



WIMBERLY LAWSON SEALE WRIGHT & DAVES, PLLC

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THE EAGLE'S VIEW

September 2004 Volume 4, Issue 9

SAME-SEX UNIONS CREATE LEGAL QUAGMIRE FOR EMPLOYERS

About our Firm

Wimberly Lawson Seale Wright & Daves, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Nelson & Schneider, P.C., Atlanta, Georgia; Wimberly Lawson Daniels & Brandon, Greenville, South Carolina; Wimberly, Lawson, Suarez & Russell, Tampa, Florida; and Holifield & Associates, P.C., Knoxville, TN.

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Some commentators have suggested that the relationship of marriage invokes over 1,000 distinct rights, benefits and responsibilities under federal law alone. Various laws cover every aspect of a marital relationship by covering such matters as Social Security benefits, preferential tax treatment, standing to sue, access to health insurance, support obligations for children, access to divorce courts, intestacy rights, decision-making authority for an incapacitated spouse, and parental rights. Further, approximately 35 states have laws barring same-sex marriage. Ten states have no laws on the issue, while Alaska, California, Hawaii and the District of Columbia have some sort of recognition of same-sex couples. Vermont has a "civil union" law.

In May of this year, by virtue of a court decision, Massachusetts became the first state in the country to legalize same-sex marriages. In California, where municipalities issue marriage licenses, the City of San Francisco had been marrying same-sex couples, but an injunction granted by California courts stopped the marriages. Under a newly enacted law that goes into effect in 2005, California will treat same-sex couples in much the same way as Vermont. In April, a judge in Oregon

struck down a law that blocked same-sex couples from marrying and ordered the state to recognize the 3,000 marriages of same-sex couples that had already taken place.



The situation is further complicated by the fact that states that permit same-sex marriages or civil unions also may impose a residency requirement, and that other states may not recognize those unions. Thus, gay couples who are granted a marriage or civil union by a state in which they don't reside, or in Canada, may suffer different consequences when they return home or travel elsewhere. Further, various civil union laws and state registries are not the same as marriage, and thus each state's law confers different rights to same-sex couples. Thus, employers in various states must contend with different issues of who is a "spouse" or even "children." While as a general rule, under federal laws, no same-sex benefits are available, different type issues occur under state law and company benefit plans and policies.

In those states that recognize same-sex marriages or unions, it is likely that employers will be required to provide both same-sex and heterosexual couples the same benefits. In gay marriage states, pre-

sumably wedded gay workers would have the same rights as heterosexual married couples. However, the states that base benefits on marriage would not recognize domestic partners.

It is only a question of time before employers, even in states that do not recognize same-sex marriages or civil unions, are going to be approached by an employee who says that I am married (or have a civil union) and I want the same benefits for my same-sex partner. Even if an employer wanted to be cooperative, it doesn't mean it can be done. In the case of health and pension benefits, for example, federal and some state laws having defined marriage as between a man and a woman are likely to affect the availability of coverage as well as the tax consequences of offering it. Insurers may not offer policy coverage because it is not required by law. Further, what is the employer going to do about unmarried heterosexual couples? How is a "divorce" handled in these situations?

The above legal quagmire is not likely to be resolved in the near future. Most believe it will take many years to sort out the situation. In the meantime, employers need to start asking themselves what position they might take on same-sex marriage or civil unions, and compare its proposed position to the state's position and the wording of its various health and welfare plans. Employers will have to be ready to move when someone "pops the question."

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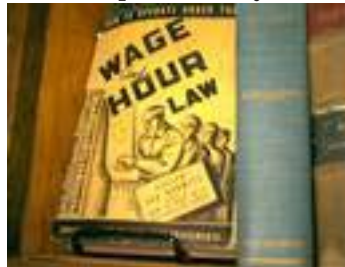
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ARE YOU READY FOR THE IMPLEMENTATION OF THE NEW WAGE AND HOUR REGULATIONS?

The controversial new federal rules concerning overtime went into effect on August 23, 2004. The U.S. Department of Labor has suggested that all employers review existing job classifications and salary levels to insure compliance with the revised rules. For example, under the old rules, workers earning less than \$8,060 annually were guaranteed overtime, while under the new rules workers earning up to \$23,660, regardless of the job, will receive overtime. In addition, certain high-income workers may lose

the overtime pay they previously received under the old rules, if the job duties meet the requirements of the new rules.

Unfortunately, according to recent surveys, many employers will not be in compliance by the



effective date and others need help involving characterizing current jobs and interpreting the new rules. Further, most companies have not yet determined the financial impact of the new Wage-Hour rules.

Failure to comply could spell big trouble. Wage-Hour lawsuits have become the issue du jour and more class actions are being brought under Wage-Hour laws than under the discrimination laws. If you need assistance in devising programs to meet the requirements and yet conserve employer financial resources, please feel free to contact Wimberly Lawson Seale Wright & Daves for advice.

The controversial new federal rules concerning overtime went into effect on August 23, 2004.

WORKERS CAUGHT WITH WEAPONS ON PROPERTY MAY BE FIRED, COURT RULES

A recent court decision by the Supreme Court of Utah involved three employees who were fired for bringing firearms onto the employer's parking lot. Hensen v. America Online, Inc., 7/20/04. The employees argued that the right to keep and bear arms is a clear and substantial public policy in Utah, but the court ruled that this right "cannot supplant the right of an employer to regulate the possession of firearms by employees within the workplace environment." The employees had further argued that by barring guns at the parking lot, the employer had in effect "disarmed" its employees by making it impractical for them to store guns in their cars. However, the court ruled that the employer has the right to restrict firearms in its

parking lot and to fire workers for violating the policy.

Numerous states have passed laws defining the scope of a person's right to keep and bear arms. However, these state laws uniformly allow employers to restrict weapons in the workplace by virtue of the company's policy.

It should be noted that in the past year, Ohio, Minnesota and Missouri have enacted legislation permitting individuals to carry concealed weapons, joining 35 other states with relatively liberal concealed weapons laws. However, even in those states, the general rule is that as long as certain guidelines are followed, employers can prohibit firearms from their premises. Some of these state laws or principles may require employers to provide prior notice of

their policies, including in some cases, posting notices at entry points.

One exception to the above principles is in the state of Minnesota. Although employers may restrict the carry or possession of firearms by its employees, it may not prohibit the lawful carry or possession of firearms in a parking facility or parking area. The other states with concealed weapons laws leave the parking lot decision up to employers. Further, in the case of Minnesota, the new law does not permit employers to extend the ban to applicants, temporary workers and so on.

The wise employer will publish its policies concerning its prohibition of firearms, and will also include a statement that reserves the employer's

KNOW YOUR ATTORNEY



ROBERT V. DURHAM

Robert is a Senior Associate of the Cookeville office of the firm, which he joined in 1996. His practice includes an emphasis in workers' compensation defense, and employment discrimination, as well as ADA, FMLA, and HIPAA compliance. He received his B.S. degree, with honors, from Tennessee Technological University and his law degree, with high honors, from the University of Tennessee. Robert is a member of the Putnam County Bar Association. In the community, Robert is the president-elect of the Cookeville Noon Day Lion's Club, and serves on the Board of Trustees for Cookeville First Assembly of God.



right to search company property for guns or contraband. Such a provision should be stated in the policy to avoid invasion of privacy claims.

"GOING POSTAL" REQUIRES GOVERNMENT TO RADICALLY CHANGE HANDLING VIOLENCE

A United States Postal Service official has indicated that the U.S. Postal Service has radically changed the way it handles violence. At a conference sponsored by the Occupational Safety and Health Administration and Western New England College, Carl Augustina said that in the past when postal employees fought, "we would not have done anything other than tell them to shut up and go back to work. We would not have fired someone for getting in an argument; it happens now," he said. Key elements in the USPS workplace violence prevention strategy are improving hiring procedures, better security, zero tolerance, better labor relations, safe separation procedures, and more accountability.

Job applicants go through a more rigorous round of questioning and background checks. Safety audits, locks, and employee badges are now used in all post offices. Threat assessment teams have been added. Employees who engage in fights are taken off the job immediately, while an investigation takes place.

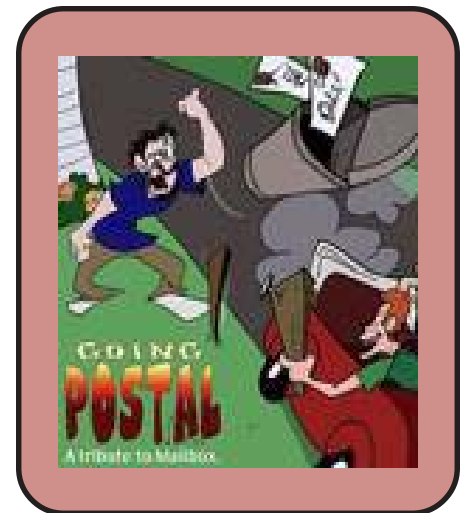
Another interesting point made at the conference is that training about workplace violence should start from the top down. That is, if an employer starts by training workers, there will be an upsurge in the reporting of violent incidents but no expertise in how to handle them. A conference speaker suggested that the employees should receive a notice of the company policy and sign a statement

that they are aware of the policy.

Other speakers indicated that confidentiality should take second place in cases that involve potential workplace violence. For example, when workers are threatened by domestic violence, the employer should perform a workplace risk assessment including asking such questions as whether the potential victim has been bothered at work or threatened at work, whether he/she fears for his/her safety, and whether the potential perpetrator has access to weapons.

Various state laws are available to

prosecute those who commit workplace violence, including statutes against threats, annoying or accosting, making annoying telephone calls, stalking, harassment, extortion and assault.



BENEFIT PLAN MAY BE AMENDED TO BENEFIT ONE EMPLOYEE

An employer's pension plan that bent the rules and allowed a lump sum distribution to one employee, but denied such distribution to another, did not violate ERISA, the Sixth Circuit Court of Appeals rules in Coomer v. Bethesda Hospital (2004 WL 1191058, CA 6, 2004). An employee sought a lump sum distribution from his pension plan so that he could attend medical school and the employer amended the plan to allow that one employee to receive a lump sum distribution. Upon learning of this distribution, another employee, also requested a lump sum distribution, but his request was denied. The other employee sued

under ERISA Section 510, alleging discrimination.

In analyzing ERISA, the court noted that while the statute establishes rules and responsibilities for the operations of benefit plans,



the statute does not govern what a plan must provide. The court stated that employers need not establish benefit plans at all under ERISA and that

employers are generally free to adopt, modify or terminate plans for any reason at any time.

The court stated that "Section 510's prohibition against discrimination does not limit a plan sponsor's ability to design or amend the plan any way it sees fit, so long as the sponsor does not reduce the participants' vested benefits."

The court held that "the plan sponsor's amendment of a plan to benefit one individual and its refusal to amend the plan to benefit another individual are not the kinds of discrimination prohibited by Section 510."

Editor's Note - Obviously, advice of counsel should be sought in any case in which an employer wants to make an "exception" to its benefit plan policies, and it should be noted in this case that the employer properly adopted a plan amendment in order to make the exception. Further, as the court noted, the plan may not be amended to reduce vested benefits, a point recently made by the U.S. Supreme Court in applying an ERISA provision that prohibits pension plans from expanding the conditions for reducing retirement benefits that have already been accrued by plan participants. Central Laborers' Pension Fund v. Heinz, 2004 WL 1237456 (U.S. 2004).

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Upcoming Seminars and Events

Our firm regularly sponsors and co-sponsors conferences focusing on current and important employment issues. Please check the conference page on our website for a comprehensive list of these seminars.



Come Join us on **Saturday, October 30** (immediately after our Knoxville Conference on October 28 and 29) in beautiful downtown Townsend, Tennessee as we co-sponsor The Townsend 10K & 1 Mile Walk/Fun Run To Benefit **The Second Harvest Food Bank**. Registration at www.wlswd.com.

EMPLOYERS RECEIVE RELIEF ON PENSION CONTRIBUTIONS

During April Congress passed legislation giving defined benefit pension plans some relief from contributions. The law replaces an outdated formula that companies used to estimate contributions for their pension plans. The Pension Benefit Guarantee Corp., estimates that the revisions will save companies \$80 billion over the next two years. The main part of the bill only fixes the formula for single employer payments for two years while Congress works on longer-term changes to make pension plans fiscally solvent and protect retirement pay. The old formula was based on 30-year treasury bonds, which no longer are issued. The new formula will be

based on the interest rates of high-quality corporate bonds. The changes extend relief to 31,000 defined benefit plans that are sponsored by a single employer, overwhelmingly, it only extended relief to



During April Congress passed legislation giving defined benefit pension plans some relief from contributions.

and it is estimated that those plans cover about 35 million workers and retirees. The main controversy in the bill, which passed Congress about 50 of the nation's 1,600 multi-employer plans, which include most plans sponsored by unions.

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PRESENTATION TOPICS

Overview of Year's Changes in Labor and Employment Law
Overhaul of New Wage & Hour Regulations
Significant Developments Over the Year in EEO Law
Changes at OSHA and What They Mean to You

Strategies in Implementing Changes in Wage & Hour Requirements
Strategy in Reducing, Settling & Winning Workers' Comp Claims
Pro & Cons of Specific Written Work Rules, Policies, and Discipline Thereunder
Special Issues with Temporary, Part-Time, Seasonal and Contract Employees

Changes in OFCCP (AAP) Enforcement
Point & Counterpoint - Pros & Cons of Alternative Dispute Resolution Agreements
Cutting Edge Issues in Harassment Investigations and Litigation
Update on Social Security No-Match Letters and Immigration Compliance

Tips on HIPAA Compliance
Handling Employees Who Misuse Absenteeism and Leave Policies
Go-To Checklist in Handling FMLA Issues
Status of Unions - Where Have the Organizers Gone?

How to Avoid Becoming a Target for a Discrimination Class Action
New Workplace Issues - Cell Phones with Cameras, Tape Recorders, Undercover Agents,
Unusual Security Devices & Measures
What Types of Supervisor Training are Mandated by Law

Management of Electronic Messages & Record Keeping
Romance in the Workplace, Fraternizing, "Love Contacts," & the Like
Ways to Counter the Plaintiff's Fairness Argument in Litigation
How to Avoid Becoming a Wage & Hour Case Target
Tennessee Workers' Compensation Reform Act Summary

Handling a Worker on Workers' Comp. Under Benefit & Leave Policies
Issues Regarding Withholdings from Paychecks
Theft of Employer Information as a Growing Issue
Strategies in Handling Unemployment Matters in Sensitive Cases
Strategies in the Healthcare Market for Benefits

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865-637-1234

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Nashville at the
Hilton Nashville Downtown
121 Fourth Avenue South
615-620-1000

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