

# THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER

HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES

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## “I’M SICK AND I’M GOING HOME—AGAIN!”

It’s Spring; it’s Friday; it’s sunny and 70 degrees outside. Suzie tells you just before lunch, “I’m sick. I’m going home.” And she leaves. This is the tenth time in the past two months that Suzie has left early claiming a sudden illness—usually a migraine. This time, she didn’t mention migraines, but wore dark sunglasses in the office all morning, and frequently rested her head on her desk. She has used all of her vacation and sick leave and you are fed up with her lack of reliability. You want to fire Suzie. But first, can you count to 50?

If you count the number of employees on your payroll and they add up to 50 or more who work within a 75-mile area of Suzie’s work location, then your business is covered by the Family and Medical Leave Act (FMLA). Also, if Suzie has worked for the company a total of 12 months, and reported 1,250 work hours in the past 12 months, and has not used up her 12 weeks of FMLA leave this year, she is eligible for FMLA for absences due to a “serious health condition.” Terminating Suzie for this absence could violate the FMLA, even though her absences are

excessive, and unduly burdensome for the Company, and even though she did not ask for FMLA leave. As the following cases illustrate, employees do not need to say to their employer “I am requesting FMLA leave” in order for their absence to be protected by the FMLA. The only requirement is that the employee provide sufficient information to put the employer on reasonable notice that the leave is being requested for an FMLA-qualifying condition.

In *Burnett v. LFW, Inc.*, 472 F.3d 471 (7<sup>th</sup> Cir. 2006), a court held that Mr. Burnett’s comment that he was “sick and wanted to go home,” when considered in the context of his medical history was sufficient to put his employer on notice of his need for FMLA leave. Over a four-month period he: 1) informed his employer that he was suffering from a “weak bladder;” 2) made an increasing amount of medical visits; 3) had a prostate biopsy, which his employer was aware of; 4) repeatedly stated that he “felt sick” and hinted that his condition might be similar to that of his brother-in-law’s prostate cancer; and 5) suggested he might consider suicide if he ended up bedridden as a result of prostate cancer.

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Burnett was fired for the absence and sued the company under the FMLA. Despite Burnett's failure to specifically request FMLA leave, and despite the fact that even Mr. Burnett did not find out he was *actually* suffering from prostate cancer until *after* he was terminated, the court refused to dismiss his claim and held that a jury could find that his employer should have known he was suffering from a serious health condition or should have inquired further to find out. The court explained that, although an employee's bare assertion that he is "sick" is usually not enough to put an employer on notice of an FMLA-qualifying illness, the surrounding circumstances can provide enough support to create sufficient notice.

What about an employee who doesn't leave work, but takes short breaks away from his work station during the work day to eat because of a medical condition? Are the breaks protected FMLA leave? What notice must the employer receive?

Amazingly, intermittent FMLA leave can be taken in time blocks as short as one-minute, if medically necessary. For instance, take the case of Mr. Collins, a diabetic. In November, he provided his employer with a physician's note explaining that his blood sugar could get low because of the diabetes, and he would need a break to eat in order to keep from passing out. The employer responded that he was eligible for intermittent FMLA leave for this purpose. In January and March, Collins left his work station a couple minutes before his scheduled break to get something to eat. He was fired for this conduct, and sued for interference with his FMLA rights. He claimed he informed his supervisors on each occasion that he was taking his break early because of his diabetes. The supervisors denied that he said his early breaks were because of his diabetes. The company asked that the FMLA claim be dismissed because of

insufficient notice, and because the leave period was too short to qualify as FMLA. The court refused to dismiss Collins' FMLA claim, holding that a jury could reasonably conclude that the company knew Collins was suffering from a serious health condition, or that it should have inquired further whether the early breaks were due to a serious health condition. The court also held that a break during the day could qualify as intermittent FMLA leave, if medically necessary. *Collins v. United States Playing Card Co.*, 2006 WL 3231309 (S.D. Ohio),

What if the doctor's certification for FMLA leave doesn't clearly identify a serious health condition? Can you deny leave or do you have to give the employee a chance to have the doctor cure the deficiency? Let's look at the case of *Schmutte v. Resort Condominiums Int'l*, 463 F.Supp.2d 891 (S.D. Ind. 2006).

Schmutte was terminated for excessive absences after she passed out at work and was taken by ambulance to the hospital for observation, causing her to miss the rest of the work day. She had left work early on several other occasions in recent months because of panic attacks and, as a result, she did not have enough accrued sick leave to cover this absence. She had not asked for intermittent FMLA leave for these panic-attack absences, but did request it after her trip to the hospital.

Schmutte filed suit over her firing, alleging that her rights under the FMLA had been violated. The key issue was whether she had given the employer adequate notice of her need for intermittent FMLA. The employer was aware that Schmutte suffered from depression and anxiety because only a few months before, she had used two months' FMLA leave for these conditions. When she returned from her FMLA leave, she told

her supervisor that she was “not cured” and “needed additional treatment.” On the occasions when she left early following her FMLA leave, she told her supervisor that she was leaving due to job stress and anxiety.

The employer’s FMLA administrator denied Schmutte’s request for intermittent FMLA leave, concluding that she was out of work for less than three days, with no follow-up visit, and no treatment plan, and thus did not meet the criteria for a serious health condition. This conclusion was based on the boxes checked by Schmutte’s physician in completing the FMLA physician certification form. The physician failed to check that her condition was chronic and required intermittent leave. The employer did not advise Schmutte or her doctor of the deficiency in the certification or offer an opportunity to cure before firing her.

On these facts, the court refused to dismiss Schmutte’s case because it held that a jury could reasonably find that the employer’s prior knowledge of Schmutte’s condition imposed a duty to inquire further whether the absence was due to a chronic serious health condition covered by the FMLA, and to give the employee a chance to cure the physician’s certification.

**Back to Suzie:** These cases indicate that before you fire Suzie for leaving early on Friday, if she is otherwise eligible for FMLA, you should offer her an opportunity to explain the nature of her illness, request intermittent FMLA and provide a physician’s certification supporting the request. Because she has claimed migraines in the recent past and there were signs she was having a migraine again today, you may have sufficient notice that her absence is due to a serious health condition to create an obligation under the FMLA to inquire further.

## THE WEAKNESS OF PRE-EMPLOYMENT STRENGTH TESTS

If your company requires employees to pass a strength test as a condition of employment, and the pass rate is lower for women than men, the use of the test could violate Title VII’s prohibition against sex discrimination. Consider the case of *E.E.O.C. v. Dial Corp.*, 469 F.3d 735 (C.A.8 (Iowa), 2006).

Dial Corporation assigns entry level employees to the sausage packing area of its plant. The workers are required to carry approximately 35 pounds of sausage at a time and lift and load the sausage to heights between 30 and 60 inches above the floor. Because employees in the sausage packing area were getting hurt too often, in 1996, Dial implemented several measures to reduce the injury rate, including an ergonomic job rotation, institution of a team approach, lowering the height of machines, and conducting periodic safety audits. These measures worked and the injury rate dropped in 1998 and 1999.

In 2000, Dial added a strength test to evaluate potential employees, called the Work Tolerance Screen (WTS). For this test, job applicants carried a 35-pound bar between two frames, 30 and 60 inches off the floor, and lifted the bar onto these frames. The applicants were told to work at their “own pace” for seven minutes. An occupational therapist watched their process, documented how many lifts each applicant completed, and recorded her conclusions.

The percent of women who passed the test was 38%, compared to 97% for men. Passing the test was required. The percent of new hires that were women dropped from 46% to 15%.

Clearly, the test had an adverse impact on women candidates. When a pre-employment screening test adversely impacts a protected group (like women), the use of the test is unlawful, unless the employer can prove that it is a valid indicator of the skills necessary to perform the job.

The Equal Employment Opportunity Commission (EEOC) sued Dial on behalf of several rejected women, charging intentional sex discrimination as well as sex discrimination based on adverse impact. Dial defended that the test was a valid measure of necessary skills for safely performing the job, and the decrease in injuries warranted its continued use.

Dial lost the suit. Bad facts for Dial included that the injuries declined before the test began. It could not prove how much of the decline in injuries after the test started was due to the test and how much was due to other measures it had taken before starting the test. In two of the three years before Dial implemented the WTS, the women's injury rate had been lower than that of the male workers. There was evidence that the occupational nurse marked some women as failing despite their having completed the full seven minute test. Significantly, the EEOC's expert in industrial organization testified the test was more difficult than the sausage making job. The average applicant had to perform four times as many lifts as current employees and had no rest breaks. The applicants were testing in a competitive environment, so they tended to work as fast as possible during the test in order to outperform the competition. This rapid pace was not required of employees actually performing the job.

**Lesson:** Pre-employment strength tests should not require more of the applicant than is required of employees who successfully perform the job. Don't use the test if it eliminates a significantly

higher percentage of women than men, disabled workers, or older workers unless you can validate that the test is a business necessity and accurately predicts who can successfully perform the job. See 29 C.F.R. § 1607.5 for testing regulations.

## WHEN IS A BONUS SO MUCH MORE?

XYZ Company is in trouble. The company reported another month of declining profits. The Board of Directors is growing frustrated and the President is afraid to answer his telephone. So, in a last-ditch effort to sell more widgets, the President pitches an offer to an account he's long sought. But there's a catch: to close the deal the President promised that XYZ would deliver the widgets within one week, when it normally would take it two weeks to make that many widgets.

So, last Monday, the President held a meeting where he explained to the employees the predicament XYZ faced: produce the widgets in record time or the Company will close. As an incentive, the President promised the widget makers a \$500 bonus each if the employees completed the widget order on time.

Hearing this promise, the employees worked massive overtime hours and got the order completed. As promised, the Company paid everyone a \$500 bonus. But now, employees are claiming that they are owed more overtime because the bonus increased their overtime rate of pay for that week. Can this be? Sure can!

Under the Fair Labor Standards Act, an employee is entitled to receive 1 ½ times their regular hourly rate for all hours worked over 40 in a workweek. But an employee's regular rate is not simply the employee's hourly rate. Instead, the

FLSA's Regulations provide that employers compute the "regular rate" by dividing the total compensation received in a workweek (not including overtime premiums) by the total number of hours worked that workweek.

If a bonus is entirely discretionary (e.g., unpromised Christmas Bonus), then the amount can be excluded from an employee's regular pay rate. But bonuses that are announced to employees to induce them to work more steadily, rapidly or efficiently, or to remain with the firm, are regarded as part of the regular rate of pay. In those situations, the bonus must be apportioned back over the workweeks of the period during which it may be said to have been earned, resulting in adjustment of the regular rate and the payment of additional overtime in accordance with the adjusted regular rate of pay.

For example, in XYZ's situation from above, assume that the employees are all paid \$10 per hour and worked 70 hours during the workweek in question. Under those circumstances, the Regulations would require XYZ to pay each employee an additional \$107.10 ( $\$500 / 70 \text{ hours} = \$7.14$ ;  $\$7.14 \times .5 \times 30 \text{ hrs. overtime}$ ).

Other compensation paid to employees may also qualify as a nondiscretionary bonus. For example, in *Acton v. City of Columbia*, 2004 WL 2152297 (W.D.Mo., 2004), the Court decided whether lump-sum payments for unused sick time was a non-discretionary bonus that must be added to the regular rate of pay for purposes of computing overtime. The Court's answer was "yes." It based this decision on its determination that the buy-back was remuneration for services rendered. That is, one clear purpose in Columbia's sick-leave buy-back plan is to encourage regular attendance. And the buy-back program, effectively, permits the city to retroactively give more money to those

employees who have worked steadily because their services were more valuable than the services of an employee who regularly uses his sick leave time. Thus, the Court concluded that in essence, the payments are for work already done and, therefore, qualified as remuneration.

Another example of payments that may affect an employee's regular rate of pay include the promise of an annual bonus based on individual employee performance and individual department performance (DOL Opinion Letter, 1999 WL 33210906).

On the other hand, discretionary gifts from a company do not have to be included as part of an employee's regular rate. So, if the company makes no promise, but on April 2<sup>nd</sup>, the President wakes up in a good mood and passes out \$100 bills to everyone at the plant, the regular rate of pay and overtime premium is not affected. He can even call it a "bonus" and still not affect the overtime premium, because it was discretionary.

**Practical Tip:** Employers should review all bonuses provided to their employees to determine if the bonus is promised in advance as a carrot for employees to work harder, more efficiently, be reliable, or stay longer. In those situations, the employer may owe more overtime compensation for the period covered by the bonus.

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#### **UPDATE ON EMPLOYMENT LAW SEMINAR COMING SOON!**

Bechtel & Santo, LLP, will present a morning Employment Law Update Seminar on April 25, 2007, in Grand Junction, Colorado, sponsored by the Western Colorado Human Resources Association (E-mail [marney@wchra.org](mailto:marney@wchra.org) for sign-up information).

## Q. & A.

*Q. Can we hire a legal alien who does not have a social security number?*

A. Yes. Assuming you comply with the I-9 requirements, the individual can begin work without the Social Security Number (SSN), but must apply for a SSN using Form SS-5. If the SSN is not received by the time the W-2 is issued, indicate "Applied For" in the space for the SSN. In some cases, work performed by non-citizens is not covered by Social Security and no SSN is needed. According to Martin Gerry, Deputy Commissioner for Disability and Income Security Programs, temporary agricultural workers admitted with an H-2A visa are not covered by Social Security and do not pay FICA taxes. But individuals admitted with an H2B visa to perform skilled or non-skilled non-agricultural employment, which is temporary or seasonal, are covered by Social Security.

*Q. Our drivers are given a per diem allowance of \$120 per day when they are out of town overnight to cover expenses of meals and lodging. We do not withhold taxes from the per diem payment because it is "expense reimbursement." Is this OK?*

A. IRS Revenue Ruling 2006-56 states that in order for a per diem allowance to be excluded from income for purposes of tax withholdings, the payment must be made according to an "accountable plan" that 1) has a business connection; 2) requires substantiation of the expense; and 3) requires the employee to return amounts

in excess of the substantiated expenses. You must establish a policy that requires employees to provide proof of expenses and requires them to return any excess payments within a reasonable period. Otherwise the entire per diem payment may be considered wages by the IRS and subject to withholdings and employment taxes. Consult with your tax accountant or Office of Associate Chief Counsel, Ligeia M. Donis, 202-622-0047. 26 CFR 1.62 -2(k).

*Q. An employee was absent from work for two weeks for a "surgical procedure." The employee has never provided us with an FMLA medical certification of the need for leave, even though we have asked for this. Can we deny FMLA leave for this reason?*

A. The FMLA provides that an employer may require a certification issued by a health care provider to support an employee's request for FMLA leave due to a serious health condition. The employer must provide written notice to the employee of its certification requirement, and the anticipated consequences of failure to provide adequate certification. If you have complied with these notice requirements, and the employee fails to provide the certification within a minimum of 15 days, the absence is not protected by the FMLA. *Lipscomb v. Electronic Data Systems Corp.*, 462 F.Supp.2d 581 (D.Del.,2006).

*Q. Do we have to pay overtime rates for work performed on Sundays and Holidays?*

A. Neither Colorado nor Federal law requires this, unless the hours worked on those days are overtime hours for that workweek, and the employee is non-exempt.