

WILLCOX & SAVAGE

EMPLOYMENT LAW OUTLOOK



FMLA LIMITS EMPLOYER'S ABILITY TO FORCE EMPLOYEES TO TAKE PAID LEAVE

William M. Furr



A federal appellate court recently held that employers may not force employees out on FMLA leave to use vacation/sick leave if the employee is receiving disability benefits from another source. In *Repa v. Roadway Express, Inc.*, the employee was injured off the job and became eligible for paid leave under a disability policy. In processing the employee's FMLA leave request, Roadway

Express required her to use her accrued paid sick and vacation leave. Both the trial court and the United States Court of Appeals for the Seventh Circuit found that Roadway Express had violated the Family and Medical Leave Act by forcing the employee to use vacation and sick leave against her will.

The employee filed suit against Roadway because she wanted to preserve her right to take paid vacation and sick leave at a later time and because she was already receiving paid leave pursuant to the disability policy. The appellate court agreed with the employee citing the Department of Labor's FMLA regulations which stated that it would be inappropriate to substitute paid leave when the employee is receiving paid disability benefits.

It is unclear whether other appellate courts and the United States Supreme Court will adopt the ruling of this appellate court. Some commentators have suggested that future employers will attack the validity of the Department of Labor's FMLA regulations. For now, employers should be careful not to require employees to use paid vacation/sick leave if the employee is also receiving paid leave through another source such as workers' compensation or pursuant to a disability policy. ■

Noncompetition Agreements Alert

If your noncompetition agreement forms have not been reviewed in more than eighteen months, you should have an employment lawyer review the forms immediately. The Supreme Court of Virginia and other courts have recently changed the rules on drafting these agreements. Your agreements may need to be revised based on recent court rulings.

SUPREME COURT LIMITS PAY DISCRIMINATION SUITS

David A. Kushner



On May 29, 2007, a sharply divided U.S. Supreme Court issued a ruling which limits the ability of employees to sue their employers under Title VII over allegedly discriminatory pay. In *Ledbetter v. Goodyear Tire and Rubber Company*, the Supreme Court held that an employee must be able to establish that her employer made an intentionally discriminatory

decision related to pay within the relevant statute of limitations period. Prior to this ruling many courts, including federal courts in Virginia, only required employees to prove that they received a single paycheck within the statute of limitations period which was lower than the paychecks of similarly situated men. Under the old rule it did not matter if the actual *decision* to set the lower pay was made years before the employee filed a Charge of Discrimination.

From 1979 through 1998, Lilly Ledbetter worked as one of the few female supervisors in Goodyear's Alabama facility. Initially, Ledbetter's pay was equal to that of her male counterparts, but over time a growing disparity developed as she consistently received lower pay increases during her annual performance reviews. By 1998, her pay was less than all of her male counterparts by as much as 40 percent. In 1998, Ledbetter filed a Charge of Discrimination with the Equal Employment Opportunity Commission alleging that she was paid less than similarly situated men based on her gender. She further alleged that many of the past decisions to deny her pay increases were discriminatory, resulting in her current lower paychecks. Ledbetter subsequently filed a lawsuit making these same allegations.

Title VII of the Civil Rights Act of 1964 prohibits discrimination against employees because of that employee's race or gender, as well as other protected bases. Title VII generally requires a showing of *intentional* discrimination. In addition, Title VII requires an aggrieved employee to file a Charge of Discrimination with the EEOC within 180 or 300 days (depending on the state) of any act of discrimination. If an employee fails to file a Charge within 180 (or 300) days of a discriminatory act, any lawsuit based on this act would be time-barred.

(CONTINUED ON PAGE 2)

FAMILY RESPONSIBILITY DISCRIMINATION: A WOLF IN SHEEP'S CLOTHING?

Samuel J. Webster



On April 17, the EEOC conducted a hearing concerning "family responsibility discrimination" (FRD). This social science creation covers employee lawsuits for discrimination based upon their care giving responsibilities at home. That the EEOC even held a hearing on this topic should worry employers. But the EEOC has gone a half step further; it has announced

that it may develop FRD enforcement guidelines. Although the District of Columbia and Alaska have included FRD provisions in their state anti-discrimination laws, Congress has passed no statutory FRD prohibition. Rather, FRD suits find their genesis in Title VII, Pregnancy Discrimination Act, Family and Medical Leave Act (FMLA), Americans with Disabilities Act (ADA), and the Equal Pay Act. Employees and applicants have sued because they were rejected for employment, passed over for promotion, subjected to hostile work environments, and terminated based solely on employers' negative assumptions about the value and performance of employees who have care obligations outside of work.

In 1971, the United States Supreme Court in *Phillips v. Martin Marietta Corporation* announced that Title VII's sex discrimination prohibition applied to employers who used one set of applicant criteria for women and another for men. The Court held that Martin Marietta's refusal to accept applications from women who had preschool age children violated Title VII's sex discrimination provisions.

Family responsibility discrimination arises in part because of the changing workplace paradigm. The Family Medical and Leave Act attempted to respond to that changing paradigm. More women are entering the workplace and cannot be subjected to mid- and late-twentieth century stereotypes. More families have both parents working. More men in the workplace are also the primary home caregiver. At the chronological other end, more families have to deal with aging parents. Most FRD cases result from outdated stereotyping. Employers have made incorrect assumptions based on an old workplace paradigm about how a parent or other caregiver will act or should act and then made personnel decisions based on those faulty assumptions. Family responsibility discrimination comes in subtle forms. For example, employers may assume that women with young children do not want to travel and are more committed to the home than advancing their careers, so the employer does not include them in networking or social events; employers harass male employees who insist on being active in home care responsibilities. Employers face increasing tension between needing employees who are devoted to their jobs and willing to work the hours those jobs require and employees desiring life balance and having care giving responsibilities at home. This generational paradigm workplace shift drives the increasing number of FRD lawsuits.

The EEOC's ominous interest in FRD should cause employers concern. If the EEOC enacts guidelines, it would effectively be creating another class of discrimination without Congress' imprimatur. Employers must administer their leave policies in an absolutely neutral fashion, particularly FMLA leave, which is directed at family responsibility issues. Employers must also train supervisors to avoid the subtle nuances accompanying, for example, assumptions about women with young children. Increasingly, employers must be prepared to respond to the changing workplace paradigm and become more family friendly. The EEOC's FRD hearing and subsequent announcement may be a harbinger of additional enforcement efforts based upon FRD. ■

SUPREME COURT LIMITS PAY DISCRIMINATION SUITS

(CONTINUED FROM COVER PAGE)

At her trial, Ledbetter was unable to prove that any of her supervisors intentionally discriminated against her in the 180 days prior to her filing a Charge in 1998. However, Ledbetter was able to convince the jury that previous supervisors had discriminated against her by denying her pay increases at various times throughout her employment, all of which fell outside of the 180-day limitations period. Because most pay increases at Goodyear were based on a percentage of an employee's current salary, these earlier denials of pay increases affected Ledbetter's pay for the remainder of her employment. Goodyear was therefore paying Ledbetter less than men because of the alleged sex-based decisions made by a manager many years before Ledbetter filed a Charge against Goodyear. Ledbetter argued that, even if her current supervisors did not intentionally discriminate against her, each individual paycheck which paid her less than similarly situated men was a separate discriminatory act which restarted the 180-day period.

The Supreme Court disagreed, holding that Ledbetter's failure to file a Charge of Discrimination within 180 days of each discriminatory pay *decision* precluded her from maintaining a lawsuit against Goodyear because no Goodyear supervisor intentionally discriminated against Ledbetter during the relevant 180-day period prior to the filing of her 1998 Charge. Even though her pay in 1998 was significantly lower than similarly situated men, the Court stated that "current effects alone cannot breathe life into prior, uncharged discrimination."

The Supreme Court's ruling in *Ledbetter* could significantly decrease the number of pay claims brought under Title VII. As the dissent pointed out in *Ledbetter*, each individual pay decision usually involves a small amount of money, such as where a female receives a \$1,000 pay raise but her male counterparts receive a \$2,000 raise. It is unlikely that an employee will be able to find a lawyer to take a case over such a small amount of money. Nevertheless, unless employees such as Ledbetter file a Charge within 300 days of being informed of a discriminatory pay decision, their claims are now precluded. ■

FILING AN EMPLOYER'S ACCIDENT REPORT IS A MUST

Stephen R. Jackson



Sometimes the basic requirements of the Virginia Workers' Compensation Act are the most misunderstood. One of those basics is the Employer's Accident Report or what used to be called the Employer's First Report of Accident. This form is an employer's first communication with the Virginia Workers' Compensation Commission to let them know that a

workplace injury has occurred. Most importantly, it is *required* by Virginia law and must be filed within 10 days of the injury. Either the employer or its insurance carrier must file this report with the Commission or face penalties ranging from \$500 to \$5,000 under Va. Code Ann. § 65.2-902. Failure to file the Accident Report may also toll the statute of limitations for the filing of a claim by an employee.

The employer's accident report is VWC Form 3 and can be found at the Commission's Web site at www.vwc.state.va.us/index.htm. The employer's accident report must be filed if a workplace injury meets *any* of the following seven criteria:

- Lost time or partial disability exceeding seven days.
- Medical expenses exceeding \$1,000.
- Any denial of compensability.
- Any disputed issues.
- An accident that results in death.
- Any permanent disability or disfigurement.
- Any specific requests made by the Commission.

Broadie v. Allied Temp Agency, VWC File No. 216-95-10 (May 25, 2005). If the injury does not meet any of the seven criteria, the employer may still be required to file a Report of Minor Injury (Form 45-A). While the filing of the Accident Report is evidence

(CONTINUED ON PAGE 4)

BEYOND H-1B: ADDITIONAL VISA OPTIONS FOR PROFESSIONALS FROM CERTAIN COUNTRIES

Ruby W. Lee



As many employers are aware, the United States Citizenship and Immigration Services ("CIS") has already received enough H-1B petitions to reach the cap for fiscal year 2008 (October 1, 2007 – September 30, 2008). This article will address additional visa options for professionals who are citizens of Chile, Singapore, Mexico, Canada, or Australia.

The H-1B1 visa for Chilean and Singaporean nationals

The H-1B1 visa was created for Chilean and Singaporean professionals in specialty occupations. A specialty occupation is one that generally requires a Bachelor's degree in the specific specialty (or its equivalent) as a minimum qualification. H-1B1 visa holders may receive one-year periods of stay, renewable indefinitely, as long as they demonstrate that they do not intend to stay permanently. Employers may file petitions to change status to H-1B1 for qualifying individuals who are in lawful status in the United States. Alternatively, Chilean and Singaporean nationals may apply for H-1B1 visas directly at a U.S. Consulate abroad. Family members of H-1B1 visa holders may receive H-4 status, which allows them to live and attend school in the United States.

The TN visa for Canadian and Mexican nationals

The TN visa was created for Canadian and Mexican professionals who are engaged in certain professions, including but not limited to, accountants, engineers, registered nurses, pharmacists, scientists, teachers, and computer systems analysts. TN professionals may also receive periods of stay in one-year increments, renewable indefinitely, provided that they demonstrate that the stay is temporary. Employers may file petitions to change status to TN for qualifying Canadian and Mexican nationals who are in lawful status in the United States. If they are outside of the U.S., Mexican nationals apply for TN visas at a U.S. Consulate and Canadian nationals submit their applications at the port of entry. Family members of TN visa

(CONTINUED ON PAGE 4)



LABOR AND EMPLOYMENT LAW

William M. Furr, Chair	wfurr@wilsav.com	757/628-5651
Wm. E. Rachels, Jr.	wrachels@wilsav.com	757/628-5568
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

Gillian W. Field	gfield@wilsav.com	757/628-5645
------------------	-------------------	--------------

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

IMPORTANT STATUTORY CHANGES

Susan R. Blackman



Federal Minimum Wage Increases

Congress has enacted legislation to raise the minimum wage across the nation. On July 24, 2007, the federal minimum wage will increase from the current \$5.15 per hour to \$5.85 per hour. Twelve months later, on July 24, 2008, it will increase to \$6.55 per hour, and twelve months after that, on July 24, 2009, it will increase again to \$7.25 per hour. Remember to update your posters!

New State Law Gives Time Off for Crime Victims

The Virginia General Assembly passed a law to protect the job security of individuals who are victims of crime. Effective July 1, 2007, employers in Virginia must allow a crime victim to take time off from work to be present at any criminal proceedings relating to the crime, unless the absence would create undue hardship for the employer. To exercise this right, the employee must present documentation of the criminal proceeding. The absence may be unpaid. ■

Immigration Alert

Ruby W. Lee

In our last newsletter, we reported that the United States Citizenship and Immigration Services ("CIS") had published a proposed rule that would dramatically increase the filing fees for most immigration petitions and applications. Since then, CIS has published a rule confirming that new fees will take effect beginning July 30, 2007. As anticipated, the fee increases are significant for employment-based immigration cases. For example, the fee for a petition for a nonimmigrant worker will increase from \$190 to \$320. The fee for a petition for an immigrant worker will increase from \$190 to \$475. The fee for an application for extension of stay or change of nonimmigrant status will increase from \$200 to \$300. For a complete listing of the new fees, please visit CIS's Web site at www.uscis.gov.

Please contact Susan Blackman (757-628-5646) or Ruby Lee (757-628-5605) if you would like more information about the new fees or if you would like to file an immigration petition or application before the fees increase at the end of July.

FILING AN EMPLOYER'S ACCIDENT REPORT IS A MUST

(CONTINUED FROM PAGE 3)

that the accident occurred, it is not an admission by the employer that the accident is compensable or that it occurred as the claimant reported. In short, an employer has every reason to file the Accident Report and no reason not to. Employers should work with their insurance carriers to provide for a procedure for the proper reporting of workplace injuries and the filing of the Employer's Accident Report with the Commission. ■

BEYOND H-1B: ADDITIONAL VISA OPTIONS FOR PROFESSIONALS FROM CERTAIN COUNTRIES

(CONTINUED FROM PAGE 3)

holders may receive TD status, which allows them to live and attend school in the United States.

The E-3 visa for Australian nationals

The E-3 visa was created for Australian professionals in specialty occupations. E-3 visa holders may be admitted to the United States for a two-year period, renewable indefinitely, provided that they demonstrate that the stay is temporary. Employers may file petitions for change to E-3 status on behalf of Australian professionals who are in lawful status in the United States, or the Australian nationals may apply for E-3 visas directly at a U.S. Consulate in Australia. Family members may receive E-3 status, which permits them to live, attend school, and/or work in the U.S.

These visa options are excellent alternatives for employers who wish to hire nationals of these countries. It is worth noting that employers are not required to pay the hefty fees associated with H-1B petitions, although they will be required to attest that they are paying the foreign national the prevailing wage or the actual wage paid to similarly employed workers. ■

**Current and previous issues of the
Employment Law Outlook
are available on the
Willcox & Savage Web site**

www.willcoxsave.com/nep/newsletters.html
