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LEGISLATION

All the king's men (and women) — Louisiana Legislature back in session

by Jennifer A. Faroldi and Jennifer L. Anderson

Even those of you who haven't read Robert Penn Warren's All the King's Men know it's the Pulitzer Prize-winning novel based loosely on the colorful but short life and political career of Louisiana's own Governor Huey P. Long. Louisiana has long been defined by its politics and politicians as much as by its culture and food. And All the King's Men always comes to mind when the Legislature convenes to do away with, change, and add more laws to our books.

The first U.S. poet laureate's famous book tells the story of the rise and fall of Willie Stark, a politician as southern as fried chicken. After ascending to the highest office in the state, Governor Stark offered his thoughts on the law and the legislative process:

> *[The law is] like a single-bed blanket on a double bed and three folks in the bed and a cold night. There ain't ever enough blanket to cover the case, no matter how much pulling and hauling. . . . The law is always too short and too tight for growing humankind. The best you can do is do something and then make up some law to fit and by the time that law gets on the books you would have done something different.*

Those words are a fitting introduction to this year's coverage of the regular legislative session. When you get right down to it, Governor Stark summed up the law and the legislative process about as well as any law professor could have. So, in keeping with our protagonist's blanket metaphor, we present to you a summary of the most significant labor and employment bills introduced so far that, depending on the outcome, will leave you either warm and cozy or shivering from the cold.

The Louisiana Legislature convened its 2004 regular session on March 29 and will adjourn on June 21. Of the bills featured, you'll undoubtedly want to follow House Bill 516, which seeks to require some employers to pay six months of severance in certain circumstances, and House Bills 845 and 1229, which would prevent employment discrimination on the basis of sexual orientation and gender identity. Of course, we'll continue to track the progress of these and any other significant bills that are introduced during the remainder of the session and give you a final report when the verdict is in.

Bigger blanket to cover discrimination

Wage discrimination. Although you already know that you can't pay employees different wages based solely on their gender or race, three bills seek to explicitly prohibit certain types of wage discrimination in employment — some more expansively than others. These bills would also prohibit retaliation against employees who oppose any act or practice in violation of them. HB 324 and 1054 and SB 33 would prohibit you from paying different wages to employees based on certain protected classifications: SB 33 (gender, race, and national origin), HB 1054 (gender and race), and HB 324 (gender).

SB 33 takes that concept one step further, however. The bill would also require covered employers to provide each employee with a written statement informing him of his job title, wage rate, and the manner in which his wages are calculated. That statement would have to be supplemented whenever an employee is promoted or reassigned

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to a different position unless it's a temporary reassignment lasting no more than three months. SB 33 would also require you to preserve indefinitely all documents relating to the payment of your employees' wages and the method, system, calculations, and criteria used to establish, adjust, and determine them.

SB 33 and HB 1054 also authorize civil actions for employees allegedly discriminated against in the payment of their wages and provide for recovery of compensatory damages, back pay, benefits, reinstatement or front pay, reasonable attorneys' fees, and court costs. As with Louisiana's current Employment Discrimination Law, any employee intending to pursue a civil action must notify his employer in writing at least 30 days before filing suit, and both parties must make a good-faith effort to resolve the dispute before litigation. Finally, SB 33 would give employees up to two years to file suit (unlike the current one-year statute of limitations). That statute of limitations would be suspended during any administrative review or investigation by a government agency.

But SB 33 provides some hope for employers. Any employee found to have filed a frivolous claim will be liable to his employer for reasonable damages as a result of his frivolous suit, including attorneys' fees and court costs.

HB 324 (Richmond), HB 1054 (Richmond) referred to the House Labor and Industrial Relations Committee; SB 33 (Fields) referred to the Senate Labor and Industrial Relations Committee.

Sexual orientation/gender identity discrimination. Two bills seek to enlarge the group of employees protected by Louisiana's employment discrimination law. Current law prohibits discrimination against applicants or employees on the basis of their race, color, religion, sex, national origin, age, or disability status. HB 845 would make it unlawful for covered employers — companies with 20 or more employees in the current or preceding calendar year — to discriminate against applicants or employees because of their sexual orientation or gender identity.

The proposed law defines gender identity as "a person's gender-related identity, appearance, or expression, whether or not that identity, appearance or expression is the same from that traditionally associated with the person's assigned sex at birth." Sexual orientation is defined as "being, [or] perceived as being, heterosexual, homosexual, or bisexual." HB 845 includes a provision permitting you to require employees to adhere to reasonable workplace appearance, grooming, and dress standards, "provided that an employer must allow an employee to appear and dress consistently with the employee's gender identity."

Likewise, HB 1229 would prohibit the state, state agencies, boards and commissions, and political subdivisions from employment discrimination because of a person's sexual orientation. Unlike HB 845, this bill doesn't address gender identity. As we've reported before, however, some courts have defined unlawful harassment because of sex, a form of discrimination, broadly enough to protect homosexuals and people with gender identity disorders in some limited circumstances.

HB 845 (Carter) referred to the House Labor and Industrial Relations Committee; HB 1229 (Murray) referred to the House Government Affairs Committee.

Applicants with felony convictions. Ever wonder if felons are a "protected class"? HB 1174 proposes to outlaw the denial of employment to an applicant solely because she has been convicted of a felony. If enacted, the law wouldn't apply to someone seeking to work with children or security services. But could it prohibit you from refusing to hire an applicant who wants to work in a money-handling position even though she has a felony conviction for theft or forgery? Denying employment because of a felony conviction when the job would place someone in a unique position to commit the same or a similar crime or for other job-related reasons shouldn't be unlawful, and this bill causes some concern because it doesn't address that scenario.

HB 1174 (Richmond) referred to the House Labor and Industrial Relations Committee.

'Share our wealth': wage issues

HB 195 seeks to allow local governments to establish a "local" minimum wage. If this bill is enacted, it's possible that the minimum wage in New Orleans, Shreveport, Metairie, and elsewhere could differ. SB 32 seeks to raise Louisiana's minimum wage to $6.15 an hour. It also provides that if the federal minimum wage increases, Louisiana's minimum wage will concurrently increase to one dollar more.

Two bills, SB 37 and 162, would require you to pay employees who are exempt from overtime under the Fair Labor Standards Act at least once a month. If wages are paid other than on a monthly basis, each pay period would have to cover, as nearly as possible, an equal number of days. The bills also provide a default if you don't specify paydays: the first and 16th of each month. The proposed law would, yet again, modify the final paycheck rule, requiring you to pay all wages owed to a discharged employee no later than six days after he's discharged and all other employees who are separated from employment no later than the next regularly scheduled payday.

SB 37 and 162 contain further provisions regulating the payment of commissions and bonuses, the manner of wage payment, the place of wage payment, deductions from wages, and providing for civil action, damages, and penalties for violations. These bills will directly affect your bottom line, so we'll be studying their progress.

HB 195 (Richmond), SB 32 (Fields), SB 37 (Holden), SB 162 (Holden) referred to the Senate Labor and Industrial Relations Committee.

'Every man a king': employee benefits

Currently, no Louisiana law requires private employers to pay severance to discharged employees. The matter

is left up to you, and it's governed by your policies, practices, and/or employment agreements. HB 516 seeks to change that by mandating that companies with 100 or more employees pay workers *six months of severance pay* if they were discharged because of a corporate consolidation, downsizing, layoff, or company relocation. The proposed law doesn't define "employee" or state how long someone must be employed before he's eligible for the benefit. So that means an employee of less than two weeks who's discharged because of a consolidation, downsizing, layoff, or relocation would be entitled to much more severance pay than he ever received in wages.

Louisiana doesn't have its own version of the federal Family and Medical Leave Act (FMLA). SB 217 would remedy that by providing an FMLA-type benefit for employees. The proposed law requires you to permit employees to use any earned sick leave or other paid time off to care for a child with a health condition requiring medical treatment or medical supervision, or a spouse, parent, parent-in-law, or grandparent who has a serious health condition or emergency condition. The bill also prohibits retaliation against an employee who exercises his rights under the proposed law or files a complaint or testifies or assists in any proceeding to enforce it.

Finally, HB 242 would require you to permit employees who are victims of domestic or sexual violence to take up to six weeks of unpaid leave a year to deal with their problems.

HB 516 (Shepherd) referred to the House Labor and Industrial Relations Committee; SB 217 (Fields) referred to the Senate Labor and Industrial Relations Committee; HB 242 (Richmond) referred to the House Labor and Industrial Relations Committee.

Ever wonder if felons are a "protected class"?

Workers' comp for 'growing humankind'

Several bills address Louisiana's workers' compensation laws, particularly employers' immunity from civil suits for your employees' on-the-job injuries. Currently, you cannot be sued by an employee who has been injured on the job; state law limits his recovery to workers' comp benefits. Four identical bills, HB 776 and SB 402, 671, and 703, would eliminate the exclusive remedy protection if a court finds an employer failed to install adequate security equipment or implement adequate security measures when it knew or should have known of a danger to the employee.

Similarly, SB 672 and HB 780 would revoke an employer's civil immunity for any injury that could have been prevented by an adequate guard or safety device that the employer removed or directed to be removed. Finally, SB 713 revokes immunity for employers that fail to secure workers' comp insurance or proper certification of self-insured status and pay any workers' comp benefits due.

Other workers' comp legislation, HB 191, seeks to amend the current law that provides for the forfeiture of an employee's claim for benefits if he makes a false statement or misrepresentation to obtain benefits or payment. The bill requires the employee's statement or representation to be material and relevant to his injury to constitute grounds for forfeiture of his right to benefits. A false statement that doesn't have anything to do with the injury won't be a bar to comp benefits.

HB 191 (Faucheux), HB 776 (Hunter), and HB 780 (Hunter) referred to the House Labor and Industrial Relations Committee; SB 402 (Marionneaux), SB 671 (Holden), SB 672 (Holden), SB 703 (Jones), and SB 713 (Marionneaux) referred to the Senate Labor and Industrial Relations Committee.

Job protection for our protectors

Louisiana and federal law generally protect the employment of service members who are absent from work because of active or reserve duty in the uniformed services. SB 692 would require employers of anyone who has first-response obligations to homeland security emergencies, including medical personnel, emergency medical technicians, Civil Air Patrol members, anyone called to active duty in the uniformed services of the United States, Louisiana National Guard members, law enforcement personnel, and fire protection personnel, to maintain their employment, pay rate, pensions, and benefits during periods of declared homeland emergencies. The bill provides that leave for homeland security and emergency preparedness shall be unpaid, but employees are entitled to reinstatement to the same or an equivalent position, pay, and benefits upon their return except in very limited circumstances.

SB 692 (Barham) referred to the House Labor and Industrial Relations Committee.

Employment of minors

HB 691 seeks to clarify existing law covering the employment of minors. It would amend the law to allow minors who haven't graduated from high school to work between 10:00 p.m. and 1:30 a.m. before the start of a school day or between 12:00 p.m. and 5:00 a.m. any other day if they have written consent from a parent or legal guardian. The proposed law forbids allowing minors 16 or older to work between 1:30 a.m. and 5:00 a.m. on a school night.

HB 691 also prohibits a minor *under 16* from working between 7:00 p.m. and 7:00 a.m. before the start of any school day or between 9:00 p.m. and 7:00 a.m. on *any* day. The amendment would also clarify that a school day is a day during which school is in session as designated by the local superintendent.

According to HB 691, a minor is considered to have graduated from high school if he has taken and passed a

GED test and been awarded a high school equivalency diploma from the Louisiana Department of Education. Finally, the bill defines "written authorization" as a parent's or legal guardian's signature on a form supplied by the Department of Labor and maintained on file with the minor's employment certificate.

HB 691 (Johns) referred to the Senate Labor and Industrial Relations Committee.

'WARN'ing of plant closing, mass layoffs

The federal Worker Adjustment and Retraining Notification Act (WARN) requires advance notice to employees affected by certain plant closings and mass layoffs. Currently, Louisiana doesn't have its own version of that federal law. HB 325 proposes to establish the Louisiana Worker Adjustment and Retraining Notification Act (LWARN), which would generally mirror the provisions of its federal counterpart.

If enacted, LWARN would require you to provide written notice 60 days before a mass layoff, relocation, or termination at any industrial or commercial facility that has employed 100 or more people within the preceding 12 months. The written notice must be provided to affected workers who have been employed for at least six months, the Louisiana Department of Labor, and the chief elected official of each city and local government within which the layoffs will occur. You are exempted from the written notice requirement if at the time notice was required, you were actively seeking capital or business that would have allowed you to avoid or postpone the layoffs and you reasonably believed that providing the written notice would have prevented you from obtaining the capital or business.

HB 325 also outlines the penalty for failing to give the required written notice: back pay and benefits paid to the affected employees for the period of the employer's violation up to a maximum of 60 days or one half the days they worked for the company, whichever is smaller. Finally, the proposed law authorizes civil actions and provides that attorneys' fees and costs be awarded to the prevailing party.

HB 325 (Richmond) referred to the House Labor and Industrial Relations Committee.

Unemployment compensation benefits

Several bills that will affect employees' entitlement to unemployment compensation benefits have been introduced. Two bills seek to protect unemployment benefits for workers who can establish that they left their employment because of domestic violence. Current law disqualifies someone from receiving unemployment compensation benefits if she voluntarily left her employment for any reason other than a substantial change in employment by the employer.

HB 1048 would carve out an exception to that rule for an employee who can establish that she left her employment because of domestic violence — for example, a fear of violence en route to and from work, a need to relocate to avoid future violence, a need to receive treatment, or a need to quit work to receive services or shelter from an agency providing those services. The proposed law allows an employee to prove her reason for leaving employment in several ways, including providing a sworn statement attesting to the abuse.

Similarly, HB 1379 proposes that an unemployed person would be eligible for benefits if he's discharged or otherwise unable to continue employment because of domestic abuse. The bill is significant because it proposes to allow an employee to receive unemployment benefits when the reason for separation had nothing to do with his employer. That is, the employer didn't cause a substantial change in employment; rather, the employee resigned for personal reasons.

Louisiana law currently disqualifies workers from unemployment benefits when they also receive retirement payments. SB 9 would create an exception for seasonal workers who receive social security benefits, allowing them to also collect unemployment benefits when their employment ends at the close of the season.

HB 1048 (Gray) and HB 1379 (Hunter) referred to the House Labor and Industrial Relations Committee; SB 9 (Dupre) referred to the Senate Labor and Industrial Relations Committee.

Kingfish is gone, but contact your legislators

You may direct your comments or questions about any of the bills summarized in this article by contacting your legislators. Members of the House of Representatives may be reached by calling (225) 342-6945, e-mailing 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. Members of the Senate may be reached by calling (225) 342-2040, e-mailing 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 that may be of interest to you. In the meantime, you can check the status of a bill by calling the PULS line at (225) 342-2456 or (800) 256-3793. ❖

ELECTRONIC WORKPLACE

You've got mail, a pink slip, and a lawsuit

by Antonio D. Robinson and Jennifer L. Anderson

With the explosion in electronic communications technology, many of you have implemented e-mail, voice mail, and Internet policies to keep your employees' use of your electronic systems in check and reduce potential liability for the improper

use of your systems. An effective policy identifies the conduct prohibited, the avenues for seeking redress for violations, and the consequences for violations. But a policy is only good if it's communicated to your employees and actually enforced when it's violated.

In other words, without the dissemination and consistent enforcement of your policy, you could face a grievance, lawsuit, or liability for firing an employee who commits even the most egregious violation — for example, viewing and transmitting pornography — particularly if he's a union member. Seem counterintuitive? A recent case from the U.S. Court of Appeals for the Fifth Circuit in New Orleans shows just how realistic that scenario is.

'Snapshot' of e-mail revealing

A company took a "snapshot" of its e-mail server to determine whether its employees were complying with its e-mail policy. Unfortunately, it discovered that more than 250 employees had sent, received, or saved pornographic, violent, and nonbusiness-related material on its system. Instead of firing each employee who violated its policy, the company developed a ratings system to gauge the severity of the violations.

Using its system of rating their e-mail policy violations, the company fired 20 employees. A dozen of them belonged to a union, which filed grievances on their behalf. Freddie Bonner, one of the 12, was serving a three-year probation under a last-chance agreement with the company when he was fired. Interestingly, his probation resulted in part from his earlier involvement with sexual materials in the workplace.

Panel gives ratings system two 'thumbs down'

Almost two years after the terminations, a three-person panel of arbitrators heard the former employees' grievances. Although the panel found that the employees had violated the company's e-mail policy by sending "garbage through Company email," it also found that the company didn't have just cause to end their employment. The panel concluded that some similarly situated employees, including supervisors, had received less severe punishment, the e-mail policy was unclear, and the company inadequately trained its employees about its policy. As a result of the arbitration, the terminations were converted into suspensions without pay, but the panel awarded each employee full benefits as if they had never been fired.

Displeased with its decision, the company first asked the panel to reconsider reinstating Bonner, the employee who had been disciplined previously for an infraction involving sexual material in the workplace. After the panel declined, the company then asked it to clarify what it meant by "benefits." The panel explained that in its opinion the employees were entitled to (1) the same performance award received by other employees who hadn't been disciplined, (2) vacation time and pay for three years, and (3) the maximum 401(k) benefits that would have vested during their termination period.

Employer asks court for second opinion

Not surprisingly, the panel's decision and explanation weren't acceptable to the company, which then filed a complaint asking a federal court to set aside the benefits awarded by the panel and reject Bonner's reinstatement. Of course, the union asked the court to uphold the panel's decision. Both parties asked the court to dismiss the other side's case. The court threw out Bonner's reinstatement, but it upheld the benefits given to each employee except him. Both parties appealed the decision to the federal appeals court in New Orleans.

The appeals court began its analysis of the case by noting that the panel's decision enjoys deferential treatment, which means that it's pretty darn hard to get a court to overturn or modify a panel's decision. The appeals court also explained that it *must* uphold the panel's decision if the award "draws its essence from the Collective Bargaining Agreement" (CBA). Of course, the company argued that the panel exceeded its authority by formulating an award not supported by the CBA. But the appeals court rejected that argument.

In reviewing the CBA, the court discerned no language limiting the panel's ability to award vacation and 401(k) benefits to the wrongfully terminated employees. It also discovered no prohibition against the panel awarding them a performance honor received by employees who weren't disciplined. Essentially, the court concluded that the relevant provisions of the CBA were either silent or ambiguous on the issues confronted by the panel, but the CBA in no way limited the panel from fashioning the relief it provided. As a result, the court considered itself bound to affirm the panel's decision.

The appeals court approved of Bonner's discharge, however. The court explained that the last-chance agreement he signed after his previous infraction served as a supplement to the CBA. That agreement gave the company the power to fire him for any future performance problems, including "possessing sexually oriented materials on [its] property." During the e-mail "snapshot," the company discovered that he forwarded a sexually explicit cartoon, which violated its e-mail policy and his last-chance agreement. Consequently, the appeals court rejected the union's argument that he should be reinstated and upheld the lower court's decision. *Dow Chemical Co. v. Local No. 564, International Union of Operating Engineers,* 2003 U.S. App. LEXIS 25424.

Practical lessons for new technologies

Despite having an e-mail policy that allowed it to fire employees for violations, this company found itself defending its decision to terminate workers who possessed or

transmitted sexually explicit or other improper material over its electronic system. And despite its best efforts on appeal, it succeeded in having only one of the lower court's decisions reversed. Why?

Some of you might argue that the panel and the courts just got the decision wrong. From an employer's perspective, it's easy to see that view. Others might argue that the CBA's vagueness allowed the panel too much leeway in fashioning a remedy, thereby tying the courts' proverbial hands. Although both of those views are appealing and may have some merit, it can't be denied that a major reason for the decision, according to the panel, was the company's inconsistent application of its e-mail policy. If other employees committed similar infractions but weren't disciplined, the company's explanation for firing the employees it did was susceptible to challenge.

Being inconsistent when you discipline or discharge employees will almost assuredly result in unhappy workers and will likely lead to litigation. That's true regardless of whether your workforce is unionized. Most e-mail and Internet policies state that a company's e-mail and Internet systems are for business purposes only and any other use is prohibited. But we know that many employees, sometimes even management, use their employer's e-mail and Internet systems for a number of personal reasons. And sometimes those personal reasons are improper or in conflict with your policies or standards of conduct.

But a problem arises when you aren't consistent in applying your e-mail and Internet policies and you discipline or fire some employees when others have received less severe or no discipline for similar violations. When you enforce your policy, you must make sure that similarly situated employees — those who have committed the same or similar violations — receive the same discipline. By looking both behind and ahead of the situation at hand and asking how you've dealt with similar situations in the past and how you want to deal with them in the future, you'll be well on your way to minimizing potential complaints from employees who might otherwise feel they're just not being treated fairly and who might speculate that your motivation in disciplining them is unlawful. ❖

Employers Have Rights, Too!

Past performance not indicative of future job success

A federal appellate court recently dismissed a lawsuit filed by a group of employees who claimed they were laid off during a company restructuring in violation of the Age Discrimination in Employment Act (ADEA). According to the court, the employer wasn't obligated to consider the workers' past performance in judging their future skills in the new organization. This is a positive ruling for employers facing the daunting task of a corporate downsizing/reorganization.

Facts

In February 2000, BASF Corporation notified employees at its Joliet, Illinois, facility of its intention to reorganize the company's styrenics production unit. The company's stated purpose for the restructuring was to "reduce the number of personnel and repopulate the organization with individuals who demonstrated specific behavioral skills and attributes that BASF believed were necessary to [the unit's] future success."

In the first phase of the restructuring process, BASF offered a voluntary special early retirement program to all employees over the age of 52 who had 10 or more years of service with the company. During the second phase, all employees who desired to continue their employment with the unit were subject to a behavioral assessment to determine whether they had the requisite "competencies." Employees who lacked those competencies would be terminated.

The company hired Development Dimensions International (DDI) to assist in the assessment process. DDI forwarded its results to BASF for further consideration by the company's selection panels. Each selection panel reviewed the scores and integrated them with their collective knowledge of each employee's workplace behavior and performance. If the panel reached a consensus that the DDI score didn't accurately reflect an employee's on-the-job performance, the score was increased or decreased accordingly.

Ten employees at the Joliet facility — all of whom were terminated for having six or more developmental needs — filed a lawsuit against BASF. The suit alleged, among other claims, that the workers were fired because of their age in violation of the ADEA. The trial judge granted the company's request to dismiss the suit, and the workers appealed to the Seventh Circuit.

Legal analysis

The workers first argued that the early retirement offer made to certain older employees during the first phase of the restructuring process was discriminatory and not truly voluntary. The Seventh Circuit disagreed, noting that "an offer of incentives to retire early is a benefit to the recipient, not a sign of discrimination." The court also found that it's unreasonable to infer that the company's offer was discriminatory simply because some employees may have chosen to retire out of fear that they wouldn't survive the assessment process. According to the court: "The ADEA was not enacted to immunize older employees . . . from being terminated for legitimate reasons."

The workers also relied on several ageist comments allegedly made by management-level employees to support their suit. During a restructuring meeting, for example, one executive stated, "There's no other way; it's going to be out with the old and in with the new." Another individual allegedly asked one of the workers, "How is the old man doing today?"

The Seventh Circuit held that those remarks were insufficient to support the workers' case. The court wrote: "[T]here is nothing inherently discriminatory about the colloquialism 'out with the old, in with the new,' and the [workers] offer no evidence upon which a reasonable jury could infer that the phrase was used . . . in a discriminatory manner." Moreover, the court found that the workers failed to show that a causal link existed between the alleged prejudicial views of management and the workers' terminations.

Finally, the workers argued that their previous performance evaluations demonstrated they were satisfying the employer's legitimate expectations. BASF chose to make its decision on which employees to retain by using a process that didn't take into account the workers' prior written performance evaluations. According to the court: "[W]hether the [workers] or this court believe that BASF's prescribed methodology for gauging the prospective abilities of its employees was fair, prudent, or wise is beside the point. Employers, not employees or courts, are entitled to define the core qualifications for a position, so long as the criteria utilized by the company are of a nondiscriminatory nature."

Because the methodology used by BASF wasn't discriminatory, the Seventh Circuit upheld the trial judge's decision to dismiss the workers' suit. *Cerutti v. BASF Corp.*, Nos. 02-3471, 02-3700, Seventh U.S. Circuit Court of Appeals (2003).

Workers must share part of the burden associated with FMLA leave.

Practical impact

A corporate restructuring or downsizing is generally a difficult task. But as demonstrated by this court's ruling, you can avoid liability for the decisions made during the process by ensuring that the factors used are both objective and consistently applied to all employees who are considered for layoff. The Seventh Circuit pointed out in this case that an employer may choose its own prescribed methodology so long as the criteria used aren't discriminatory. ❖

FAMILY AND MEDICAL LEAVE

Courts take strong stance on notice

Two federal appellate courts recently issued decisions that focus on the importance of providing proper notice when seeking leave under the FMLA. In the first case, the court held that an employee who took nearly two weeks of leave before the birth of his child didn't provide his employer with sufficient notice of his wife's serious health condition. In the second case, the court rejected a lawsuit filed by a worker who requested time off to care for his mentally ill wife but failed to provide the necessary documentation to substantiate the leave period.

Doting dad

Steve Aubuchon was employed as a laborer by Knauf Fiberglass. On August 21, 2000, he requested leave under the FMLA to care for his pregnant wife. At the time, he didn't notify his employer that she was experiencing complications or that she had experienced false labor. He simply stated that he wanted to stay home with his wife. She eventually gave birth on September 2.

On September 1, Aubuchon followed up his oral request for FMLA leave by submitting a completed form that the employer furnishes for requesting such leave. On the form, he checked a box indicating that his wife had a "serious health condition" but provided no additional details.

The company denied Aubuchon's request for FMLA leave and terminated him for violating its attendance policy. He grieved his termination through the union that represented Knauf's employees, and the company agreed to reinstate him without back pay. Shortly thereafter, the company fired him a second time after discovering that he had falsified his original employment application by failing to disclose that he had been terminated by previous employers for excessive absenteeism. He responded by filing suit under the FMLA.

A federal judge in Indiana granted the employer's request to dismiss the suit, and Aubuchon appealed that ruling to the Seventh Circuit.

The federal appellate court held that Aubuchon failed to meet the FMLA's notice requirement. Under regulations issued by the U.S. Department of Labor, notice must be provided to the employer at least 30 days in advance or "as soon as practicable under the facts and circumstances of the particular case." His initial request for leave, the court held, "did not give complications, false labor, or a serious health condition" as a reason for his absence. According to the court, "Wanting to stay at home with one's wife until she has the baby, while understandable, is not the same thing as wanting to stay home to care for a spouse who has a serious health condition."

The court found that Aubuchon's subsequent written leave request was also insufficient because it wasn't until after he was fired the first time that his wife's physician provided a note stating that she had experienced complications with the pregnancy. That notice, the Seventh Circuit held, was "too late." According to the court, "Employees should not be encouraged to mousetrap their employers by requesting FMLA leave on patently insufficient grounds and then after the leave is denied obtaining a doctor's note that indicates that sufficient grounds existed, though they were never communicated to the employer." Thus, the trial judge's decision to dismiss the worker's FMLA claim was upheld. *Aubuchon v. Knauf Fiberglass*, No. 03-1382, Seventh U.S. Circuit Court of Appeals (March 8, 2004).

Missing in action

Bobby Dry was employed by The Boeing Company. Between 1995 and 1997, he took FMLA leave on several occasions to care for his wife, who suffers from bipolar

disorder. During that period, all his requests for leave were granted and all requisite forms were completed by Dry and his supervisors.

On Friday, March 6, 1998, Dry's wife again experienced problems as a result of her bipolar disorder. The following Monday, Dry remained at home to care for her but didn't call his office to report his need for leave until later that week. He stayed home with his wife throughout the month, calling in approximately once a week. Each time, he stated that he would return to work the following Monday but then would fail to appear for his shift and didn't call to explain his absence.

After several unsuccessful telephone calls, Dry's supervisor sent a letter informing him that his leave wasn't authorized and that without medical documentation, his absence constituted job abandonment. The letter requested that he provide the company with medical documentation by April 10, 1998.

Dry obtained a doctor's note at his wife's next scheduled appointment on April 15. The handwritten note stated that he was needed at home from the week of March 16 until April 15 to care for his wife. The note further stated that "he is able to return to work at this time as [his wife] no longer needs him to care for her at home." Although the note stated he could return to work as of April 15, he didn't do so.

When Dry failed to contact Boeing by April 20, the company notified the union that represented him of its plans to initiate termination proceedings. On April 21, his supervisor drafted, but didn't finalize, a termination letter — which was mistakenly mailed to Dry. The union contacted Dry shortly thereafter and offered to help, but he rejected the offer, stating that he had already been fired.

Dry obtained a second note from his wife's doctor, which stated that he had taken care of his wife from March 9 through April 21. Although the company didn't receive the note until May 15, it credited Dry with FMLA leave for the entire period. The note failed to excuse him for his absences after April 21, however. As a result, his employment was terminated.

Dry filed a lawsuit alleging that his former employer unlawfully interfered with his FMLA rights. The trial judge ruled in favor of Boeing, and he appealed that decision to the Tenth Circuit.

The federal appellate court agreed with the trial judge, noting that with regard to Dry's absences before April 21, he failed to perform his FMLA duties. According to the court, "He had a duty to timely provide the medical documentation requested, which he virtually ignored."

The Tenth Circuit further held that despite Dry's tardiness in providing the requested documentation, the company still granted him leave for all days for which he submitted medical documentation — March 9 to April 21, 1998. Nonetheless, the court found, that doesn't excuse him for being absent from work from April 21 forward. Because his termination was caused by his voluntarily missing weeks of work without explanation, the court dismissed his FMLA interference claim. *Dry v. The Boeing Company,* No. 01-3294, Tenth U.S. Circuit Court of Appeals (February 19, 2004).

Practical impact

These rulings are important for employers because the courts recognized that workers must share part of the burden associated with leave taken under the FMLA. As noted by the court in the first case: "Conditioning the right to take FMLA leave on the employee's giving the required notice to his employer is the *quid pro quo* for the employer's partial surrender of control over his work force. Employers do not like to give their employees unscheduled leave even if it is without pay, because it means shifting workers around to fill the temporary vacancy and then shifting them around again when the absentee returns. The requirement of notice reduces the burden on the employer."

On the same note, employers have the right to seek medical documentation supporting the leave. Moreover, for an employee who's seeking recurrent leave, the employer may require him to "obtain subsequent recertifications on a reasonable basis." The employee must in turn provide the medical certification "in a timely manner."

These employee obligations are designed to lessen incidents of fraud and help employers respond to the challenges created by the FMLA's leave entitlements. It's nice to see courts hold employees to these obligations.

You can catch up on the latest court cases involving the FMLA in the subscribers' area of HRhero.com,the website for Louisiana Employment Law Letter. Just log in and use the HR Answer Engine to search for articles from our 51 Employment Law Letters. Need help? Call customer service at (800) 274-6774. ❖

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