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Briefly

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REGULAR MAIL INADEQUATE TO PROVE DELIVERY OF FMLA NOTICES

Edward H. Trent ..

"Most employers have assumed that it met its legal requirements under the Family and Medical Leave Act (FMLA) by mailing legally-required notices of employee rights and obligations under the FMLA when such leave is sought by an employee."

Various types of notices required by law have been proven in the past by an employer's testimony that it deposited a first-class letter in the U.S. mail system. This "mailbox rule" has been applied to information requests and responses in litigation, answers to lawsuits, and even right-to-sue notices issued by the Equal Employment Opportunity Commission. Most employers have assumed that it met its legal requirements under the Family and Medical Leave Act (FMLA) by mailing legally-required notices of employee rights and obligations under the FMLA when such leave is sought by an employee. The U.S. Court of Appeals for the Third Circuit, however, held that an employer may not rely on the "mailbox rule" to prove that the employer provided an employee notice of their rights and obligations under the FMLA if the employee later denies actually receiving the notice. *Rupian v. Corinthian Colleges and Gardner v. Detroit Entertainment, LLC.*

Under the facts of the case, the company held a meeting with the employee to discuss her leave but did not give her the FMLA designation form and notice of rights at that meeting. It mailed the notice to the employee later that day. However, the employee later denied receiving the letter. Subsequently, when the employee attempted to return to work, she was informed that because of her failure to return to work following her 12 weeks of FMLA-protected leave and certain other reasons, her employment was terminated. She sued, contending that her employer failed to give her notice of her FMLA rights which resulted in her being terminated. She claimed that she would have structured her leave differently had she known she only had a certain amount of protected leave.

The federal district court judge ruled in favor of the company, relying on the traditional "mailbox rule" that allows for the presumption of receipt if one can show a letter was properly mailed. The Third Circuit overruled the trial court, however, finding that the mailbox rule does not create a conclusive presumption of receipt, but creates only a rebuttable inference. The plaintiff's testimony that she never received the FMLA notice was found sufficient to overcome that inference, at least for the purpose of denying the employer summary judgment.

The court found fault with the employer's use only of "regular mail" rather than certified mail or some other means that would have created a receipt or a tracking number. The Third Circuit further found that the plaintiff's testimony created a jury issue for trial by her simple statement that she could have returned to work earlier had she received the FMLA notice.

While this ruling is only binding in the Third Federal Judicial Circuit (which covers Delaware, New Jersey and Pennsylvania), it serves as a warning to employers across the country that employers should consider sending required FMLA notices by certified mail or through a delivery service with tracking numbers, or even through email with an electronic receipt. FMLA lawsuits are becoming more popular with 877 such lawsuits filed in 2013, almost tripling in number from a year earlier. Such an approach can help avoid a situation where an employer properly processed a claim for FMLA leave and sent all required notices but has to defend its actions in a trial because while it could prove it mailed the required notices, it was unable to prove actual receipt of those documents.

GOVERNMENT MOVING RAPIDLY ON TRANSGENDER AND SEXUAL ORIENTATION ISSUES

Jeff Jones

"Both lawsuits seek injunctions to end the (transgender) discrimination and to force the employers to institute new non-discriminatory policies, as well as compensatory and punitive damages."

The EEOC during September filed two lawsuits against two different employers alleging they violated Title VII's prohibition on sex discrimination by firing transgender employees based upon their gender identity. *EEOC v. Lakeland Eye Clinic*, No. 14-2421 (M.D. Fla.); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc*., No. 14-13710 (E.D. Mich.). In one of the cases the employee informed the company that she was transgender, and in the other case the employee informed the company that she intended to undergo surgery to transition to a woman. The lawsuits rely upon the EEOC's 2012 ruling in *Macy v. Holder*, 2012 W.L. 1435995 (April 20, 2012), arising in the federal sector, where the EEOC has adjudicative authority. In that case, the EEOC held that Title VII's prohibition on sex discrimination is violated when employment decisions are based upon an employee's transgender status or gender identity, or because the employee has transitioned or intends to transition to the different sex. Both lawsuits seek injunctions to end the discrimination and to force the employers to institute new non-discriminatory policies, as well as compensatory and punitive damages.

On July 21, 2014, President Obama issued an Executive Order amending Executive Order No. 11246 to prohibit employment discrimination by federal contractors against LGBT (lesbian, gay, bi-sexual and transgender) employees. The Order directs the DOL to issue implementing regulations within ninety (90) days. While the amendment took effect immediately, it only applies to government contracts entered into on or after the effective date of the final regulations.

Finally, on December 18, 2014, Attorney General Eric Holder stated that the U.S. Department of Justice will now take the position that Title VII of the 1964 Civil Rights Act's prohibition against sex discrimination includes bias based on gender identity and transgender status. He admitted that the federal government's position on this issue has changed over the past several years, and that his memo was designed to clear up any confusion and to foster consistent treatment of the issue.

In a related development, a federal judge in Seattle ruled that an employer may have violated federal and state discrimination laws by denying health benefits to same-sex spouses. *Hall v. BNSF Railway Co*., No. 13-2160 (W.D. Wash.). The couple, who were legally married in Washington State and one of whom worked for the employer, sued the company for failing to provide health insurance for his same-sex spouse while providing such coverage to the different-sex spouses of employees. The judge considered the case as one involving disparate treatment based on sex, not sexual orientation. That is, the employer treated a male who married a male differently than it treated male employees who married females. A similar lawsuit has been filed against Little Caesar's Restaurant in California. Further complicating that case is a statement made to the employee by a corporate representative that the since company is headquartered in Michigan, which does not recognize same-sex marriage, the company did not have to provide benefits to the same-sex spouses of employees. *Bernard v. Ilitch Holdings, Inc*. et al., No. 30-2014-00742153-CU-OE-CJC (Cal. Super. Ct., Orange Country August 27, 2014).

Editor's Note: 34 states currently allow same-sex marriage, whether by legislative action or by judicial order. Some 15 states plus the District of Columbia prohibit discrimination based on gender identity, along with the EEOC, the Office of Federal Contract Compliance Programs, and the Department of Labor. Additionally, 3 states prohibit discrimination based on gender preference. In light of these developments, employers should think about adding "gender identity" to their non-discrimination policies. These legal and policy changes do require consideration of new factors such as how employers should handle sensitive issues such as bathroom use, dress codes and harassment.

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EBOLA QUESTIONS AND ANSWERS

Mary Helms

"According to CDC, Ebola is a severe, often fatal disease in humans and nonhuman primates currently impacting multiple countries in West Africa."

The increased media attention related to the Ebola virus, as well as the recent announcement that travelers arriving at certain U.S. airports from West Africa will be screened for fever, may prompt questions from your employees, customers, communities, and media about safety.

The Centers for Disease Control and Prevention (CDC) is the most credible and knowledgeable source providing information about Ebola. According to CDC, Ebola is a severe, often fatal disease in humans and nonhuman primates (such as monkeys, gorillas and chimpanzees) currently impacting multiple countries in West Africa.

The CDC also has a Q&A available regarding transmission of the virus that makes clear that person-to-person transmission occurs through direct contact with body fluids of a person who has symptoms of Ebola disease. The CDC also has an infographic stating that, in the U.S., Ebola cannot be contracted through air, water or food. Perhaps the most important message in CDC's materials is that "Ebola poses no significant risk to the United States."

The Occupational Safety and Health Administration's (OSHA) Ebola Safety and Health Topics website provides important information for workers and employers. Worker safety with regard to Ebola transmission follows the same, straightforward approach as the influenza protocols previously developed for the H1N1 flu strain.

The basic employment laws still apply to Ebola issues. ADA regulations prohibit an employer from making "disability-related inquiries" or requiring medical examinations in the absence of a job-related business necessity. Thus, while a worker might be questioned about a recent trip to a country in which the disease is prevalent, such a worker may not be required to stay home from work unless the employee has exhibited symptoms of the disease, and thus is a "direct threat" to the health and safety of others. OSHA law prohibits employers from retaliating against employees who refuse to work because they fear for their safety, which could also be an issue regarding Ebola. The biggest problem in many situations has been a lack of information about Ebola, and rumors can bring about panic.

PROS, CONS AND ISSUES WHEN DEALING WITH ELECTRONIC I-9 SOFTWARE PROVIDERS

Jerome D. Pinn

"Some employers have made the mistake of relying on the software provider as the expert."

Should an employer adopt an electronic I-9 system? If so, how should an employer go about selecting an electronic I-9 software provider?

On the pro side, the perception is that an employer can reduce administrative burdens and costs, such as filing and retrieval time and storage costs. Moreover, in theory, the HR clerk could enter the information one time for payroll, HR and E-Verify purposes. In addition, many electronic I-9 software programs are marketed as fool-proof so that an employer can feel confident that the I-9 form is fully completed. On the con side, the government likes electronic systems because the government can review I-9s more quickly and there are a lot of rules to follow. Also, the electronic I-9 systems are not foolproof. Some employers have made the mistake of relying on the software provider as the expert, and have learned the hard way that legal advice and guidance would have saved them a lot of time and money.

For example, Abercrombie & Fitch learned that its electronic I-9 system must comply with federal regulations when it had to pay more than $1 million to settle ICE fines because its electronic I-9 system did not satisfy federal employment eligibility verification and recordkeeping requirements.

In addition, the federal government filed a complaint against Rose Acre Farms in 2012 alleging discrimination because the electronic I-9 system did not allow non-U.S. citizens to present List B and C documents, but did allow U.S. citizens to present List B and C documents. The litigation of that case continues.

WELCOME TO THE FIRM!

MICHELLE REID

The Nashville office of Wimberly Lawson Wright Daves & Jones PLLC is pleased to welcome MS. MICHELLE REID as an Associate Attorney, as of January 2015. Michelle's practice includes an emphasis on employment law, workers' compensation and general liability defense. Michelle received her Bachelor of Arts degree in Psychology from Argosy University, Summa Cum Laude, in 2006, and her law degree in 2010 from the Nashville School of Law, where she was awarded the Trustee & Faculty Scholarship from 2007-2010 . Prior to joining the Firm, Michelle served in the corporate sector as in-house counsel for litigation and employment law issues. Michelle is a member of the Tennessee Bar Association, Mid-South Workers' Compensation Association and Middle Tennessee Society for Human Resources Management.

WIMBERLY LAWSON WINS COVETED AWARDS...AGAIN

2015 TOP RANKED LAW FIRMS BASED ON AV PREEMINENT Martindale-Hubbell Lawyer Ratings

Top Ranked Law Firms – Fortune Magazine

Wimberly Lawson Wright Daves & Jones, PLLC, has been distinguished as one of the Top Ranked Law Firms by LexisNexis® Martindale-Hubbell®. The Firm appeared in Fortune's "2012 Investor's Guide" and was one of 965 firms out of 254,000 to receive this honor. This first-time list of Top Ranked Law Firms features U.S. law firms with 21 or more attorneys in which at least one in three of their lawyers earned the AV® Preeminent™ Peer Review Rating, the highest possible rating. An AV® Preeminent™ certification is a significant accomplishment – a testament to the fact that a lawyer's peers rank him or her at the highest level of ethical standards, professional conduct, and legal ability.

U.S. News & World Report and Best Lawyers, for the fifth consecutive year, announce the 2015 "Best Law Firms" rankings. Firms included in the 2015 "Best Law Firms" list are recognized for professional excellence with persistently impressive ratings from clients and peers. Achieving a tiered ranking signals a unique combination of quality law practice and breadth of legal expertise. "For thirty years, U.S. News has provided consumers with accurate, in-depth information and rankings of a wide range of institutions," says Tim Smart, Executive Editor of U.S. News & World Report. The 2015 rankings are based on the highest number of participating firms and highest number of client ballots on record. To be eligible for a ranking, a firm must have a lawyer listed in The Best Lawyers in America, which recognizes the top 4 percent of practicing attorneys in the US. Over 17,000 attorneys provided almost 600,000 law firm assessments, and almost 7,500 clients provided more than 40,000 evaluations. "For five years, we have combined massive amounts of hard data with peer reviews and client assessments to develop our law firm rankings," says Steven Naifeh, CEO and Co-Founder of Best Lawyers. "Increasingly, clients tell us that ours are the most thorough, accurate, and helpful rankings of law firms available anywhere." Ranked firms, presented in tiers, are listed on a national and/or metropolitan scale. Receiving a tier designation reflects the high level of respect a firm has earned among other leading lawyers and clients in the same communities and the same practice areas for their abilities, their professionalism and their integrity. The 2015 "Best Law Firms" rankings can be seen in their entirety by visiting bestlawfirms.usnews.com.

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