

HR Legal Update: What's Next for Employers

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Constructive Resignation

- Constructive Discharge
 - Whether employer intentionally made working conditions so intolerable that a reasonable person compelled to resign
 - Actions deemed intolerable are demotion; reduction in salary; reduction in job responsibilities; demeaning reassignment; harassment; early retirement offer or demotion
 - If so, court will find a discharge instead of a voluntary resignation

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Constructive Resignation

- New concept recognized this year:
 - Just as an employer cannot benefit from forcing employee to quit, employee cannot benefit from forcing employer to fire her
 - Question is whether employee's behavior is so extreme and inconsistent with her continuing in the job that it forces employer to terminate

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Constructive Resignation

- Effect of new concept provides protection to an employer dealing with an employee whose actions are so inconsistent with that of a positive employee but who won't quit
- Many plaintiff attorneys instruct employees to not quit, wait to be fired!

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Breast-Feeding

- Three moms were sitting on a bench inside three different Wal-Marts in Ohio, were breast-feeding and were each told to either leave the store or stop breast-feeding
- They sued Wal-Mart and alleged they were discriminated on the basis of their sex in violation of Ohio's public accommodations law

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Breast-Feeding

- Federal Court held, in a case of first impression in Ohio, that Wal-Mart's ban on breast feeding was lawful:
 - The class of individuals who don't breast feed consist of both men and women, thereby showing that the action taken is not "on the basis of sex"
 - Need to show discrimination against all women, not just some

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Breast-Feeding

- Would the Wal-Mart holding have been different if the plaintiffs were employees?
 - The few courts who have analyzed such issues have held that neither Title VII nor the PDA cover breast-feeding
 - However, no Ohio court has examined the issue under Ohio's pregnancy discrimination statute

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Breast-Feeding

- Effect of Holding:
 - Probable amendment to Ohio's public accommodation law to cover discrimination against women with pregnancy-related conditions
 - Another suit brought in Ohio courts where plaintiffs expect a more favorable review

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Limiting Liability on Job Applications


READ CAREFULLY:

I agree that any claim or lawsuit relating to my service with Chrysler Corporation or any of its subsidiaries must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. I waive any statute of limitations to the contrary.

If you are hired, this becomes part of your employment record

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Limiting Liability on Job Applications

- Employee who signed the application sued Chrysler for sexual harassment more than 6 months after the date she claims to have been harassed but within the state's statute of limitation
- Suit dismissed because employee signed application with warnings on it and it became part of her record

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Limiting Liability on Job Applications

- May want to consider adopting language identical to Chrysler's application
- Also should consider adopting arbitration agreements, either in application or separately

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Terminations Following Leaves

- Sam employed by Dana Corp. for 20 years. A new manager assigned to Sam in late '02 and in 1/03 received his yearly evaluation
 - 37 "D's" and 28 "C's", based on prior supervisor input
 - Customer complaints and work backlog
 - Sam acknowledged poor performance

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Terminations Following Leaves

- Between 1/03 and 8/03, additional complaints from co-workers and counseling sessions on back-logging of reports
- 8/03 to 11/03 FMLA leave
- Employee who took over duties uncovered numerous problems and new ones as well

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Terminations Following Leaves

- On the day Sam returned from FMLA leave, he was fired
- Filed suit claiming his termination was in retaliation for taking FMLA leave

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Terminations Following Leaves

- To prove prima facie case, Sam must show:
 - Requested and took FMLA leave
 - Suffered adverse action
 - Causal connection between leave and adverse action
- He met his burden of proof

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Terminations Following Leaves

- However, Dana put forth legitimate, non-discriminatory reason for termination, which Sam couldn't attack
 - Dana knew there were problems before the leave, but it did not know the full extent of the problems until after the leave began

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Terminations Following Leaves

"Fact that the leave permitted the employer to discover the problems cannot logically be a bar to an employer's ability to fire the deficient employee"

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Terminations Following Leaves

- Nevertheless, be very careful if and when terminating a returning employee from any type of leave
 - Carefully review entire personnel file
 - Talk to all involved
 - Consider counseling employee instead of immediate termination

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Intermittent FMLA Leaves

- Sue has been employed as a customer service representative for the past 3 years and is an average employee
- On February 2, 2003, Sue brought in FMLA paperwork authorizing her to go on intermittent leave due to her severe fatigue syndrome

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Intermittent FMLA Leaves

- In questioning Sue as to what type of leave she would be needing, Sue said her doctor told her that it would depend on how she feels day to day
- ABC Co. decided to work with Sue and see what would happen
- Sue began taking off Mondays and Fridays but was otherwise performing

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Intermittent FMLA Leaves

- After 18 months of such intermittent leaves, Sue's co-workers began to complain about the long weekends she was taking at their detriment
- After looking into the situation, it did appear that Sue's work performance was also declining, but her evaluations do not reflect any such issues

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Intermittent FMLA Leaves

- What can ABC Co. do?
 - The FMLA regs permit employers to obtain 2d opinions when doubting the medical certification:
 - Co. doc calls employee's doc
 - Co. sends employee to a 2d doc, at co.'s expense and if differ, sends to a 3d doc agreed to by the employee
 - If 2/3 agree, co. terms FMLA leave

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Intermittent FMLA Leaves

- What can ABC Co. do?
 - Or, temporarily transfer employee to a different position that better accommodates the intermittent absences
 - Must be at the same rate of pay and similar duties
 - For the duration of the leave and then reinstate back into regular position after leave terms

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Intermittent FMLA Leaves

- What can't ABC Co. do?
 - Cannot discipline and/or terminate Sue for taking 18+ months of intermittent leave
 - Cannot limit her intermittent leave so long as she doesn't take more than her allotted leave time
 - Cannot make her go home and take the leave full time

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- Employee assaulted
- After 21 months of leave, no return to work in sight
- Her employer terminated – no leave left
- Supreme Court – can't terminate while on temporary total

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Coolidge

Unanswered questions

- Is it lawful to take other action short of discharge while on TT?
- Can employer terminate while employee is on workers' comp benefits other than TT?

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Coolidge

Jefferson v. Mills Creek

- Employee off on TT. While employee is off, employer finds misconduct
- Employer demotes
- Court – no violation

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Coolidge

Nickelson-Mills v. Family Medicine of Start Co.

- Employee off work – BWC denies TT
- Family Medicine issued two warnings while employee is on light duty

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Coolidge

- Employee terminated while off but while TT was denied
- Court holds that termination is not violation because employee not on TT at time of discharge

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Veterans Rights

Veterans Benefits Improvement Act

- Requires posting of USERRA notice
- Extends COBRA-like health insurance continuation to 24 months.

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Veterans Rights

USERRA

- Up to 5 years leave for military service
- Reinstatement at equivalent pay and status
- Just cause discharge for 6 months to one year after return
- Health care continuation



Veterans Rights

USERRA

New regs allow:

- Time off before military service to get affairs in order
- Provides employer procedure to contact military about adjusting leave



Veterans Rights

New Regs

- Define "equivalent job" upon reinstatement to include:
 - Opportunities for advancement
 - General working conditions
 - Job location
 - Shift
 - Rank, responsibility



Veterans Rights

New Regs

- Define "prompt re-employment" as within two weeks for most leaves
- Require pay to reflect raises veterans would have received including merit raises



Sarbanes-Oxley

- Passed in 2002 to prohibit publicly traded companies and their agents from discharging, demoting, suspending, threatening, harassing or otherwise discriminating against employees who report fraud.
- 2005 decision says Sarbanes-Oxley applies to subcontractors of publicly traded companies.



Sarbanes-Oxley

Protected activities include:

- Reports to SEC
- Internal whistle blowing (even when breaking chain of command)
- Filing or threatening to file complaints with agencies
- Testifying or participating in investigation.



Fact Act

- Doesn't the government have anything better to do?
 - June 1, 2005 – new regulations on destruction of “consumer information” including:
 - Background check reports
 - DMV records
 - Credit reports

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Fact Act

Destruction of documents

- Employer must “take reasonable measures” to protect against unauthorized access in connection with disposal
 - Implement policies and procedures that require “burning, pulverizing or shredding” so that information cannot be read

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Fact Act (cont'd)

- Require destruction or erasure of electronic forms of consumer reports; or
- Monitor compliance by entering into contract with record disposal company

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Sexual Harassment

- Supreme Court says you have a defense to harassment by a supervisor when:
 - No employment action has been taken
 - Company took reasonable care to prevent and correct harassment and
 - Employee failed to take advantage of corrective opportunities

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Sexual Harassment

- Sixth Circuit has defined “reasonable care to prevent harassment” as a policy that requires:
 - Supervisors to report harassment
 - Permits both formal and informal complaints
 - Provides opportunity to bypass harassing supervisor, and
 - Provides training for policy

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Sexual Harassment

Even if you have this type of approved policy, you must implement it effectively when you learn of harassment.

- UPS – supervisors heard harassing comments but did not report to HR – UPS loses

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Sexual Harassment

- How to investigate properly – *Collette v. Stein Mart* -
 - Collette goes to Christmas party at Assistant Manager's house
 - Assistant Manager made crude sexual overtures toward Collette

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Sexual Harassment

- Two days after party, Collette's attorney called Stein Mart to corporate headquarters to report
- Stein Mart immediately:
 - Began investigating by talking to other managers
 - Suspended Assistant Manager pending outcome of investigation
 - District Manager came to town and took statements of everyone at party

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Sexual Harassment

How to investigate properly

- Reached conclusion of investigation within six days
- Terminated Assistant Manager
- Informed harassed employee of results
- Offered reinstatement to employee

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Sexual Harassment

Court found Company had no liability

- Response was "epitome of how an employer should respond."

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