

**Spring 2008
Employment Law Update**
Paul Smith
Chelsea Petersen
Puget Sound Locations

New Federal Statutes and Regulations

- FMLA Amendments
- Proposed New FMLA Regulations
- Genetic Information Nondiscrimination Act

FMLA Amendments

- Signed into law January 28, 2008
- Two new types
 - Service Member Family Leave
 - Military Exigency Family Leave

Service Member Family Leave

- Available to employee who is spouse, son, daughter, parent, or next of kin of someone ill or injured in the line of duty in the military
- Up to 26 weeks of leave
- For any period when the family member in the military is undergoing medical treatment, recuperation or therapy

Military Exigency Leave

- Limited to 12 weeks
- Available to employee with qualifying exigency arising out of spouse, son, daughter or parent on active duty in the military
- Statute does not define "qualifying exigency", and DOL has not yet issued regulations
- Presumably intended to cover non-medical situations of an urgent nature that may arise when employee has family in the military

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New Leaves Similar to Existing FMLA Leaves

- Employed for 12 months and worked 1250 hours
- Located at a worksite with at least 50 employees within a 75-mile radius
- Can be taken intermittently or on a reduced-schedule basis

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Proposed New FMLA Regulations

- First revision since rules were new 13 years ago
- Proposed in January, plan is to issue final rules by end of year

Fairly Subtle Changes

- At least two doctor visits per year for chronic condition
- Follow generally applicable reporting standards when using intermittent leave
- Direct contact from employer to health care provider to get clarifications
- Can require fitness for duty exam after intermittent leave

Genetic Information Nondiscrimination Act (GINA)

- Passed House last year, passed Senate on April 24, 2008
- President has indicated he will sign
- Bars employers from making hiring or other employment decisions based on genetic information
- Bars insurers from increasing premiums or denying coverage based on genetic info

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New Washington Developments

- Family Military Leave
- Domestic Violence Sexual Assault Leave

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Family Military Leave

- Only for an employee who has a spouse in the military
- 15 days per deployment
- Before deployment or during R&R
- Give notice within 5 business days of deployment order
- Must work at least 20 hours per week

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Domestic Violence/Sexual Assault Leave

- For employee to seek law enforcement or legal assistance, health care treatment, counseling, safety planning, relocating, related to domestic violence, sexual assault, or stalking
- Also to help family member (child, spouse, parent, parent-in-law, grandparent, dating relationship) with the above

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Different from Most Other Mandated Leaves

- No specific limit on amount of leave
- Notice no later than end of first day of leave
- Verification by police report, court documents, employee's own written statement
- Block of time or intermittently

Immigration Developments

- New Form I-9
- Federal No-Match Rules

New I-9 Form

- Must be used for all new hires after December 26, 2007
- Five document removed from List A of acceptable documents
- Employee does not have to provide SSN on form unless employer is using E-Verify

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Federal No-Match Regulations

- Final rules issued August 2007
- No-match letters not new, but rules would have required employers to resolve discrepancies or face liability
- Federal court enjoined implementation
- DHS has appealed to Ninth Circuit

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Supplemental Rules

- Comment period from March 21 to April 25
- More explanation than substantive change
- No timetable for next steps
- Broad opposition from immigration, labor, and business groups
- 2% of workforce would face termination?

Case Law Developments

Case Law Developments

- Thresholds for statutory applicability
- Minimal evidence sufficient
- Pretext analysis

Fichman v. Media Center

- ADA: 15 or more employees
- ADEA: 20 or more employees
- The Media Center: fewer than 15 paid employees
- What about Board of Directors and volunteer producers?

Six Factors to Determine If An Individual Is an "Employee"

- Hire/fire or set regulations of work
- Supervision
- Reporting relationship
- Influence in the organization
- Intent for individual to be an employee
- Share in profits/losses/liabilities

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- "A recurring television comedy sketch later adapted into a motion picture, in which a high school student offered weekly sardonic observations on life from the basement of his parent's home in Aurora Illinois."

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The Takeaway

- Small employers: know the statutory thresholds and assess your actual number of "employees"
- But, don't assume you are immune from suit even if you do not meet the threshold

Wahl v. Dash Point Family Dental Clinic

- "Bad facts"
- Employer argues on appeal:
 - WLAD applies to employers with eight or more employees
 - Dentist office had fewer than eight employees
 - Clinic owner free to harass employees!
- Court holds common law claim actionable; upheld

The Takeaway

- Sexual harassment is illegal regardless of number of employees
- Key language for all employers:
 - When the person you are to report a sexual harassment claim to is the harasser and there is no higher person, there is no requirement to complain.

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Davis v. Team Electric Co.

- Only female electrician assigned to construction site
- Complains that her male coworkers isolated her and made sexist remarks
- Laid off in R.I.F.
- Files discrimination and retaliation claims
- Trial court finds for employer

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Ninth Circuit Reverses; Finds Sufficient Evidence to Put Case Before the Jury

- Anecdotal evidence enough
- Incidents fell short of "physical abuse or aggressive sexual advances," but they "repeatedly occurred" and
- "We believe that a reasonable woman could have a reaction similar to Davis's"

The Takeaway

- Take special care when traditional barriers are broken in the workplace
- Davis was the first woman to enter a predominantly male environment—courts are often sympathetic in these situations

Beck v. United Food & Comm'l Workers Union

- Member of union at Fry's Food Store
- CBA policy against use of "profane, abusive or threatening language"
- Final warning – no grievance
- Termination – grievance dropped

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The Claims

- Two claims against union:
 - Breach of duty of fair representation
 - Disparate treatment based on gender
- Beck's evidence of disparate treatment is enough:
 - Union aggressively pursued claims of two males, but not Beck and another woman
 - \$200,000 award upheld

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The Takeaway

- Opinion does not suggest that Beck offered any evidence of discriminatory motive, just different experiences of two men and one other woman.
- Carefully consider any contemplated discipline to be sure you are treating comparable situations similarly.

Hegwine v. Longview Fibre Co.

- Applicant responds to job advertisement
- Interviewer mentions 25 lbs lifting requirement
- Conditional offer made contingent on physical exam
- Applicant reveals she is pregnant – told to get clearance from personal physician

Lifting Restrictions

- **1st form:** cleared to lift 20 - 30 lbs.
 - Reports for work; told requirement is 40 lbs.; sent home
- **2nd form:** cleared for 40 lbs.
- **3rd form:** cleared for 20 lbs. freq./40 infreq.
- Essential job functions finally analyzed:
 - Lift boxes up to 60 lbs, carry 15-30 feet and down 3-4 steps to load to back of truck, drive truck, unload boxes to hand truck and pull to another location.
- Conditional job offer rescinded – applicant told her "availability" precluded her from performing the job.

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Failure to Accommodate or Gender Discrimination?

- Trial court analyzed as a failure to accommodate issue
 - Judge rules in favor of employer
- Court of Appeals analyzed as gender discrimination
 - Reversed
 - Applicant never asked for accommodation, no indication she was disabled

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Supreme Court Agrees

- Failure to hire pregnant woman is sex discrimination
 - *unless* refusal is based upon a business necessity or the employer proves a valid bona fide occupational qualification (BFOQ).
- BFOQ standard
 - Excluding pregnant women is “essential to ... the purposes of” the position, or
 - “All or substantially all” pregnant women “would be unable to efficiently perform the duties” of the position, such that hiring them would undermine operations.

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The Takeaway

- *Pre*-employment inquiry about pregnancy is discrimination, unless the inquiry is based upon a valid BFOQ
- Failure to hire an applicant based on their pregnancy is gender discrimination
- An applicant who *does* allege a pregnancy-related disability could claim entitlement to a reasonable accommodation
- Employers *do* have the duty to accommodate pregnancy-related medical conditions

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Surrell v. California Water Service Co.

- Procedural Issue:
 - Title VII requires claimants to timely filing of charge with EEOC and obtain right-to-sue notice
 - Work sharing arrangements with state agencies – counts as if filed with EEOC
 - California agency issued right-to-sue notice, but plaintiff never followed up with EEOC
 - Ninth Circuit holds that claims can go forward once a claimant is *entitled* to receive right-to-sue letter

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Employer Prevails With Strong Legitimate, Nondiscriminatory Reasons

- On the merits:
 - Promotion claim: evidence that promoted employee had superior skills, experience, and education
 - Cross-training claim: other employee already performed part of position, easy to train for five-day need
 - Retaliation claim: drug testing performed only after she appeared impaired at work
 - Hostile work environment: no evidence comments about performance motivated by race; not severe or pervasive

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Takeaway

- Lawyers should assess whether plaintiff was "entitled" to right-to-sue letter
- Employers can successfully defeat claims where they have solid, documented explanations for their decisions

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Labor Law Developments

- Employees versus independent contractor
- Employee use of email

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Employees v. Independent Contractors

- Friendly leases cabs to drivers on a weekly basis, drivers keep all fares
- Policy manual and standard operating procedures for cabs, annual training
- Dress code and personal hygiene requirement
- Road manager checks for compliance
- Respond to dispatchers, accept credit cards

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Why Did It Matter?

- Drivers unhappy with Friendly, want to be represented by union
- Employees, but not independent contractors, have collective bargaining rights under federal labor law

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The Result?

- Drivers were deemed employees under federal labor law
- No opportunity to operate and develop their business independently
- Friendly controlled means and manner of drivers' performance, and disciplined drivers for failure to comply

Email Policies

- Employer had email policy barring use to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or "other non-job-related solicitations"
- Did it violate right of all employees (whether or not in union) to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection?

Was the Email Policy Okay?

- No statutory right to use company email system engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection"
- Based on prior rulings that employees have no statutory right to use employer equipment such as bulletin boards, telephones, televisions
- Rejected the notion that email should be viewed similarly to a face-to-face solicitation

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What Kind of Distinctions Are Allowed?

- Cannot specifically discriminate against unions or mutual aid and protection
- But, barring emails soliciting support for all outside groups is okay, even if it includes unions,
- Thus, employer's policy here was okay

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Allegedly Improper Emails

- 1 email clarifying facts of a recent union rally, sent from company computer during break time
- 2 emails soliciting employee support for upcoming union activities, sent from union computer to employees at their company email addresses

Implications

- All could change after presidential election, but:
- No-solicitation email policies are okay, unless done with antiunion motivation
- Charitable v. non-charitable
- Personal v. commercial
- Business v. nonbusiness
- Consistent enforcement is key

Alternative Dispute Resolution

- Was the arbitration agreement with employee enforceable?
- Agreement forced employee to arbitrate rather than file suit in court
- Dispute over commission, terminated employee thought he would get full share of commission on house sale, but got none

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Features of Arbitration Agreement

- 3-person panel comprised of agents and employees from other offices
- Panel selected by employer
- Employee could strike one proposed member for cause
- Employee could strike one proposed member without a stated reason

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The Result?

- Court throws out arbitration agreement
- Strong public policy favoring arbitration, but
- Panel selection violates spirit of neutrality
- All panel members selected by one side
- Employee's strikes did not save the process, since panel members all still agents or employees of one side