

# Louisiana Employment Law Letter

H. Mark Adams, Editor; Sidney F. Lewis V and Jennifer L. Anderson, Associate Editors

May 2001

Vol. 10, No. 2

## Highlights

- A tale of two houses: lawmakers back to work
- FMLA leave: Does unqualified equal denied?
- Sexual harassment -- consider the source
- Evidence of political intrigue doesn't prove discrimination
- EEOC concludes employers 'don't get what they pay for'
- High court holds worker to signed agreement

## LEGISLATIVE ROUNDUP

### A tale of two houses: lawmakers back to work

*The Louisiana Legislature convened its 2001 regular session on March 26 and expects to adjourn by June 18. This year a number of proposed laws are on the table that could affect you if they survive both houses and the governor's scrutiny -- subject to an overriding vote of two-thirds of both houses, of course.*

*A variety of bills addressing labor and employment issues have already been introduced, and as we will explain, they could mean the best of times or the worst of times for employers. Some of them propose lessening the burden of existing laws on employers, while others propose more stringent requirements and potential penalties. This section of our newsletter highlights the pending bills we think will most significantly affect you if they become law. As usual, we will continue to track the progress of these and any other bills that may be introduced during the remainder of the session.*

#### ***The best of times***

The best of times -- that's what you have to look forward to if House Bills 1312 and 1740 become law. HB 1312 would prohibit local governments from requiring businesses to become or operate as union shops or to remain neutral to union organizing efforts in order to bid on public works projects. Similarly, HB 1740 would prohibit local governments from requiring businesses to operate under union terms or to remain neutral to union organizing efforts in exchange for public services that are typically available to all citizens, such as licensing and permitting. In essence, both bills seek to prohibit local governments from circumventing Louisiana's right-to-work law.

*HB 1312 (Scalise), reported favorably by House Labor and Industrial Relations Committee, returned to calendar and subject to call; HB 1740 (Scalise), passed by the House, referred to Senate Labor and Industrial Relations Committee.*

### ***The worst of times***

Several bills aim to expand the universe of protected groups of employees under Louisiana's employment discrimination law, which could expose you to a new type of employment discrimination claim. SB 862, SB 1083, and SB 1085 would make it unlawful for any public or private employer to discriminate against applicants or employees because of actual or perceived sexual orientation or gender identity. They would apply only to employers with more than 15 full-time employees, except the federal government and religious organizations with employment positions that pertain solely to nonprofit activities exempt from Section 511(a) of the Internal Revenue Code.

The proposed laws wouldn't require you to justify neutral policies or practices that have a disparate impact on such individuals or to adopt quotas or give preferential treatment to them. Use of statistical evidence of your employees' sexual orientation or gender identity would be prohibited. The bills also propose a higher burden of proof -- clear and convincing evidence -- than required for other types of alleged employment discrimination.

*SB 862 (Cravins and Irons), SB 1083 (Dean), and SB 1085 (Dean), all referred to Senate Labor and Industrial Relations Committee.*

### ***The age of wisdom***

The right to recover stolen goods is meaningless without a reliable method of enforcing it. SB 332 would give employers whose employees have stolen money from them a way to get it back.

Louisiana law currently prohibits you from assessing fines against your employees or making deductions from their wages unless they willfully or negligently damage your property, goods, or works. If an employee willfully or negligently causes such damage, the fine or deduction cannot exceed the amount of the actual damage. Moreover, most Louisiana courts addressing this law require you to have a written authorization or agreement signed by the employee expressing his understanding that fines or deductions will occur under those circumstances. SB 332 would add another exception to the general law prohibiting fines and deductions from an employee's wages when he is convicted of or has pleaded guilty to theft of employer funds.

*SB 332 (Michot), hearing set for Senate Labor and Industrial Relations Committee.*

### ***The age of foolishness***

Many employers feel foolish when their recruiting and training efforts and expenses are wasted on a new employee who quits soon after being hired. One proposed law would make it possible for private security companies to recoup any licensing and training fees, up to \$200, paid on behalf of any security officer who voluntarily terminates his employment within 12 months of hire. HB 1586 would also give the employer the authority to withhold those fees from the employee's final paycheck.

The employer would be able to exercise its recoupment and withholding rights only if the employee received advance written notice that recoupment and withholding would be required under the described circumstances. Finally, the licensing board would have the authority to deny or revoke the license of any security officer who fails to reimburse any employer as required under the proposed law if the employer provided proper notice.

*HB 1586 (Pinac), reported favorably by House Labor and Industrial Relations Committee, returned to calendar and subject to call.*

### ***The epoch of belief***

What is the price of truth? Several bills propose amendments to Louisiana's workers' compensation law to modify the penalties for providing false information in connection with a claim. Some proposed laws aim to put a higher price on truth while others seek to lower it.

The law currently imposes civil and/or criminal penalties on any person who provides false information for the purpose of obtaining or defeating payment of workers' compensation benefits. Current law also provides that an employee providing false information shall forfeit benefits. HB 1802 proposes amending the workers' compensation law to require employees who falsify information to make restitution of any benefits they receive and to require any employer providing false information to pay a fine to the employee rather than the state.

HB 1473 would eliminate an employer's immunity from a lawsuit in state court -- one of your primary benefits under the workers' compensation law -- if it provides false information in connection with an employee's claim. HB 1093 would make an employee's forfeiture of benefits for providing false information permissive rather than mandatory.

*HB 1802 (Scalise), referred to House Labor and Industrial Relations Committee; HB 1473 (Townsend), hearing set for House Labor and Industrial Relations Committee; HB 1093 (Devillier), reported favorably by House Labor and Industrial Relations Committee, set on House Orders.*

### ***The epoch of incredulity***

It seems unbelievable that an element of our physical being as minuscule as our DNA can provide such a wealth of information about our past and our future. But it's true, and the information that can be derived from human DNA has caused concern among employee rights advocates about the potential for employers to obtain and misuse information. The Health Insurance Portability and Accountability Act of 1996 prevents group health insurers from using genetic information to deny individuals health insurance benefits. Last year, former President Clinton signed an executive order prohibiting the federal government from using genetic information in making employment decisions, among other things.

Earlier this year, the Genetic Nondiscrimination in Health Insurance and Employment Act was introduced to Congress for consideration. Not unlike many other states, Louisiana is considering legislation of its own in this regard. SB 651 would limit genetic testing in employment, prohibit disclosure of an employee's genetic information except under specified circumstances, and prohibit genetic discrimination in employment.

*SB 651 (Hines), reported favorably by Senate Labor and Industrial Relations Committee, set on Senate Orders.*

### ***The season of light***

Is there really a light at the end of the tunnel? There just may be for employers struggling to meet the deadline for tendering the final paycheck to a discharged employee under current Louisiana law.

Current law requires you to pay discharged employees all wages due within three days of the discharge. When employees resign, you have until the next regular payday or 15 days after resignation, whichever occurs first, to tender the final paycheck. The consequences for failure to timely pay wages owed can include not only the wages but also penalties and attorneys' fees. HB 1295 proposes to give you a break by extending the three-day period for paying wages owed to discharged employees to "the next regularly scheduled compensation run for the employer," or the next regular payday.

*HB 1295 (Stelly), passed by House, referred to Senate Labor and Industrial Relations Committee.*

### ***The season of darkness***

HB 313 would expose employers to punitive damages under Louisiana's employment discrimination law to the same extent as federal employment discrimination law. Currently, Louisiana's statute doesn't permit employees to recover punitive damages for employment discrimination. This bill, however, would amend the law to allow punitive damages of a certain amount if the employer employs a certain number of people in each of 20 or more calendar weeks in either the year in which the alleged unlawful conduct occurred or the preceding year:

- \$50,000 if you have between 15 and 100 employees;
- \$100,000 if you have between 101 and 200 employees;
- \$200,000 if you have between 201 and 500 employees; or
- \$300,000 if you have 501 or more employees.

*HB No. 313 (Richmond), hearing set for House Labor and Industrial Relations Committee.*

### ***The spring of hope***

There's hope for employers that have been sued by employees seeking to benefit from their own misdeeds. When an employee files a lawsuit seeking to recover monetary damages for lost wages or earning capacity, she typically must offer evidence of her earnings history. HB 238 would require her to prove that she reported her earnings to the federal and state revenue departments and/or any governmental agency providing her with need-based benefits, such as welfare. Thus, if she didn't pay income taxes on her earnings or report them to any governmental agency to avoid disqualification for need-based benefits, she couldn't present evidence of them in a lawsuit for her monetary benefit.

Additionally, if an employee offers evidence of earnings during a period for which reporting is not yet required, she must prove the earnings by clear and convincing evidence, such as

corroborating testimony from the employer or another person paying the wages. The proposed law would also require any other party receiving such information to report it to the appropriate governmental agency in exchange for immunity from suit for making the report. HB 238 attempts to keep employees honest and set a standard of proof for lost wages and earning capacity evidence.

*HB 238 (Waddell), referred to House Civil Law Committee.*

### ***The winter of despair***

A couple of bills propose amendments to the workers' compensation law to permit penalties against employers and insurers that discontinue paying benefits if stopping those payments is determined to be arbitrary, capricious, or without probable cause. Current law requires employers or insurers to pay the employee's attorneys' fees for discontinuance, but HB 597 and HB 1065 would also subject them to an additional penalty of 12 percent of any unpaid compensation or medical benefits or \$50 for each calendar day they remain unpaid, whichever is greater.

*HB 597 (Bowler), passed by House, referred to Senate Labor and Industrial Relations Committee; HB 1065 (Murray), pending in House Labor and Industrial Relations Committee.*

### ***Everything before us***

Regulated employment services will have a lot to look forward to if HB 798 becomes law. The bill proposes to completely deregulate "employment services" in Louisiana, which include any person who receives a fee to offer or attempt to procure, directly or indirectly, employment for an applicant or candidate or procures or attempts to procure an employee for an employer.

The current law contains several exclusions, such as businesses that operate for the sole purpose of furnishing contract or temporary employees, lawful union hiring halls or referral systems, and nonprofit employment services. The law, however, requires regulated employment services to obtain a license from the Louisiana Private Employment Service Advisory Council within the Louisiana Department of Labor, pay licensing, investigation, and examination fees, and furnish a bond. Regulated employment services are also penalized for failing to meet the current law's requirements, so this bill is certainly one to watch if it applies to you.

*HB 798 (Donelan), reported favorably by House Labor and Industrial Relations Committee, set on House Orders.*

### ***Nothing before us***

"Nothing before us" is exactly what Louisiana courts may be saying to any employee who sues her employer alleging she was discriminated or retaliated against for filing a workers' compensation claim. HB 1048 seeks to prohibit employees from proceeding directly to court with such a claim, instead requiring them to use the administrative process set up to handle workers' compensation claims generally. Current law provides that workers' compensation judges have exclusive jurisdiction over claims related to workers' compensation coverage, overpayment of benefits, employer credits, and indemnification and contribution. HB 1048

would add discrimination and retaliation claims arising from an employee's workers' compensation claim to the list.

*HB 1048 (Devillier), hearing set for House Labor and Industrial Relations Committee.*

***Don't like what you see here? Do something about it!***

You may direct comments or questions about any of the bills summarized above by contacting your legislators:

3 Members of the House of Representatives may be reached by calling (225) 342-6945, e-mailing [webreps@legis.state.la.us](mailto:webreps@legis.state.la.us), or writing in care of the Louisiana State House of Representatives, P.O. Box 94062, Baton Rouge, LA 70804-9062.

3 Members of the Senate may be reached by calling (225) 342-2040, e-mailing [websen@legis.state.la.us](mailto:websen@legis.state.la.us), or writing in care of the Louisiana State Senate, P.O. Box 94062, Baton Rouge, LA 70804-9062.

We will continue to monitor the status of these and any other bills of interest to employers. In the meantime, you can check the status of any bill by calling the PULS line at (225) 342-2456 or (800) 256-3793.

**Copyright 2001 M. Lee Smith Publishers LLC**

**LOUISIANA EMPLOYMENT LAW LETTER does not attempt to offer solutions to individual problems but rather to provide information about current developments in Louisiana employment law. Questions about individual problems should be addressed to the employment law attorney of your choice. The State Bar of Louisiana does not designate attorneys as board certified in labor law.**