

MANAGEMENT UPDATE

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APRIL 2008

U.S. Supreme Court Update

The Supreme Court has issued several employment related decisions already this year.

- Judicial Review of Arbitration Decisions Under FAA is Limited:** In *Hall Street Associates, L.L.C. v. Mattel, Inc.* (March 25, 2008), the Court reaffirmed the limited grounds for judicial review of an arbitrator's decision under the Federal Arbitration Act (FAA). Sections 9-11 of the FAA provide for expedited judicial review to confirm, vacate, or modify arbitration awards. The Court held that parties to an arbitration agreement cannot contractually expand the statutory grounds for modifying or vacating an arbitration award. Although *Hall Street* is not an employment case, the Court's decision is relevant to employers because its reaffirmation of the limited grounds for judicial review of an arbitration award applies to awards issued by arbitrators in employment-related matters.
- "Me Too" Evidence of Discrimination May Be Admissible at Trial:** In *Sprint/United Management Co. v. Mendelsohn* (February 26, 2008), the Supreme Court held that testimony by non-parties to a lawsuit claiming they were subject to discrimination by individuals other than those accused in the lawsuit is neither *per se* admissible nor *per se* inadmissible. According to the Court, the relevance and prejudice of this evidence must be determined in the context of the facts and arguments in a particular case.
- EEOC Intake Questionnaire May be a Charge of Discrimination:** On February 27, 2008 the Supreme Court held by a 7-2 vote in *Federal Express Corp. v. Holowecki* that a former employee who filed an intake questionnaire supported by a detailed affidavit had filed a charge that entitled her to file an ADEA suit. The Supreme Court decided that a document filed with the EEOC that requests action to protect the employee's rights or to settle a dispute with the employer constitutes a discrimination charge under the ADEA. The Court also noted, however, that employers and their counsel must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.

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Massachusetts Law Mandates Treble Damages for Wage Hour Violations

A new law in Massachusetts makes treble damages mandatory for any violation of the state's wage and hour laws, even if the violation was inadvertent. This includes the state's wage payment and overtime and minimum wage laws. The law is a reaction to a 2005 decision of the Massachusetts Supreme Judicial Court, which held that treble damages are punitive in nature and should be awarded only in situations involving "willful misconduct" by the employer. Massachusetts is the only state whose law provides for mandatory treble damages for wage and hour violations.

The law is effective on July 13, 2008. However, language in the statute states that it is "intended to clarify the existing law and to reiterate the original intention of the general court that triple damages are mandatory." Based on this language, plaintiffs' attorneys may argue that the law is retroactive and applies to wage and hour claims that arise prior to July 13, 2008. It is not clear whether such an argument will be successful, but employers in Massachusetts should be aware of this risk and take action to ensure that they are complying with all applicable wage and hour laws.

Florida Governor Signs "Guns at Work" Law

Florida Governor Charlie Crist has signed the "bring your guns to work" bill, which makes it illegal for public and private employers to have policies prohibiting firearms on their private property. Specifically, the law permits employees who have concealed weapons permits to keep firearms locked in their vehicles on company property. Additionally, the law permits customers or other "invitees" of a business to have firearms locked in their vehicles in the business' parking lot, regardless of whether they have a concealed weapons permit.

Under the law, which takes effect July 1, 2008, employers may not:

- Prohibit employees, customers, or invitees from keeping a firearm locked in their vehicle on company property;
- Ask an employee, customer, or invitee about the presence of a firearm in the person's vehicle on company property;
- Search a vehicle on company property to ascertain the presence of a firearm in the vehicle (the law provides that a search of a vehicle to ascertain the presence of a firearm may only be conducted by on-duty law enforcement personnel, based upon due process and must comply with constitutional protections);
- Take any action against an employee, customer or invitee based on statements concerning the presence of a firearm in a vehicle on company property;
- Condition employment on whether an individual holds a concealed weapons permit;
- Condition employment on an agreement that prohibits the employee from keeping a firearm locked in a vehicle on company property;
- Prohibit employees, customers or invitees from entering the company parking lot if the person's vehicle contains a firearm that is out of sight in the vehicle.

Additionally, the law prohibits employers from terminating or otherwise discriminating against an employee or expelling a customer or invitee "for exercising his or her constitutional right to keep and bear arms or for exercising the right of self-defense as long as a firearm is never exhibited on company property for any reason other than lawful defensive purposes."

Exceptions: The law does not apply to:

- Schools;
- Correctional institutions;
- Nuclear power plants;

New Jersey Legislature Approves Paid Family Leave Law

The New Jersey legislature has approved the “Paid Family Leave Law,” which, if signed by the governor, would make New Jersey the third state in the country to provide paid family leave benefits to employees. New Jersey Governor Corzine has indicated his support for the bill, but had not signed it as of the date of publication of *Management Update*. If signed, the law will be effective July 1, 2009.

The Paid Family Leave Law will amend New Jersey’s temporary disability benefits law to provide eligible employees with up to six weeks of paid leave to care for a newborn or newly adopted child or a family member with a serious health condition. The new law will apply to all employers covered by the New Jersey unemployment compensation law. Employees are covered by the law if they have worked at least 20 weeks in covered New Jersey employment or earned at least 1,000 times the applicable minimum wage in such employment during the prior year (currently \$7,150 per year).

Eligible employees will be able to collect up to two-thirds of their weekly salary for up to six weeks during any twelve-month period (capped at \$524 per week). The benefit is subject to a one-week waiting period. The law permits employers to require employees to take up to two weeks of paid sick leave, vacation time, or other leave at full pay before the employee is eligible for disability benefits for family temporary disability leave.

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The Paid Family Leave law does not grant employees a right to reinstatement following the leave. Note, however, that employers who are also covered by the New Jersey Family Leave Act or the federal Family Medical Leave Act generally are required to reinstate employees returning from covered leave; thus, employers should ensure they are in compliance with all applicable laws when making a decision on reinstatement.

Employers will be required to post a notice of the benefits available under the law and will be required to provide employees a written copy of the notification.

The leave will be funded through an employee payroll tax. Although the law will not take effect until July 1, 2009, employees will begin paying the tax on January 1, 2009.

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- **Plan Participants May Sue for Fiduciary Breach:** In *LaRue v. DeWolff, Boberg & Associates, Inc.* (February 20, 2008), the Court held that individual participants can sue for fiduciary breaches related to their 401(k) plans. The Court held that while ERISA §502(a)(2) does not allow a remedy for individual injuries apart from plan injuries, it does permit individuals to recover for harm to their plan assets due to a breach of fiduciary duty. The Court distinguished this case, which involves a defined contribution plan, from a 1985 decision in which it held that a participant in a defined benefit plan could not bring a claim under §502(a)(2). The Court found that with today's plans, which are often defined contribution plans, "fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive."
- **Court Holds that FAA Overrides Conflicting State Law Jurisdictional Provision:** In *Preston v. Ferrer* (February 20, 2008), the Court held that the FAA overrides state laws that would lodge primary jurisdiction in another forum beside arbitration, regardless of whether that forum is judicial or administrative. The Court stated that the national policy favoring arbitration forecloses "state legislative attempts to undercut the enforceability of arbitration agreements." Additionally, the Court confirmed that parties do not forego statutory rights by submission of claims to an arbitrator; instead they have agreed to the forum in which those rights are to be considered.

Guns at work - Continued from pg. 2

- Property upon which substantial activities involving national defense, aerospace, or homeland security are conducted;
- Property upon which the primary business conducted is the manufacture, use, storage, or transportation of combustible or explosive materials regulated under state or federal law, or importing, manufacturing, or dealing in explosive materials;
- A motor vehicle owned, leased, or rented by a public or private employer or the landlord of a public or private employer;
- Property upon which possession of a firearm or other legal product by a customer, employee, or invitee is prohibited pursuant to any federal law, contract with a federal government entity, or general law of Florida.

Enforcement: An individual "aggrieved under this act" may bring a civil action for violation of rights protected by the act. If this action is successful, the individual may recover "all reasonable personal costs and losses suffered" as a result of the violation of rights under the act. The law also permits the prevailing party in a civil action under the law to recover court costs and attorney fees.

Additionally, the Attorney General is charged with enforcement of the law. If there is reasonable cause to believe that an individual's rights under the act have been violated, the Attorney General may bring a civil or administrative action for damages, injunctive relief and civil penalties, and such other relief as may be appropriate.

Immunity: The law states that it does not create a duty of care on behalf of an employer with regard to the prohibitions of the act. Additionally, the law provides that an employer "is not liable in a civil action based on actions or inactions taken in compliance with" the law. This immunity does not apply to civil actions based on an employer's acts that are unrelated to compliance with the law.

Business groups, including the Florida Chamber of Commerce and Florida Retail Federation have opposed this legislation and may challenge it in court. However, employers should review any workplace policies relating to the possession of firearms on company property to ensure they comply with the law, prior to July 1, 2008.

If you have any questions regarding the law or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work, or Edmund McKenna, a partner in our Tampa office, at emckenna@fordharrison.com or 813-261-7821.

Second Circuit Permits Title VII Claim Based on Association to Proceed

The Second Circuit recently reversed a trial court's decision granting summary judgment in favor of an employer, holding that an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race. See *Holcomb v. Iona College* (April 1, 2007). In this case, Holcomb, who is white, claimed the college discharged him from his job as an assistant basketball coach because he was married to a black woman. The college claimed he was discharged as part of an overhaul of its staff in an effort to improve a poorly performing basketball team.

The Second Circuit held that where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's own

race. The court explained that a white employee who claims he has been subjected to discrimination as a result of his marriage to a black woman has implicitly claimed discrimination based on his own race. If the employee were black, his marriage would not have been interracial. Thus, inherent in this claim is an allegation the employee has suffered discrimination based on his own race.

The Second Circuit did not find that Holcomb was, in fact, subjected to discrimination in violation of Title VII. Instead, it held that he should be permitted to take his claims to trial because there were issues of fact for a jury to decide regarding whether the decision to terminate Holcomb was partly motivated by his wife's race.

Tenth Circuit Defines "Willfulness" Under the FMLA

The Tenth Circuit recently held that an employer who denied an employee's Family Medical Leave Act (FMLA) claim after the employee twice failed to provide an adequate medical certification did not "willfully" violate the FMLA. See *Bass v. Potter* (10th Cir. April 15, 2008). The decision is the first published decision by the Tenth Circuit defining the standard for "willfulness" under the FMLA.

Generally, an employee has two years from the date of the alleged FMLA violation in which to bring a lawsuit. "Willful" FMLA violations are, however, subject to a three-year statute of limitations. The FMLA does not define the term "willful." The Tenth Circuit adopted the standard for willfulness used by courts in Fair Labor Standards Act (FLSA) cases: "a plaintiff must show that 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.'"

In *Bass*, the court noted that it was not determining whether the employer violated the FMLA; its decision only addressed whether the employer *willfully* violated the act. The court held that the employer did not act willfully because evidence showed that it attempted to comply with the FMLA's certification process. The court noted that in cases in which willfulness has been found, the employer either deliberately chose to avoid researching the law's terms or affirmatively evaded them.

Because the employer did not act willfully, the three-year limitations period did not apply to the plaintiff's claim. Accordingly, the court dismissed the claim because it was not filed within the FMLA's general two-year limitations period.



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Editor: Amy W. Littrell,
alittrell@fordharrison.com

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