

WILLCOX & SAVAGE

EMPLOYMENT LAW OUTLOOK



AN E-MAIL CAN COST A MILLION BUCKS

Samuel J. Webster



Discovery is burdensome and costly, and the most critical part of an employment-related lawsuit. Discovery allows the parties to find out as much as possible about the other's case. Technology has revolutionized the way we communicate and the ways employers retain and store information. This revolution has compounded discovery and will dramatically increase the cost of discovery, mostly to the employer's detriment. Recent decisions from a New York sex discrimination case demonstrates: \$107,000 in costs to the employer to recover its electronically stored information; sanctions against the employer for failing to preserve electronic evidence; and a \$9.1 million judgment against the employer.

We have preached the necessity of having company policies for use of e-mail and the Internet. We have likewise preached the wisdom of document retention policies. These needs are magnified by the increasing discovery demands for electronic documents, databases, and e-mails. The e-discovery fight, centers around "inaccessible" data, the material that requires trained, IT gurus to pull information from hard drives and backup tapes. Thus, employers face major issues regarding the cost of complying with electronic discovery and therefore the need to reduce that cost with sound policies regarding e-mails, Internet use and document retention.

Electronic documents become problematic for various reasons: their sheer volume and duplicability; their persistent existence ("delete" does not mean "gone"); their dynamic content (drafts); their dispersion to various sites; searchability. Corporations no longer keep archived documents in boxes in dusty warehouses. All of these problems lead to the necessity for a records management program:

- to meet legal requirements (e.g. Sarbanes-Oxley compliance)
- to reduce liability exposure in any given case
- to facilitate disaster recovery, improve access to records, and save money.

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EMPLOYERS' PAYMENTS TO UNIONS MUST BE REPORTED

Timothy M. McConville



The Department of Labor (DOL) recently issued a new Advisory on employers' LM-10 reporting and disclosure obligations under the Labor Management Reporting and Disclosure Act ("LMRDA"). The DOL Advisory confirms employers' obligations to report payments, gifts or other financial arrangements given to or made with any union or union official.

Who Must File

Congress passed the LMRDA in 1959 to help fight widespread corruption in organized labor. The DOL has acknowledged that many employers have failed to file LM-10 reports although the obligation to file them dates back to the 1959 enactment of the statute. The statute specifically requires that both unions and employers file reports identifying certain payments made to each other or to consultants, *i.e.*, the LM-30 reports required of unions and the LM-10 reports required of employers.

The DOL guidance confirms that the obligation to file LM-10 reports applies to virtually all private sector businesses with one or more employees provided that the employer in any year engages in reportable conduct.

What is Reportable

Employers must file a Form LM-10 to disclose any payments made to any union or union official other than certain exempt payments such as payments to the employer's employees as compensation for service as employees and money deducted from wages in payment of union dues. The Advisory identifies other exemptions. The DOL Advisory also offers some limitations to the scope of payments required to be reported, including limitations based on the nature of the relationship between the employer and union and a reporting exemption for *de minimis* payments.

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AN E-MAIL CAN COST A MILLION BUCKS

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Serious legal consequences flow from not having a records retention policy, especially as to electronic records. An employer faces not only the cost of data retrieval, but also the possibility of sanctions (plaintiff's attorneys' fees and costs; fines; contempt) for even inadvertent spoliation of evidence. Failure to retain or, worse, deliberate destruction, of electronic evidence in the face of the reasonable prospect of litigation could also result in criminal exposure (think *Enron*). Spoliation also allows a court to permit an adverse inference of the effect of the evidence that has been destroyed or no longer exists, leading to a bad trial result for the employer. Sanctions may involve dismissal of a case. Ineffective record retention policies also may lead to damage to company reputation. Personal executive liability may arise from the failure to take steps to preserve data or evidence once litigation is reasonably foreseeable. Finally, employers face the cost and difficulty of retrieving critical documents from other, more deeply buried, electronic sources.

A careful records management program contains the following components:

- statement of record retention policy;
- administrative personnel and their functions;
- record retention schedule;
- procedure for suspension of that schedule once litigation becomes reasonably foreseeable ("litigation holds");
- index and identification of vital records;
- disaster recovery procedures;
- protocols for electronic record creation, maintenance, access, and destruction;
- employee training and accountability;
- monitoring/auditing procedures;
- internal discipline for violation of policies and procedures;
- someone in charge of the record retention program.

Development of sound record retention program, coupled with e-mail/Internet policies, will help employers reduce the rising cost of litigation, including the exponential rise generated by electronic discovery.

E-mails abound (think how many forwarded messages you receive in any given day). We are rapidly becoming a paperless society with a proliferation of information. E-mails lack both the body language and voice inflection of oral communications and the precision of the formal written word. Documents and data bases are created on the computer and revised over and over again, and then e-mailed in various forms to multiple persons. All are fair game for discovery, and plaintiffs are using electronic discovery to leverage their cases. ■

EMPLOYERS' PAYMENTS TO UNIONS MUST BE REPORTED

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Filing Deadline

New filers of the Form LM-10 will not have to submit reports or maintain records for fiscal years beginning prior to January 1, 2005, even if such reports should have been filed. In the interest of achieving greater compliance with the reporting requirements, the DOL has stated that it will not require a new filer to submit reports for any prior years absent extraordinary circumstances. To take advantage of the DOL's special enforcement policy and grace period, a new filer must submit its report for the first fiscal year beginning on or after January 1, 2005 on time, and without further direction by the DOL. For those who do not take advantage of this special enforcement policy, the DOL will continue to follow its normal practice in which it may seek reports from covered employers for the five prior years.

To be timely, a report must be filed within the statutorily prescribed filing period, which is within 90 days of the close of the employer's fiscal year. To be timely, the *initial* report for an employer operating on a calendar-year basis must be filed within 90 days of December 31, 2005, *i.e.*, by March 31, 2006. For employers operating on other than a calendar year, the *initial* report must be filed within 90 days of the close of such fiscal year in order to be timely.

Who Must Sign the LM-10

In general, the LMRDA provides that the Form LM-10 must be signed by the employer's president and treasurer or corresponding principal officers. When signing, the filer must swear that the report is true, correct and complete to the best of his or her knowledge, and the report must be signed under penalty of perjury. The DOL's guidance provides that in an *initial* filing, an employer may authorize key officials other than the president and treasurer to sign the initial filing of the Form LM-10 in place of the president and treasurer. The key officials alternatively authorized to sign the Form LM-10 must be the individuals who supervised or conducted the required good faith search for reportable transactions.

The DOL has relaxed the attestation required in an *initial* filing by eliminating the under-penalty-of-perjury provision. The alternative attestation may be used provided specific requirements are satisfied.

Future Compliance

The DOL's guidance makes clear that the Department intends to enforce the reporting requirements against employers. The requirement that future reports be signed by the president and treasurer of the employer under penalty of perjury should signal the need for management officials to implement appropriate compliance efforts, including the development of policies and procedures to identify and track reportable payments. ■

FEDERAL COURT SETS LOW STANDARD FOR FITNESS-FOR-DUTY CERTIFICATION

Ruby W. Lee



Experts generally agree that the Family and Medical Leave Act (“FMLA”) does not require an employer to offer light duty to an employee whose medical restrictions render her unable to return to her original job duties following FMLA leave. Unlike the Americans with Disabilities Act, which requires complex analysis to determine

whether an employer must modify a disabled employee’s duties, the FMLA is commonly seen as involving only the narrower questions of whether an employer must grant an employee time off and reinstatement after leave. A recent court ruling, however, illustrates that employers can face tough questions under the FMLA when an employee cannot perform all of her original duties following FMLA leave.

On November 2, 2005, a federal appeals court ruled that an employer violated the FMLA when it failed to reinstate an employee after FMLA leave because the employee’s health care provider imposed work restrictions inconsistent with the employer’s expectations. In *Brumbalough v. Camelot Care Centers*, the Sixth Circuit Court of Appeals held that “once an employee submits a statement from her healthcare provider which indicates that she may return to work, the employer’s duty to reinstate her has been triggered under the FMLA.”

As a general rule, an employee returning from FMLA leave must be restored to her previous position or an equivalent position. Linda Brumbalough was employed as State Clinical Director by Camelot Care Centers, Inc. (“Camelot”). As State Clinical Director, Brumbalough supervised Clinical Directors at five Tennessee offices and a regional treatment center. This responsibility resulted in work weeks over sixty hours and frequent out-of-town travel. Additionally, Brumbalough was required to be on call twenty-four hours a day, seven days a week.

On June 11, 2001, Brumbalough reported to Camelot that she was experiencing health problems and that she needed to reduce her work hours to 40 to 45 hours per week. She subsequently took FMLA leave. On July 27, 2001, Brumbalough contacted Camelot and indicated that she felt ready to return to work. Camelot sent Brumbalough a letter for her health care provider to review and sign, as well as a description of Brumbalough’s job duties. On August 3, 2001, Brumbalough submitted a note from her doctor, which stated simply, “She may return to work on 8/13/01. She should only work a 40-45 hour week and limit her out-of-town travel to one day per week.” Camelot deemed this note insufficient and terminated Brumbalough’s employment on August 17, 2001. Brumbalough filed suit in U.S. District Court.

The lower court granted Camelot’s motion for summary judgment, concluding that the note “did not meet defendant’s requirements for a fitness-for-duty certification because it did not specify whether Brumbalough could perform the essential functions of

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GENERAL ASSEMBLY CONTINUES EXPANSION OF EMPLOYEE JURY DUTY RIGHTS

David A. Kushner



Performing one’s civic duty by serving on a jury can be a major personal inconvenience. However, when the citizen called to jury duty is also depended on by an employer, that inconvenience can potentially affect an entire organization. Jury duty can last from less than a day to as long as months. Notwithstanding this

potentially lengthy absence from work, under Virginia law jury duty is an inconvenience that employers *must* accept without taking adverse action against the employee.

To protect employees called to serve on juries, the Virginia General Assembly passed a law in 1981 that criminally penalized any employer that discharged an employee because of that employee’s jury service. The original Jury Duty Law also prohibited employers from requiring an employee to use sick leave or personal leave while serving on the jury. An employer who violated this law would be guilty of a class three misdemeanor.

In 1985, the General Assembly expanded this law to prohibit not just discharge, but also to prohibit the employer from taking *any* adverse employment action as a result of jury service. In addition, in 1988 the law was once again expanded to further protect employees summoned or subpoenaed to appear in a court as a witness.

In 2004, the General Assembly further prohibited an employer from requiring an employee to work on the same day that he or she had served on a jury. For example, an employee who served on a jury from 9:00 A.M. until 3:00 P.M. could no longer be required to work the night shift at their particular job. However, before this amendment went into effect, the General Assembly amended the statute yet again.

Employer Prohibitions under Virginia’s Current Jury Duty Protection Statute

The 2005 amendment changes the details of exactly when an employer can require an employee to work following jury service. Employers can assure full compliance with this law (and avoid a criminal penalty) by bearing the following rules and advice in mind.

- An employer cannot require an employee who serves on a jury for at least four hours in one day (including travel time) to work any shift starting after 5:00 P.M. on the day of jury service.
- The employer also cannot require an employee to work before 3:00 A.M. on the day *after* jury service.
- Employers *can* require employees to attend their shift if they serve on the jury for less than four hours, although this includes travel time.

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FEDERAL COURT SETS LOW STANDARD FOR FITNESS-FOR-DUTY CERTIFICATION

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her job.” Brumbalough appealed this decision to the Court of Appeals for the Sixth Circuit. The Sixth Circuit reversed the grant of Camelot’s motion for summary judgment, holding that, while requiring a fitness-for-duty form prior to reinstatement is permitted by the pertinent FMLA regulation, “a plain reading of this regulation indicates that the fitness-for duty certification need only state that the employee can return to work.” Essentially, the court set a new low standard for fitness-for-duty certifications: if the health care provider states that an employee may return to work, that employee must be reinstated regardless of whether the health care provider certified that the employee could perform the job duties associated with the position.

The Sixth Circuit remanded the case back to the district court for determination of whether the doctor’s work restrictions rendered Brumbalough unable to perform the essential functions of her job. In doing so, the Sixth Circuit specified that the issue of whether working over sixty hours per week was an essential function of the job was a question of fact to be determined by the jury.

The Sixth Circuit decision is controlling case law in Kentucky, Michigan, Ohio, and Tennessee. The United States Court of Appeals for the Fourth Circuit, which covers Virginia, has not yet ruled on a case presenting the same issue as the *Brumbalough* case. However, employers in this jurisdiction who face similar situations should assess the importance of the particular duty that the employee is unable to perform. If that duty is essential, then the employee will not be entitled to reinstatement in accordance with the FMLA regulations. If the duty is not essential, then the employer may be required to reinstate the employee to her original position or an equivalent position. ■

GENERAL ASSEMBLY CONTINUES EXPANSION OF EMPLOYEE JURY DUTY RIGHTS

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- Employers must not take any adverse action against an employee for serving on a jury or as a witness.
- Employers cannot require employees to use sick leave or personal leave while serving on a jury. However, the law does not require that employers pay employees for their time on the jury, as long as employers otherwise comply with relevant wage and hour laws. ■

Immigrant Visa Retrogression Alert

Ruby W. Lee

The U.S. Department of State sets a fixed limit of green cards that are available each year. Green card availability depends on the applicant’s country of origin on the rate at which green card applications are being processed. In recent years, these annual limits did not pose significant problems for employment-based green card applicants because the United States Citizenship and Immigration Service (CIS) was unable to process enough green card applications to reach the annual limit.

Recently, however, CIS has improved its processing speed and, as a result, it has been able to issue more green cards each year. Due to the increase in green cards being issued each year, certain categories of employment-based green cards have run out. As of October 2005, the third preference employment-based category of green cards (for positions that require only a Bachelor’s degree or less) is no longer immediately available. CIS is now issuing green cards in this category only for applications that were received on or before April 1, 2001.

Presently, the first preference employment-based category (for aliens of extraordinary ability, outstanding professors and researchers, and multinational managers) and the second preference employment-based category (for positions requiring a Master’s degree or equivalent) are current for most countries. This means that applicants in these categories may file immigrant visa petitions with adjustment of status applications and CIS will process their applications. However, it is likely that these categories will also run out in 2006. Once a category “regresses,” it could take years before it is brought up to date. For this reason, individuals seeking to file immigrant petitions in one of these two categories should begin the process as soon as possible to avoid immigrant visa retrogression’s long-term consequences.



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