



QUIRKS IN LEAVE OF ABSENCE POLICIES CAN LEAD TO EXPENSIVE LITIGATION



Suzanne Roten

"There are a number of "special" situations which over the years have generated a great deal of litigation."

Most employers covered by the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA) are aware that in appropriate situations, they must grant leaves of absence to eligible employees. However, there are a number of "special" situations which over the years have generated a great deal of litigation.

A recent development generating increasing litigation is the common practice of many employers' leave policies that include an automatic termination provision (sometimes called an administrative separation) after an employee is absent a set period of time, such as six (6) months, one year, etc. Over the years, the EEOC has taken the position that such policies violate the ADA as they do not consider brief leave extensions to help employees return to work. In a settlement reached in late 2009, Sears Roebuck paid \$6.2 million to satisfy an ADA claim resulting from such a set period for automatic termination policy. The case arose when Sears fired an employee when his workers' compensation leave expired. Following discovery, the EEOC filed a lawsuit claiming that Sears had discharged hundreds of employees without seriously considering granting additional leave as a reasonable accommodation, in order to permit the employees to return. In September of 2009, Sears agreed to settle the matter and pay \$6.2 million in damages to more than 400 former employees. *EEOC v. Sears Roebuck & Co.*, No. 04 C 7282 (N.D.Ill., 9/29/09).

The company agreed to adopt more flexible return-to-work strategies as part of the settlement, providing among other things, notifying injured employees 45 days before their leaves expire that they could request an accommodation in the form of additional leave in order to enable their return to work.

Many employers apparently feel that their only obligation is to provide the minimum of 12 weeks under the FMLA, and/or the appropriately designated time for workers compensation, without considering the ramifications of the ADA. Although the courts have generally not been as receptive to the EEOC's position on administrative separation policies, many employers are nevertheless modifying their policies to in some way allow a timely request for a leave extension where the employee has a disability and can otherwise return to work in the near or foreseeable future.

Another quirk in leave policies can occur if an employer does not allow any leaves of absence for a set period of time, such as during the initial probationary period, relying on the fact that the FMLA generally does not kick in until the employee has worked for one year. However, the ADA may require that a leave of absence be granted does meet a reasonable accommodation in spite of these type policies, unless it works an undue hardship on the employer. A related problem occurs when females become pregnant and are not granted leave because they do not have enough length of service. To prevent lawsuits being brought in based on these types of policies, employers should at least consider accommodations and/or encourage employees who do not meet generally applicable requirements for recall to reapply when they are able return to work.

Another issue is that some employers have exceptions for additional leave for workers compensation claimants, often designed to minimize the employer's workers compensation expenses. The question is whether the employers granting a longer, more beneficial leave of absence to a workers compensation claimant, can result in claims by others that they

Continued on page 4 ►►

EMPLOYERS' INCREASING USE OF CREDIT CHECKS GENERATES LEGAL ISSUES



Jerry Pinn

"Employers who perform credit checks and/or criminal background checks performed by third parties should be aware that these checks are regulated by the Fair Credit Reporting Act (FCRA), which sets forth numerous and highly technical requirements governing their use."

.....

According to various surveys, a majority of employers run credit checks on at least some job applicants. But the numbers appear to be increasing each year, no doubt in part due to increasing concerns about violence, theft, and negligent hiring claims. Employers believe that such checks give them valuable information about an applicant's honesty and sense of responsibility. Detractors claim that such checks violate basic human rights concepts and that no credible research shows a person with a bad credit history is going to perform poorly.

Employers who perform credit checks and/or criminal background checks performed by third parties should be aware that these checks are regulated by the Fair Credit Reporting Act (FCRA), which sets forth numerous and highly technical requirements governing their use. These requirements include the following:

- An employer must disclose to the applicant or employee that a background check will be obtained for employment purposes.
- A disclosure must be made in a document that consists only of the disclosure.
- The employer must obtain the applicant's or employee's written authorization to perform the background check.
- Before taking any adverse action against the applicant or employee based upon information contained in the background check, the employer must provide the applicant or employee with a copy of the background check and a summary of his/her rights under FCRA.
- The employer must then wait a reasonable time before taking any adverse action against the applicant or employee.
- When taking an adverse action against an applicant or employee on the basis of information contained in a background check, the employer must provide the applicant or employee with the name and contact information for the entity from which the background check was obtained, along with other information regarding the applicant's or employee's rights under FCRA.

In an informal advisory letter dated March 9, 2010, the EEOC issued an opinion that an employer's use of credit checks to screen job applicants could be illegal if it leads to a disproportionate exclusion of minorities and other protected groups from the workforce. The letter said that although discrimination laws do not directly prohibit discrimination based upon credit information, laws such as Title VII bar employment practices that disproportionately screen out racial minorities, women or other protected groups, unless the practice is job-related and "consistent with business necessity." The letter cited as a example of "business necessity" situations where employees are required to handle large amounts of cash. Thus, according to the EEOC, if an employer's use of credit information disproportionately excludes African-American and Hispanic candidates for a job, the practice would be unlawful unless the employer could establish that the practice is needed for it to operate safely or efficiently.

Editor's Note – The bottom line is that while credit checks and criminal background investigations are increasingly used by employers, there are significant legal ramifications to their use and so advice of counsel is highly desirable if not necessary as to how such checks are used. Legal claims from credit checks also lend themselves to class action treatment, an additional reason for caution by employers.

Save the Date!



THE 2010 LABOR EMPLOYMENT UPDATE CONFERENCE

November 18 & 19, 2010 • KNOXVILLE MARRIOTT • 500 HILL AVE SE, KNOXVILLE, TN

Please visit our website www.wimberlylawson.com for registration information

EMPLOYER TURNS TABLES ON INDEPENDENT CONTRACTORS CLAIMING TO BE EMPLOYEES



Jeff Jones

“The claims are based upon the practical concepts that the classifying of employees as independent contractors deprives employees of the protection of the employment laws...”

.....
the defendant “arising out of or in connection with plaintiffs’ obligations under this agreement.” The plaintiffs moved to dismiss the counterclaim, contending that it failed to state a claim against them.

The court ruled that the plaintiffs were simply wrong in arguing that the counterclaim could not lie against them based only on the filing of the lawsuit. The real issue, according to the court, was whether the counterclaim was objectively baseless. While the court indicated the counterclaim might be baseless if it was preempted by the wage-hour laws or contrary to the policies of that statute, the defendant company asserted that the wage-hour laws were wholly inapplicable because plaintiffs were independent contractors exempt from the statute’s scope. The court concluded that the defendant company’s counterclaim was not in fact baseless, because it might in fact be true that the plaintiffs were independent contractors, and thus the defendant company might have a valid counterclaim.

Editor’s Note – In the current environment of increasing legal attacks on the independent contractor relationship, companies need to be careful in insuring that proper written independent contractor agreements are entered into with their contractors. An alleged “independent contractor” without a written “contract” is often presumed by the courts to be an employee, and therefore some type of written agreement with a contractor is desirable if not necessary. Specific provisions in the independent contractor agreement can “make or break” the status as an employee or independent contractor. The company in this case made use of an indemnity clause, meaning the company could recover its losses for any breach of the contract by the independent contractor. Such indemnity clauses can be very valuable to a company in a wide variety of situations.

There is a great deal of momentum at both the federal and state levels to pass laws punishing employers for misclassifying employees as independent contractors. The claims are based upon the practical concepts that the classifying of employees as independent contractors deprives employees of the protection of the employment laws, allows the company to undercut others in labor costs by some 30%, and may result in depriving the federal and state treasuries of employment-related taxes. Thus, such classification issues are a matter of high priority to all levels of government.

An interesting recent case involved a fact situation in which an employer was sued in violation of the wage-hour laws under federal and state law. *Spellman v. American Eagle Express, Inc.*, 15 WH Cases 2d 1756 (D.D.C. 2010). The lawsuit alleged that the defendant company misclassified the plaintiff employees as independent contractors under federal and state law. The defendant company answered and counterclaimed seeking to enforce an indemnity provision in the independent contractor agreement executed by the plaintiffs. The counterclaim alleged that the plaintiffs agreed to indemnify the defendant for any “action” against

KNOW YOUR ATTORNEY KELLY A. CAMPBELL

KELLY A. CAMPBELL is the Regional Managing Member of the Morristown, Tennessee office of Wimberly Lawson Wright Daves & Jones, PLLC, which she joined in 1994. Her law practice includes an emphasis in workers’ compensation, employment discrimination and wrongful discharge litigation (defense), as well as ADA and



FMLA compliance for employers. She received her Bachelor of Science degree in General Business from the University of Tennessee at Knoxville in 1984 and her Doctor of Jurisprudence degree from the University of Tennessee College of Law in 1988. Ms. Campbell is a member of the Hamblen County Bar Association and Tennessee Bar Association. She is active in community activities as a Board member for Pregnancy Crisis Center, Inc., a ministry of the Nolachucky Association of Baptists (Board President 2007-2008), and as a member of Kiwanis. She is also an adjunct instructor in the Paralegal/Legal Assistant Program at Walters State Community College in Morristown, Tennessee, and an adjunct instructor in the Business Department at Lincoln Memorial University in Harrogate, Tennessee.

**Be sure to visit our website often
www.wimberlylawson.com
for the latest legal updates, seminars, alerts and firm biographical information!**

TO SUBSCRIBE to our complimentary newsletter, please go to our website at www.wimberlylawson.com or email bhoule@wimberlylawson.com

OSHA WITHDRAWS LONG STANDING NOISE DIRECTIVE AND MOVES MORE AGGRESSIVELY ON NOISE ISSUES



Mary Helms

"This means that a plant which for decades had maintained compliance by requiring ear plugs, could now be subject to a citation for violation of the noise standard and required to institute engineering controls."

In late 2009 OSHA took a little-noticed step to withdraw quietly a decades-old directive that provided employers practical guidance on how noise hazards must be abated. An OSHA directive, CPL2-2.3A issued in 1983 (www.OSHA.gov), provided that an employer could comply with this standard by requiring employees to wear hearing protection so long as noise levels were not in excess of 100 d.b.a., and that "administrative or engineering controls" – that is, procedures or devices designed to reduce the amount of noise generated, in contrast to hearing protection, which reduces the employee's exposure – would be required only at noise levels above 100 d.b.a. on an 8 hr. time weighed average (TWA). This directive was issued after OSHA engaged in extensive litigation on the noise standard over the issue of economic and technical feasibility, and suffered many losses in court. Therefore, it took the position for enforcement and compliance purposes, that noise levels under 100 d.b.a. could be abated with personal protective equipment such as ear plugs and sound-suppressing ear muffs, and that engineering controls – changes to machinery to reduce the level of sound generated – would only be required in excess of that amount.

With the quiet withdrawal of this directive, OSHA is now taking the position that it can demand engineering controls at 90 d.b.a. TWA and above. This means that a plant which for decades had maintained compliance by requiring ear plugs, could now be subject to a citation for violation of the noise standard and required to institute engineering controls.

It should also be noted that OSHA appears to be engaging in "baiting" techniques in issuing citations for noise violations, and issuing relatively small fines for an employer's failure to have engineering controls at 90 d.b.a. Employers are thus "baited," but not contesting the citation to later discover the enormous cost of instituting changes to machinery to reduce the level of sound generated. Moreover, any subsequent violations are considered willful.

Editor's Note – The bottom line is that employers may wish to consider a plant safety and health audit to assess potential exposure and to determine what sort of "administrative or engineering controls" are feasible. Further, should a noise citation be issued under these circumstances, advice of counsel should be secured before entering into any settlement with OSHA requiring the institution of engineering controls at 90 d.b.a., as there is a great deal of precedent on the issue supporting the position of employers to the contrary.

"QUIRKS IN LEAVE OF ABSENCE POLICIES" continued from page 1

should be granted similar treatment, or else be subject to discrimination claims. The majority rule in the courts appears to be that persons on workers compensation leave can be treated more favorably. However, the cases are not completely uniform in this regard.

A recent case arose when the EEOC sued an employer who operated a rigid leave policy that prevented employees from taking leave for any reason during certain critical periods in its annual business cycle. To settle the lawsuit, the employer agreed to pay \$50,000 to two former employees. *EEOC v. Beverage Solutions*, No. 09 C 3829, (N.D.Ill., 2/26/10). According to an EEOC spokesperson, "companies are free to encourage their employees to structure periods of leave at times of the year when business is slow. . . but under the ADA, there are situations where medical leave is necessary as a reasonable accommodation."

Editor's Note – It is no secret that the current administration is much more aggressive in "pushing the envelope" concerning the expansion of employee rights. Even if employers might ultimately win such claims in court, they often choose to settle to save legal costs and avoid adverse publicity or damages to the company's image. For that reason, many employers are adjusting their leave of absence policies to lessen the risk that such claims will be brought.



Wimberly Lawson

Attorneys & Counselors at Law

We invite you to attend our 31st Annual Labor and Employment Law Update

TARGET OUT OF RANGE



THE WIMBERLY LAWSON LABOR & EMPLOYMENT LAW UPDATE

Knoxville Marriott Downtown
500 Hill Avenue, Knoxville, Tennessee
November 18 & 19, 2010



KEYNOTE SPEAKER

Michael T. Strickland

*Founder and CEO of Bandit Lites
and Chairman, Knoxville Chamber
of Commerce Board of Directors*

SPECIAL GUESTS EEOC OFFICIALS

Opportunities to participate in
panel discussions entitled
*"What You Always Wanted To Know,
But Were Afraid To Ask"*
with guest speakers
Sarah L. Smith, Director, and
Sylvia Hall, Enforcement Supervisory
Federal Investigator with the Nashville,
Tennessee office of the EEOC.

A FEW COMMENTS FROM LAST YEAR

☐☐ Fun, outstanding speakers
and presentations...
lively, entertaining. ☐☐

☐☐ Very informative -
organized and professional. ☐☐

☐☐ It was very positive -
I left feeling
VERY motivated! ☐☐

www.wimberlylawson.com



The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit.



Wimberly Lawson

Attorneys & Counselors at Law

TARGET OUT OF RANGE



Dear Clients and Friends:

Our Annual Conference is truly the high point of the year for us -- a time to gather with friends and discuss important, contemporary employment issues. **PLEASE PLAN NOW TO JOIN US.**

Our day and a half program covers important legal decisions and societal trends affecting employment. Topics are carefully selected to address the concerns of all employers and to give you an opportunity to select from a wide array of topics dealt with in detail. Some of the twenty-five or more topics are:

- Impact of Healthcare Reform on Employers
- FMLA Intermittent Leave Regs and How They Affect You
- Social Media in the Workplace
- COBRA Expansion
- 21st Century Contracts and Agreements
- Avoiding Issues Later with Effective Hiring Now
- When is Mediation Best?
- Avoid Top Wage-Hour Violations
- Sweatpants, Tattoos and Body Piercings – Issues and What You Need to Know
- Violence in the Workplace
- Latest Developments in Workers Compensation
- Understanding the EEOC – EEOC Officials Will Comprise Panel

Join us in Knoxville on November 18 and 19! We promise you an informative, but light-hearted, thorough and practical journey through today's workplace issues.

Hope to see you there!

Respectfully,

Ronald G. Daves
Managing Member

AGENDA

Thursday, November 18, 2010 (9:00 a.m. - 5:15 p.m.)

8:00 a.m. – 9:00 a.m. Registration and Continental Breakfast

9:15 a.m. - 10:45 a.m. - General Session

The Year in Review - Privacy Rules, Selection Testing and More
DOL's Ramped-Up Enforcement
Jury Waivers/Mandatory Arbitration
Employment Non-Discrimination Act (ENDA)
Crisis Management, Response Plans and Strategies

11:00 a.m. - 12:00 p.m. - Breakout Sessions

Employee and Employer Rights and Obligations Under the FMLA
HR Jeopardy - the Game (Interplay between ADA/FMLA/WC)
What OSHA's New Enforcement and Penalty Plan Means to You
Latest Developments on TN Workers Compensation Law
Non-Compete, Confidentiality & Separation Agreements for the 21st Century
Strategies to Meet the New Wave of Immigration Enforcement

12:00 p.m. - 1:15 pm - Lunch (*Courtesy of Wimberly Lawson*)

1:30 p.m. - 2:30 p.m. - General Session

Keynote Speaker - Michael T. Strickland,
Founder and CEO of Bandit Lites and Chairman,
Knoxville Chamber of Commerce Board of Directors

2:45 p.m. - 3:45 p.m. - Breakout Sessions

Defending Wage-Hour Class and Collection Actions/Q&A
The Obama Administration NLRB - What's Next?
EEOC Panel - What You Always Wanted to Know, But Were Afraid to Ask
Workplace Violence - What Should You Do Now?
ADAAA and Reasonable Accommodations Without a Hassle
Healthcare Reform-Effects and Strategies for Employers
Don't Be a Dope - Ensure Protection Under the Tennessee Drug Free Workplace Act

4:00 p.m. - 5:15 p.m. - General Session

Have You Met GINA? Genetic Information Non-Discrimination Act
E-Verify and Immigration Update
WARN Act Issues
Recreational Activities and Workers Compensation
Things That Go Bump In The Dark And Other Things That Keep Corporate Counsel Awake At Night

5:15 pm – 7:00 pm Reception (please join us for scrumptious hors d'oeuvres)

Friday, November 19, 2010 (8:30 a.m. - 12:30 p.m.)

8:00 a.m. – 8:30 a.m. - Continental Breakfast

8:45 a.m. - 9:45 a.m. - General Session

No Safe Sex in the Workplace
Proliferation of Retaliation Claims
Nuts & Bolts of Class Action Claims
Update on Ledbetter Fair Pay Act Cases/Decisions

10:00 a.m. - 11:00 a.m. - Breakout Sessions

Open Forum and Q&A Regarding Compliance with ObamaCare
Most Common Mistakes In Tennessee Workers Comp Settlements
Avoiding and Remediating Wage-Hour Deficiencies
Defining New Reasonable Facts Other than Age in Discrimination Cases
EEOC Panel - What You Always Wanted to Know, But Were Afraid to Ask
Employee Handbooks - Critical Issues
Social Media in the Workplace - Problems and Cures

11:00 a.m. - 12:30 p.m. General Session

Internal Investigations - Risks and Rewards
Strategies for Mediating/Settling Employment Claims
Diversity - Why Can't We All Just Get Along?
Tattoos and Dress Codes - problems and Cures

12:30 p.m. Conclusion



The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit.

This program has been approved for 9.25 recertification credit hours toward PHR, SPHR and GPHA recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI home page at www.hrci.org.

This program has been accredited by Tennessee CLE for 9.25 general credit hours.



Wimberly Lawson

Attorneys & Counselors at Law

Thirty-First Annual Labor & Employment Law Update Conference

**Knoxville Marriott - Knoxville, Tennessee
November 18-19, 2010**

COST:

Early Bird (registration AND payment received by October 15)

\$299 per person

\$289 for each additional person from same company

\$239 for eight or more from same company

Registration and payment received AFTER October 15

\$339 per person

\$329 for each additional person from same company

\$299 for eight or more from same company

REGISTRATION INCLUDES:

Seminar (1 1/2 days), materials, two continental breakfasts, lunch and evening reception on Thursday, November 18, 2010

CANCELLATION CHARGE:

50% cancellation fee will be incurred for cancellations after October 29. Cancellations made after November 10, 2010 will forfeit registration fee (registrants will receive the conference materials post-seminar)

HOTEL ACCOMMODATIONS Knoxville Marriott • 500 Hill Avenue

SPECIAL RATES AVAILABLE

Be sure to state you are attending the Wimberly Lawson conference in order to receive the room rate of \$102.00/standard.

800-836-8031

RESERVE ONLINE at www.marriott.com/TYSMC
(use the Group Code **LAWLAWA** to reserve at the conference rate)

FIVE WAYS TO REGISTER

1. Mail to: Bernice Houle
Wimberly Lawson Wright
Daves & Jones, PLLC
P.O. Box 2231
Knoxville, TN 37901
2. Fax to: **865-546-1001**
3. Email to: bhoule@wimberlylawson.com
4. Via website: www.wimberlylawson.com
5. Phone: **865-546-1000**



KEYNOTE SPEAKER

Michael T. Strickland

*Founder and CEO, Bandit Lites
Chairman, Knoxville Chamber of
Commerce Board of Directors*

Michael T. Strickland, founder and CEO of Bandit Lites, grew up in Kingsport, Tennessee. Along the way Michael played football and basketball, was an Eagle Scout, was twice president of his Junior Achievement companies and was an avid church member. Michael attended city schools in Kingsport and graduated from Doby's Bennett High School in 1973. In 1968 at age 12 while in junior high school Michael started what would become his life long passion and his company, Bandit Lites. Michael moved the firm to Knoxville when he began to attend college at the University of Tennessee. He obtained a Bachelor of Science in Business from the University of Tennessee and then attended the University of Tennessee Law School. The company continued throughout college and has existed ever since under Michael's guidance and ownership. In 1999 CNN USA Today named Michael as Entrepreneur of the Year. Michael currently serves as Chairman, Knoxville Chamber of Commerce Board of Directors.

A large part of Michael's time is now spent philanthropically as Michael and Bandit Lites attempt to give back to a world that has so blessed the staff at Bandit Lites. Michael spends as much time as possible helping others through a number of different charities, agencies and foundations, including Boy Scouts of America, American Heart Association, Make a Wish Foundation and others to which he belongs.

Michael is married to Nicole and has two children, Chase and Cole. Michael and his family live in Knoxville and are very involved with the University of Tennessee as well as many little league sporting events and activities.

Name _____

Company _____ Address _____

City _____ State _____ Zip _____

Phone _____ - _____ - _____ Fax _____ - _____ - _____

Email _____

BPR and State for CLE: _____ No. Attending Reception: _____

Special Needs? If you should have any special needs, such as wheel chair access or special dietary requirements, please contact Bernice Houle at 865-546-1000 no later than 10 days before the event.