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ARBITRATION AGREEMENTS SHOULD INCLUDE A SEVERABILITY CLAUSE

Brandon L. Peak

In *Jackson v. Cintas Corp.*, the Eleventh Circuit recently enforced an arbitration clause in an employment agreement requiring a former employee to arbitrate her claims of discrimination rather than litigate them in federal court. The Court did so even though another portion of the agreement was deemed illegal and unenforceable. Importantly, the Court did not declare the entire agreement invalid and force the parties to litigate their claims in federal court. Rather, the Eleventh Circuit looked to Georgia state law, which provides that invalid portions of a contract may be severed when the parties have expressed intent to sever such portions and enforce the remainder of the contract. Following this state law, the Court in *Jackson* enforced the valid arbitration clause in the employment agreement and dismissed the lawsuit.

Although the parties' intent to sever invalid portions of an agreement may be expressed either directly or indirectly, a severability clause is the clearest indication that the parties intend to sever unenforceable provisions. A severability clause is a contractual provision in which the parties expressly agree to ignore illegal or invalid portions of a contract and enforce the remainder of the contract. Thus, after *Jackson*, employers should re-examine their agreements to arbitrate employment-related disputes and ensure that each agreement contains a severability clause so that their agreement may be upheld and enforced even if other provisions of their employment agreement are deemed invalid. ♦

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ENSURING COMPLIANCE WITH THE BREAK TIME PROVISIONS OF THE FAIR LABOR STANDARDS ACT

Sara J. Bass

Rest periods and meal breaks are often beneficial to a company in that they help boost employee morale, foster employee camaraderie, and increase productivity. However, break periods may also be a source of confusion for employers and employees, both of whom are often uncertain as to what is required under applicable federal and state laws. As a result of this uncertainty, many employers who voluntarily provide breaks for their employees may face liability for failing to comply with the Fair Labor Standards Act ("FLSA") and various state laws governing break periods. The purpose of this article is to provide employers with a broad overview of their break time obligations under the FLSA.¹

Meal Breaks – Are Employees Entitled to Them?

Under the FLSA, employers have no obligation to provide employees with meal breaks. However, several states have enacted laws requiring employers to provide meal breaks, and many of these state laws mandate when during a shift a break must be provided.²

Employers located in states that do not require meal breaks for employees, and who are not bound by any other agreements (such as collective bargaining agreements), have complete discretion in deciding whether or not to provide their employees with a meal break. If an employer voluntarily provides a meal break, it is free to rescind or modify its policy at any time. However, if an employer voluntarily implements a meal break for its employees, it must comply with the FLSA's provisions regard-

ing the length of the meal break as well as compensation requirements.

Must An Employer Pay Its Employees For The Time Spent On Meal Breaks?

Under the FLSA, meal breaks are generally not considered work time. Thus, employers are not required to pay employees for their meal breaks provided that their meal break policy meets the following two conditions: (1) the meal break is 30 minutes or longer (any break lasting less than 30 minutes is normally considered a rest break for which employees are typically compensated); and (2) the employee must be *completely excused* from work during the meal break.

To be considered completely excused from work, an employee must be excused from performing *any* work duties. This requirement is strictly enforced, and employers are cautioned that employees must be free to utilize this time as they wish. Even requiring employees to eat at their desks or stations may be construed as a denial of complete relief from work.

Must Employers Provide Rest Breaks?

Like meal breaks, the FLSA does not require employers to provide employees with rest breaks, and only seven states currently have laws requiring them (Colorado, Kentucky, Maine, Minnesota, Nevada, Oregon, and Washington). Rest breaks are characterized as any break from employment duties lasting five minutes to twenty minutes. Rest breaks are typically paid for as working time and they must

be counted as hours worked. Employers who are not legally obligated to give rest periods, but who choose to provide them, are free to designate how many breaks per shift to provide, the length of the break periods, and where the breaks may be taken.

Must an Employer Provide Break Time For Religious or Health Reasons?

While the vast majority of employers are not legally obligated under the FLSA to provide employees with break time, many federal and state anti-discrimination laws (for example, Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act) require an employer to make a reasonable accommodation to allow employees to engage in a religious practice or tend to health needs without interfering with their work obligations. While the type of accommodation required will vary depending on the needs of the individual employee, an employer will be required to provide a rest break unless doing so would impose an undue hardship on the employer. It is thus important for employers who do not already provide break periods to implement a reasonable accommodation for those employees who require one for religious or health reasons.

Tips to Ensure Compliance

- Review your current break time policy.
Contact an attorney if you have any questions regarding your obligations to provide meal breaks or rest periods under state law.
- Make sure your policy is in writing and that your employees understand what type of break, if any, they are entitled to.
- Remind supervisors that employees must be completely relieved from all work activity during meal breaks and monitor break activity for any behavior that could result in liability (i.e., an employee working through his or her meal break).
- Require employees to obtain prior written authorization before they are allowed to work through meal breaks. ◆

(Footnotes)

¹Because state wage and hour laws vary from state to state, employers are advised to contact an attorney for assistance with applicable state law provisions.

² The following states have provisions governing an employer's obligation to provide meal or rest breaks: California, Colorado, Connecticut, Delaware, Illinois, Kentucky, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New York, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Washington, West Virginia, and Wisconsin. If your state is not listed, it means there is no state law that governs meal or break periods.

THE REASON BEHIND NAME, RANK AND SERIAL NUMBER: WHEN ARE EMPLOYERS AFFORDED IMMUNITY FOR STATEMENTS MADE ABOUT EMPLOYEES?

Scott Feldman

It is one of the cornerstones of the human resources profession that when a third party inquires about a current or former employee the only information most employers provide is the employee's name, job classification, and perhaps, salary. The rationale for this long-standing practice is the fear that the employer will be sued for defamation if it tells a third party what it actually thinks about the employee. Although defamation is typically governed by individual state law, and can therefore vary, it generally requires the publication of a false statement without privilege by one person about another. At the heart of this definition, and of particular interest to any employer subject to suit by an employee for defamation, is the question of whether the statement at issue is privileged. Privileges are classified as either absolute or qualified, and if alleged defamatory statements are privileged, the employer will have a valid defense to a claim for defamation.

Absolute Privilege

An absolute privilege bars a defamation claim by an employee even if the statement uttered was knowingly false and/or malicious. In the case of an absolute privilege, the courts have determined that under certain circumstances the public policy interests in protecting these kinds of comments outweighs any impact or damage that may be inflicted upon the individual about whom such comments were made. In general, comments made during the course of judicial or quasi-judicial proceedings are afforded this highest level of privilege

against defamation. Although some courts do differ, this privilege has generally been extended in the case of administrative matters as well as local, state and federal court proceedings.

In order for comments made in connection with legal proceedings to be considered absolutely privileged, the comments must be pertinent and material to the proceedings at issue. However, merely because a statement is relevant, it is not always afforded status as a privileged communication. For example, although statements made by an employer in connection with an investigation before the Equal Employment Opportunity Commission ("EEOC") are absolutely privileged, comments made to a third party in preparation for an EEOC hearing or in order to gather evidence may not be privileged. Thus, employers must be careful when discussing or investigating employee misconduct with suppliers or subcontractors. While such investigations are necessary to shield an employer from liability for various causes of action, stray remarks or comments about the employee being investigated could give rise to a claim of defamation that will fall outside the purview of an absolute privilege — even if made in anticipation of a legal proceeding. Thus, it is a good rule of thumb to advise any employer representative charged with investigating employee misconduct to be judicious in sharing details of the alleged misconduct with outside parties. As Judge Friday was fond of saying, "just the facts."

A more difficult question, however, is whether an employer's comments made in the course of a grievance procedure are privileged from defamation. A federal appeals court recently ruled that entirely private grievance procedures did not provide a sufficient level of due process for the participants to confer either judicial or quasi-judicial status, and therefore, the employer's remarks made during the grievance procedure were not immune from the employee's claim of defamation. Overall v. University of Pennsylvania, 412 F.3d 492 (3rd Cir. June 27, 2005). The Overall court was careful to distinguish these entirely private proceedings from grievance procedures performed in connection with collective bargaining agreements or governmental or administrative bodies. In concluding that no privilege attached to purely private grievance procedures, the Overall court focused on the following factors:

- (a) The grievance procedure did not require sworn testimony;
- (b) Faculty members who presided over the grievance lacked the power to make any binding judgments or enforce disciplinary measures; and
- (c) There was no transcript of the hearing and no record of what was exactly said.

The lesson here is that employers who maintain internal grievance procedures as a way to address employee complaints and to issue discipline should exercise extreme care to guard against overtly false statements that may be the basis for a defamation claim.

Qualified Privilege

Unlike the case where an employer is able to assert an absolute privilege, a qualified

privilege allows an employee to proceed with a defamation claim if the employee is able to prove that the employer's statements were made with actual malice, and not simply that the statement was false, defamatory or merely issued carelessly. In the employment context, to properly assert a qualified privilege, an employer must prove that: (1) the comments at issue were made in good faith, (2) the employer had an interest or duty to uphold such comments when they were made, (3) the statement was limited in its scope to achieve a proper purpose, (4) the statement was made at a proper occasion, and (5) publication was made in a proper manner and to proper parties. Some states, such as California, have codified this privilege. California defines a qualified privilege as "a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information."

The qualified privilege is most often asserted where the employer has disclosed to other employees the reason for an individual's termination. In this situation, the qualified privilege against defamation will exist if disclosure is limited to those employees who need to know why the person was discharged because it is a part of those employees' duties and responsibilities. Such employees who "need to know" are most often supervisors, managers, union representatives and those individuals directly impacted by the termination. Courts have found that valid reasons for disclosing the details surrounding an employee's termination to other individuals exist when: (1) the purpose was to let co-workers know that they them-

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selves had been exonerated from the misconduct, (2) the employer had an interest in the smooth running of a department and putting to rest misleading rumors about an employee's dismissal, and (3) the disclosure of facts surrounding an employee's theft and discharge were made to protect the employer's interest in security and employee morale.

Conclusion

If the foregoing principles are followed, employers may assert either an absolute or

qualified privilege defense to an employee's claim of defamation. Often, however, it is the employer and not the employee who initiates a defamation claim for comments that the employee makes in the heat of an ugly termination. Employers should be wary of asserting such claims and letting their emotions get the better of them. Indeed, at least one federal court has found that a defamation lawsuit filed against an employee for comments the employee made to the EEOC constituted unlawful retaliation. ♦

ELEVENTH CIRCUIT SAYS EMPLOYERS MUST ACCOMMODATE PERCEIVED DISABILITIES

Ashley C. Adams

The Eleventh Circuit Court of Appeals recently ruled that an employer can be liable under the Americans with Disabilities Act ("ADA") when it believes an employee is disabled and it fails to provide the employee with reasonable accommodations, even if the employee is not actually disabled.

In *D'Angelo v. ConAgra Foods, Inc.*, the Eleventh Circuit reversed a grant of summary judgment to an employer who allegedly terminated an employee because she suffered from vertigo. Joining the Third Circuit Court of Appeals, the *D'Angelo* Court held that the employee was entitled to seek remedies under the ADA, despite not being actually disabled under the statute, because she presented evidence that her employer regarded her as having a disability and failed to provide

her with reasonable accommodations. In doing so, the Eleventh Circuit rejected decisions in the Fifth, Sixth, Eighth, and Ninth Circuits, which held that the ADA does not require employers to accommodate employees who are regarded as disabled.

The *D'Angelo* Court recognized that requiring employers to accommodate individuals who they regard as disabled could create a windfall or compel employers to waste resources that could be better spent on those employees who are actually disabled. However, stated the Court, it is not for the courts to rewrite legislation that Congress validly enacted. Instead, courts must give effect to the plain language of the statute. The Eleventh Circuit thus concluded "that the ADA, by its plain language, requires employers to provide reasonable accommodations for employees they regard as disabled." ♦

BBLUE SKIES FOR NON-SMOKERS IN GEORGIA: LEGISLATORS PASS SMOKEFREE AIR ACT

Brandon Williams

In May 2005, Georgia legislators enacted the Smokefree Air Act of 2005 ("the Act") to reduce exposure to secondhand smoke and its associated risks to residents and visitors of the state. The Act, which became effective July 1, 2005, prohibits smoking in most public areas and provides specific guidelines for allowing smoking in or around public establishments. Georgia lawmakers hope the Act will significantly reduce the number of adult deaths from tobacco-related illnesses in Georgia, which annually exceeds 11,000.

Where Is Smoking Not Allowed?

The Act bans smoking in all enclosed areas within "places of employment" and all enclosed "public places." As defined by the Act, a "place of employment" is "an enclosed area under the control of a public or private employer that employees utilize during the course of employment." Under the terms of the Act, a place of employment "includes, but is not limited to, work areas, employee lounges, restrooms, conference rooms, meeting rooms, classrooms, employee cafeterias, and hallways." However, a "place of employment" does not include a vehicle used in the course of employment. The Act defines an "employer" as "an individual or a business that employs one or more individuals." A "business" is defined as "any corporation, sole proprietorship, partnership, limited partnership, limited liability corporation, limited liability partnership, professional corporation, enterprise, franchise, association, trust, joint venture, or other entity, whether for profit or nonprofit."

The Act also prohibits smoking in any "public place," which means an enclosed area where the public is invited or otherwise permitted, including but not limited to, reception areas, retail service establishments, retail stores and waiting rooms.

Where Is Smoking Allowed?

The Act does provide some exceptions to the smoking ban that include the following areas:

- *Smoking areas designated by an employer.* These areas must be for employees only, must be located in a non-work area, and must have an independent air handling system that exhausts air to the outside.
- *Common work areas, conference and meeting rooms, and private offices in private places of employment that are open to the public only by appointment.* However, smoking will still be prohibited in any public reception area of such a place.
- *Outdoor areas of places of employment.*

In order for the above described areas to be exempt from the provisions of the Act, employers must conspicuously post signs at all entrances to areas where smoking is permitted. These exemptions, however, are merely voluntary and therefore employers may declare an entire facility, establishment, or outdoor area a nonsmoking place if they so choose.

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What Are My Responsibilities As An Employer?

In order to comply with the provisions of the Act, employers must have communicated the new smoking prohibitions (1) to all current employees (or visitors) by July 1, 2005, and (2) to each prospective employee upon his or her application for employment.

Employers are also required to notify all job applicants that smoking is prohibited. Where an individual applies for a job in person, the employer should consider including a copy of its No Smoking Policy along with the job application. Since many prospective employees apply for jobs online, the employers should also post a notice on all web pages containing job applications. Finally, employers should provide copies of the No Smoking Policy to staffing firms who regularly supply the employer with prospective employees.

Finally, the Act also requires employers to remove all ashtrays from any area where

smoking is prohibited, unless the ashtray is permanently affixed to an existing structure.

How Will The Act Be Enforced?

The Department of Human Resources and the county boards of health are authorized and empowered to enter upon and inspect the premises of any establishment or business at any reasonable time and in a reasonable manner to enforce the provisions of the Act.

A person caught smoking in violation of the new law will be guilty of a misdemeanor and, if convicted, assessed a fine of not less than \$100 and not more than \$500. As enacted, the law currently does not provide for penalties against employers for non-compliance. However, the Act provides that the Georgia Department of Human Resources and the agency designated by each local governing authority are authorized to "engage in a continuing program to explain and clarify the purposes and requirements" of the law and to guide employers in their compliance with the law. ◆

COMPLYING WITH THE NEW DISPOSAL RULE UNDER THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003

Benjamin D. Briggs

On June 1, 2005, the Federal Trade Commission's new consumer information "disposal rule" went into effect. The rule was issued under the Fair and Accurate Credit Transactions Act of 2003 ("FACTA") and is intended to reduce the risk of consumer fraud (such as identity theft) created when information derived from consumer reports is disposed improperly. The rule requires companies that maintain or otherwise possess consumer

information to properly dispose of such information by taking reasonable measures to protect against unauthorized access to or use of that information.

What does this mean for employers? In a nutshell, it means that all employers must take appropriate measures to dispose of sensitive information about employees and/or applicants that is derived from consumer reports (which include compilations of information about an individual's employment history,

credit history, residential history or medical history). Fortunately, the standard for proper disposal of consumer information is flexible, and it allows employers to implement procedures that are reasonable in light of the costs and benefits of different disposal methods and developments in technology.

The FTC has provided the following suggestions to help companies comply with the rule:

- Implementing and monitoring compliance policies and procedures that require the burning, pulverizing or shredding of papers containing consumer information;
- Implementing and monitoring compliance with policies and procedures that require the destruction or erasure of electronic media containing consumer information; and
- Hiring a document destruction contractor in connection with the due diligence process, and taking steps (such as reviewing an independent audit of that contractor's operations, obtaining references on the contractor, requiring that the contractor be certified by a recognized trade association, or reviewing the contractor's information security policies) to ensure that the contractor is qualified for the work.

By implementing a policy and process consistent with these examples, employers can ensure compliance with the disposal rule.

Although the rule is fairly limited in scope (it only applies to consumer information derived from consumer reports), prudent employers should consider using a FACTA-compliant disposal process when discarding other sensitive information concerning applicants and employees. Indeed, once an effective disposal process is in place, using that process for the disposal of other sensitive personnel records and information should involve little additional effort and expense. Along these lines, the FTC has urged businesses to use the same procedures for disposal of all consumer information, regardless of whether the information is obtained from a consumer report or some other source. For obvious reasons, using that process to dispose of other sensitive information (i.e., employee medical records) also makes sense. By incorporating the disposal rule requirements into a broader document disposal policy, employers can safeguard against the inadvertent disclosure of sensitive personnel information and the potential liability exposure that can result.

For more information about the new disposal rule, including the FTC's complete Federal Register rule, visit the FTC website, www.ftc.gov. ◆

THE APPROPRIATE USE OF VIDEO SURVEILLANCE IN THE WORKPLACE

Lindsay Marks

As an employer, have you ever suspected that an employee has stolen money or inventory from your company? Have you ever noticed that the level of employee productivity has decreased? Do you have concerns about being held liable for the wrongful acts of your employees? If so, you may have considered implementing video surveillance in your workplace to monitor employees and to detect theft or violations of company policies, or simply to manage overall productivity. While there are certainly benefits to closely monitoring employee activities, you may wonder what risks are involved in installing video equipment. The most apparent consequence (other than cost) is that employees may claim that you are invading their right to privacy by monitoring their activities. By following a few of the simple steps outlined below, however, you can minimize those risks, and your video surveillance program will likely help solve the all too common problems of theft, productivity loss, and violations of company policy.

In deciding whether to install and use video surveillance equipment, it is essential to consider the appropriate privacy expectation of a company's employees. Assessing an employee's right to privacy first depends on whether the employer is public or private. Public employers are directly subject to constitutional protections against unreasonable searches and seizures, while private employers are governed by common law tort and contract principles.

Public Employees

Public employees are protected under the Fourth Amendment (and may also be protected under state constitutions) against unreasonable search and seizure. Courts may find a constitutional violation if the employee establishes that the video monitoring infringes on his or her reasonable expectation of privacy. The employee's expectation of privacy must be both subjectively and objectively reasonable. In the public setting, courts balance an employee's expectation of privacy with the employer's need for supervision, control, and efficiency in the workplace.

Generally, courts find that an employee has a reasonable expectation of privacy as to his or her exclusive private office, desk, and file cabinets containing personal matters not shared with other workers. On the other hand, courts find no reasonable expectation of privacy where video surveillance is of open work areas and unenclosed locker areas, desks, or files, which are subject to shared access among employees, or in open areas where the employer discloses its use of surveillance. Courts have cautioned that a public employer's covert use of clandestine cameras (such as in employee restrooms) will almost always violate this right to privacy.

Private Employees

In contrast with public employers, private employers must contend with the common law right to privacy and, in the union setting, collective bargaining principles. To prove a

claim for invasion of privacy based on video surveillance against an employer in the private, non-unionized context, an employee must demonstrate that the employer's use of video cameras is an intrusion into his or her privacy that would offend a reasonable person. This is often a difficult hurdle for employees, as they must establish that (1) the work environment is private and (2) the monitoring is highly offensive or objectionable to a reasonable person. An area in the workplace accessible or visible to others does not constitute a private work environment. In other words, where objects and employees are in plain view (such as in open work spaces and unenclosed locker and desk areas), employees cannot have a reasonable expectation of privacy. Further, if employers provide notice to employees that they may be subject to surveillance in certain areas, these employees generally do not have a reasonable expectation of privacy. Courts have found surveillance "highly offensive" only in extreme situations, such as monitoring of restrooms or locker rooms where employees change clothes. Often, employer concern for employee misconduct outweighs an employee's right to privacy.

Unionized Setting

In a unionized work setting, the installation and use of hidden video cameras is deemed a condition of employment and thus a mandatory subject of collective bargaining. The National Labor Relations Board ("NLRB") and federal courts have found hidden video surveillance to be a condition of employment because cameras are considered investigatory tools (like physical examinations, polygraph testing, and drug testing). Thus, since video surveillance, like investigatory tools, implicates privacy concerns, it cannot be unilaterally imposed on the workforce by an employer. Before installing hidden cameras, employers

are required to bargain with unions over issues such as whether the cameras may ever be used, in what general areas (but not specific location) they may be used, whether the employer must demonstrate a certain level of suspicion before using the cameras, and whether information learned from the cameras can be used to discipline or terminate employees.

In sum, it is advisable to install hidden cameras only after informing employees that they may be subject to such monitoring. Installing cameras in plain view in open, public spaces does not invade an employee's reasonable expectation of privacy. Indeed, posting a sign like the one below in areas that are subject to video surveillance will minimize or even eliminate any risk of liability for invasion of privacy:

This area is subject to video monitoring.

You do not have a reasonable expectation of privacy.

With these limitations in place, video surveillance can be used to improve your company's productivity and theft detection capabilities while decreasing risks of liability for employee misconduct. ◆

OFCCP ISSUES NEW REGULATION

Sara Bass

As you may know, all federal contractors and subcontractors are required to obtain information about the gender, race, and ethnicity of each "applicant" for employment. The Offices of Federal Contract Compliance Programs ("OFCCP") uses this information to ensure that contractors' hiring practices do not have an adverse impact on minority or women applicants. With the ever increasing number of individuals who submit applications over the Internet, employers currently face the daunting task of maintaining records for literally hundreds of thousands of individuals who submit applications via electronic means. On October 7, 2005, the OFCCP responded to this problem by issuing a new regulation defining who qualifies as an "Internet Applicant" from whom contractors must collect gender, race, and ethnicity information. This rule will go into effect on February 6, 2006.

Under the final rule, the following four criteria must be met in order for an individual to qualify as an "internet applicant":

(1) The individual has submitted an expression of interest in employment through the Internet or related electronic data technologies:

- (2) The employer actually considers the individual for employment in a particular position;
- (3) The individual's expression of interest indicates that the individual has the basic qualifications for the job; and
- (4) The individual does not remove himself or herself from consideration for the position or otherwise indicate that he or she is not interest in the position at any time during the selection process.

Federal contractors and subcontractors should become familiar with this new rule as well as the impact it has on recordkeeping and administrative burdens, so that they may begin to implement policies to establish a more manageable recordkeeping system. ◆

RELLEASE AGREEMENTS AND THE FMLA

William C. Nijem, Jr.

In Taylor v. Progress Energy, Inc., the Fourth Circuit Court of Appeals (encompassing Virginia, West Virginia, Maryland, North Carolina and South Carolina) recently held that an employee could sue her employer for alleged violations of the Family and Medical Leave Act of 1993 (“FMLA”), despite having previously entered into a general release agreement with her employer releasing all claims against it under federal, state, and local laws. The Taylor court based its decision on a Department of Labor (“DOL”) regulation stating that “employees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA.” 29 C.F.R. § 825.220(d). The Taylor court concluded that, in the absence of prior approval by the DOL or a court, the above DOL regulation bars the waiver or release of all past and future FMLA claims.

On a more positive note for employers, the Fifth, Sixth and Ninth Circuit Courts of Appeals have, unlike the Fourth Circuit, uphold private waivers or releases of FMLA claims. In light of the Taylor decision, however, employers (especially those within the Fourth Circuit) should recognize that a court may find unenforceable any release or waiver of FMLA claims that has not been approved by the DOL or a court. In addition, employers should take certain actions to protect their interests:

- Although a court may determine that a release is unenforceable with respect to FMLA claims, employers should include a severability clause in the release which may continue the validity of the release with respect to non-FMLA claims.
- In addition to a general release provision, employers should also include a covenant not to sue to ensure that the employer has the additional argument that the employee has agreed not to sue the employer.
- To support a counterclaim for restitution, setoff or recoupment, employers should include a clause in the release agreement stating that if the employee files a lawsuit or administrative charge, the employee will first tender back monies to the employer which the employee has received for entering into the release agreement.
- Employers should include a clause in the release agreement in which the employee represents that the employer has not violated his/her FMLA rights.

While these measures may not allow an employer to escape the holding in Taylor, they do allow an employer to make additional threshold arguments when an employee files an FMLA claim despite having previously entered into a release agreement. ◆

SHARED LEAVE POLICIES: A GOOD IDEA?

Kristina Vaquera

Employers often have employees who develop reputations for abusing and routinely exhausting all forms of leave available to them. On the other hand, however, employees may sometimes develop a legitimate need for more leave than is available to them. What can an employer do? Many employers have turned to shared leave policies as a way of getting additional leave to employees for various life events.

The idea is fairly simple at first glance. Generally speaking, private employers can tailor their leave policies to reflect the needs of their companies, but each state's requirements should be checked before enacting a shared leave policy. Pursuant to a shared leave policy, employees with accrued, extra, unused leave can volunteer to donate the time to a bank or pool of leave. Employees in need of additional leave for serious health conditions and/or other extenuating circumstances then submit requests to use leave from the bank of pooled, donated leave. However, the questions that immediately follow an announcement of such an idea highlight the complicated issues that need to be addressed before a shared leave policy can become effective.

The first issue that arises is whether employees should be allowed to directly transfer time to another employee. Most employers have found that this is counterproductive and results in employees directly soliciting other employees for the donation of

time. Therefore, employers will typically set up a shared leave pool allowing employees to anonymously donate time. Once an employee decides to donate time, the next question that arises is how the time will be valued. Employees with different rates of pay will be donating leave time of different values. Thus, employers must decide whether to implement the shared leave policy on a wage basis or an hour for hour basis. If a wage basis is chosen, an employee who donates 10 hours at \$10 an hour will have donated a \$100 value to the pool. However, an employee who earns \$20 an hour would only be able to draw 5 hours in time (equal to \$100) because of the difference in wages. Therefore, most employers implement an hour for hour approach because it creates less of an administrative and accounting burden by tracking time donated and transferred to the pool in hours only. The dollar value is not attached to any hours until they are used by the recipient.

An employer must decide who will be in charge of administering the shared leave policy. Typically, shared leave policies are administered by the Human Resources Department or by a committee appointed to oversee the maintenance of the leave pool, including determining whether donor and recipients meet eligibility requirements. Procedures must also be established for application and qualification. An employee who wants to donate hours usually submits a signed donation form to HR indicating the type of earned hours he wants to donate. The company must determine if employees will be allowed to donate vacation, sick leave or any other available paid leave, or any combination thereof. The form needs to make it clear to an employee that the donation is strictly voluntary and that solicitation of

donations is not acceptable. Most importantly, the form should clearly stress that the donation of hours may not be revoked.

Employees wishing to request a donation of leave from the pool, should likewise submit a signed application specifying the number of hours and describing the situation forming the basis of the request. HR or the shared leave pool committee should evaluate eligibility of the employee applying based on set criteria. Basic criteria should only allow employees to receive hours if there is sufficient time available in the pool and only at the employee's normal rate of compensation. Regular income and employment taxes, other payroll deductions or salary reductions should be withheld from any amounts paid from the pool, just as if the employee was receiving his/her regular pay. An employee should not be eligible to participate in the pool if he/she has not contributed hours. This helps to ensure that enough hours are donated to make the program available to all employees. Employers should also consider imposing a cap or limit on the number of hours an employee may donate or receive. Likewise, employers should establish whether donating employee will be required to keep a certain amount of hours in his/her own account, thereby precluding the need to immediately make a request on the pool.

The shared leave policy should establish the health condition or life situations triggering eligibility to participate in the pool, assuming that all other criteria have been met. Most policies condition eligibility on a demonstration of a serious health condition or disability of the employee or an immediate family member, similar to the showings necessary under the Family Medical Leave Act or the Americans with Disabilities Act., or other significant non-

medical emergency. These parameters should also take into consideration an employee's eligibility for short and/or long term disability benefits. Documentation requirements should be clear.

Lastly there are tax and accounting issues to keep in mind with a shared leave policy. Employees utilizing leave from the pool have the time included in their gross income as regular wages for purposes of income and employment tax withholding and reporting, but the donating employee has no taxable event since they do not realize any income or have a basis for a tax deduction. If a pool of time accumulates, a company may be able to put it on their ledger as a liability. Programs that give employees the option of converting hours into cash may result in "constructive receipt" of the value of the time. Constructive receipt may result when employees have the option to select between receiving a taxable benefit now and deferring receipt of that taxable benefit to another year. In order to avoid constructive receipt, many companies treat cashed out hours at 75% of their value. ◆

LEGISLATIVE UPDATE

Matt Almand

No Target Date for Proposed Changes to FMLA Regulations

More than four years after the United States Department of Labor (DOL) announced its intention to update the regulations governing the Family and Medical Leave Act (FMLA), deadlines for the updates continue to slide—the most recent deadline lapsing on May 2005. Although the precise nature of changes which will be made is unknown, it is likely that the proposed changes will address the following issues raised by judicial decisions and employer groups:

- The United States Supreme Court's decision in Ragsdale v. Wolverine World Wide, Inc., 122 S. Ct. 1155 (2002), which invalidated 29 C.F.R. § 825.700(a), a regulatory provision that required employers to provide up to an additional 12 weeks of FMLA leave if they failed to give notice to an employee that the requested leave would be counted against his or her FMLA leave entitlement. The Court concluded that the regulation was incompatible with the FMLA because it automatically punished employers, even when the employee was not harmed by the lack of notice.
- The Tenth Circuit Court of Appeals' decision in Harbert v. Healthcare Serv. Group, Inc., 391 F.3d 1140 (2004), which invalidated 29 C.F.R. § 825.111(a)(3) because the regulation

requires an employee subject to joint employers to have a constructive "worksite" for purposes of determining whether the employee is covered under the FMLA.

- Intermittent leave provisions which can be difficult for employers to administer, particularly when employers are forced to track intermittent leave periods of less than a day. Business groups have proposed that intermittent leave be limited to half-day increments.
- The definition of "serious health condition," which has been criticized as too broad, most notably because the definition includes any illness that lasts three or more days and includes a visit to a doctor.
- Employer notice requirements – through workplace posters, employee handbooks, and individual notice if an employee may have a qualifying condition – can be unduly burdensome on employers.

Despite the numerous criticisms of FMLA regulations voiced by the courts, any changes to the regulations proposed by the DOL would not necessarily have universal support. Representatives of AFL-CIO and more than 100 House Democrats, led by Rep. Rosa L. DeLauro (D-Conn.) and Rep. George Miller (D-Calif.), have voiced their opposition to any rule changes that would make it more difficult for employees to take FMLA leave.

Despite the DOL's steadfast commitment to these changes, no new deadline has been set.

New Laws Provide Employment Assistance to Victims of Hurricane Katrina

On September 23, 2005, President Bush signed into law two bills designed to help victims of Hurricane Katrina secure employment. The Hurricane Katrina Tax Relief Act of 2005 (H.R. 3768) is a tax package that provides two different tax credits to eligible employers. The Flexibility for Displaced Workers Act (H.R. 3761) is an emergency grant measure that allows the use of National Emergency Grant (NEG) funds awarded by the DOL for temporary disaster relief employment to workers affected by the hurricane.

H.R. 3768. The first tax credit (which is an expansion of the Work Opportunity Tax Credit (WOTC)) created by this bill is available to employers who hire employees who lived in the disaster zone and became unemployed as a result of Katrina's destruction of their workplace. The WOTC tax credit is available for two years for employers located inside the disaster zone and for three months for employers located outside the disaster zone.

The second tax credit is an employee retention tax credit available to small employers who continue to pay employees who worked in the disaster zones, even if those employees are no longer performing their jobs because of the hurricane and/or are reporting to work at another location while the business remains inoperable. Eligible employers are those who

employed an average of 200 or fewer employees in the current taxable year and whose business is now inoperable as a result of damage sustained by the hurricane. The employee retention tax credit is available for employers until the end of 2005.

Under both tax credits, eligible employers could claim a one-time \$2,400 tax credit for each Katrina evacuee hired as a full-time employee. Despite concerns that these tax credits will place the jobless outside the designated areas at a disadvantage in competition for employment, most employers maintain that these incentives are unlikely to influence their hiring decisions.

H.R. 3761. Under the Workforce Investment Act, after a disaster occurs, states may apply for NEGs to provide temporary disaster relief employment to individuals who participate in projects that provide food, clothing, shelter, and other humanitarian assistance for victims of that particular disaster. The Flexibility for Displaced Workers Act adds flexibility to NEG funds (currently valued at over \$191 million) by making these funds available to displaced workers for employment projects outside of the designated disaster zones. Previously-awarded NEG funds may also be directed to workers impacted by the hurricane. In addition, these funds may be used for temporary jobs in the public sector that are not directly related to the disaster. Although these temporary jobs last only six months, the bill

grants the Secretary of Labor the authority to expand that period to 12 months under certain circumstances.

Federal Government Relaxes Requirements for Federal Contractors Assisting with Hurricane Katrina Reconstruction Projects

In an effort to encourage private employers to participate in the massive cleanup and reconstruction efforts in designated areas devastated by Hurricane Katrina, the federal government has temporarily suspended various requirements for federal contractors.

Suspension of the Davis-Bacon Act.

On September 8, 2005, President Bush issued a proclamation suspending application of the Davis-Bacon Act prevailing wage requirements on federal reconstruction projects in designated disaster zones in Alabama, Florida, Mississippi, and Louisiana. Under the Davis-Bacon Act, federal construction contractors are required to pay workers local prevailing wages on all projects in excess of \$2,000. The suspension applies to contracts awarded on or after September 8, 2005, and will remain in force until rescinded by the President. According to Bush and his supporters, suspension of the wage payments will lower the cost of reconstruction to the federal government and create more jobs.

Opponents to the suspension have already launched their counterattack. On

September 13, 2005, Rep. George Miller (D-Calif.) introduced legislation to reinstate application of the Davis-Bacon Act on federal construction projects in areas devastated by Hurricane Katrina. Miller contends that Bush's measures will prevent workers from earning a decent wage on construction projects financed with federal dollars. Other members of Congress have also urged President Bush to either rescind the suspension or require contractors on those projects to reduce their profits. Rep. James L. Oberstar (D-Minn.), among others, strongly disagrees with Bush's proposition that more jobs will be created as a result of paying workers less than the local prevailing wages in these areas, which are already generally lower than the prevailing wages in many other parts of the country.

Affirmative Action Plans.

Private companies that are awarded federal contracts or subcontracts to assist with the recovery and clean-up efforts of those areas damaged by Hurricane Katrina will be temporarily exempt from Executive Order 11246's requirement that they develop written affirmative action programs. The exemption is effective through December 9, 2005, and only applies to new federal contractors and subcontractors hired for Katrina-related efforts. The exemption is not available to companies that have existing contracts or subcontracts with the federal government. ◆

TROUTMAN SANDERS LLP ADDS FORMER UNITED STATES ATTORNEY AND THREE LITIGATION COLLEAGUES TO DC OFFICE

Troutman Sanders LLP is pleased to announce the addition of four new partners to the law firm's Complex Litigation and Special Investigations Practice Group in its Washington, D.C. office. Former United States Attorney for the District of Columbia, Roscoe C. Howard, Jr., joins the firm along with Mark E. Nagle, Daniel S. Seikaly and Nathan J. Muyskens. All four attorneys come to Troutman Sanders from the law firm of Sheppard Mullin Richter & Hampton in Washington, D.C.

Roscoe C. Howard, Jr. brings extensive litigation and special investigation experience to the firm. His practice focuses on corporate compliance and ethics issues, white collar criminal matters and complex litigation. He served as the United States Attorney for the District of Columbia from 2001 to 2004, leading the largest U.S. Attorney's office in the country. He previously served as a tenured, full professor at The University of Kansas School of Law, where he taught from 1994 through 2001. Mr. Howard is a graduate of Brown University and the University of Virginia School of Law.

Mark E. Nagle brings a strong complex civil litigation practice to the firm, which includes a focus on class actions in employment and other settings, internal investigations and civil anti-trust matters. From 1998 to 2004, Mr. Nagle served as Chief of the Civil Division of the United States Attorney's Office for the District of Columbia. Mr. Nagle has handled cases arising under the False Claims Act, the Clean Air and

Clean Water Acts, Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, the Rehabilitation Act of 1973 and various whistleblower statutes. Mr. Nagle is a graduate of Emory University and the Georgetown University Law Center.

Daniel S. Seikaly has extensive litigation, advisory and special investigation experience that he brings to the firm and a practice involving complex criminal and civil litigation and corporate investigation matters. From 2001 to 2004, he served as the Chief of the Criminal Division of the United States Attorney's Office for the District of Columbia, where he was responsible for supervising prosecutors involved with the enforcement of the Patriot Act, Sarbanes-Oxley provisions, as well as the prosecution of white collar crime and terrorism cases. Mr. Seikaly is a graduate of Michigan State University and the Wayne State University School of Law.

Nathan J. Muyskens focuses his practice on criminal investigations and litigation, complex civil litigation and government and civil anti-trust investigations and litigation in federal and state courts. He represents corporate and individual clients in all aspects of criminal investigations and litigation and counsels clients regarding complex civil litigation, including class, shareholders and whistleblower actions. Mr. Muyskens is a graduate of the University of Virginia and the University of Kansas School of Law. ◆

THE LABOR & EMPLOYMENT PRACTICE GROUP

Christopher A. Abel
Ashley C. Adams
Matthew R. Almand
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C. Brandon Williams
Rebecca L. Williams
Laura D. Windsor

EEDITORS

Seth T. Ford
T. Wood Lovell, Jr.

CONTRIBUTING WRITERS

Ashley C. Adams (404) 885-3806 ashley.adams@troutmansanders.com
Matthew R. Almand (404) 885-3882 matt.almand@troutmansanders.com
Sara J. Bass (404) 885-6567 sara.bass@troutmansanders.com
Benjamin D. Briggs (404) 885-3394 benjamin.briggs@troutmansanders.com
Scott B. Feldman (212) 704-6365 scott.feldman@troutmansanders.com
Lindsay S. Marks (404) 885-3543 lindsay.marks@troutmansanders.com
William C. Nijem, Jr. (404) 885-3407 bill.nijem@troutmansanders.com
Brandon L. Peak (404) 885-3446 brandon.peak@troutmansanders.com
C. Brandon Williams (404) 885-3693 brandon.williams@troutmansanders.com
Kristina H. Vaquera (757) 687-7723 kristina.vaquera@troutmansanders.com

TROUTMAN SANDERS LLP invites you to
visit our Web site at www.troutmansanders.com

ATLANTA
600 Peachtree Street, NE
Suite 5200
Atlanta, GA 30308

HONG KONG
2 Exchange Square
8 Connaught Place
Suite 3403
Central, Hong Kong

LONDON
Regina House - Sixth Floor
Five Queen Street
London EC4N 1SW
England

NEW YORK
The Chrysler Building
405 Lexington Avenue
New York, NY 10174

NORFOLK
150 West Main Street
Suite 1600
Norfolk, VA 23510

RALEIGH
434 Fayetteville Street Mall
Two Hannover Square
Suite 1100
Raleigh, NC 27601

RICHMOND
Troutman Sanders Building
1001 Haxall Point
Richmond, VA 23219

TYSONS CORNER
1660 International Drive
Suite 600
McLean, VA 22102

VIRGINIA BEACH
222 Central Park Avenue
Suite 2000
Virginia Beach, VA 23462

WASHINGTON, D.C.
401 Ninth Street, NW
Suite 1000
Washington, D.C. 20004

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