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Briefly

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"Complex issues arise if there is a traffic accident and injury going to and from work, raising the question of employer liability ..."

EMPLOYEE CAR POOLS: THE ISSUE OF EMPLOYER LIABILITY IS COMPLEX

Many employers depend on employees being able to get to work from remote locations, or encourage car pool or van pools for economic or environmental reasons. To improve the process, some employers will pay the driver of the car pool or van pool for their transportation services. Complex issues arise if there is a traffic accident and injury going to and from work, raising the question of employer liability under both tort and workers' compensation law.

A recent state court case in Texas addresses these issues in *Painter v. Amerimex Drilling*, 40 IER Cases 1516 (Texas Court of Appeals, Nov. 3, 2015). In this case, Amerimex, (the employer), paid each driver a bonus of $50 a day to drive their crew to and from the work site. There was no requirement that the employees ride with the driver, and on one occasion there was a wreck and the driver and the passengers were killed or seriously injured. The driver sought workers' compensation benefits, necessarily contending that he was injured in the course and scope of employment at the time of the accident. For reasons addressed later, Amerimex also urged that the driver was in the course and scope of his employment. The workers' compensation division in Texas found that the driver's injury was compensable under workers' compensation because he was paid to transport the employees to and from the work site and was directly furthering the business interests of the employer.

None of the passengers, however, filed claims for workers' compensation benefits. Amerimex actually attempted to initiate benefit proceedings on behalf of their employee passengers, contending that when an employee driver of the vehicle is in the course and scope of employment, so too would any employee passenger. The Texas Workers' Compensation Division found the employer lacked standing to initiate benefit proceedings on the passengers' behalf, and even if it did, the employee passengers did not sustain compensable injuries under workers' compensation law.

Two of the passenger employees were killed in the crash, and a third seriously injured. The three passengers sued the driver, the employer and various other entities, for negligently causing the accident of running into the back of another vehicle. The employer contended that all of the employees were in the course and scope of employment and their exclusive remedy was under the Texas worker's compensation laws, otherwise barring claims against the employer. Alternatively, they claimed in defense that none of the employees, including the driver, were in the course and scope of employment and thus it owed no duty to them and there was no liability.

The court noted there were limitations to employer liability under tort law, as the employer may only be held liable for the tortious acts of an employee committed within the course and scope of employment. An employee traveling to and from work is generally not in the course and scope of his employment, but instead has risks attendant to transportation which are not unique to the workplace, but are shared by the motoring public as a whole.

The court noted that the workers' compensation laws represent a statutorily imposed compromise between the worker and employer whereby workers forfeit their right to sue the employer in exchange for certain, but more limited benefits. It is liberally construed in favor of the employee. Therefore, the statutory definition of course and scope of employment found in the workers' compensation laws may lead to different outcomes than those based upon vicarious liability tort laws on one party for the conduct of another, a concept which is generally a pure policy question of allocation of risk. Regarding the issue of tort liability, the court found that a plaintiff seeking to impose vicarious liability on an employer for the acts of a traveling employee needs to show not only that the transportation originated and furthered the employer's business, but also that the employer controlled in some way the transportation as to the details of the work (the drive) through such means as directing the route.

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EEOC NOW PROVIDING EMPLOYERS' POSITION STATEMENTS TO EMPLOYEES AND OTHER CHARGING PARTIES IN DISCRIMINATION CLAIMS

Edward H. Trent

"[A]n employee will now receive substantially more information about the employer's position that the employer will ever receive about the employee's allegations."

Employers routinely provide position statements to the Equal Employment Opportunity Commission (EEOC) investigators in defense of discrimination charges. These position statements cover the employer's (respondent's) version of the facts and why the employer believes the charge should be dismissed. The EEOC's confidentiality rules precluded the EEOC from releasing the employer's position statement to the employee as part of the investigation. Indeed, the parties were precluded from receiving any information submitted to the EEOC until its investigation was concluded, and only then in response to a limited Freedom of Information Act request which would only be granted if a lawsuit was filed based on the charge in question. While an EEOC investigator reasonably had to provide at least the basis of the employer's position to the employee to allow the employee to respond, the full details set out in the position statement including the supporting documentation were to be kept confidential. This, however, has now changed.

The EEOC recently announced that it will begin providing for the release of an employer's position statement to the employee(s) who filed the charge (the charging parties) or their representatives upon request during the investigation of a charge of discrimination. These procedures apply to all position statements submitted in response to any EEOC request for a position statement made to employers on or after January 1, 2016. This new change is not a two-way street as the EEOC does not provide for the release of the charging parties' response *to the employer* during the investigation and still does not provide any information submitted by the charging party other than the formal charge, which often contains minimal if any factual information and is relegated to conclusory allegations of discrimination. Even a pre-charge affidavit or supporting documents filed in support of the charge are not provided to the employer under this new rule.

The EEOC has provided a Q&A section on its website detailing the effects of this policy change. It can be accessed at *http://www.eeoc.gov/employees/position_statement_procedures.cfm*. As the EEOC explains, an employer generally has thirty (30) days to submit a position statement with supporting documents to the EEOC as part of its investigation. The EEOC notes that if the employer relies on confidential information in its position statement, that information will not be disclosed to the charging party. There are no procedures, however, to allow the employer to know what is being provided and how any questions over "confidential" information are resolved. The EEOC identifies "confidential" information as information that falls into categories such as "Sensitive Medical Information," "Confidential Commercial Information," "Confidential Financial Information" or "Trade Secret Information." It will also include "Non-Relevant Personally Identifiable Information of Witnesses, Comparators or Third Parties" such as "Social Security numbers, dates of birth in non-age cases, home addresses, personal phone numbers, personal email addresses, etc." This information is to be redacted before the EEOC provides the position statement and non-confidential attachment to charging parties. The charging party then has twenty (20) days to respond to the employer's position statement. The charging party's response will not be provided to the employer. The EEOC also notes that it does not intend to release any additional documents submitted by either party, which presumably includes any supplemental responses by the employer, including responses to requests for additional information.

The EEOC attempts to justify its change by noting that it discloses "the first formal document" submitted by each party. Given that the employer's position statement generally contains far more factual details and is required to include company documents supporting the employer's position, an employee will now receive substantially more information about the employer's position than the employer will ever receive about the employee's allegations. The employee's "first formal document" is the charge of discrimination, which never contains supporting documents and is often a few brief paragraphs short on facts and long on conclusory phrases such as "I believe I was discriminated against on the basis of my [sex, race, religion, etc.] in violation of Title VII of the Civil Rights Act of 1964." By not providing the employer with information the employee provides to support his/her allegations, the scales are tipped in favor of the employee, leaving the employer in the dark as to the precise actions the employee asserts supports a claim of discrimination.

So, rather than serving the stated goal of "strengthening investigations," this policy change will only create an effective means for free, pre-suit discovery for a plaintiff's counsel, leaving employers to wonder what information the employee submitted to justify his or her allegations. It also begs the question of whether employers will limit the information contained in their "first formal document" to general denials, hoping the EEOC will keep to its word of not disclosing subsequent submissions, including responses to requests for additional information. Rather than streamlining investigations and encouraging full disclosure from the outset, this policy change may only delay investigations and result in investigators making several requests for additional information during the course of a single investigation.

KNOW YOUR ATTORNEY - MARY MOFFATT HELMS

MARY MOFFATT HELMS is a Member of the Morristown office of Wimberly Lawson Wright Daves & Jones, PLLC, which she joined in 1994. Prior to joining Wimberly Lawson, Mary was a partner in a law firm in Kingsport, Tennessee. Her law practice includes Labor and Employment Law, Commercial and Business Law and Litigation. She received her Bachelor of Science degree, magna cum laude, from East Tennessee State University and her law degree from Washington and Lee University. Mary has served as a member on the Hearing Committee for Tennessee Board of Professional Responsibility, Supreme Court of Tennessee. She has an AV Preeminent® Rating - which is the highest possible rating given by Martindale-Hubbell, the leading independent attorney rating entity. She is a member of the Tennessee Bar Association, Hamblen County Bar Association, the Board of Directors of the Morristown Boys and Girls Club, and is a Trustee of the Boys and Girls Club Foundation. Mary has served as Municipal Judge for the City of Morristown and is a Rule 31 Listed General Civil Mediator.

"EMPLOYEE CAR POOLS"

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In the *Amerimex Drilling* case, the court found that if the employer was liable for the driver's conduct while carpooling simply because it passed along payments for that carpooling, or even having encouraged it, the employer would have every incentive to end that practice. Generally, the employer owes no duty for the actions of its off-duty employees. The only exception is where the employer exercises control over the off-duty employee. Therefore, the court found that the employer would need to retain the right to exercise some control over how the driver transported his crew, as a predicate to shifting the risk of any accident and to hold the employer liable under the tort law theory of vicarious liability.

The court ruled for the employer on the basis that there was no evidence that the employer had or exercised any control over the manner of transportation - the type of vehicle used, the qualifications of the driver, the number of passengers, or any other issues which might implicate the right of control that justifies shifting the risk of loss from one party to another.

Editor's Note: This was a close case under Texas state law, and it should also be noted that the laws of each state may vary somewhat in the application of these principles. It is very possible that courts in other states could reach different holdings on similar facts under both tort and workers' compensation law. The main point of discussing the case is to sensitize the employers to the issue, as many employers encourage carpooling, van pooling, and shared rides for a variety of reasons.

MANDATORY PAID SICK LEAVE:
DOL PROPOSES NEW REGULATIONS

Jerome D. Pinn....

"Acceptable reasons for employees to use paid sick leave include … care for family members, which have a broad definition including 'any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship."

Having declared a minimum wage hike to $10.10 per hour for Federal contractor employees by Executive Order in 2014, President Barack Obama followed up in September 2015 with another Executive Order requiring those same Federal contractors to establish paid sick leave programs for their employees. On February 25, 2016, the U.S. Department of Labor published proposed rules to implement that policy.

Provisions. The Executive Order requires most employers that contract with the Federal Government to provide their employees with up to seven (7) days of paid sick leave annually, including for family care and absences resulting from domestic violence, sexual assault, and stalking. The program would affect approximately 437,000 workers who currently do not have paid sick leave.

Covered employers would include Federal contractors with (1) procurement contracts for construction covered by the Davis-Bacon Act (DBA); (2) service contracts covered by the McNamara-O'Hara Service Contract Act (SCA); (3) concessions contracts, including any concessions contracts excluded from the SCA by the Department's regulations at 29 CFR 4.133(b); and (4) contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public. Excluded are (1) grants; (2) contracts and agreements with and grants to Indian Tribes; (3) any procurement contracts for construction that are not subject to the DBA (i.e., procurement contracts for construction under $2,000); (4) any contracts for services, except for those otherwise expressly covered by the proposed rule, that are exempted from coverage under the SCA; and (5) contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government. The term "contract" broadly includes all contracts and any subcontracts of any tier thereunder.

All employees of covered contractors would be included, even employees who qualify for an exemption from the FLSA minimum wage and overtime provisions. There is a narrow exemption for employees who perform duties necessary to the performance of a covered contract but who are not directly engaged in performing the specific work called for by the contract and who spend less than 20 percent of their hours worked in a particular workweek performing work in connection with such contracts.

Under the proposed rules, employees would accrue not less than one hour of paid sick leave for every 30 hours worked on or in connection with a covered contract, to be calculated at the end of each workweek. Alternatively, a contractor could provide an employee with at least 56 hours of paid sick leave at the beginning of each accrual year. Employers would have to inform employees in writing, at least monthly, of the amount of paid sick leave they have accrued. The proposed rules set out in great detail requirements for carryover, caps, and reinstatement rights. Acceptable reasons for employees to use paid sick leave include physical or mental illness, injury or medical condition, and to care for family members, which have a broad definition including "any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship."

Just about the only good news for a covered contractor under this program is that they will not be required to pay employees for accrued, unused paid sick leave at the time of separation from employment. A mechanism is set up for employees to file complaints with USDOL's Wage and Hour Division if they feel they have been unfairly denied leave.

Comments. As with the Federal contractor minimum wage hike and affirmative action under EO 11246, this is another move to impose policy goals on a significant sector of the economy. It will certainly increase the administrative burden on covered employers.

The proposed rules are available at *www.regulations.gov* and at the USDOL Website. The proposed rules invite interested parties to submit written comments electronically at *www.regulations.gov*, or by mail. The docket ID number is 1235-AA13.