Neel, Hooper & Banes, P.C.

Counsel Leaders Trust

VOL. XXVII, No. 1 **SUMMER UPDATE** **JULY 2008**

I. FMLA

Effective Immediately!

FMLA Covers Care For Members Of Armed Forces. Amendments to the Family and Medical Leave Act of 1993 (FMLA) became effective on January 28, 2008. Section 585 amends the FMLA to permit a "spouse, son, daughter, parent, or next of kin" to take up to 26 workweeks of leave to care for a "member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness." There are four important things to note about this amendment: 1) it only applies to military families; 2) it expands the list of people to be included as family members; 3) it uses a different definition of "serious medical condition" than what has normally been used under the FMLA; and 4) it allows the leave to be up to 26 workweeks in certain situations.

And Coming Soon ... Another pending change would permit an employee to take FMLA leave for "any qualifying exigency (as the Secretary [of Labor] shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation." This provision is *not* effective until the Secretary of Labor issues final regulations defining "any qualifying exigency." We'll let you know when this change becomes effective. But companies are encouraged to implement this now.

And Another Thing ... Many states have now passed legislation providing their residents with unpaid family military leave. Texas is not among those states, but if your company does business in states like California, Illinois, Indiana, Maine, Minnesota, Nebraska and New York you need to be aware of those regulations. Hawaii and Wisconsin have such legislation currently pending.

Absence May Not Make The Heart Grow Fonder. Under the Department of Labor regulations, an employer must provide individualized notice to an employee if the employer intends to count an absence as FMLA leave. You may remember that back in 2002, the US Supreme Court ruled in the *Ragsdale* case that if an employer failed to give notice that leave would be counted as part of FMLA, but the employee still got the time off with job protection, the employee had not suffered any damage—no harm, no foul.

However, a recent case out of Louisiana adds a different twist. An employer did not give proper notice and it did result in the employee being "damaged." In that case, an employee had taken off many weeks due to a serious illness, but the employer did not notify her that the time would be counted towards her 12-week FMLA entitlement. The employee then scheduled surgery for her serious health condition, believing she still had 12 weeks under the FMLA. When she did not return to work, she was terminated. The Fifth Circuit affirmed the lower court's ruling that the employee was prejudiced by the employer's failure to give her notice that her first absence would count towards her 12 weeks of FMLA leave. The Court reasoned that if the employee had known she had exhausted all FMLA leave, she could have been able to postpone her surgery to another FMLA period.

The employer had to pay back pay and front pay. The lesson here is that it's better to be safe than sorry. Best practice? Always give an employee notice when leave is being counted towards the 12 weeks of FMLA entitlement.

What's The Score On Whistleblowers?
Employers: 3
Whistleblowers: 0

In three separate cases that were decided recently whistle-blowers struck out every time. Keep in mind the Whistleblower Act only covers public employers.

In the first case, the Texas Supreme Court had to interpret the phrase "adverse personnel action."

The Whistleblower Act defines a personnel action as an action affecting an employee's compensation, promotion, demotion, transfer, work assignment or performance evaluation. But the Act does not define "adverse." The court held that it would be the same standard as the US Supreme Court adopted. A plaintiff must show that a reasonable employee would have found the challenged action materially adverse and it would have dissuaded a reasonable worker from "blowing the whistle." Here the court held the action was not adverse when the sheriff's department took away the employee's responsibility of arranging security for private events. There was no evidence of loss of earnings or job opportunities.

The second case looked at whether an employer's knowledge of and negative attitude towards an employee's whistleblowing activities can raise a material issue of fact for purposes of summary judgment. In this case, there was some evidence that the employer knew about some of the employee's protected conduct and the employee's performance evaluations dropped significantly thereafter. But the Fort Worth court found this insufficient to avoid summary judgment.

The third case looked at whether the plaintiff could show that the adverse personnel action taken against him was due to his criminal assault charge against another employee. The evidence showed that the plaintiff was aware that adverse personnel action was pending against him *before* he filed his assault charge.

In whistleblower cases, the law tries to strike a balance between the Act's purpose which is to encourage legitimate whistleblowing by protecting the whistleblowers from employer retaliation and the need for government employers to have protection from baseless suits.

III. SEXUAL HARASSMENT

Two's Company. Often in a harassment case, the plaintiff-employee will sue not just the company, but also an individual, often a manager or supervisor. A Fifth Circuit case reminds us that an employer's affirmative defense against a hostile environment sexual harassment claim does not necessarily protect the individual accused of harassment from liability.

In this case, the plaintiff sued both the individual offender and the employer and succeeded in proving severe and pervasive sexual harassment for purposes of her hostile environment claim. The employer prevailed because it could show that it took steps to prevent and remedy harassment and the plaintiff unreasonably failed to make use of protective procedures. (See, it pays to follow our advice and have clear policies and prompt investigations!) The claims against the employer were dismissed. The lower court also dismissed the claims against the individual. But the Fifth Circuit said not so fast. The individual defendant was clearly not entitled to ride the company's coattails for his harassment of the plaintiff. You need to be aware of this potential problem and if faced with such a lawsuit, it may be best for the individual to have separate counsel.

IV. NON-COMPETE

A Non-Compete Agreement By Any Other Name Is Still ... Crafting a truly enforceable non-competition agreement in Texas has long been something of a thorny issue. A Houston accounting firm was recently reminded that a rose by any other name is still a rose. Specifically, the firm discovered that a non-compete pretending to be a non-solicitation agreement won't be enforced by the courts if it does not comply with The Covenants Not to Compete Act. The firm had garden-variety employment contracts which contained clauses prohibiting ex-employees from soliciting the firm's clients for 24 months following departure from the firm. The court found the agreement was unenforceable because it was too

broad. It contained no geographical restrictions and was not limited to the clients that had actually been served by the employee.

While the Texas Supreme Court attempted in 2006 to clarify the consideration issue and ruled that the employer does not have to give consideration at the exact same moment as the employee signs the agreement, there are still many traps for the unwary. A Houston appeals court reminded employers that a non-compete agreement disguised as a non-solicitation agreement will still be analyzed as a non-compete agreement and must jump through all the hoops Texas law requires in order to be enforceable. If you want to protect your company's interests from unfair competition by ex-employees and come out smelling like a rose, give us a call to review those agreements.

V. IDENTITY THEFT

How Secure Are You? The better question is: how secure is the personal information you keep on your employees? Identity theft is becoming the fastest growing crime in America and states, including Texas, have become more aggressive than the federal government in mandating protections.

One of the biggest concerns is the use and misuse of social security numbers (SSNs). Often SSNs are used to identify and track employees for a variety of reasons, including benefit plan enrollment, running background checks and federal and state tax reporting. The best practice dictates that employers simply limit the use of SSNs to the extent possible. We are now advising our clients to eliminate the SSN from the basic job applications.

Besides SSNs, businesses need to take a more proactive approach to safe-guarding all kinds of personal information. Many states, including Texas, have laws which require that a business has reasonable procedures in place to protect and safeguard sensitive personal information maintained by the business from any unlawful use or disclosure …and the business shall use proper methods to destroy records containing sensitive personal information. In the event of a breach of the security system the business must inform all those whose sensitive personal information was or may be acquired by an unauthorized person.

As a small business owner, you may think you don't have to worry about protected information…but you would be wrong! Your employees' names, social security numbers, driver's license numbers and credit cards numbers are all examples of protected personal information. Failure to follow the requirements for protecting such information can lead to lawsuits by the individuals and action from the Texas Attorney General, who can recover civil penalties from $2,000 to $50,000. In 2007 and 2008 a number of Texas companies were sued by the state because of failure to comply with laws requiring proper disposal of records.

You must be proactive in developing a strategy for protecting information from unauthorized access. And the sooner you get started the safer you will be!

VI. ADA

ADA and Cyberspace. Most employers are aware that if they provide goods and/or services to the public, the facility needs to be accessible to individuals with disabilities. Likewise, most employers are aware that under certain circumstances they may need to provide reasonable accommodations to an employee with disabilities in order for that employee to continue to perform the primary functions of his or her job. But did you know there are aspects of the ADA that now extend beyond your company's physical space and into your cyberspace?

In recent years lawsuits have been brought against Target and Southwest Airlines, among others, because of their websites. The decisions emphasized that the applicability of the ADA to internet websites depends on the nature of the website and the website's connection to another entity that is governed by one of the provisions of the ADA. Surely that does not apply to you, right? WRONG! Read on to see how this could impact you and your business.

Title I of the ADA prohibits disability discrimination in employment, including all aspects of the employment relationship. This includes an employer's recruitment and assessment of prospective and current employees. For example, if you use an internet website to recruit employees

or to seek online applications, it is risky to assume it does not need to be accessible to individuals with disabilities. Additionally, if you administer computer based employment tests to evaluate candidates or current employees for hiring or promotion, you should be aware of accommodations that may be needed for individuals with impairments. Or perhaps you have decided to "go paperless" and loaded your employee handbook and policies on the computer. Will individuals with disabilities be able to access those policies? And don't think the impairments are only of a visual nature. Other impairments to consider include mobility impairments which could prevent individuals from keying in the answers or learning impairments, such as dyslexia or ADHD, which could prevent the individual from comprehending the material on a computer screen. The EEOC's Interpretive Guidance has listed types of adjustments an employer may make in the administration of employment tests.

In all honesty, we must tell you that the exact application of the ADA to the internet and internet websites is still an open question. But there is no question that under various situations the ADA does apply to cyberspace ... and it could apply to your company. The internet and technology are constantly changing ... the only constant is that it will continue to change ... you need to keep up or you will be lost in space!

Texting Headaches Won't Leave You LOL! We have always advised clients that employees should have no expectation of privacy when using company-owned computers, especially with email. And we still believe that to be the best policy. However, we are SRY to say a recent case out of California has a different opinion. This time the issue is whether an employee should have a reasonable expectation of privacy for text messages sent on city-owned pagers. The court unanimously said YES.

In this case, the employees were police officers who had exceeded the department's 25,000 character limit for texting which resulted in the department paying overage charges. The chief ordered a copy of the transcripts to ensure the pagers were being used purely for work purposes and sure enough many of the messages were personal and several were sexually explicit ... YRU surprised? But that didn't stop the officers from suing for violations of their constitutional right to be free of unreasonable searches.

The court found the provider of the service had violated federal law by turning over contents of communications stored on the service and went on to say in this instance the employees had a reasonable expectation that their messages stored on the network were private. But the court did allow that the expectation of privacy depended on several factors. Here, the informal policy had been that emails could be monitored, but text messages sent over the city-owned pagers would not be monitored. Bad idea!

Yes, this is a California decision and the employer was a governmental entity, but it still serves as a warning to the rest of us. We've said it B4, well-written and consistently applied policies are important and can be your BFF. Talk (including texting) is not cheap!

VII. NLRB

NLRB Rules Employers Can Limit E-mail Use. Most employers agree that e-mail use in the workplace can be both good news and bad news. At its best, e-mails provide quick and easy communications. But employers have always had a need to limit non-job related e-mail use to prevent wasted time and system overload. Additionally, employers who fail to monitor e-mail use may find themselves inadvertently being accused of discriminatory behavior in the form of inappropriate jokes or cartoons circulating on the system. Just ask a well-known investment company how much money such lax enforcement cost them several years ago!

The current case came about because a publishing company, which had a policy of prohibiting e-mails for non-job related solicitations, gave two disciplinary write-ups to an employee for sending union related e-mails over the company's system. While the company did allow a certain amount of personal messages, including baby announcements, party invitations and the occasional offer of sports tickets, there was no evidence that the employees used e-mail to solicit support for or participation in outside causes or organizations. The National Labor Relations Board (NLRB) made a strong statement that

employers definitely can prohibit a union, or employees seeking to solicit or organize for a union, from using company e-mail systems to communicate so long *as they do so in a nondiscriminatory manner*. The NLRB held that employees have no right under the Act to conduct union business on their employer's e-mail system. But there is a word of caution here too: if the employer had allowed employees to post notices of other kinds of organizational meetings, but prohibited only those that dealt with union meetings, the employer would have been guilty of discriminatory enforcement. It's critical for your company to have policies on e-mail use and to enforce those policies in a nondiscriminatory way. "To err is human–and to blame it on the computer is even more so!"

VIII. TEXAS WORKFORCE COMMISSION

Texas Supremes Rule No Second Bite At The Apple. The Texas Supreme Court recently held that when a claimant pursues a wage claim to final adjudication before the Texas Workforce Commission (TWC), the claimant cannot then decide to file a lawsuit for the same damages in court just because the claimant does not like the outcome from the TWC.

In this case an employee claimed he was due nearly $300,000 in unpaid wages, bonuses and other benefits (that's no small potatoes!) and was fired in violation of his employment agreement. The TWC ruled he had not filed his claim within the 180- day limit. But despite the untimely claim, the TWC went on to decide that the company did not owe the former employee any money. The ex-employee did not appeal the decision or seek a judicial review. About five months later he woke up and smelled the coffee and filed a claim for breach of contract against his old employer in state court. The case made its way up through the courts where the Texas Supremes decided they would not upset the apple cart and held that once a claimant pursues a wage claim to a final decision before the TWC, the claimant is barred from switching to state court. Employees must decide early on whether they want to pursue their claims in front of the TWC or have their day in court.

IX. GOVERNMENT CONTRACTS

Just a Friendly Heads Up! E-Verify Is Coming Soon To A Federal Contractor Near You ... Or It May Be You! In early June President Bush signed an executive order amending an existing order which required all federal contractors to use "an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility" of all persons assigned by the contractor to perform work within the US on a federal contract. E-Verify has been designated as the official system all federal contractors must use once these regulations go into effect.

Requiring federal contractors to use E-Verify is part of the administration's worksite enforcement plan for improving border security. There are still several unanswered questions that need to be clarified and public comments on the new regulations will be accepted for 60 days. Our best guess is that most likely the new regulations will not take effect until 2009.

This is good news for employers because once you have a final ruling from the TWC on a wage claim, you will not need to worry about the same claim coming back to bite you through a state court lawsuit.

Important things to note are:

- E-Verify is not immediately required for federal contractors;
- The present E-Verify program will be substantially enlarged;
- Currently, E-Verify cannot be used to re-verify an existing employee's ability to work;
- Once the new regulations go into effect, E-Verify will still be used for all new hires, but will also be used to re-verify certain existing employees.

Start planning now how you will implement these new regulations. Call us if you need help.

Nobody knows for sure exactly what the final regulations will look like, but you have been warned!

To add to the confusion, if you do business in other states be aware of their state laws. For example, Arizona now requires all employers to use E-Verify while Illinois forbids the use of that system.

Be Careful What You Wish For: New Protest Jurisdiction For Task And Delivery Order Contracts. Since the enactment of the Federal Acquisition Streamlining Act (FASA) in 1996, protests against the award of task or delivery orders issued under multiple award, indefinite-delivery, indefinite-quantity (ID/IQ) contracts have been prohibited. *See* Federal Acquisition Regulation 16.505. Generally, the only exceptions to the prohibition are protests alleging that a task or delivery order improperly increased the scope, period or maximum value of the underlying contract. All this changed, however, on January 28, 2008, when President Bush signed into law the National Defense Authorization Act for Fiscal year 2008 (the 2008 NDAA).

The 2008 NDAA revised the procedures applicable to task and delivery order contracts. Specifically, Section 843 of the 2008 NDAA, entitled "Enhanced Competition Requirements for Task and Delivery Order Contracts," imposes new competition requirements for such contracts and includes a provision authorizing the filing of protests at the Government Accountability Office (GAO) for a period of three years based on any theory "in connection with the issuance or proposed issuance ... of an order valued in excess of $10,000,000." These provisions will certainly have a significant impact on current federal acquisition procedures and GAO bid protest practice.

Please contact us if you wish to discuss how this provision may impact either your existing ID/IQ contracts or your chances for obtaining one.

X. FIRM NEWS

A Howdy And Welcome To Gina G. Palmer, Attorney, And Fran Watson, Law Clerk!

Gina comes to us with a wealth of labor and employment law experience ... over 20 years! She has represented management in all arenas, including collective bargaining, arbitration, union campaigns and litigation and has both in-house and law firm experience. Gina is Board Certified in Labor & Employment Law and ready, willing and able to help you with any labor and employment problems.

Fran is a third-year law student at Thurgood Marshall School of Law where she is in the top 10% of her class and the executive editor of the law review. She has garnered many awards and has participated in a variety of activities, including volunteering as a tutor and moot court coordinator. We're happy to put her research and writing talents to work!

Union Organizational Activity Since Our Last Newsletter. Nine petitions for certification have been filed by unions. Five petitions for decertification have been filed by management. Eight elections have been held, none of which have been won by management.

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Neel, Hooper & Banes, P.C. **
1700 West Loop South, Suite 1400
Houston, Texas 77027
713/629-1800
713/629-1812 (Facsimile)
www.neelhooper.com (Website)

James M. Neel*	jneel@neelhooper.com
Samuel E. Hooper*	shooper@neelhooper.com
Bryant S. Banes*	bbanes@neelhooper.com
Linda H. Evans*	levans@neelhooper.com
Sean D. Forbes	sforbes@neelhooper.com
Gina G. Palmer*	gpalmer@neelhooper.com
Paul T. Gregory	pgregory@neelhooper.com
Marion Gerhadt	mgerhardt@neelhooper.com

* Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization

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