



## EMPLOYMENT ISSUES

### The Family and Medical Leave Act: Emerging Trends

The Family and Medical Leave Act of 1993, 29 USC 2601 et seq (“FMLA” or the “Act”) provides up to twelve (12) weeks of unpaid leave to employees for (1) the birth or adoption of a child, (2) the care of an immediate family member with a serious health condition, or (3) the care of the employee’s own serious health condition. The Act applies to any private sector employer who engages in commerce (or in any industry effecting commerce), and who has fifty (50) or more employees each working day during at least twenty (20) calendar weeks in the current or preceding calendar year. An eligible employee must have worked at least 1,250 hours during the twelve (12) months immediately preceding the start of the FMLA leave. Between 1993 and 1999, approximately 24 million people took FMLA leave.<sup>1</sup>

Given its widespread use, the FMLA has spawned many legal issues which continue to be developed and refined by court decisions.

#### Notice to Employers

What sort of notice must be given by the employee to let their employer know that FMLA leave is necessary? FMLA regulations from the U.S. Department of Labor (“DOL”) require “at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave.” 29 CFR 825.302(c) (1995). The Seventh Circuit has found that employees can give “constructive notice” of the need for FMLA leave. Byrne v. Avon Products, 328 F.3d 379 (7<sup>th</sup> Cir. 2003), held that where a model employee exhibited bizarre behavior (including paranoia and sleeping on the job), the employee had given “constructive notice” of his need for FMLA leave. The Byrne court held that an employee could provide constructive notice by *either*: (1) being unable to give verbal or written notice of his or her need for FMLA leave; *or* (2) demonstrating a “sudden change of behavior,” indicating a mental problem. . Id. at 382.

Subsequent Seventh Circuit cases have continued to apply Byrne, at least where employees were subsequently found to have psychiatric conditions. In Stevenson v. Hye Elec. Co., 505 F.3d 720 (7<sup>th</sup> Cir. 2007), an employee had an extreme reaction to a stray dog getting into her work place. After swearing at her supervisors and calling the police, she informed a supervisor that she was ill and

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### The Illinois Whistleblower Act: Basics and Recent Developments

As the Illinois Whistleblower Act (740 ILCS 174/1 *et seq.*, as amended January 1, 2008) (the “Act”) celebrates its fourth anniversary, Illinois courts continue to refine their interpretation of its scope.

#### Overview

The Act applies to all private-sector employers with at least one Illinois employee, and generally prohibits those employers from:

- making, adopting, or enforcing rules, regulations, or policies preventing employees from disclosing information to government or law enforcement agencies if the employee has “reasonable cause to believe that the information discloses a violation of a State or federal law, rule, or regulation;” (740 ILCS 174/10);
- retaliating against employees who disclose information in judicial, administrative, legislative, or other investigatory proceedings where the employee has “reasonable cause to believe that the information discloses a violation of a State or federal law, rule, or regulation;” (740 ILCS 174/15);<sup>1</sup> and
- retaliating against employees for refusing to participate in activities that would result in a violation of a State or federal law, rule, or regulation. (740 ILCS 174/20.)

Violations of the Act constitute a Class A criminal misdemeanor and, in the case of Sections 15 and 20, present civil liability as well. Employees suing under Sections 15 or 20 may seek reinstatement; back pay, with interest; and “compensation for any damages sustained as a result of the violation, including litigation costs, expert witness fees, and reasonable attorney’s fees.” (740 ILCS 174/30.) Notably, the Act does *not* provide for punitive damages.

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### Insurance Coverage for Wage and Hour Class Actions

The Fair Labor Standards Act of 1938 (“FLSA”) and individual state and hour laws require employers to maintain accurate records of all hours worked by

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had to leave work. Two days later, she was diagnosed with anxiety and stress, and was prescribed medication. The Seventh Circuit found that the district court had inappropriately required the employee show that she was *both* unable to communicate her need for FMLA leave and exhibited “clear abnormalities” in behavior. Instead, Byrne only required the presence of one of those factors. The Seventh Circuit reversed the summary judgment grant, holding that a fact-finder could find that the employee’s behavior alone was “so unusual” that it provided her employer with constructive notice of a need for FMLA leave. Id. at 727.

On the other hand, where the employee did not otherwise appear sick, and did not display such bizarre behavior, the Seventh Circuit and its district courts have refused to find constructive notice was given. *See, e.g., Phillips v. JP Morgan Chase*, 2007 WL 1266303 (N.D.Ill. Apr. 30, 2007) (employee only said she was “ill”, failed to explain symptoms or provide a doctor’s note, and did not display any “dramatic change” in her behavior).

Byrne faced criticism in Conrad v. Eaton, 303 F.Supp.2d 987 (N.D. Iowa 2004). Conrad suggested that Byrne’s constructive notice ruling was inconsistent with the DOL’s regulations requiring notice be given only “in person, by telephone, telegraph, facsimile (‘fax’) machine or other electronic means.” Id., at 998, quoting 29 C.F.R. § 825.303(b). However, Conrad did not rule on the alleged discrepancy between Byrne and DOL regulations, because that employee had provided a letter from his psychiatrist. No other court has directly addressed this issue. Byrne remains good law, giving employees in the Seventh Circuit significant protections.

### Retaliation

Employees with FMLA claims now commonly charge retaliation. While the FMLA itself does not use the term “retaliation”, subsequent DOL regulations make it illegal to “discriminate” against anyone who has taken FMLA leave, or to use it as a factor in employment actions such as hiring, promotion and discipline decisions.<sup>2</sup> The Seventh Circuit has held that the same test to show retaliation under Title VIII civil rights law also applies to retaliation under the FMLA. First, a plaintiff must show that: (1) he or she engaged in FMLA-protected conduct; (2) he or she suffered an adverse employment action; and (3) the adverse action was causally connected to the protected activity. King v. Preferred Technical Group, 166 F.3d 887 (7<sup>th</sup> Cir. 1999). Next, the burden shifts to the employer to provide a legitimate, non-discriminatory reason for the adverse employment action. If the employer meets this burden, the employee may show that the given reason was mere pretext for retaliation. Other courts have followed the Seventh Circuit’s lead. (*See, e.g., Potenza v. City of New York*, 365 F.3d 165(2nd Cir. 2004)).

Some cases, including King, have suggested that the above “burden-shifting” requirements need not apply where the employee only alleges “interference” with protected FMLA rights, rather than actual retaliation, because the employer’s *intent* is not at issue. One case taking an expansive view of “interference” allegations is Bachelder v. American Airlines, 259 F.3d 1112 (9<sup>th</sup> Cir. 2001). In Bachelder, the court held that where an employer had used the taking of FMLA leave as a “negative factor” in deciding to terminate the employee, FMLA regulations against “interference” rather than against “retaliation” applied. Therefore, the employee *only* had to prove by a preponderance of the evidence that her employer had used her FMLA leave as a negative factor in deciding to terminate her. This standard is beneficial to employees, because an employer’s legitimate “non-discriminatory” is not part of the inquiry. Other circuits have yet to decide whether to adopt Bachelder’s approach.

### Waiver Issues

Another emerging issue is whether FMLA rights can be waived. 29 C.F.R. § 825.220(d) states: “Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA.” This language is less than clear in the context of *former* employees. In Faris v. Williams WPC-I, Inc., 332 F.3d 316 (5<sup>th</sup> Cir. 2003), the Fifth Circuit held that the DOL’s waiver provision only applied to *current* employees in the context of exercising the FMLA’s *substantive* rights (*e.g.*, the right to leave and reinstatement), and not to retaliation and damage claims. Reaching the opposite conclusion was Taylor v. Progress Energy, Inc., 493 F.3d 454 (4<sup>th</sup> Cir. 2007). The Taylor court rejected the DOL’s *own* argument in its *Amicus* brief that § 220(d) applies only to substantive FMLA rights, finding that the term “rights” encompassed substantive rights, proscriptive rights (*e.g.*, prohibitions against retaliation and discrimination) *and* remedial rights (*e.g.*, legal claims under the FMLA). No other circuits have yet addressed this issue. Given the growing use of waivers in the employment context, this issue should only increase in importance.

The FMLA is here to stay. More employees are seeking leave. FMLA issues should continue to be at the forefront of employment law in the future. Furthermore, legislative expansion is likely, as Congress is currently considering statutes which will offer *paid* leave<sup>3</sup> and expanded unpaid leave for injured service members.<sup>4</sup> Legislative actions and a growing body of case law will help employers and employees to establish predictable leave practices and resolve disputes. ❖

1. “Balancing the Needs of Families and Employers, Family and Medical Leave Surveys, 2000 Update,” at <http://www.dol.gov/esa/whd/fmla/fmla/cover-statement.pdf>, at 5.

2. “Liability Risks Do Not End When FMLA Leave is Over: Retaliation under Family and Medical Leave Act”, Jackson Lewis Web Site, July 19, 2004, at <http://www.jacksonlewis.com/legalupdates/article.cfm?aid=609>.

3. “Dodd, Stevens Introduce Landmark Bill to provide Paid Leave for Workers”, Senator Christopher Dodd’s web Senate web site, at

## Whistleblower Act ... *cont'd from Page 1*

### Construction with Other Rights

Although the Act itself is silent on how it is to be construed with other sources of whistleblower protection – whether statutory or common law – two recent Illinois decisions provide some guidance on the issue.<sup>2</sup>

The first is Robinson v. Alter Barge Line, Inc., 482 F. Supp.2d 1032 (S.D. Ill. 2007), which examined the Act's interaction with overlapping federal legislation. The plaintiff in Robinson, a deckhand on the defendant's river towboats, alleged that his employment had been terminated in retaliation for his complaints about the use of illicit substances by his co-workers during work hours. Defendant moved for summary judgment, arguing that the anti-discrimination provisions of federal maritime law (26 U.S.C. § 2114) preempted plaintiff's claims under both the Act and common-law. Citing the differing reporting standards and remedies available, and noting a strong desire for uniformity of the law as applied to the subject population of plaintiffs, the court held that the federal statute impliedly preempted all of plaintiff's claims. 482 F. Supp.2d at 1039, 1043-44.

Perhaps more significant is the Act's interaction with common law whistleblower rights, including the tort of retaliatory discharge. In Callahan v. Edgewater Care & Rehabilitation Center, Inc., 374 Ill. App.3d 630 (Ill. Ct. App. 2007), the plaintiff alleged that she had been fired in retaliation for reporting to her supervisors her belief that a resident of the defendant home was being kept in the facility against her will, in violation of the Illinois Nursing Home Care Act. Edgewater moved to dismiss, arguing that plaintiff's sole common law retaliatory discharge claim was preempted by the Act. The trial court agreed, and dismissed the suit. On appeal, the First District reversed, noting that, "The fact that individuals discharged in retaliation for reporting illegal activities to their superiors have no right of action under the Whistleblower Act does not compel the conclusion that they have no right of action at all." 374 Ill. App.3d at 635.

Callahan is of obvious and heightened significance to whistleblower plaintiffs in Illinois – the decision permits individuals whose whistle blowing is protected under both the Act and the common law to seek a wide range of damages for any retaliation by the employer, most significantly attorneys fees (under the Act) and punitive damages (under the common law). Relying on Callahan, RGR recently obtained an order reinstating an executive client's common law retaliatory discharge claim against her former employer, in addition to her surviving claim under the Act.

## Open Issues of Significance

Although Robinson and Callahan shed some light on the scope of the Act as currently understood, there are many issues yet to be resolved, including:

- *Personal liability for management.* Effective January 1, 2008, the definition of "employer" for purposes of the Act was greatly expanded. See 740 ILCS 174/5, as amended by P.A. 95-128. Defined employers now include "any person acting within the scope of his or her authority express or implied on behalf of those [other listed] entities in dealing with its employees." This language creates increased exposure both for management, in the form of suits against them individually, and their insurers, in the form of increased defense cost exposure through conflicts counsel or otherwise.
- *Impact on confidentiality agreements and policies.* While few employers are likely to have a formal "rule, regulation, or policy" prohibiting employees from speaking to government regulators or law enforcement, many use confidentiality agreements and policies to protect their employees from revealing confidential information and/or trade secrets. Such provisions can conceivably be construed as a violation of Section 10 of the Act, to the extent a whistleblower claims she was contractually constrained from earlier reporting suspicions of illicit conduct.
- *"Reasonable cause."* Under Sections 10 and 15 of the Act, the employee is protected only if he or she has reasonable cause for believing the information disclosed reveals unlawful conduct. While there are no reported decisions on what constitutes "reasonable cause" in this context, Illinois courts have found "reasonable cause" established in the criminal context "when the totality of the facts and circumstances existing at the time are sufficient to warrant the belief by a person of reasonable conscience that an offense has been, is being, or will be committed." People v. Grano, 286 Ill. App. 3d 278, 292 (Ill. Ct. App. 1996). Thus, even under this relaxed standard, employees will continue to bear at least a modicum of responsibility for the reasonableness of their belief of illicit activity.

We await further judicial analysis of these and other issues under the Act. ❖

1. This language, effective January 1, 2008, clarifies and expands upon the Act's original language protecting individuals who disclose information to "a government or law enforcement agency." See P.A. 95-128.

2. Effective January 1, 2008, the Act is amended to include an express home-rule provision prohibiting the enactment of additional whistleblower protections by units of local government. See P.A. 95-128 (adding 740 ILCS 174/40).

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employees and protect workers from employers' violations denying overtime pay or breaks. After the Department of Labor modernized the FLSA in 2004 by regulating exemptions, the media attention that accompanied it and the ensuing multimillion dollar settlements and judgments from wage and hour class actions dramatically increased the number of federal wage and hour lawsuits filed. Employers are left with little protection from these ever multiplying wage and hour lawsuits, however, as employment-practices liability insurance policies generally exclude such claims.

### Overview

Common violations alleged in wage and hour claims are: forcing employees to work overtime or "off-the-clock" without compensation; automatically deducting wages for absences from exempt employees' salaries; and misclassifying employees as exempt, thereby failing to pay them for overtime.

The relevant provisions in the FLSA that are applicable to the majority of current wage and hour claims state that:

- "no employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C.A. 207(a)(1) and
- "The provisions of section 206 ... and section 207 of this title shall not apply with respect to any employee employed in a bona fide executive, administrative, or professional capacity ..." 29 U.S. C.A. 213(a)(1).

### Wage and Hour Class Actions

Wal-Mart is currently experiencing the snowball effect of the recent influx of wage and hour claims and is facing numerous lawsuits across the country, most of which are class actions. Many of these lawsuits stem from the practice of rewarding managers for keeping labor costs down, thereby maximizing profits. The allegations cited in some of the lawsuits include forcing employees to work off-the-clock by requiring workers to skip lunch and rest breaks and manipulating time records.<sup>1</sup>

Recently, in the largest wage and hour class action ever certified in Washington state, 75,000 current or former Wal-Mart employees were notified by mail of the lawsuit. The lead plaintiff alleges that she often worked two to five extra hours per week to complete her tasks without receiving compensation. When she once recorded a few minutes over forty hours for the week, the store manager

told her that she would be terminated if she did so again. Wal-Mart expects their store managers to reduce payroll, yet the employees are pressured to finish their work as sales go up, resulting in an increase of off-the-clock work.<sup>2</sup>

### Insurance Coverage

Unfortunately for Wal-Mart and other companies facing similar lawsuits, wage and hour violations are generally excluded from employment practices liability ("EPL") insurance policies or in EPL provisions of directors and officers policies. Although EPL policies provide broad coverage and policy language is typically construed in favor of the insured, courts have upheld the exclusions for public policy reasons.

In a recent Seventh Circuit decision, Farmers Automobile Insurance Association ("Farmers") bought EPL coverage from St. Paul Mercury Insurance Co. ("St. Paul") and attempted to obtain coverage for a class action brought against Farmers by claims adjusters seeking overtime pay pursuant to the Illinois Minimum Wage Law. St. Paul denied coverage based on an exclusion in the EPL policy for any actual or alleged violation of the FLSA or other similar provision of any federal, state, or local statutory or common law. Policy interpretation turned on the meaning of the word "similar."

The Seventh Circuit upheld the district judge's ruling that Illinois' statutory overtime pay provision is similar to the FLSA because the purpose of the exclusion, to avoid unjust enrichment, is equally applicable to both statutes. Farmers Auto Ins. Assoc. v. St. Paul Mercury Ins. Co., 482 F.3d 976, 978 (7<sup>th</sup> Cir. 2007) "Insurance against a violation of an overtime law, whether federal or state, would enable the employer to refuse to pay overtime and then invoke coverage so that the cost of the overtime would come to rest on to the insurance company." Id. at 978-9.

To minimize their exposure to liability for wage and hour violations, employers should take preventive measures by correctly identifying employees' exempt status, accurately recording employees' hours, and preventing "off-the-clock" work. ❖

1. "Wal-Mart's Wage and Hour Violations: Saving Money on the Backs of its Employees," at [http://walmartwatch.com/issues/labor\\_relations](http://walmartwatch.com/issues/labor_relations) (listing over 80 ongoing wage and hour cases filed against Wal-Mart as of September 10, 2007).

2. "75,000 Plaintiffs Notified of Wal-Mart Lawsuit," at [http://seattlepi.nwsource.com/business/341852\\_walmart01.html](http://seattlepi.nwsource.com/business/341852_walmart01.html) (November 30, 2007).



Reardon Golinkin & Reed wishes all a healthy and prosperous new year.