Hoffman to post a detailed notice informing its workforce of what had happened, and it told Hoffman to offer reinstatement and backpay to the fired employees. Hoffman consented to the Board's order.

In this issue ...

G	Supreme Court Update	p. 1
G	Salts, Testers, and Backpay Awards	p. 3
G	Recent Cases on Pregnancy Discrimination	p. 5
G	Virginia Supreme Court Limits Negligent Hiring and Wrongful Termination Claims	p. 6
G	Like Father, Like Son – ADA Protects Kin from Retaliation	p. 8
G	Burden of Proof in MOSHA Cases	p. 9

Later, a compliance hearing was held to determine the amount of backpay owed each employee. On the final day of that hearing, Castro admitted under oath that he was born in Mexico and had entered the U.S. illegally, that he was not authorized to work here, that he got his job with Hoffman only after showing Hoffman a birth certificate that belonged to a friend from Texas, that he fraudulently obtained a Social Security card and a California driver's license, and that he fraudulently obtained other employment after he'd been fired by Hoffman.

Faced with accommodating both federal labor laws and federal immigration policy, the Board ruled that undocumented workers are entitled to the same labor law protections and remedies as are legal employees. Accordingly, the Board awarded Castro almost \$67,000 in backpay, covering the three and one-half years between Castro's firing and the date Hoffman learned he was an illegal alien.

The Supreme Court reversed. By a slim, 5-to-4 majority, the Court reminded the Board that, in devising remedies for unfair labor practices, the Board is obligated to take into account other, equally important Congressional objectives – in this case immigration policy. Further, although the Board may be owed deference when it comes to interpreting and applying federal labor laws, the Board has no special expertise in immigration matters.

The majority opinion, written by Chief Justice Rehnquist, pointed out that Congress made combating the employment of illegal aliens central to the immigration laws. Under those laws it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Yet, said the Chief Justice, the Board

asks that we overlook this fact and allow it to award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained

in the first instance by a criminal fraud.

The Court refused to overlook the illegality of Castro's employment, saying that awarding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations.

(Similar backpay issues arise when an illegal alien is subjected to race discrimination, sexual harassment or other forms of discrimination under federal civil rights laws such as Title VII. The EEOC takes the position that backpay can be awarded to illegal aliens who are discrimination victims. The Supreme Court has not yet addressed the matter.)

What's peculiar about the case is Castro's behavior. Having obtained employment through fraud and violation of U.S. immigration law, one might have guessed he'd keep a low profile. Instead, a mere seven months into his illegal employment, he apparently went out of his way to get involved in union organizing activity. Perhaps a majority of the justices simply felt they couldn't reward Castro for his conduct.

Family and Medical Leave Act

In another March decision, this one also a 5-to-4 split, the Supreme Court invalidated Department of Labor regulations that penalize employers who fail to notify employees whether leave is being counted against their Family and Medical Leave Act entitlements

FMLA grants qualified employees up to 12 weeks of unpaid leave per year. The Act also encourages employers to adopt more liberal leave policies, and many employers have done so. In the case before the Supreme Court, for example, Wolverine World Wide, Inc. granted its employees up to seven months of unpaid sick leave.

When Wolverine employee Tracy Ragsdale was diagnosed with cancer, she qualified for and took the seven months' leave, missing a total of 30 weeks of work. Wolverine held her position open throughout the period, and it paid her health insurance during the first six months

of her absence. At the end of the seven-month period, she asked for additional leave, which Wolverine refused. When Ragsdale failed to return to work as required, she was terminated.

Ragsdale then sued her employer for reinstatement and backpay, claiming that under Department of Labor regulations, an employer must notify an employee when leave is being counted against FMLA. Those regulations say that if an employee takes leave “and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee’s FMLA entitlement.” Since Wolverine did not tell her that her seven-month absence was FMLA leave, she felt she still had 12 more weeks coming.

The Supreme Court disagreed with Ragsdale. The Court ruled that, whether or not the Department’s *notice* regulation is valid, its *penalty* for failing to give notice – disallowing the leave as satisfying the employer’s FMLA obligation – is “categorical,” “disproportionate,” and “incompatible” with the statute itself. In short, FMLA grants eligible employees only 12 weeks of leave; the Department of Labor regulation would grant 12 weeks *plus* whatever additional leave the employer voluntarily grants.

The Court left open the possibility that the notice requirement itself is valid and that an employee who suffers actual harm from lack of notice could still sue his employer.

As in *Castro v. Hoffman Plastic*, the employee’s conduct here is troublesome. The seven months’ leave that Wolverine granted Ragsdale – during six of which Wolverine paid her health insurance – was far more than FMLA or any other law requires. Yet despite that generosity, Ragsdale still saw fit to bite the hand that fed her.

Statutory references. 8 U.S.C. § 1324a; 29 U.S.C. § 151; 29 U.S.C. § 2601.

Regulatory references. 29 C.F.R. § 825.700; EEOC

Enforcement Guidance, Notice No. 915.002 (Oct. 26, 1999).

Case references. *Hoffman Plastic Compounds, Inc. v. NLRB*, __U.S.__ (No. 00-1595, decided March 27, 2002); *Ragsdale v. Wolverine Word Wide, Inc.*, __U.S.__ (No. 00-6029, decided March 19, 2002).

EMPLOYER’S SURVIVAL GUIDE references. 6.02; 15.01; 19.08.

Salts, Testers, and Backpay Awards

A “tester” is someone who, though applying for a job, is really not looking for employment but is simply trying to find out whether the employer discriminates in hiring. See “Testers and Employment Discrimination,” *Employer Alerts!*, Aug. 2000, p. 1. A “salt” is a job applicant at a non-union shop who is in fact seeking employment but whose real purpose is to organize the shop once he’s hired. See “‘Salting’ of Non-Union Shops,” *Employer Alerts!*, Aug. 2000, p. 2.

Employers are prohibited from discriminating against testers or salts. But suppose an employer does discriminate and the tester or salt sues. Is a backpay award – equal to the wages that would have been earned but for the discrimination – an available remedy in that situation? If so, how should it be calculated?

Union Salting

Winson Cox, an electrician, was employed full-time as a union organizer for the International Brotherhood of Electrical Workers. In 1993 he applied for a job at Aneco, Inc., a non-union electrical contractor. Cox disclosed his motives during his job interview, and Aneco refused to hire him. Cox then filed an unfair labor practice charge with the National Labor Relations Board.

Five years later, in 1998, the Board ruled that Cox should be awarded backpay for any loss he may have suffered from the date he applied for the job to the date Aneco makes him a valid offer of employment. Aneco then made an employment offer and Cox accepted, but he left after only five weeks of work.

In a subsequent compliance hearing to determine the amount of backpay that should be awarded, Cox asked for some \$47,000, covering two and one-half years of the five-year period between his job interview and Aneco's offer. (He made no claim for backpay covering the remaining two and one-half years.) Aneco, on the other hand, argued that Cox should get no more than five weeks. The Board awarded Cox the full \$47,000, which Aneco appealed to the U.S. Court of Appeals for the Fourth Circuit (the court that hears federal appeals from Maryland and Virginia).

One of Aneco's arguments on appeal was that Cox had a duty to "mitigate" his income loss – that is, to make reasonable efforts to find alternative employment. Here, argued Aneco, Cox did not do that. Instead, he limited his search to companies that were non-unionized, and that were neither too small to be of interest to his union nor too large for him to be effective. In addition, he brought other electrician applicants with him to serve as witnesses should a potential employer commit an unfair labor practice. These limitations significantly narrowed Cox's chances of finding employment, but they were fully appropriate given Cox's role as a union salt.

The Court of Appeals disagreed with Aneco's failure-to-mitigate argument. The Court conceded that had Cox been unemployed, rather than being a full-time union salt, the limitations he placed on his job search would have been unreasonable. Here, however, Cox was not unemployed and the limitations were consistent with his union position. Therefore, Cox's job search was reasonable under the circumstances.

Aneco's second argument was that, had Cox been hired back in 1993, he would have quit when it no longer served the union's interest for him to stay, and that would

have occurred long before 1998. This argument the Court of Appeals did agree with. The Court pointed to the fact that when Cox was eventually hired, he stayed on the job only five weeks. Further, union salts typically leave after a short time, either because they have successfully organized the shop, or they see no likely prospect of doing so.

The Court remanded the case back to the Board to reconsider its backpay award.

Discrimination Testing

Before deciding whether testers are entitled to backpay, courts must first deal with the question whether testers even have "standing" to sue. To date, most courts have ruled that since testers are not applying for jobs in good faith, they cannot complain about being rejected for discriminatory reasons. Therefore, they are not entitled to *any* remedy.

About two years ago, the U.S. Court of Appeals for the Seventh Circuit (which includes Chicago), ruled that testers may sue for hiring discrimination, even though they wouldn't have taken the job if offered. The Court suggested, however, that the applicants' remedies would be limited (and presumably would not include a right to be offered the job or an award of backpay).

Federal courts in other jurisdictions, including the Fourth Circuit (which covers Maryland and Virginia) and the D.C. Circuit, have ruled that testers lack standing and cannot sue. Until the issue is resolved by the Supreme Court, a tester's standing to sue and the remedies that are available remain open questions.

Related Issues

Backpay computation issues also arise in other situations. Suppose for example that an employer fires an employee on race and gender grounds and gets sued for the illegal conduct. During the course of the lawsuit, the employer discovers that the fired employee had engaged in some wrongful conduct – such as lying on his job

application, or removing confidential company documents – that would have justified immediate termination had the employer known about the conduct. Can the employer defend the discrimination claim based on the employee's wrongful conduct?

The answer is: in part. After-acquired evidence – even evidence of a serious nature that would have been grounds for firing had it been discovered earlier – is not a complete defense to a discrimination claim. But it does limit the remedies that are available to the aggrieved employee. As the Supreme Court said in just such a case, it makes no sense to compel an employer who fired an employee for discriminatory reasons, to re-hire the employee and then turn around and fire the employee again based on the wrongful conduct. But it does make sense to award the employee backpay for the period between the discriminatory firing and the time the wrongful conduct was discovered.

Statutory references. 29 U.S.C. § 151; Title VII, 42 U.S.C. § 2000e.

Regulatory reference. EEOC Enforcement Guidance, Notice No. 915.002 (May 22, 1996).

Case references. *Aneco Inc. v. NLRB*, __F.3d__ (4th Cir. No. 01-1572, decided March 29, 2002); *Kyles v. J. K. Guardian Security Services, Inc.*, 222 F.3d 289 (7th Cir. 2000); *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995).

EMPLOYER'S SURVIVAL GUIDE references. 2.02; 11.01; 19.08.

Recent Cases on Pregnancy Discrimination

Title VII of the federal Civil Rights Act prohibits discrimination “because of ... sex,” which is defined to include

because of or on account of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.

In other words, discrimination because of pregnancy, childbirth, or a related medical condition is sex discrimination, so that an employer cannot refuse to hire a pregnant woman or a woman of child-bearing age because of her pregnancy or because of the possibility she may become pregnant.

Nor may an employer have special rules for pregnant women. For example, sick leave, light duty assignments, or other accommodations must be available to pregnant women on the same basis as they are to others. Similarly, employers who have health or disability insurance plans must cover pregnancy-related expenses and disabilities the same as they would other medical expenses or disabilities.

A recent Fourth Circuit case involved Deitra Golson, who worked as a collector of delinquent loans for Green Tree Financial Servicing Corp. in Columbia, South Carolina. Collectors were given performance goals each month and collectors who consistently failed to meet their goals were subject to probation and dismissal.

Golson's production was generally outstanding but, by the summer of 1997, she was forced to miss several weeks of work with pregnancy-related medical problems and she fell short of her production goals.

Golson informed her employer of her pregnancy, furnishing written verification from her doctor that her absence was medically necessary. Although Green Tree's regular practice was not to hold employees accountable for their performance goals when they'd been absent for three or more days for verified medical reasons, Green Tree nevertheless put Golson on 90-day

probation. And despite improvement in her work, she was fired 30 days later. Thus, Green Tree failed to treat Golson the same as it treated other employees who, for medical reasons, are temporarily unable to work.

The Fourth Circuit agreed that Green Tree had discriminated. It therefore upheld an award of \$30,000 in backpay, \$1,500 in compensatory damages, and \$230,000 in punitive damages.

Under a line of cases that seems unique to New York, it apparently is alright in that state to fire a pregnant employee to save your marriage. An April 2 decision by an intermediate appellate court ruled that Rainer Mittl, an ophthalmologist, acted properly in terminating his pregnant secretary in the face of unfounded suspicions by the ophthalmologist's wife that they had been having an affair.

The doctor at first greeted his secretary's announcement that she was pregnant in good spirit, offering her advice on taking maternity leave and filing for disability benefits. However, when the doctor's wife learned about the pregnancy, she became hostile toward the secretary, even questioning whether her husband was the child's father. After unsuccessful efforts to calm his wife down, the doctor bowed to her pressure and fired his secretary.

In upholding the termination, the court said that the doctor's conduct might be described, at worst, as disloyalty to a valued secretary. But that would not support a finding that the secretary's termination was due to her pregnancy and was therefore discriminatory. The court relied on several earlier New York cases in which employers *were* engaged in affairs with their employees but fired the employees in the face of spousal pressure. In those cases, as well, there was no sex discrimination because the motive for the firing was family harmony.

Statutory reference. Title VII, 42 U.S.C. § 2000e.

Case references. *Golson v. Green Tree Financial Servicing Corp.*, 2002 WL 27104 (4th Cir. No. 00-

2365, decided Jan. 10, 2002) (unpublished); *Mittl v. Rivera-Maldonado*, 2002 WL 493186 (N.Y.App. No. 365, decided April 2, 2002); *Mauro v. Orville*, 259 A.D. 89 (1999); *Kahn v. Objective Solutions, Intl.*, 86 F.Supp.2d 377 (S.D.N.Y. 2000).

EMPLOYER'S SURVIVAL GUIDE reference. 12.02.

Virginia Supreme Court Limits Negligent Hiring and Wrongful Termination Claims

In an important decision for employers, the Virginia Supreme Court has ruled that neither the temp agency that provided an employee, nor the University of Virginia Alumni Association where the employee worked, is liable for an after-hours automobile accident caused by the employee. In a separate case, the Court also ruled that an employer may lawfully fire an employee after the employee refused to drop criminal charges against a fellow employee.

Negligent Hiring

Ricky East, had been convicted several times of driving under the influence. He had also failed to pay fines associated with his convictions or attend alcohol counseling. This led the Department of Motor Vehicles to declare him an habitual offender and to suspend his driving license.

When East applied for work at a temp agency, Interim Personnel of Central Virginia, he denied any criminal convictions and he falsely stated that he held a valid driver's license. Interim never asked East to produce his license, and it never checked criminal background or driving records for East.

One of East's temp assignments was at the University of Virginia Alumni Association. His job responsibilities there included driving the Association's

truck on a regular basis to the post office – a one-mile trip. When East interviewed for the job with the Association, the Association similarly failed to have East produce his driver's license, relying on the Interim's screening process.

For a time, East was a model employee. However, over a Thanksgiving weekend, East was furnished a key to the alumni building while the building supervisor was on vacation. On Wednesday evening before the holiday, East gained access to the building, retrieved the key to the truck, and took it for the weekend, all without permission. On the Friday after Thanksgiving, he consumed a substantial amount of alcohol and, while joyriding, rear-ended another vehicle.

Mildred Messer, who was injured in the accident, not only sued East for her injuries, she also sued Interim (the temp agency that employed East) and the UVA Alumni Association where East was assigned. Unable to claim that Interim and the Association were vicariously liable for East's actions (since the accident obviously did not occur during the course and scope of East's employment), she instead brought her suit on a theory of negligent hiring.

As the Virginia Supreme Court explained,

liability for negligent hiring is based on an employer's failure to exercise reasonable care in placing an individual with known propensities, or propensities that should have been discovered by reasonable investigation, in an employment position in which, due to the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.

Under a negligent hiring theory, an employer may be held liable for its own *direct* negligence in hiring an employee it should not have hired. This contrasts with an employer's *vicarious* liability for the negligent acts of its employees that occur within the course and scope of their employment, even though the employer has not personally

committed any negligence.

Messer's theory here was that Interim and the Association should have discovered East's background and, with that knowledge, refused to hire him for a job that involved driving. The Virginia Supreme Court disagreed. It ruled that

the mere fact that East had been convicted twice of DUI, had failed to pay fines or attend counseling, and had been declared an habitual offender, would not place a reasonable employer on notice or make it foreseeable that East would steal a truck, operate the stolen vehicle during non-business hours for his own frolic, and cause an accident on the open highway distant from the environs of his job.

While Virginia employers – and their insurers – can take comfort in this decision, it is still a good idea to do a background check on employees who will have driving responsibility or other duties involving the public. At a minimum, Interim and the Association could easily have asked to see East's license before he was handed the keys to a truck. Their failure to do so here was apparently not unreasonable only because of the limited driving responsibilities involved in the job.

Wrongful Termination

Linda Rowan, an at-will employee, worked as a cashier for Tractor Supply Company in Christianburg, Virginia. During the course of her employment she discovered information that led her to believe her manager, Jerry Snider, and other employees, were embezzling money and property from Tractor Supply. Rowan expressed her concern over the matter to Snider, who reacted violently by twisting her arm and pushing her against a desk.

Rowan reported the latter incident to several others at the company, but was uniformly rebuffed. In her view, the company's primary interest was in keeping the matter quiet. Rowan then filed both a civil suit and criminal

charges against Snider. She recovered a \$1,500 judgment for damages in the civil suit, and Snider was later convicted of criminal assault and battery.

While the criminal charges were still pending against Snider, a company official told Rowan that the company wanted the charges dropped. When Rowan refused to go along, she was fired. Rowan then filed suit against Tractor Supply for wrongful termination, claiming that it was against Virginia public policy to coerce an employee to drop criminal charges.

The Virginia Supreme Court rejected Rowan's claim, finding no public policy violation in these circumstances. The Court reiterated its view that the so-called public policy exception to the employment-at-will doctrine is a "narrow exception." The Court went on to discuss those few limited circumstances in which the exception had been properly invoked –

- ! where a bank discharged stockholder employees for refusing to vote their bank stock as management wanted, the Court finding that stockholders have a right under state statute to vote their stock free from duress or intimidation;
- ! where an employee's discharge was based on illegal gender discrimination; and
- ! where an employee was discharged for refusing to commit a criminal act.

Rowan's case, said the Court, was different. Unlike the bank stock case, where the employees had a statutory right to vote their stock as they pleased, Rowan could point to no similar statute giving her a right to press or drop criminal charges as she pleased.

Case references. *Interim Personnel of Central Virginia, Inc. v. Messer*, 559 S.E.2d 704 (Va. 2002); *Rowan v. Tractor Supply Co.*, 559 S.E.2d 709 (Va. 2002).

EMPLOYER'S SURVIVAL GUIDE references. 1.01; 1.03; 19.06.

Like Father, Like Son – ADA Protects Kin from Retaliation

The Americans with Disabilities Act prohibits discrimination in employment against persons with disabilities. It also protects persons against retaliation for exercising their rights under the ADA. And unlike other federal civil rights laws, the ADA makes it unlawful for an employer to "coerce, intimidate, threaten, or interfere with any individual" who is exercising protected rights under the statute.

Sterril Fogleman had worked as an engineer at Mercy Hospital in Pennsylvania for 17 years when he left the hospital in 1993. Claiming that he had been forced out of his job due to age and disability discrimination, he sued.

Sterril's son Greg also worked for Mercy as a security guard. According to Greg, a hospital manager repeatedly questioned him about the status of his father's lawsuit in an attempt to pry information out of him to aid the hospital's defense. Greg claimed that he had no involvement in the lawsuit and refused to answer any of the manager's questions.

In 1996, after 18 years at the hospital, Greg, too, was fired. According to Mercy, the firing was justified because Greg had used a passkey without authorization to enter the hospital's gift shop. Greg argued that the firing was a mere pretext, since he was authorized to use the passkey and had routinely done so in the past. The real reason, according to Greg, was that Mercy thought he was helping with his father's lawsuit.

Greg then sued Mercy himself, claiming his firing amounted to illegal retaliation under the ADA. The trial court dismissed Greg's suit, ruling that since Greg denied aiding his father's lawsuit, he had not engaged in any

“protected activity” and could not make a claim under the ADA.

The U.S. Court of Appeals for the Third Circuit (which governs federal trial courts in Pennsylvania) reversed the trial court and reinstated Greg’s claim. It ruled that by firing Greg, the hospital attempted to “coerce, intimidate, threaten, or interfere with” Sterril’s rights under the ADA.

As the Court pointed out, “to retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations.”

Firing Greg amounted to illegal retaliation for the additional reason that the hospital *thought* (apparently in error) that Greg was helping his father. Said the Court, “If Greg can show, as he claims, that adverse action was taken against him because Mercy thought that he was assisting his father and thereby engaging in protected activity, it does not matter whether Mercy’s perception was factually incorrect.”

The decision highlights a difficult problem for employers. How should a company act when one family member is an adversary and another family member is an otherwise trusted employee? It is not much different from having a suspected mole inside the CIA.

In a large organization, it is probably possible to isolate the trusted employee to limit his access to sensitive information and avoid potential conflicts. But in a small organization, that may not be so easy. One solution is to have a strict policy against nepotism – so long as the boss is willing to follow the policy herself by turning down her son-in-law’s job application, and not using her husband’s firm for accounting services.

The problem is heightened when the adversary is still employed and has daily contact with the very people he is accusing of discrimination. That’s what makes retaliation so tempting – and so dangerous.

Statutory reference. 42 U.S.C. § 12102.

Case reference. *Fogleman v. Mercy Hospital, Inc.*, ___F.3d ___ (3d Cir. No. 00-2263, decided March 18, 2002).

EMPLOYER’S SURVIVAL GUIDE reference. 11.03.

Burden of Proof in MOSHA Cases

Last July, we reported on a Maryland Court of Special Appeals case involving Maryland’s Occupational Safety and Health Act. See “Employer Liability for Unforeseeable OSHA Violations,” *Employer Alerts!*, July 2001, p. 3. There, a roofing company was charged with failure to install fall protection devices as required by regulations under the Act. Although the company essentially admitted that the regulations had not been followed, it argued that the violations were unforeseeable and unpreventable. According to the company, its jobsite foreman had been trained and instructed in use of fall protection devices but had simply neglected to follow those instructions on the day a safety inspector happened to visit.

The issue before the Court of Special Appeals was who had the burden of proof on the question of foreseeability and preventability: Did the Commissioner of Labor and Industry have to prove that the roofing company could have foreseen and prevented the violation? Or did the company have the burden of proving the opposite – that the violations were unforeseeable and unpreventable? Although the issue may sound hyper technical, it can make a real practical difference in the outcome of a case, as it did here.

The Court of Special Appeals ruled last year that the Commissioner had the burden of proof, and since the Commissioner had not proved foreseeability and preventability, there was no violation. The Court of

Appeals (Maryland's highest court) has now reversed that decision, holding that the roofing company has to carry the burden.

What this means for Maryland employers is that it is not enough simply to give training and instruction on safety requirements. The employer must be able to show that he actively enforces the requirements through worksite inspections and, where appropriate, disciplinary action against offending employees.

Statutory reference. Md. Code, L&E § 5-101.

Case reference. *Maryland Comm'r of Labor & Ind. v. Cole Roofing Co.*, __A.2d.__ (Md. No. 70, decided April 9, 2002).

EMPLOYER'S SURVIVAL GUIDE reference.
10.04.

Employer Alerts!, ISSN 1538-6228, is published monthly as a free supplement to **EMPLOYER'S SURVIVAL GUIDE – MD/VA/DC Edition**, ISBN 0-9703059-0-7. *Employer Alerts!* is also available by e-mail subscription for \$36.00 per year. For further information, contact the publisher, EMPLOYERS INFONET, LLC at 56 Crescent Road, Greenbelt, MD 20770, telephone (301) 441-3809 or <http://www.EmployersInfoNet.com>. Copyright © 2002 Charles H. Fleischer. All rights reserved. This publication may not be reproduced in whole or in part without the express written permission of the author. While every attempt has been made to provide accurate, authoritative and current information regarding the subject matter covered, this publication is for general information only and is not intended as legal or other professional advice. The reader should consult an attorney, accountant, or other appropriate professional regarding specific questions or problems. Neither the author nor the publisher is liable for any errors or omissions.