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## EMPLOYMENT LAW O U T L O O K



### EMPLOYEE HARASSED BY E-MAIL SHE OBTAINED INAPPROPRIATELY

William E. Rachels, Jr.



On a claim brought for her by the EEOC, it was found that a sexually derogatory e-mail concerning a female car sales manager was evidence of harassment, even though the e-mail was not sent to her and she saw it only by her unauthorized view of a company owner's e-mail account. The U.S. Court of Appeals for the Tenth Circuit so ruled in May of this year in *EEOC v. PVNF, L.L.C., d/b/a Big Valley Auto & Chuck Daggett Motors*.

*L.L.C., d/b/a Big Valley Auto & Chuck Daggett Motors.*

After a confrontation with another manager, the female manager composed and sent an e-mail to one of the owners of the business expressing frustration about the tension between her and the other manager. She later thought better of it and accessed the owner's e-mail account in order to erase the message she had already sent. She had no authority to so access that e-mail account. In doing so, she saw a profanity-laced e-mail about her that had been forwarded to the owner by the male manager with whom she had the dispute. Such e-mail had been sent to that male manager by a subordinate of the female manager. The wording of that e-mail was sufficiently offensive as not to be repeated here, but only to note that it degraded her body parts typically thought of as "private."

The employer contended that the e-mail was not evidence of discrimination or harassment because the female manager was never intended to see it. However, the Court of Appeals soundly rejected that argument. The Court wrote that, "We have never held, nor would we, that to be subjected to a hostile work environment, the discriminatory conduct must be both directed at the victim and intended to be received by the victim."

It is not surprising, and the law is rather well established, that offensive remarks which constitute harassment do not have to have been made with an intent for the victim to become aware of them. The most obvious example is where the victim would overhear other employees making offensive remarks. The point there is that such remarks should not be tolerated and one takes the chance on where they land. However, the *Big Valley Auto*

### NEW RULES FOR SOCIAL SECURITY "NO MATCH" RESPONSE

Susan R. Blackman



The Department of Homeland Security has issued final regulations that went into effect September 14, 2007, concerning an employer's obligations after receiving a "No Match" letter from the Social Security Administration or other information raising doubts as to an employee's authorization to work in this country. The regulations provide a safe harbor procedure that

employers can follow to avoid potential liability for employing illegal aliens.

When an employer's W-2 wage reports contain names and Social Security numbers that do not match the records of the Social Security Administration (SSA), the SSA sends a letter informing the employer of the discrepancy. These so-called "No Match" letters have generated much confusion due to conflicting information about how employers are supposed to respond. The letters typically advise the employers that mere issuance of a "No Match" letter does not, in and of itself, indicate that a listed employee is an illegal alien and, therefore, employers should not terminate or take adverse action against employees simply because employees are named in such letters. On the other hand, in some cases, immigration enforcement officials have used an employer's failure to respond to such "No Match" letters as a basis for finding that the employer had constructive knowledge of the fact that an employee was an alien not authorized to work in the United States.

The new regulations provide some clarity concerning the circumstances in which an employer may be found to have constructive knowledge of an alien's unauthorized status. Employers can face civil or criminal penalties for knowingly employing an alien who is not authorized to work. In this context, "knowingly" includes situations in which the employer has actual knowledge as well as situations in which the employer should have known of the unauthorized status due to facts and circumstances that would lead a reasonable person to infer that the alien was not authorized to work. Some courts have found such constructive knowledge based on an employer's "deliberate

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## EIGHT POLICIES AND PRACTICES TO IMPROVE CONTROL OF FMLA LEAVE

Timothy M. McConville



Ask a human resource professional weary of questionable leave requests under the Family and Medical Leave Act (“FMLA”) if the Act fairly balances the interests of employers and employees, and the likely answer is that the scales tip decidedly against the employer. While this belief is an understandable response to persistent problems with the FMLA, the employer

does have options. The statute itself, the Department of Labor (“DOL”) regulations and case law reveal various practices employers can use to control abuse of FMLA leave. To be sure, none of them are a silver bullet, and not all will be appropriate for every employer given differences of workplace policies, practices and particular problems encountered. These tools, however, offer some means by which employers can improve FMLA controls and reduce abuse. Employers should review their FMLA policies and procedures in light of the statute and regulations as well any applicable state or local law, and consider revisions to include the following:

1. **Prohibit Material Misrepresentations in Connection with the Use of Leave.** Courts have rejected employees’ FMLA claims in cases in which the employee lied to or misled the employer or falsified leave documentation.
2. **Prohibit Other Employment During Leave.** The regulations provide that if the employer has a uniformly applied policy governing outside or supplemental employment, the policy may continue to apply to an employee while on FMLA leave. But the regulations also provide that an employer that does not have such a policy may not deny FMLA benefits on this basis unless the FMLA leave was fraudulently obtained. The DOL has indicated that “uniformly applied” includes application to both paid and unpaid leave.
3. **Provide for Recertification of Health Conditions.** The regulations and case law allow an employer to require recertification in cases involving pregnancies and chronic permanent/long-term conditions every 30 days in connection with an absence if the certification previously submitted does not specify a minimum period of incapacity. When the certification does describe a period of incapacity and the period is more than 30 days, the employer may require recertification only after the minimum duration described passes.
4. **Require Employees to Provide Information Regarding Changes of Circumstances.** The DOL regulations permit an employer to require recertification before the expiration of the minimum period specified in the certification as necessary for the leave if the circumstances described by the previous certification have changed significantly. If, for example, the duration or nature of the illness changes or complications arise, the employer may request recertification.

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## WHAT EXACTLY IS AN “INJURY”?

Stephen R. Jackson



It seems like an easy question. Well, it is . . . except when it’s not. Virginia Code Ann. § 65.2-101 defines “injury” as meaning “only injury by accident arising out of and in the course of the employment or occupational disease. . . .” There is a considerable body of caselaw decided by the Virginia Workers’ Compensation Commission as well as the Virginia Court of Appeals and the Virginia Supreme Court on the meaning of the term “injury” and more particularly, whether an injury that occurred in the workplace is compensable.

Generally speaking, an injury that occurs while a person is engaged in the business of their employer is covered by the Workers’ Compensation Act, provided that it is caused by some work-related risk. *Southside Va. Training Ctr. v. Ellis*, 33 Va. App. 824, 829, 539 S.E. 2d 35, 37 (2000) (back injury resulting from lifting a tray at work not compensable). Simple acts such as walking, bending or turning, without some work-related risk are not compensable. A good example is the workplace slip and fall accident, which may not be covered. (See “Slip and Fall Injuries in the Workplace,” *Willcox and Savage Employment Law Outlook*, Spring 2007.) Indeed, an employee who claims to have been injured as a result of bending or lifting is not covered by workers’ compensation, unless that injury was a result of a sudden, obvious mechanical or structural change. *Virginia Elec. & Power Co. v. Cogbill*, 223 Va 354, 356, 288 S.E. 2d 485, 286 (1982) (gradual onset back problems are not compensable).

When an employee reports an injury, the compensability of that injury may turn on specifically what the employee was doing at the time the injury occurred and whether the injury was the result of some work-related risk. Equally important, is whether the injury occurred suddenly or over a period of weeks or months. In short, a simple injury may not be as simple as it seems. ■

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case ventures into the unusual territory of unauthorized access of information to discover the offending comments. The court did not address such access issue, apparently undisturbed by it. Perhaps that is another example of the egregiousness of the harassing statement outweighing certain other protocols.

The lesson: Do not allow improper comments regardless of the intended recipients. ■

## **NEW RULES FOR SOCIAL SECURITY “NO MATCH” RESPONSE**

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failure to investigate suspicious circumstances.” It has previously been unclear whether receipt of a “No Match” letter constitutes a “suspicious circumstance” that an employer would have a duty to investigate.

### **Safe Harbor Procedures**

The new regulations outline steps for responding to “No Match” letters and provide time frames for completing these steps. If an employer complies with these steps and time frames, the employer will be protected against a charge that the employer knowingly continued to employ an illegal alien. The safe harbor procedures, in a nutshell, are as follows:

1. The employer must check company records to determine whether the employer made a typographical or clerical error in submitting the employee’s name and Social Security number to SSA. If such a discrepancy is found, the employer must correct the error and then verify with SSA that the corrected name and number match SSA records. The employer must complete these steps within 30 days of receiving the SSA letter and must record the date and manner of completion.
2. If step 1 does not resolve the discrepancy, the employer must ask the employee to review his Social Security card and confirm that he provided the employer with the correct name and number as shown on the card. If that does not resolve the problem, the employer must advise the employee to contact SSA directly to resolve the discrepancy. The discrepancy will then be considered resolved only if the employer subsequently verifies with SSA that the employee’s name and number now match SSA records and the number is valid for work. The employer must also document this verification. This process must be completed within 90 days of receipt of the SSA letter.
3. If the discrepancy is not resolved within 90 days of receipt of the “No Match” letter, the employer must go through the I-9 verification process again to verify that the employee is authorized to work in the U.S., without relying on a Social Security card or document that was the subject of the “No Match” letter. In addition, any document used to establish identity at this stage must contain a photo of the employee. If the employment authorization cannot be verified through such action, the employer must either terminate the employee or run the risk that DHS will find the employer had constructive knowledge of the employee’s lack of authorization to work in this country, which would result in legal consequences to the employer.

### **Responding to Other Suspicious Circumstances**

In addition to prescribing procedures for an employer who receives a “No Match” letter, the new regulations also provide guidance on how employers should react to other notices or facts that might give reason to question whether a foreign employee is authorized to work in the United States. If an employer receives

written notice from DHS that the immigration status document or employment authorization document provided or referenced by an employee in completing Form I-9 is not valid, the employer must also take steps to resolve this problem. These steps can include contacting the local office of DHS and completing a new I-9 Form without relying upon any document that has been identified as invalid. In addition, an employer may be regarded as having constructive knowledge that an alien is not authorized to work if the alien requests that the employer file a labor certification or employment-based visa petition on behalf of the alien.

These new regulations expand or clarify the circumstances in which an employer may be found to have constructive knowledge. However, the regulations also confirm the current nondiscrimination rule that an employer may not presume an employee is unauthorized solely because the employee has a foreign accent or appearance. Employers must still be careful not to discriminate against authorized aliens based on national origin or citizenship.

### **Being Prepared for a Government Inspection**

These new procedures for responding to “No Match” letters and the recent increase in enforcement actions against employers by DHS make it more important than ever for employers to improve their I-9 compliance practices. The best way to accomplish this is through a 3-step process: 1) identify common problems in your I-9 process by conducting a self-audit of your I-9 Forms or hiring an immigration attorney or outside expert to audit them; 2) correct any errors found in the audited forms in accordance with prescribed correction procedures; and 3) follow up with training for all personnel who are involved in the I-9 completion and retention process. These steps will leave you well-prepared for an I-9 inspection by Immigration and Customs Enforcement (ICE). If you receive an inspection notice or you need help completing these steps, consult an attorney who is knowledgeable about immigration compliance to make sure you fully understand your rights and responsibilities.

If you would like to learn more about how to respond to Social Security discrepancies or how to complete I-9 Forms properly, please contact Susan Blackman at (757) 628-5646. Our firm can provide in-house training programs or audit services to help employers improve their immigration compliance and avoid costly penalties. ■

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5. **Reinitiate the Medical Certification Process in the New Leave Year.** The DOL has stated in an opinion letter that an employer may reinitiate the medical certification process with the first absence in a new twelve-month leave year. A second and third medical opinion, as appropriate, could then be requested in any case in which the employer has reason to doubt the validity of the new medical certification.
6. **Attach Job Descriptions and Other Pertinent Information to Certification Form.** In the context of an employee's pattern of Monday/Friday absences, the DOL has stated in an opinion letter that the FMLA does not prohibit the employer from including a record of an employee's absences along with the medical certification form for the health care provider's consideration. The employer may ask the health care provider whether the pattern of absences is consistent with the employee's condition. The regulations also allow the employer to provide a job description for the physician to consider in determining whether the employee is unable to perform any of the job functions. In the absence of a job description, the physician will rely on the employee's account of the employee's job functions.
7. **Use a Physician to Clarify and Authenticate Medical Certifications.** A health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for the purposes of clarification and authenticity of the medical certification.
8. **Require Employees to Report Any Changes in Contact Information.** The circumstances of an employee on leave sometimes take the employee to locations other than a regular home address, and as a result, the employer may be uncertain whether its communications are being received by the employee. By requiring the employee to report changes in contact information, the employer will be better positioned to counter employee claims that the employer provided notices to the employee at incorrect locations. Courts have held that an employer may safely send notices under the FMLA using the method prescribed by collective bargaining agreements or some other source of rules. ■

## U.S. SUPREME COURT RULES THAT HOME HEALTH CARE WORKERS ARE NOT ENTITLED TO MINIMUM WAGE OR OVERTIME PAY UNDER FEDERAL LAW

Ruby W. Lee



As most employers are aware, the Fair Labor Standards Act ("FLSA") sets federal minimum wage and overtime rules for workers. The FLSA specifically exempts certain workers from its provisions, such as baby-sitters and companions for the elderly. One might assume that those companionship workers exempt from coverage are workers that are directly employed by the person for whom services are performed and that the exemption does not extend to those employed by private, third-party companies. However, a U.S. Department of Labor ("DOL") regulation specifically exempts companionship workers "who are employed by an employer or agency other than the family or household using their services." 29 CFR §552.109(a)(2006). The DOL is the government agency charged with promulgating regulations under the FLSA.

In April of 2002, Evelyn Coke filed suit against her former employer, Long Island Care at Home, Ltd., and its owner, Maryann Osborne, alleging that they failed to comply with the FLSA by not paying minimum and overtime wages to Ms. Coke during her employment as a companionship worker. In doing so, Ms. Coke argued that the DOL exceeded its authority in promulgating the above regulation because Congress intended to exempt only companionship workers employed directly by the household using their services.

The District Court for the Eastern District of New York ruled in favor of the employer, but the Court of Appeals for the Second Circuit agreed with Ms. Coke and reversed. The decision was brought before the U.S. Supreme Court on appeal. In a 9-0 opinion delivered on June 11, 2007, the U.S. Supreme Court ruled that the DOL's regulation was valid and binding because DOL has the authority to interpret the FLSA and its interpretation does not conflict with congressional intent. Companionship workers are not entitled to the minimum wage or overtime compensation under the FLSA, even if they are employed by a third-party agency. ■

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