

# THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER  
HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES  
PREPARED BY ATTORNEYS BETTY BECHTEL AND MICHAEL SANTO

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## TERMINATING OLDER WORKERS IS NOT FOR SISSIES!

The editors of this newsletter, personally, do not think of employees who are 40 years old as "older workers," but Congress does. The Age Discrimination in Employment Act (ADEA) classifies anyone 40 or above as an "older worker" who can not be discriminated against in employment on the basis of age. Congress was so concerned about the employment rights of the ancient ones that it also enacted the Older Workers' Benefits Protection Act ("OWBPA") to protect them from unknowingly giving up their right to sue the employer for age discrimination. Under the OWBPA, an older worker can sign a release of claims in exchange for severance pay, collect the money, and still sue the company for age discrimination, unless all of the OWBPA's requirements are satisfied. The courts are, similarly, unforgiving when enforcing the OWBPA, as one employer recently discovered.

Weyerhaeuser Company determined to lay off 31 employees. Although it had no legal obligation to give these employees a severance package, it did, on condition that the employees sign a written waiver of claims and agree not to

sue the Company as a result of the layoff. Employees signed the waiver, collected their severance package and then sued Weyerhaeuser for age discrimination, pointing out that 28 of the 31 employees terminated were 40 or older.

Weyerhaeuser countered with the waiver agreements, and the trial court dismissed the employees' law suit because the waiver said they released the company from claims of age discrimination. But the employees were tenacious and appealed to the 10<sup>th</sup> Circuit Court of Appeals. The 10<sup>th</sup> Circuit found that the waiver agreements were invalid because they did not strictly comply with all of the requirements for releases under the OWBPA. The case is now remanded to the District Court for trial.

What was wrong with the waivers? The 10<sup>th</sup> Circuit explained that an individual may not waive any right or claim under the ADEA unless the waiver is knowing and voluntary. A waiver is not knowing and voluntary unless at a minimum it satisfies the OWBPA's requirements as follows: (1) the release must be written in a manner calculated to be understood by the employee signing the release, or by the average individual eligible to participate;

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- (2) the release must specifically refer to claims arising under the ADEA;
- (3) the release must not purport to encompass claims that may arise after the date of execution;
- (4) the employer must provide consideration for the waiver or release of ADEA claims above and beyond that to which the employee would otherwise already be entitled;
- (5) the employee must be advised in writing to consult with an attorney prior to executing the agreement;
- (6) the employee must be given at least 45 days to consider signing if the incentive is offered to a group, or 21 days if offered to an individual;
- (7) the release must allow the employee to revoke the agreement up to 7 days after signing; and
- (8) if the release is offered in connection with a group termination program, the employer must provide information relating to the job titles and ages of those eligible for the program, and the corresponding information relating to employees in the same job titles who were not eligible or not selected for the program.

In addition to the above requirements, the OWBPA provides that when a group of employees is being terminated, written notice must be given identifying the group or unit considered for the termination program, any eligibility factors for such program, and any time limits applicable to such program.

Weyerhaeuser goofed by not correctly identifying the group or unit considered for termination. Its termination notice advised employees that all salaried employees at its mill were considered for layoff. In fact, the unit considered was only employees reporting to one person. Also, Weyerhaeuser did not advise the employees of the "eligibility factors" it used to determine which individuals in the group would be terminated. The eligibility factors were the

leadership, abilities, technical skills, and behavior of each employee and whether each employee's skills matched its business needs. Weyerhaeuser's failure to disclose this information rendered the waivers ineffective as a matter of law.

**Lesson:** No employer wants to give a group of employees severance pay in exchange for their release of claims only to find itself later defending an age discrimination law suit because the release was defective. Under the OWBPA, employees do not even have to refund the severance pay before suing. In drafting a release and waiver of claims for any employee 40 or older, carefully review the OWBPA's requirements and make sure each requirement is satisfied. *Kruchowski v. Weyerhaeuser Co.*, 423 F.3d 1139 (10<sup>th</sup> Cir (Okla) 2005); 29 U.S.C. §626.

## **THE FMLA IN REVIEW**

When Congress enacted the Family and Medical Leave Act (FMLA) back in 1993, it assured businesses that the FMLA would not be a financial burden for employers because the 12-week leave allowed under the Act for serious health conditions was unpaid. But, as businesses have learned in the past 13 years, there are a zillion costs associated with administering the FMLA in their workplaces, not the least of which is the cost of defending the law suits employees and their attorneys love filing for alleged violations of the FMLA. And the reported cases are increasing each year. Unfortunately, regardless whether the employer wins or loses an FMLA law suit, the cost of defending the claim can be HUGE.

Here is a sampling of recent FMLA claims employers have battled:

### MONITORING SICK LEAVE ABUSE

David Callison was employed by the City of Philadelphia. Initially, Callison was a reliable employee. But after a year he began to have serious attendance problems due to deep anxiety reactions caused by stress at home and at work.

Due to his attendance problems, the City placed Callison on its "Sick Abuse List." This designation required Callison to obtain medical certification for all sick days. It also meant that on days when Callison was absent for illness, the City required him to contact the Sick Leave Hotline when leaving his home and upon his return. The policy further provided that Callison was to "remain at home except for personal needs related to the reason for being on sick leave. While on sick leave an employee may be called or visited by a sick leave investigator...."

During Callison's next two FMLA-covered absences, a sick leave investigator telephoned Callison at his home to make sure he wasn't violating that policy. On both occasions, Callison was not home and he had not notified anyone at the City that he was going out. So, the City gave Callison two suspensions, which he served upon return from the FMLA leave. Then, Callison sued the City claiming the enforcement of its sick leave policy infringed on his FMLA rights. He asserted that "once an employee is on pre-approved FMLA leave, he should be left alone." The Court disagreed.

First, the Court determined that the City's requirement to call the "Sick Leave Hotline" when leaving home during regular work hours did not conflict with any substantive provision of the FMLA, and that the requirement did not compromise the FMLA's purpose because it neither prevented employees from taking FMLA

leave, nor did it discourage employees from taking such leaves. Instead, the Court reasoned, it ensured that employees did not abuse their FMLA leave.

Second, the Court found that, contrary to Callison's assertions, there is no right under the FMLA to be "left alone" while on FMLA leave. Nothing in the FMLA prevents employers from ensuring that employees who are on leave do not abuse their leave, "particularly those who enter leave while on the employer's Sick Leave Abuse list."

In sum, the Court determined that nothing in the FMLA prevented the City from enforcing its leave policies or permitted Callison to ignore the rules in the City's sick leave policies when he was on FMLA because the City's policies did not interfere with Callison's rights under the FMLA. *Callison v. City of Philadelphia*, 128 Fed.Appx. 897 (3<sup>rd</sup> Cir. 2005).

### A WOLF IN SHEEP'S CLOTHING

As the *Callison* Court explained, employers are permitted to consistently enforce their leave policies, unless that policy infringes on eligible employees' FMLA leave rights. This infringement is illustrated in the following case.

On June 22, 2003, Sandra Solovey learned that her father was ill. She immediately requested that her employer grant her FMLA leave for June 23 and June 26 so that she could care for her father's serious health condition. Her employer agreed. Because FMLA is an unpaid leave, Solovey also requested that her employer permit her to concurrently use her paid vacation leave on those two days. Her employer denied that request because its sick leave policy required employees

to provide two-weeks' advance notice before taking a paid vacation day. Solovey sued.

As the basis for her claim, Solovey claimed that the FMLA permitted her the ability to concurrently use accrued paid leave when taking FMLA leave (“[a]n eligible employee may elect, or an employer may require the employee, to substitute any of the accrued leave ... for any part of the twelve-week period”). Her employer countered that its two-week notice provision was not a “limitation,” but operated as a “regular requirement of the vacation provisions set forth in the collective bargaining agreement.”

The Court disagreed with the employer’s semantic argument in finding that, no matter how it was titled, the two-week notice requirement operated as a limitation on Solovey’s FMLA rights.

**Practical Tip.** These two cases (*Callison* and *Solovey*) emphasize a critical point: courts will support employers in the consistent enforcement of their work rules, as long as those work rules do not violate, or infringe on, eligible employees’ FMLA rights. But when the work rules do infringe on those rights, no matter how consistently the employer may enforce those rules, application of the rules can create liability under the FMLA. Accordingly, employers who are covered by the FMLA should review their policies and practices to ensure that they do not operate to infringe on employee’s rights under the FMLA.

#### **PUTTING CROWS OUT OF BUSINESS**

The FMLA covers private employers who employ 50 or more employees within 75-miles during 20 or more workweeks in either the current or preceding calendar year. But what the Act fails to define is how that 75-mile area is measured. Is

it as the crow flies? Is it using road surface miles? Is it using major roadways only?

The Department of Labor enacted a regulation defining the mileage as 75 “surface miles, using surface transportation over public streets, roads, highways, and waterways.” But in a recent case, *Bellum v. PCE*, the employee, Bellum, claimed that the DOL’s regulation should be ignored because by not defining how to measure the mileage in the Act, Congress “implied that it should be measured as the crow flies.”

The Court disagreed, hypothesizing:

Suppose that Company A had its headquarters along the south rim of the Grand Canyon and a branch office on the other side only 25 miles away as the crow flies. Suppose further, quite plausibly, that the shortest distance between the two by public roads is 120 miles. Now, imagine that Company B has its headquarters next to a straight-line interstate highway and a branch office 80 miles away also right along the interstate. Under [Bellum’s] reading, Company A would be bound by the FMLA, but Company B would not be. [And that] makes no sense.

Choosing to “make sense,” the Court ruled that the Department’s regulation was a permissible construction of the statute. Thus, employers should measure the miles in terms of surface road miles using public roads (if available) and not how the crow flies.

**Practical Tip:** Employers questioning their proximity to other work sites should throw away their maps and pull out their computers. This Court actually cited the employer's use of mapquest.com as persuasive evidence in determining how far it was between work sites. *Bellum v. PCE Constructors, Inc.*, 407 F.3d. 734 (5<sup>th</sup> Cir. 2005).

#### **WHAT IF, UPON RETURN, MACARTHUR QUICKLY APPLIED FOR FMLA LEAVE?**

To be eligible for FMLA leave, an employee must have been employed by his or her employer for at least 12 months, and have worked at least 1,250 hours during the previous 12-month period. While seemingly straight-forward requirements, an issue was recently raised as to whether an employee could "tack" two employment periods together to meet that year requirement.

In *Rucker v. Lee Holding Co.*, Rucker worked for Lee Holding for five years during the mid-90s before quitting. Years later, on June 5, 2004, Rucker returned to the company. He then submitted a request for FMLA leave on January 20, 2005, only 8 months after his return. The company rejected his request because, even though Rucker had worked 1,250 hours since returning, Rucker had yet to work for the company for a full year during the current employment period. Rucker argued that the company should have included his previous employment period when making that decision. Rucker cited the FMLA's regulations that state that "the 12 months an employee must have been employed by the employer need not be consecutive months." Was Rucker entitled to FMLA leave?

Despite the seemingly clear regulation, the Court's answer was "no." The Court determined that because the regulation "did not give any indication that the two periods of employment, separated by conceivably limitless amount of

time, [could] be grouped to make an otherwise ineligible employee eligible." Instead, in the Court's opinion, the regulation was intended to prevent brief interruptions in an employee's attendance from affecting an employee's eligibility, and ensure that non-consecutive months are adequate to establish eligibility for an employee who maintains an ongoing relationship with their employer. The Court concluded that it "could not imagine that [Congress] would draft a statute allowing an employee to leave an employer for years or decades, only to return and immediately become an FMLA eligible employee." Too bad the Court's decision does not establish an exact period of separation needed to break the employment relationship for purposes of the FMLA's 12-month requirement—that's left for another case. *2006 WL 598137 (March 2006)*.

**Practical Tip:** This case reinforces how stringently courts will apply the 1,250-hour/12-month requirements for FMLA eligibility. In addition to this case, which limited the 12-month requirement to the current employment period only, another court determined that an employee was not FMLA-eligible even though the employee had worked 1,249.6 hours in a year. Accordingly, before granting FMLA leave, employers should closely review both of these initial requirements to make sure that the employee satisfies them.

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#### **LEARN THE LATEST DEVELOPMENTS IN EMPLOYMENT LAW**

**WCHRA'S Spring Conference presents EMPLOYMENT LAW UPDATE 2006**, Wednesday, April 19, 2006, 8:00 am to 12:00 Noon, Two Rivers Convention Center, 159 Main Street, Grand Junction, CO 81501. The speakers are **Betty Bechtel and Michael Santo**, editors of The Employer's Advisory. There's still time to sign up! See [www.bechtelsanto.com](http://www.bechtelsanto.com) for details and sign-up form.

## Q & A

*Q. We want to make sure that employees we hire to work in the warehouse are physically fit to do this strenuous job. So we have candidates do 10 pull-ups, 50 sit-ups, a 220 yard run, and walk twenty feet carrying 100 pounds, to test physical fitness. Is there any problem with us using this test for all new candidates?*

A. Potentially. If candidates within a protected status, like women, older workers, or disabled workers, are excluded from employment by the test at a significantly higher rate than candidates not within the protected status, then the test has an “adverse impact” on protected status. Title VII, the ADEA, and the ADA prohibit adverse-impact discrimination, unless the employer can prove that the skills or qualifications measured by the test are job-related and consistent with business necessity. Be sure you can verify the test satisfies these requirements, or don’t use it to make employment decisions. *U.S. v. City of Erie, PA*, 2005 WL 3610687 (W.D.Pa.,2005)

*Q. When an employee gives us two-weeks’ notice that he or she is quitting, can we let the employee go immediately without having to pay two-weeks’ wages?*

A. Yes, unless the company has promised the employee through a written policy, verbal statement or established practice that it will not do this. Neither federal law nor Colorado state law requires an employer to retain an employee after the employee has given notice of quitting. Also, these laws do not require an employer to pay severance pay in lieu of retaining the

employee for the two weeks. But if the company has promised that it will give employees two-weeks’ notice before termination, or no termination without just cause, then terminating employment early because the employee has given notice of quitting will likely be a breach of express or implied promise. The company could be liable for the damages suffered by the employee as a result of that breach.

*Q. Hourly employees get 30 minutes off for lunch, which is unpaid time. We provide a lunch room and require that they remain in the building. They are not on-call during the lunch break, but occasionally an employee answers a customer’s phone call or gives a delivery person assistance. We don’t pay for these minor interruptions. Is that OK?*

A. Bona fide meal periods are not work time and do not need to be compensated. Ordinarily, 30 minutes or more is long enough for a bona fide meal period, and the employee can be required to remain on the premises. But DOL regulations state that an employee “must be completely relieved from duty for the purposes of eating regular meals.” Courts have ruled that job-related interruptions during lunch break do not render the entire break period compensable, if the period is used “predominantly for the employee’s benefit.” In plain English, minor, infrequent interruptions (like answering one phone inquiry) don’t count. But to avoid a courtroom dispute over pay for lunch breaks, the best practice is to not allow non-exempt employees to perform any work on an unpaid lunch break. No employer wants a jury to determine what “predominantly” means. 2005 WL 3110691; 29 CFR 785.19.