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EMPLOYMENT LAW OUTLOOK



VIRGINIA SUPREME COURT STRIKES NONCOMPETE; VIRGINIA BAR ASSOCIATION PROPOSES NONCOMPETE LEGISLATION

William M. Furr



There have been two significant developments in the law of noncompetition agreements. On September 16, 2005, the Virginia Supreme Court found a noncompetition agreement to be unenforceable because the agreement restricted the employee from working for a competitor in any capacity. *Omniplex World Services Corporation v. U.S. Investigations*

Services, Inc. The employer was a staffing company that provided security support to various customers. The noncompetition covenant restricted the employee from performing any services for any customer for whom the employee provided services while employed by Omniplex. The Supreme Court concluded that the agreement was unenforceable even though the agreement allowed the employee to compete so long as the employee did not work for Omniplex' customer. The Supreme Court concluded that the agreement should only have restricted the employee from working in the same capacity that the employee had worked on behalf of Omniplex. This is referred to as the "janitor defense"; if the agreement prohibits the employee from working as a janitor, the agreement is unenforceable. The Supreme Court's decision establishes that courts will now scrutinize noncompetition agreements much more carefully. Because of this trend, employers should make sure that their employment lawyers review their noncompetition agreements on a regular basis.

In an effort to "promote certainty in economic relationships between employers and employees," the Virginia Bar Association is planning to propose legislation to the Virginia Assembly to govern noncompetition agreements. The proposed legislation provides that if a noncompetition agreement complies with certain requirements, it will be more easily enforced. To fall within the proposed legislation, the noncompetition agreement must: 1) be in writing; 2) be signed; 3) be entered into after July 1, 2006; 4) contain a time limitation of no more than two years after the employment relationship ends; 5) contain a provision advising each side to obtain legal advice; and 6) only forbid one or more of the following: the nonpiracy of employees; the

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FAQs re: FMLA

Susan R. Blackman



The Family and Medical Leave Act requires employers who have 50 or more employees to grant up to 12 weeks of unpaid leave per year to an employee who must miss work due to a serious health condition or in order to care for a new child or for a spouse, parent or child who has a serious health condition. Covered employers must post notices that describe the basic rights

granted by the FMLA, but the notices do not provide answers to some of the more complex questions that frequently arise when administering this law. A question as simple as "who is a child" for FMLA purposes may have an answer that is counterintuitive, as shown in the questions below.

Q: Can an employee who lives with her boyfriend take FMLA leave to care for her boyfriend's sick daughter?

A: Maybe. The Family & Medical Leave Act does not require a biological or legal parent-child relationship when an employee seeks leave to care for a sick child. An employee can use FMLA to care for a child for whom the employee stands "in loco parentis." If the boyfriend's daughter lives with the employee and the employee has day-to-day responsibility, financial and otherwise, for the care of the child, then the employee may use FMLA leave when the child has a serious health condition. In contrast, if the child normally lives with her biological mother and the employee does not have day-to-day responsibility for the child, then this would not qualify for FMLA leave.

Q: Can an employee take FMLA leave for cosmetic surgery?

A: No. The regulations state that conditions for which cosmetic treatments are administered (such as plastic surgery) are not "serious health conditions" that qualify for FMLA leave, unless inpatient hospital care is required or complications develop. However, restorative plastic surgery after an injury probably would qualify.

Q: An employee is out on FMLA leave, and the company has determined that his job will be eliminated in an upcoming RIF. Can we terminate him while he is on leave?

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NONCOMPETE LEGISLATION

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nonsolicitation of customers; the nonsolicitation of prospective customers; the protection of trade secrets; the protection of confidential information; and employment with a direct competitor in a similar capacity to the capacity in which the employee worked for the employer.

The Virginia Bar Association hopes to submit the proposed legislation to the Virginia General Assembly this year. As with any proposed legislation, no one can predict whether it will succeed. If the legislation is enacted, it will give employers much more confidence that their conforming agreements are enforceable. Stay tuned for future developments. ■

FAQs re: FMLA

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A: Yes. Taking FMLA leave does not protect an employee from a legitimate reduction in force (RIF). An employee who takes FMLA leave has no greater right to reinstatement than if the employee had been continuously employed during the leave. When a RIF occurs in the middle of the leave and the employee's position is eliminated, the employer's obligation under FMLA to continue the employee's health insurance will cease at the time the position is eliminated. The employer should make sure it can prove that the RIF was not motivated by a desire to retaliate against the employee for taking FMLA leave.

Q: A pregnant employee needs to miss work for frequent doctor visits. However, she does not want to use FMLA leave, because she wants the full 12 weeks to be available following the birth of her baby. Can the company designate this as FMLA against her wishes?

A: Yes, if the company has clear indications that the absences are due to an FMLA-covered reason. The Department of Labor has stated that an employee may not bar the employer from designating a qualifying absence as FMLA leave. Absences for prenatal care are qualifying absences under the definition of serious health condition.

Q: When calculating whether an employee satisfies the 1250-hour requirement to be eligible for FMLA, should we count hours that the employee has been out on workers' compensation due to an on-the-job injury?

A: No. When determining whether the 1250-hour threshold has been satisfied, only hours actually worked in the preceding 12 months should be counted. Do not count time off that the employee has taken for vacation, personal leave, workers' compensation leave, or prior FMLA leave. There is an exception for military service members who are returning to civilian employment after a deployment in the National Guard or Reserves. Returning service members get credit for time spent in military deployment when determining FMLA eligibility.

Q: An employee's first grandbaby is due next month, and she wants to take a week off to assist her pregnant daughter during and after childbirth. Can she use FMLA for this?

A: No, unless the daughter is a minor or is disabled. An adult non-

disabled daughter will not be considered a "child" under the FMLA definitions. If the pregnant daughter is under 18 or incapable of self-care due to a long-term disability, the employee can use FMLA to care for her daughter during childbirth and recovery. If the daughter is over 18 and not disabled, the employee cannot take FMLA to care for her daughter or her new grandbaby. FMLA cannot be used to care for a grandchild unless the grandparent is raising the child in place of the child's parent.

Q: Can an employee take FMLA leave after his father's death to make funeral arrangements and handle the estate?

A: No. An employee can use FMLA while his father is on his deathbed, but not after his father's death. Many companies offer bereavement leave for such circumstances, but employers are not required to do so. Estate administration following the death of a parent is not an FMLA-qualifying event. However, if the employee is so distraught that he is incapacitated by his own emotional condition, he might qualify for FMLA leave based on his own serious health condition.

Q: Can an employee take FMLA leave to care for her mother-in-law following the mother-in-law's heart surgery?

A: No. An employee can take FMLA leave to care for her own mother or father following surgery, but not to care for her spouse's mother or father. ■

Deadline for Medicare Part D Notices

James R. Warner, Jr.

November 15, 2005 is the deadline for employers to provide Medicare Part D notices to health plan participants who have prescription drug coverage and are covered by Medicare Part A or B. The notice has detailed content requirements and must tell the participants whether the health plan's prescription drug coverage is expected to pay as much as the standard Medicare Part D prescription drug coverage will pay. The notice is generally required to be given to the following individuals if covered by the employer's prescription drug coverage and Medicare Part A or B: active employees and their spouses who are age 65 or older; retirees and their spouses who are age 65 or older; active employees and their spouses who are disabled; and active employees and their spouses with end stage renal disease. Due to the difficulty of identifying the individuals in these categories, most employers will provide the notice to all health plan participants with prescription drug coverage.

POST-OFFER MEDICAL EXAMS MAY VIOLATE ADA IF OFFER INCLUDES NON-MEDICAL CONTINGENCY

Timothy M. McConville



A federal appeals court has ruled that an employer violates the Americans with Disabilities Act ("ADA") when it makes an offer of employment but conditions the offer on both medical and non-medical contingencies. The court held that the ADA prohibits medical examinations and inquiries until after the employer has made a "real" job offer to an applicant.

To satisfy the "real" job offer requirement, an employer must evaluate all relevant non-medical information which it reasonably could have obtained and analyzed prior to giving the offer. Specifically, the court held that to issue a "real" offer under the ADA, an employer must have either completed all non-medical components of its application process, such as employment history verifications and background checks, or be able to demonstrate that it could not reasonably have done so before issuing the offer.

The United States Court of Appeals for the Ninth Circuit's ruling in *Leonel v. American Airlines, Inc.* places significant emphasis on an employer's sequence of components of its hiring process. The case arose after American Airlines rejected three applicants for flight attendant positions. The three applicants, all of whom had the human immunodeficiency virus ("HIV"), all underwent essentially the same application process. American interviewed them and then issued conditional offers of employment, contingent upon the applicants passing both background checks and medical examinations.

Rather than wait for the background checks, American immediately sent the applicants to its on-site medical department for medical examinations where they were required to fill out medical history questionnaires and give blood samples. None of the applicants disclosed his HIV-positive status or related medications. Thereafter, alerted by the applicants' blood test results, American discovered their HIV-positive status and rescinded their job offers, citing their failure to disclose information during their medical examinations.

In their lawsuit, the three applicants argued that American could not require them to disclose their personal medical information so early in the application process. The applicants argued that the ADA prohibits medical examinations before the completion of background checks and thus their non-disclosures could not be used to disqualify them.

The Ninth Circuit accepted the applicants' theory. Specifically, the court held that the ADA requirement that a medical examination be conducted only after a "real" job offer enables applicants to determine whether they were rejected because of disability or because of insufficient skills or inexperience or a bad report from a reference. According to the court, when employers rescind offers made conditional on both non-medical and medical contingencies, applicants cannot easily discern or challenge the grounds for rescission. When medical considerations are isolated, however, applicants know when

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MANAGING THE THREAT OF WORKPLACE VIOLENCE

Andrew R. Fox



Few occurrences pose a greater risk to employee safety, productivity, and morale than an outbreak of violence in the workplace. The U.S. Department of Justice estimates that 1.7 acts of violence occur in the workplace each year, equating to 12.5 incidents per 1,000 workers. Apart from the profound psychological effects of such an occurrence, workplace violence costs American businesses billions of dollars annually in lost hours of work, lowered productivity, and costly litigation of related claims.

In most cases of workplace violence perpetrated by employees, management was unaware of or ignored evident warning signs of a potential outbreak. In some cases, the employer actually furthered the incident by placing the perpetrator and victim in a situation giving rise to a high probability of violence, despite past indications that such a result would likely occur. Employers therefore face potential liability for both the devil they know and the devil they don't, under a number of legal theories.

First and foremost, Virginia law recognizes the torts of negligent hiring and negligent retention. An employer will be held liable under this theory for the violent acts of a worker who the employer knew or should have known was prone to violence based on the potential hire/employee's past behavior. While the "should have known" standard tends to be highly fact-specific, an employer may have a very difficult time arguing that an employee's past acts of violence could not have been discovered through a reasonable inquiry, especially in light of the personal information available at relatively low cost on the internet.

Additionally, employers may be held liable for violent acts occurring in the workplace under the general principle of *respondeat superior*, in which a master is held responsible for the acts of his or her servant. Workplace assaults are also often sexual in nature or related to other discriminatory acts, opening the door to litigation in federal court and all of the various remedies allowed under Title VII. The complex interplay between these various causes of action guarantee any resulting litigation to be intrusive, time-consuming, and costly.

For both legal and business reasons, employers must confront the issue of workplace violence head-on. Many employers currently discuss violence in the workplace from different angles in numerous existing policies. For instance, a security policy may notify employees that their personal effects may be searched for weapons, a disciplinary policy may specify fighting or violent acts as grounds for discipline up to and including termination, and a harassment policy may include the prohibition of offensive physical acts.

However, employers should establish and publicize a distinct, unequivocal Workplace Violence Prevention and Management policy. This policy should admonish employees that acts of violence in the workplace will not be tolerated; however, the policy must also provide

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POST-OFFER MEDICAL EXAMS MAY VIOLATE ADA

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they have been denied employment on medical grounds and can challenge an allegedly unlawful denial. The court also noted that the requirement that pre-employment medical examinations be conducted only after "real" job offers also protects applicants who wish to keep their personal medical information private.

According to the Ninth Circuit, because American's job offers were contingent not just on the applicants' successfully completing the medical component of the hiring process but also on the completion of a critical non-medical component, *i.e.*, background checks, including employment verification and criminal history checks, the company's process was contrary to the requirements of the ADA. The court held that American failed to show that it could not reasonably have completed the background check and so notified the applicants before reinitiating the medical examination process.

The court specifically suggested that American might have performed the background checks before the applicants arrived for their interviews. The company might also have performed the medical examinations at satellite sites, presumably at a later time, rather than subjecting the applicants to medical examinations immediately upon the successful interviews and communication of the job offers. The court held that while an employer may be able to prove that such alternatives were not feasible and that it reasonably could not have implemented the sequence required by the ADA, American in this case did not prove these requirements. Without such proof, the court held that American cannot require applicants to disclose personal medical information—and penalize them for not doing so—before it assures them that they have successfully passed through all non-medical stages of the hiring process.

The Ninth Circuit decision is controlling case law in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and Guam. The United States Court of Appeals for the Fourth Circuit, which covers Virginia, has not ruled on a case presenting the same issue as the *Leonel* case. ■

MANAGING THE THREAT OF WORKPLACE VIOLENCE

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avenues for engaging employees in recognizing and reporting the warning signs of a possible outbreak without fear of retaliation or other adverse action. Additionally, the policy should inform employees of the steps that the company has taken to maximize their safety and security at work.

Of equal importance, management must ensure the effectiveness of such a policy through training, encouraging open dialogue concerning sources of workplace stress, and diligently investigating employees' reports of co-worker behavior evidencing the warning signs of violence. Consistent use of progressive discipline and counseling should also significantly lower the risk of such an incident by creating outlets for discussion of personal and performance issues before they escalate to the point of potential violence. ■

LABOR AND EMPLOYMENT LAW

Wm. E. Rachels, Jr.	wrachels@wilsav.com	757/628-5568
William M. Furr	wfurr@wilsav.com	757/628-5651
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
Andrew R. Fox	afox@wilsav.com	757/628-5688
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
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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
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