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Fun Fact: Holiday and Vacation Time Does Not Count as Hours Worked Under the FMLA

By Patrick M. Watts*

When an employee receives holiday and vacation pay, should that count towards the Family and Medical Leave Act's 1,250 "hours of service" eligibility requirement? The U.S. Court of Appeals for the Sixth Circuit, which covers Kentucky, Michigan, Ohio, and Tennessee, doesn't think so. In *Saulsberry v. Federal Express Corp.*, the Sixth Circuit concluded that only the hours an employee actually works count towards the 1,250-hour eligibility requirement. 2014 U.S. App. LEXIS 819 (6th Cir.).

The employee in *Saulsberry* requested FMLA leave for vertigo. His employer denied the request because he "had not met the FMLA's 1,250-hours-worked-requirement." The FMLA defines an "eligible employee" as "an employee who has been employed... for at least 12 months by the employer... and... for at least 1,250 hours of service... during the previous 12-month period." 29 U.S.C. §2611(2)(A).

Here, the employee met the 12-month tenure requirement but did not also meet the 1,250 "hours of service" within the previous year requirement. The Sixth Circuit reasoned that the employee had to prove "he actually worked 1,250 hours." He argued he met this requirement by pointing to an employee report that stated he "put in" 1,257 hours within the year. However, the report included two different hours totals on subsequent lines. One line listed the total hours paid and the following line included an hours worked total. An employer representative stated the employer records demonstrated that the employee worked 1,136 hours during the preceding 12 months. The court carefully considered the distinction between the hours the employee actually worked and the hours for which he was paid. The employee admitted the total hours paid included vacation and holiday pay he did not actually work. In addition, the employee stated he believed his employer kept an accurate account and record of his hours worked. Since the employee did not work the requisite 1,250 hours, the court held the employee was not entitled to FMLA leave and upheld dismissal of his FMLA claim.

This case serves as an excellent reminder that hours worked and not hours paid determine an employee's eligibility for FMLA leave. Employers should keep detailed and accurate records of hours worked, as compared to hours paid.

***Patrick M. Watts**, an OSBA Certified Specialist in Labor and Employment Law, practices in all areas of labor & employment law and has extensive experience dealing with the FMLA. If you have any questions about the FMLA's requirements, standards, or application, please contact Patrick (pmw@zrlaw.com) at 216.696.4441.

Donning and Doffing: To Compensate or Not To Compensate

By Michele L. Jakubs*

To compensate or not to compensate, that is the question for "donning and doffing" clothing and gear prior to and after work. Truth be told, Shakespeare's version was a much easier question to resolve. The U.S. Supreme Court's decision in *Sandifer v. United States Steel Corp.* sheds light on this issue that has troubled employers since the enactment of the Fair Labor Standards Act of 1938 (FLSA). 134 S. Ct. 870 (2014). The issue before the Court was whether "donning and doffing" certain protective gear was compensable pursuant to the FLSA. The 12 items that were in question: flame-retardant jacket, pants, hood, hardhat, snood (hood that covers neck and shoulder area), wristlets (detached shirtsleeves), work gloves, leggings, metatarsal (steel-toed) boots, safety glasses, earplugs, and a respirator. The Court found that only the safety glasses, ear plugs, and respirator were not clothes under the Act.

The distinction of whether the items were clothes was important because pursuant to Section 203(o) of the FLSA, non-compensable time includes "time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement." 29 U.S.C. § 203(o).

WHAT CONSTITUTES COMPENSABLE TIME UNDER THE FLSA?

The collective bargaining agreement at issue did just that. The Court determined that 9 of the 12 items were subject to exclusion because they "cover the body and are commonly regarded as articles of dress." The Court found that the parties could collectively bargain away compensation with respect to these items.

The remaining three items were compensable, and per the collective bargaining agreement, the employer could not exclude them; however, the time spent putting on these "non-clothes" was not the majority of time spent "donning and doffing" gear. Therefore, the employer did not need to compensate for this time. Conversely, if the majority of the time is spent "donning or doffing" non-clothes, the time spent "donning or doffing" clothes becomes compensable.

Clearly, employers should ensure that employees are paid for all time worked. As a result, employers must fully understand what constitutes compensable time under the FLSA.

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Say What? EEOC Takes Issue with CVS's Separation Agreement Language

By Ami J. Patel*

The EEOC recently flexed its statutory muscle by suing CVS for allegedly interfering with its employees' access to the EEOC. According to the lawsuit, the company's separation agreement interfered with employees' right to communicate with, participate in proceedings conducted by, and file charges with the EEOC. Since these restrictions allegedly violate Section 707 of Title VII of The Civil Rights Act of 1964, the EEOC was able to seek immediate relief through a federal lawsuit. Section 707 prohibits employers from "engag[ing] in a pattern or practice of resistance to the full enjoyment" of any rights Title VII secures.

In the complaint, the EEOC claimed the following provisions in the separation agreement created a "pattern or practice of resistance:"

- **Cooperation provision:** requires employees to "promptly notify" the company's general counsel if the employee receives an inquiry related to any "civil, criminal, or administrative investigation."
- **Non-Disparagement provision:** prevents employees from making statements that disparage the company.
- **Non-Disclosure and Confidential Information provision:** prohibits employees from disclosing confidential information without express authorization from the company's HR director. Confidential information includes "information concerning the Corporation's personnel, including... affirmative action plans or planning."
- **General Release of Claims provision:** provides for an all-encompassing release of claims, including a release from any charges (e.g., EEOC Charge) and specifically includes "any claim of unlawful discrimination of any kind."
- **No Pending Actions; Covenant Not to Sue provision:** states the employee has not filed and agrees not to file any action, including a complaint (e.g., EEOC complaint), against the company.
- **Breach of Employee Covenants and Injunctive Relief provision:** requires the employee acknowledge that any separation agreement breach will "result in irreparable injury" to the company and requires the employee to reimburse the employer for reasonable attorney costs if the company obtains an injunction against the employee.

While the EEOC argued these provisions rendered the employer's separation agreement unlawful, it minimized or ignored provisions that protected the employees' rights. For example, the "No Pending Actions; Covenants Not to Sue" provision expressly stated an employee is not prohibited from participating in an agency proceeding "enforcing discrimination laws" or from cooperating with any investigation. In bringing its lawsuit, the EEOC emphasized that the separation agreement did not repeat this language elsewhere in the agreement.

In filing its complaint, the EEOC touted that its most-recent "Strategic Enforcement Plan" identified "preserving access to the legal system" as a top priority. On April 30, 2014, the EEOC again demonstrated its commitment to this priority by suing CollegeAmerica based on its separation agreement. Similar to CVS, CollegeAmerica included the following in its severance agreements: 1) a non-disparagement provision; 2) an agreement not to file complaints against the employer; 3) an agreement not to assist others in claims against the employer; and 4) a release of all claims. The EEOC, in part, based its lawsuit on the employer's demand that one former employee return her severance pay for allegedly violating the non-disparagement clause. In addition, the employer sued the former employee for filing an EEOC charge.

These lawsuits demonstrate that the EEOC likely will continue to pursue these types of claims. Companies should review their employee separation and severance agreements in light of these recent lawsuits filed by the EEOC.

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Paid Sick Days: Are Employers Facing an Epidemic?

By Sarah K. Ott*

The issue of a fair minimum wage has been a popular one in headlines and political debates in the last year or so, as cities, states, and the federal government address whether or not to raise it. With less media attention, another wage issue has been gaining momentum among communities: paid sick days. On April 1, 2014, 200,000 New Yorkers became eligible for paid sick days when the Earned Sick Time Act took effect. Generally, the act requires all businesses with five or more employees to provide 40 hours of paid sick leave to employees who work more than 80 hours in a calendar year. The law also requires employers of fewer than five employees to provide 40 hours of unpaid sick leave. The list of family members for whom an employee may use paid sick leave includes children, spouses, parents, grandparents, grandchildren, and siblings.

CURRENTLY, OHIO DOES NOT MANDATE PAID SICK LEAVE

As goes New York City, so goes the rest of the country? Yes and no. Like with minimum wage, cities and states are taking the lead on whether employers must provide paid sick days. While no federal law requires employers to provide paid sick leave, the Family and Medical Leave Act generally requires employers to provide unpaid sick leave. Connecticut is the only state that requires employers to offer paid sick days to employees, but it may not be the only state for long. California has a bill pending in the state legislature that would offer one paid sick day for every 30 days worked. Several cities, including Seattle, San Francisco, Washington, D.C., Portland, Newark, and Jersey City have enacted paid sick day laws for their citizens. Of course, these measures are not without opposition. Eleven states (Arizona, Florida, Georgia, Indiana, Kansas, Louisiana, Mississippi, North Carolina, Oklahoma, Tennessee, and Wisconsin) have passed legislation making it illegal for cities or municipalities to enact paid sick leave laws.

If you are an employer, you may be wondering if your company's sick leave policy is compliant and whether Ohio is contemplating similar steps. Currently, Ohio does not mandate paid sick leave, and none of the cities in the state have enacted ordinances requiring it. In 2008, the Ohio Healthy Families Act, which would have required employers with 25 or more employees to provide seven days per year of paid sick leave, was removed from the ballot. The main supporter, Service Employees International Union, withdrew the measure in order to focus on a federal paid sick leave law that never passed. No laws mandating paid sick leave are pending in the Ohio state legislature or any of its major cities, but if the national trend continues, the issue will surely arise soon.

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Zashin & Rich is pleased
to announce the addition of

Sarah K. Ott

Sarah's practice encompasses all areas of labor and employment law, including employment discrimination, legal compliance, and labor relations. As a student at The Ohio State University Moritz College of Law, Sarah won an award for excellence in legal negotiations. Prior to joining Zashin & Rich, Sarah practiced in the area of general litigation with a Cleveland-area solo practitioner. While in law school, she interned for two judges in the Southern District of Ohio and at the Ohio Environmental Protection Agency.

Implications of Assisted Reproductive Technology on Pregnancy and Gender Discrimination

By Drew C. Piersall*

In 1978 the first human was born after being conceived by *in vitro* fertilization (IVF). That same year, Congress amended Title VII of the Civil Rights Act of 1964 (Title VII) to prohibit discrimination based on pregnancy. This amendment, known as the Pregnancy Discrimination Act (PDA), protects pregnant women from employers' discriminatory actions including refusals to hire and discharges. The scope of the PDA is unclear when applied to women utilizing assisted reproductive technology that are not yet pregnant. Regardless of the PDA's impact, employers are not free to discriminate against these women based on their intention to become pregnant, as discrimination based on "child-bearing capacity" is illegal under Title VII.

Under the PDA, covered employers cannot discriminate against employees or applicants "on the basis of pregnancy, childbirth, or related medical conditions." In analyzing claims under the PDA, the U.S. Court of Appeals for the Sixth Circuit generally requires the plaintiff to prove: (i) she was pregnant; (ii) she was qualified for her position; (iii) her employer took an adverse employment action against her; and (iv) there was a nexus between her pregnancy and her employer's employment decision. Under this framework, PDA coverage would not extend to individuals undergoing assisted reproductive technology treatments that have not yet become pregnant. However, the individual may still have a viable claim under Title VII for gender discrimination based on her child-bearing capacity.

A federal district court in Michigan recently addressed the intricacies of a discrimination claim involving assisted reproductive technology. In that case, the plaintiff, who worked as a lead dental instructor, notified her supervisor she planned to become pregnant by IVF. During the plaintiff's IVF treatment, her supervisor demoted her to the position of teaching assistant so she could sit while working because she was, in her supervisor's words, "being pumped with so many hormones." After taking a week of vacation leave after completing her procedure, the plaintiff miscarried upon returning to work. The next day, the plaintiff's supervisor demoted the plaintiff, later stating she was too "focused on babies" because she intended to use IVF again and was emotionally unstable as a result of her IVF treatments. The plaintiff alleged her supervisor eventually terminated her based on her gender and pregnancy.

Relying on the Sixth Circuit's analysis of PDA claims, the court refused to reach the conclusion that non-pregnant plaintiffs utilizing IVF can successfully bring claims under the PDA. First, the court held that the plaintiff stated a plausible claim under the PDA with respect to her demotion following her miscarriage, as she was actually pregnant and a miscarriage is a pregnancy-related condition. With respect to the plaintiff's termination, which she alleged was based on her intention to become pregnant again, the court analyzed the claim not as a PDA claim, but rather as a Title VII gender discrimination claim. In doing so, the court recognized child-bearing capacity is a solely female characteristic, and therefore, discrimination based on child-bearing capacity is the very type of gender-based discrimination Title VII prohibits.

Employers should be cautious when making employment decisions that affect employees who express their intent to become pregnant or who utilize assisted reproductive technology. Even though employees utilizing assisted reproductive technology may not yet be pregnant, they are still protected from discriminatory actions directed at their attempts to become pregnant. While courts may be reluctant to analyze such claims under the PDA, employees who utilize assisted reproductive technology might state a claim under Title VII.

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You Can't Use That! Right? Wrong. Use of Unemployment Hearing Evidence in Subsequent Litigation

By David P. Frantz*

Consider the following scenario: an employer terminates an employee for just cause. The employee subsequently files for unemployment compensation and the employer challenges the application. The case goes to hearing where the hearing officer concludes that the employer terminated the employment of the employee for just cause. Unhappy with the result, the employee sues the employer in federal court. Can the federal court consider evidence and determinations made during the unemployment compensation process? One Alabama federal court recently answered that question with a resounding yes.

In *Franks v. Indian Rivers Medical Health Ctr.*, the district court judge dismissed a former employee's Family and Medical Leave Act (FMLA) lawsuit based on the "collateral estoppel" doctrine, which generally provides that when a valid and final judgment determines an issue, the same parties cannot litigate that issue again. 2014 U.S. Dist LEXIS 15544 (N.D. Ala. Feb. 7, 2014). The *Franks* judge concluded that since the Alabama unemployment commission already determined the employer terminated its employee for dishonesty, the employee's subsequent FMLA claim also failed. Although the *Franks* judge ruled in the employer's favor, the decision highlights the potential pitfalls of challenging a former employee's request for unemployment compensation. Evidence submitted, testimony introduced, and even a hearing officer's decision itself may be utilized in subsequent litigation where the stakes are typically higher.

Ohio Revised Code §4141.21 prohibits evidence submitted during the unemployment compensation process from admission in any court proceeding. Nonetheless, federal courts in Ohio have concluded that evidence submitted in the unemployment compensation process is "not absolutely privileged and should not be stricken." *Klaus v. Hilb, Rogal & Hamilton Co. of Ohio,* 437 F. Supp. 2d 706 (S.D. Ohio 2006). For example, the *Klaus* court admitted the employer's unemployment compensation statements in a later gender discrimination lawsuit. The employer initially had stated it terminated the former employee for "lack of production." However, the employer later stated it terminated the employee because the company was "winding up a line of business." Finding these statements at odds, the court commented that maintaining the O.R.C. §4141.21 privilege would enable parties to hide information in the unemployment compensation process. Thus, Ohio employers should be careful about what evidence, testimony, and information they submit when challenging a request for unemployment compensation.

So, how should an employer approach the unemployment compensation process when it anticipates future litigation? The safest bet is to involve counsel early. To the extent an employer challenges a request for unemployment compensation, it is imperative the employer has a clear understanding of what led to the claimant's separation and provides accurate information. An employer never wants to be in a position in which they are trying to explain away earlier inaccurate submissions.

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EMPLOYERS SHOULD BE CAREFUL ABOUT EVIDENCE, TESTIMONY, AND INFORMATION THEY SUBMIT

Right to Return: Equivalent Positions After FMLA Leave

By Stephen S. Zashin*

Under the Family and Medical Leave Act (FMLA), employees are entitled to return to their same job or an equivalent position after taking leave. As recently demonstrated by a federal court in Arizona, the degree of equivalence under the FMLA can be construed strictly against an employer.

EMPLOYEES ARE ENTITLED TO RETURN TO THEIR SAME JOB OR AN EQUIVALENT POSITION

Under the FMLA, covered employers generally must provide eligible employees with up to 12 weeks of unpaid leave for personal medical reasons or to tend to the medical needs of a family member. In order to ensure that employees are not punished for taking this leave, the FMLA requires employers to reinstate employees returning from leave to either: (1) the position the employee held before taking leave; or (2) a different position that is equivalent in benefits, pay, and conditions of employment. Employers must use caution when assigning a returning employee to a position different from the one the employee held before taking leave.

In order to comply with the "equivalent position" requirement, identical job title alone will not likely suffice, at least according to a federal court in Arizona. Prior to taking FMLA leave, an employee of a collection agency worked as a collector on an account for a major bank. In that position, she received a 35% commission on collections. After returning from leave, her employer assigned her to another account collecting for credit card companies. She only received 28% commission in her new assignment, but her employer argued her new position provided her an opportunity to earn more due to a higher rate of collection on the credit card accounts. Despite the fact that the employee was a "collector" both before and after her leave, a federal district court in Arizona held she had presented a triable claim under the FMLA based upon whether the employer assigned her to an "equivalent" job.

Upon an employee's return from FMLA leave, employers often are faced with limited options regarding job placement. The most risk-adverse approach is to place the returning employee into the exact position the employee held before taking leave, without altering any conditions of the position (e.g., wages, benefits, etc.). However, this approach may not be possible in all situations. As an alternative, the employer may place a returning employee into an equivalent position but should proceed cautiously when doing so and ensure the position is equivalent in benefits, pay, and other employment conditions.

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