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EMPLOYMENT LAW O U T L O O K



EMPLOYEE'S ERRATIC BEHAVIOR PROVIDED FMLA NOTICE REQUIREMENT

William E. Rachels, Jr.



An employer must be alert to information which can be deemed to put the employer on notice of an employee's need for FMLA leave. Section 825.303(b) of the Regulations suggests that the employee is to give notice to the employer of the need for leave, although there is no need for the employee to expressly assert rights under the FMLA, or even mention the FMLA.

However, a number of court decisions have held that direct notice by the employee is not required and that constructive notice is sufficient to trigger the employer to address FMLA leave.

There are situations where an employer can be on constructive notice due to a physical condition, such as where an employer has knowledge of a physical injury suffered by an employee. However, certain mental or emotional conditions also may manifest themselves in a manner to put the employer on such constructive notice. An October 2007 opinion from the United States Court of Appeal for the Seventh Circuit presents an interesting example of the latter situation in *Stevenson v. Hyre Electric Co.*

Ms. Stevenson had presented no unusual behavior at work prior to one day when a stray dog climbed through a window at the warehouse where she was working and approached her. The Opinion does not describe the dog in terms of size or breed. She immediately began spraying Glade, a room deodorizer, and began yelling and cursing in an intimidating and belligerent manner for several minutes. About two hours thereafter, she said that she was ill and went home. The next morning she left a voice mail that she was not feeling well and would not be in that day. The following day, she came to work and charged into the office of the President, yelling in a very aggressive manner about the need for management to do something about "dogs running by her desk and threatening her." Thereafter, she said that she could not work and left the premises. Later that day

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DHS WILL REVISE REGS BLOCKED BY COURT

Susan R. Blackman



On October 10, 2007, the United States District Court for the Northern District of California issued an injunction to block the Department of Homeland Security (DHS) from implementing new DHS regulations concerning how employers should respond to "No-Match" letters from the Social Security Administration. The regulations would have imposed greater burdens on employers to ensure that employees with Social Security number discrepancies are not working in the U.S. illegally. An employer would have to fire an employee who could not resolve the discrepancy within ninety days, or else the employer might face penalties for employing an illegal alien.

We do not often see the AFL-CIO and the U.S. Chamber of Commerce on the same side of an issue, but in this case, an unusual coalition of labor unions and business groups joined forces to challenge the validity of the regulations. The plaintiffs argued that DHS had not followed proper procedures in issuing the regulations and that the regulations could cause thousands of innocent U.S. citizens and lawful immigrants to be unfairly

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Thomas M. Lucas joined the firm as a partner in January. He represents management exclusively in the full range of labor and employment law matters, including employment discrimination and traditional labor law.

Tom has practiced in Hampton Roads for over twenty years and his clients include companies in the maritime, ship repair, manufacturing, health care and service industries. Prior to entering private practice, Tom worked five years with the National Labor Relations Board.

NLRB TO ALLOW SECRET-BALLOT VOTE AFTER CARD-CHECK RECOGNITION OF UNION

Timothy M. McConville



In a significant 3-2 ruling issued in late September, the National Labor Relations Board (NLRB) modified its rules relating to employers' voluntary recognition of labor unions. The ruling overturned the Board's previous policy of denying employees access to a secret-ballot vote over unionization after the employer voluntarily recognizes a union. The change in policy is a blow to controversial "card check" organizing methods increasingly used by unions to unionize workers.

The long-awaited decision came in two high-profile cases brought by employees at two automotive suppliers (Dana Corporation and Metaldyne Corporation) who found themselves organized by the United Auto Workers (UAW) union. Both Dana and Metaldyne independently entered into so-called "neutrality" and card-check agreements with the UAW. The union then gathered employee signatures on authorization cards, and each company voluntarily recognized the union.

Before any bargaining began, however, employees at both companies filed petitions at the NLRB asking for a decertification election and seeking to nullify their employers' recognition of the union. The petitions were signed by large numbers of employees at both companies. The Metaldyne employees' petition showed more than 50 percent of employees had signed, and the Dana employees' petition showed 35 percent of employees seeking a decertification election.

NLRB regional directors, however, dismissed the petitions, applying the Board's "recognition bar" policy of barring election petitions for a "reasonable time" in cases in which the employer has voluntarily recognized the union. The employees appealed and argued that the NLRB should either abolish the recognition bar doctrine entirely or provide dissenting employees with a window period within which to challenge union certification.

In deciding the case, the majority of the five-member NLRB concluded that the "current policy fails to give adequate weight to the substantial differences between Board elections and union authorization card solicitations as reliable indicators of employee free choice on union representation. . . ." The Board observed that, unlike employees' votes cast in privacy in secret-ballot elections conducted by the NLRB, card signings are public actions, susceptible to group pressure exerted at the moment of choice. The Board's majority also acknowledged that union card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees' representational options.

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FMLA: A SEVERANCE AGREEMENT NIGHTMARE

Samuel J. Webster



When an employee resigns – either voluntarily, under pressure of termination, or as part of a claim settlement – employers frequently prepare a Severance Agreement, or ask us to prepare one. Those severance agreements routinely include a "Release of All Claims," including those arising under the various Civil Rights Acts: Title VII, ADA, ADEA, etc. Heretofore, those releases have also covered the Family Medical and Leave Act (FMLA). The Fourth Circuit Court of Appeals, which covers Virginia, North Carolina, South Carolina, Maryland and West Virginia, has very recently concluded that a Department of Labor (DOL) Regulation, 29 C.F.R. § 855.220(d), requires DOL or court approval of any waiver or release of FMLA claims.

In *Taylor v. Progressive Energy, Inc.*, the Fourth Circuit considered § 855.220(d) in the context of a release that was part of a severance agreement executed in connection with settlement of potential work-related claims. Section 855.220(d) innocently provides: "Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA." This regulation is found in the Department of Labor regulations, Title 29, as are the Fair Labor Standards Act (FLSA) regulations as distinguished from Title VII regulations, which are found in Title 42. Analogizing the FMLA Regulations to the FLSA regulations and supported by the FMLA's legislative history, and based upon the plain language of the regulation, the Fourth Circuit held that FMLA rights, regardless of their nature, could not be waived either prospectively or retroactively absent DOL or court approval. This ruling, of course, surprised DOL and Fourth Circuit practitioners. The Taylor employer defendant petitioned for reconsideration, supported by a DOL amicus brief. The Fourth Circuit vacated and reviewed its ruling and rejected (correctly we think) DOL's arguments, and reinstated its original ruling. Federal District Courts around the country have begun following the Fourth Circuit's opinion.

The Fourth Circuit's ruling creates a logistical conundrum for employers and their counsel. On one hand, the employer in entering into a severance agreement that involves payment of money would like assurance that the employee is giving up any and all claims he/she may have against the employer for whatever reason. If part of that release includes FMLA rights, the Fourth Circuit's ruling requires an employer to seek DOL or court approval of the severance agreement. Alternatively, the employer could take its chances and omit the FMLA from the release, thereby eliminating the need for any DOL or court approval. Such an omission, however, reduces the protection

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USCIS ISSUES REVISED I-9 FORM AND EMPLOYER HANDBOOK

Ruby W. Lee



On November 7, 2007, the United States Citizenship and Immigration Services (USCIS) released an updated version of the I-9 Employment Eligibility Verification Form. The most significant change in the revised Form I-9 is the reduction in the list of acceptable List A documents. Employers may no longer accept the following documents as evidence of

employment authorization: (1) the Certificate of United States Citizenship; (2) the Certificate of Naturalization; (3) the I-151 Alien Registration Receipt Card; (4) the unexpired Re-entry Permit; and (5) the unexpired Refugee Travel Document. One document has been added to List A: the unexpired I-766 Employment Authorization Document.

The I-9 Form instructions have been amended to confirm that an employer may not require an employee to provide a Social Security number for I-9 purposes (although it may do so for payroll or other lawful purposes) except for employers who participate in the USCIS Electronic Employment Eligibility Verification Program (also known as the Basic Pilot Program). Employees hired by such employers are required to furnish a Social Security number in order for the employer to comply with the program.

USCIS has also issued a revised Handbook for Employers, Instructions for Completing the Form I-9, which provides guidance on employment eligibility verification, completion of Form I-9, retention of Form I-9, and penalties for unlawful employment and unlawful discrimination. The new Handbook for Employers presents updates on electronic signature and storage of I-9 forms and the Basic Pilot Program. It also contains sample documents for the employer to refer to in determining the genuineness of a document presented by a new employee.

Employers should now complete the new version of Form I-9 for newly hired employees and employees who require re-verification. The revised Form I-9 and Handbook for Employers may be downloaded from the USCIS Web site at www.uscis.gov. ■

DHS WILL REVISE REGS BLOCKED BY COURT

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terminated due to errors in the Social Security database. Judge Charles R. Breyer found the plaintiffs' arguments meritorious and granted a preliminary injunction against DHS to block enforcement of the regulations while the lawsuit proceeds.

On November 23, 2007, DHS filed a motion asking the court to suspend the case because DHS has decided to modify the

regulations and redo its rule-making process to address Judge Breyer's concerns. DHS agreed to make changes in the regulations to resolve the challenges raised in the legal action. DHS stated that it expects to complete a survey assessing the impact of its proposed regulations on small businesses and to rewrite the regulations by March 24, 2008. Judge Breyer granted DHS's motion on November 26 and stayed the case pending further rule-making activity by DHS. It is not clear how DHS will try to address the concerns about the effect on U.S. citizens and lawful immigrants. Lucas Guttentag, a lawyer for one of the plaintiff organizations, said that the government's plan to "rush through another half-baked rule without addressing the fundamental flaws [is] like putting lipstick on Frankenstein." In the meantime, DHS filed an appeal on December 4 to ask the Ninth Circuit Court of Appeals to reverse the injunction.

While the injunction stands, the Social Security Administration (SSA) will not proceed with issuance of its latest batch of No-Match letters. The letters would have addressed discrepancies concerning more than eight million workers and advised employers of their obligations under the new DHS regulations. It appears that SSA will now wait until spring of 2008 before issuing more No-Match letters. Meanwhile, there is continuing uncertainty about how enforcement officers will handle pre-existing No-Match letters when investigating immigration violations. Secretary Chertoff has confirmed that DHS remains committed to its current strategy of aggressive worksite enforcement. Prudent employers should examine prior No-Match letters and the corresponding I-9 Forms to determine whether additional action is warranted.

We will continue to monitor this issue as DHS tries to improve the regulations. If you have questions about responding to No-Match letters or other immigration issues, please contact Susan Blackman at sblackman@wilsav.com or (757)628-5646. Our firm can provide in-house training programs or I-9 audit services to help employers improve their immigration compliance and avoid costly penalties. ■

LABOR AND EMPLOYMENT LAW

William M. Furr, Chair	wfurr@wilsav.com	757/628-5651
Wm. E. Rachels, Jr.	wrachels@wilsav.com	757/628-5568
Thomas M. Lucas	tlucas@wilsav.com	757/628-5690
Samuel J. Webster	swebster@wilsav.com	757/628-5518
Susan R. Blackman	sblackman@wilsav.com	757/628-5646
Timothy M. McConville	tmconville@wilsav.com	757/628-5581
Ruby W. Lee	rlee@wilsav.com	757/628-5605
David A. Kushner	dkushner@wilsav.com	757/628-5668

LEGAL ASSISTANT

Barbara M. Dean	bdean@wilsav.com	757/628-5645
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EMPLOYEE BENEFITS

James R. Warner, Jr.	jwarner@wilsav.com	757/628-5570
David A. Snouffer	dsnouffer@wilsav.com	757/628-5678

WORKERS' COMPENSATION

Stephen R. Jackson	sjackson@wilsav.com	757/628-5642
Robert L. "Bo" Foley	bfoley@wilsav.com	757/628-5547

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she filed a complaint with OSHA regarding stray animals at the workplace and went to the emergency room complaining of headaches, insomnia, anxiety and loss of appetite. Thereafter, she called in "sick" for several days.

When she returned to work eight days following the encounter with the dog, Ms. Stevenson found that the supervisor had boxed up the contents of her desk and moved them to another room. After a few hours at work, she called the police because she believed that she was somehow being harassed. She then left work saying that she was not feeling well. She left a copy of the hospital's report from the emergency room visit on a supervisor's desk which stated she was discharged with a diagnosis of "anxiety and stress" and was prescribed Ativan. Thereafter, the Company locked her out of the premises because of its concerns about her behavior.

Hyre Electric sent her a letter advising that since she had no accrued vacation or sick leave, she would need to proceed under the FMLA Policy, including the provision of the medical certification for a serious health condition within fifteen (15) days from the commencement of her leave. Otherwise, the absences would be deemed unexcused and she would be terminated. When such certification did not arrive, the Company terminated her employment. It is to be noted that the Court did not find that the employer was on notice of the need for FMLA leave by telling her of the FMLA procedure. Also, the Court expressly did not consider whether requiring medical certification established that the Company recognized her need for FMLA leave.

Instead, the Court noted that "direct notice from the employee to the employer is not, however, always necessary." The Court found that the district court had erred as a matter of law in granting summary judgment to the employer because the district court had not recognized that Ms. Stevenson's unusual behavior at least created a factual issue for a jury to determine whether such behavior provided constructive notice of the need for FMLA leave. The Court did recognize that the fact finder could find that Ms. Stevenson just had a bad temper that erupted during the period in question, but that was found to be within the province of the jury.

To further confound employers, the Court of Appeals split 2 to 1 in the case. The dissenting judge stated that "I cannot see how the evidence presented allows any conceivable inferences that brings Stevenson's case within shouting distance" of prior decisions in the Seventh Circuit on constructive notice of the need for FMLA leave.

The message is that employers likely should take a conservative approach in terms of exposure to liability and lean toward liberality in seeing the need for providing FMLA leave. It should be recognized that the FMLA is designed to benefit employees and will likely be so interpreted. ■

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Accordingly, the Board announced that the recognition bar would apply only after an employer's voluntary recognition of a union if: (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition. If a valid petition supported by 30 percent or more of the unit employees is filed within 45 days of the notice, the petition will be processed, which generally leads to a secret-ballot election conducted by the NLRB. The Board held that the requisite showing of interest in support of a petition may include employee signatures obtained before as well as after the recognition.

The ruling also modified the contract bar rule, which normally prohibits decertification or rival petitions for up to 3 years after a collective bargaining agreement's effective date. Under the Board's new rule, such contracts will not bar such petitions until the 45-day notice period has passed.

The Board applied its ruling prospectively only, which means that the Dana's and Metaldyne's recognition of the union and existing voluntary recognitions by other employers, and contracts reached pursuant to them, will continue to act as bars to election petitions. ■

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available to the employer.

If the employer, as part of the severance package, actually seeks to settle a potential FMLA claim and it wants the aggrieved employee to release that claim, then it must obtain DOL or court approval. Given the administrative schemes available under FLSA and the Longshore and Harbor Workers' Compensation Act, the employer may not have horrible problems obtaining DOL approval; Federal Courts, however, will not want to be burdened unless the claim is actually in litigation. On the other hand, if the employer is reasonably certain it has not violated the severed employee's FMLA rights, a fairly easily ascertained fact, then omission of the FMLA from the release is probably low risk.

Given DOL's position in the reconsideration appeal of *Taylor*, we expect that the agency will seek a modification of the regulation to ease the burden on employers in crafting Severance Agreements. ■