



Wimberly Lawson
 Wright Daves & Jones, PLLC

Attorneys & Counselors at Law

Briefly
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Rebecca Brake Murray

BREAKOUT ON EMPLOYER LIABILITY
 TO BE PRESENTED AT 2012 CONFERENCE

Employers are thought to have “deep pockets.” As such, they often become targets for third party claims for personal injury or property loss resulting from the wrongdoing of their employees. Typically, a third party will file a negligence suit against both the employee and the employer, alleging the employer had control over the employee, and therefore bears responsibility for damages. Likewise, employers may also be sued for their own negligence under such theories as negligent hiring, training and retention.

Lawsuits for negligence encompass wide-ranging sets of facts, and deal with conduct that, though unintentional, nonetheless causes harm. Whether it is an automobile accident involving an employee who causes injuries to a third party, or a customer slipping on the floor of a store, employers and business owners must understand their legal obligations and the need to have protocols in place to mitigate exposure associated with these types of claims.

With personal injury or property damage cases, one party may be sued for another party’s negligence based on their “special relationship” through what is known as vicarious liability. One such “special relationship” is that between an employer and its employee. Under the theory of *respondeat superior*, an employer may be held legally responsible if an employee is negligent during the course and scope of his employment and causes personal injury or property damage to a third party. Employers should clearly define the job duties of employees, as well as the parameters of an employee’s job. Having clearly outlined what is expected of an employee, an employer may be in a better position to defend against vicarious liability claims.



Terri Bernal

In addition to vicarious liability for an employee’s actions, employers may be sued directly under theories such as negligent hiring, retention, and supervision. Negligent hiring or retention may be found where the employee had a record showing his propensity to engage in the type of behavior which caused the injured party’s harm, and the employer should have known of this propensity had it exercised due diligence. For example, in order for companies that employ commercial drivers to provide a viable defense to any claim of negligent hiring or retention, employers should create strong policies concerning driver training, safety, supervision, and monitoring driving records and consistently enforce those policies.

Another area of potential liability for business owners and employers is premises liability. Premises liability claims can stem from a variety of conditions including uneven pavement, standing water, wet floors, uncleared snow or ice, inadequate security, poor lighting, loose mats, defective chairs, etc. Employers should, therefore, be diligent in establishing and following internal safety policies in order to avoid a premises liability claim.

Employers who take the time to learn about these various forms of general liability issues can use that information to develop proactive steps to decrease their exposure for costly claims. In addition, understanding liability exposure promotes effective internal policies and procedures that benefit both employers and employees.

For more information on an employer’s general liability, Rebecca Murray, Terri Bernal and Jeff Cranford will participate in presenting a breakout session entitled *Employer Liability? Tort Reform, Negligence and Premises Liability* on Thursday, November 15, 2012 from 11:00 a.m. – 12:00 noon in the James Polk room at the Downtown Knoxville Marriott.



Jeff Cranford

Thursday, November 15
 Marriott Downtown Knoxville
 James Polk Room
Employer Liability?
Tort Reform, Negligence and
Premises Liability
 11:00 am to 12:00 noon
 Presented by
 Rebecca Murray, Terri Bernal
 and Jeff Cranford

Our Firm Wimberly Lawson Wright Daves & Jones, 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, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.

NEW DEVELOPMENTS AND STRATEGIES FOR WORKING WITH THE EEOC



Fred Bissinger



Anne McKnight

One of the best ways for an employer to create a law-abiding workplace and avoid costly charges of harassment and discrimination is to learn and understand the goals and initiatives of the United States Equal Employment Opportunity Commission (“EEOC”). In an effort to promote a better understanding of the EEOC’s enforcement initiatives, we have invited representatives from the EEOC’s Nashville Area Office to participate in a panel discussion at our 2012 Labor and Employment Law Update Conference. These representatives include Area Director, Sarah Smith, and Supervisory Investigator and Training Coordinator, Sylvia Hall. Ms. Smith and Ms. Hall will help us better understand the EEOC’s role in the investigative process and how employers can better respond to and handle charges of discrimination.

Under the laws enforced by the EEOC, it is illegal to discriminate against someone (applicant or employee) based on his or her race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information. It is also illegal to retaliate against a person because he or she complained about discrimination, filed a charge of discrimination, or participated in an employment harassment/discrimination investigation or lawsuit. In this regard, the EEOC focuses on the following:

- Job Advertisements
- Recruitment
- Application and Hiring
- Job Referrals, Assignments and Promotions
- Pay and Benefits
- Discipline and Discharge
- Employment References
- Reasonable Accommodation and Disability
- Reasonable Accommodation and Religion
- Training and Apprenticeship Programs
- Harassment
- Terms and Conditions of Employment
- Pre-Employment Inquiries – including race, height and weight, credit rating or economic status, religious affiliation or beliefs, citizenship, marital status, number of children, gender, arrests or convictions, security background checks for certain religious or ethnic groups, disability, and medical questions or examinations
- Dress Codes
- Constructive Discharge

Thursday, November 15
Marriott Downtown Knoxville
Alvin York Room
*New Developments and
Strategies for Working
with the EEOC*
2:45 pm to 3:45 pm
Moderated by
Fred Bissinger and Anne
McKnight

Friday, November 16
Marriott Downtown Knoxville
Alvin York Room
*New Developments and
Strategies for Working
with the EEOC*
9:45 am to 10:45 am
Moderated by
Fred Bissinger and Anne
McKnight

Given the increase in charges over the past few years and renewed political emphasis on investigating and enforcing the laws for which the EEOC has responsibility, it is imperative that employers examine their policies and practices to ensure compliance with all applicable laws and take appropriate steps to correct any discrimination or harassment issues that arise. Our conversation with Ms. Smith and Ms. Hall will help shed more light on how employers can meet this challenge.

For more information on EEOC initiatives, Fred Bissinger and Anne McKnight will moderate a panel discussion with Ms. Smith and Ms. Hall entitled *New Developments and Strategies for Working with the EEOC* on Thursday, November 15, 2012 from 2:45 p.m. – 3:45 p.m. in the Alvin York room of the Downtown Knoxville Marriott. On Friday, November 16, 2012, join Fred and Anne in an encore presentation of the panel discussions with the EEOC panelists in the Alvin York room from 9:45 a.m. – 10:45 a.m.

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Fred Baker



Joe Lynch



Andrew Hebar



Amanda Lowe

A CONSERVATIVE TREND IN RECENT WORKERS' COMPENSATION LEGISLATION

There can be no doubt that the Tennessee Workers' Compensation Law presents great challenges to employers and insurance carriers. The statute itself provides that the Tennessee Workers' Compensation Law is remedial in nature. This means that the statute should be construed liberally in favor of the insured worker and that any reasonable doubts on workers' compensation issues should be decided in the employee's favor. As early as 1928, the Tennessee Supreme Court noted that the Tennessee Workers' Compensation Law was intended to relieve society of the burden for caring for insured workers and to place that burden directly upon the industry which employs the workers. Needless to say, this liberal statutory backdrop means that employers and insurance carriers rarely enjoy outright victory on Tennessee workers' compensation claims, and instead must generally strive for the mitigation of damages.

According to many observers and legislators, this remedial nature of the Tennessee Workers' Compensation Law has made Tennessee workers' compensation claims relatively more expensive when compared with similar claims in other states. Accordingly, this has created the perception that Tennessee may be a less desirable destination for companies who are looking to establish businesses in Tennessee or enlarge existing Tennessee operations.

A review of new Tennessee workers' compensation legislation over the last several years demonstrates that the Tennessee General Assembly has been actively working to make the Tennessee Workers' Compensation Law more favorable to employers. For instance, consider the legislation that has been enacted since the 2008 recession. In 2009, the Tennessee General Assembly enacted a statute to limit the number of reconsideration claims that can be filed where the employee continues to be employed by a successor business at the same or higher rate of pay. In the same year, a cap was placed on the amount of temporary disability benefits an injured worker could receive for a mental injury, and a separate cap was placed on the amount of permanent disability benefits that could be received by an employee who was not eligible or authorized to work in the United States. In 2010, the Tennessee General Assembly enacted a law that would limit the number of reconsideration claims that could be filed where the employee continued to work after a reduction in pay or a reduction in hours due to economic conditions. Moreover, in that year a cap was placed on the amount of temporary disability benefits that an employee could receive after the commencement of pain management. In 2011, the definition of injury was revised to create a higher standard of causation for hearing loss, carpal tunnel, and other repetitive injury claims. In addition, the law was changed to expand the opportunity to settle future medical benefits. Finally, in 2012, a new law was enacted to give employers more control over the prescription of controlled substances for pain management. Overall, there can be no doubt that the legislative trend in Tennessee Workers' Compensation Law has been conservative and employer-oriented.

For more in depth information on Workers' Compensation Legislation and a review of recent case law, Fred Baker, Joe Lynch, Andrew Hebar and Amanda Lowe will participate in presenting a breakout session entitled *Workers' Compensation In Depth Legislative and Case Law Update* on Thursday, November 15, 2012 in the Alvin York room at the Marriott Downtown Knoxville from 11:00 a.m. – 12:00 noon.

Thursday, November 15
Marriott Downtown Knoxville
Alvin York Room
*Workers' Compensation In Depth
Legislative and Case Law Update*
11:00 am to 12:00 pm
Presented by Fred Baker, Joe Lynch,
Andrew Hebar and Amanda Lowe

To register for the conference please call /email Bernice Houle at
865-546-1000 or bhoule@wimberlylawson.com
or online at www.wimberlylawson.com

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

SIXTH CIRCUIT RULES SEVERANCE PAYMENTS TO INVOLUNTARILY TERMINATED EMPLOYEES NOT SUBJECT TO FICA TAX



Cathy Shuck.....

“...the Sixth Circuit easily concluded that the payments at issue were SUB payments, because they were made in conjunction with the employees’ permanent, involuntary layoff.”

Employers may be able to claim refunds

In September 2012, the federal Sixth Circuit Court of Appeals ruled that certain severance payments are not subject to federal FICA tax. The case, *In re Quality Stores, Inc.*, 693 F.3d 605 (6th Cir. 2012), was a bankruptcy proceeding involving a retailer that terminated all of its employees in two waves of layoffs. The company made severance payments to terminated employees pursuant to two severance plans. Each severance plan essentially provided for severance pay tied to the employee’s position and years of service.

The employer collected and paid FICA tax on the severance payments, but filed an action seeking reimbursement from the IRS on the theory that the payments constituted supplemental unemployment compensation benefits (known as “SUB” payments) not subject to FICA tax.

The concept of SUB payments originated in the 1950s, when unions began bargaining for supplements to state unemployment compensation. The U.S. Supreme Court held in 1980 that SUB payments are subject to income tax, but also noted that SUB payments are not “compensation for work performed,” since they are paid when the employee is out of work.

The employer in *Quality Stores* relied on the 1980 Supreme Court language in advancing the argument that the severance payments were SUB payments, and as such were not wages subject to FICA tax. The D.C. Circuit Court of Appeals had previously rejected such an argument, but the Sixth Circuit agreed with the employer and held that the severance pay was essentially SUB pay not subject to FICA tax.

In reaching its decision, the Sixth Circuit looked to the definition of wages in the tax code. The court noted first that the tax code defines SUB payments as payments “other than wages.” Additionally, the tax code defines SUB payments as “amounts which are paid to an employee, pursuant to a plan to which the employer is a party, because of an employee’s involuntary separation from employment (whether or not such separation is temporary), resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions[.]” The tax code specifically makes such payments subject to income tax.

There is no parallel provision, however, making such payments subject to FICA tax. Moreover, in 1981, the U.S. Supreme Court held that “wages” is intended to have the same meaning for purposes of income tax and FICA tax. Thus, the Sixth Circuit concluded that SUB payments are not subject to FICA tax. Finally, the Sixth Circuit easily concluded that the payments at issue were SUB payments, because they were made in conjunction with the employees’ permanent, involuntary layoff.

The Sixth Circuit’s decision sets up a direct conflict within the federal courts of appeal. On October 18, 2012, the federal government filed a petition for rehearing *en banc* with the Sixth Circuit, which essentially means that the government is asking the court to reconsider the opinion. Resolution of the government’s petition may take months; the government has indicated that if the court affirms the original ruling, the government will seek review in the U.S. Supreme Court. In the meantime, employers should be aware that the law in the Sixth Circuit is that SUB payments are not subject to FICA tax. Thus, employers whose principal place of business is within the states covered by the Sixth Circuit (Tennessee, Kentucky, Ohio and Michigan) are not required to withhold FICA tax from severance payments qualifying as SUB payments. Additionally, employers may wish to seek refunds of amounts they have paid. Employers should consult counsel to confirm whether specific payments are exempt from FICA tax and whether they may be due for a refund.

UPDATE

MEDICARE REPORTING MAY BE DUE WITHIN 45 DAYS OF SETTLEMENT

Last month we reminded employers that effective October 1, 2012, all awards, judgments and settlements over \$5,000 must be reported to the Centers for Medicare & Medicaid Services where the claim has a medical component and the settling claimant is a Medicare beneficiary. We indicated that the reporting must be completed by the end of the quarter following the quarter in which the judgment or settlement was finalized. This is true for some reporting entities. However, most self-insured employers will use a streamlined reporting method; in that case, the reporting must be completed within 45 calendar days. Thus, it is important for employers to determine promptly whether they are required to report, and to initiate the reporting process. Wimberly Lawson attorneys are available to answer your questions and help with the reporting process.