



**EMPLOYER PAYMENT FOR PERSONAL PROTECTIVE EQUIPMENT
 MUST BE IMPLEMENTED BY MAY 15, 2008**



Kelly Campbell
 "The final rule becomes effective this year, and must be implemented by May 15, 2008. "

On November 15, 2007, the Occupational and Safety Health Administration (OSHA) published its final rule regarding employer payment for personal protective equipment (PPE). The final rule becomes effective this year, and must be implemented by May 15, 2008. The final rule does not require employers to provide PPE where none has been required before, but instead requires that the employer pay for required PPE, except in the limited cases specified in the standard. The first exception pertains to non-specialty safety-toe protective footwear and non-specialty prescription

safety eyewear. This exception makes clear that employers are not required to pay for ordinary safety-toe footwear and ordinary prescription safety eyewear, so long as the employer allows the employee to wear these items off the job-site. The second exception relates to metatarsal protection. The employer is not required to pay for shoes with integrated metatarsal protection so long as the employer provides and pays for metatarsal guards that attach to the shoes. The third exception exempts logging

boots from the employer payment requirement. The fourth exception relates to everyday clothing, and recognizes that there are certain circumstances where long-sleeve shirts, long pants, street shoes, normal work boots, and other similar types of clothing could serve as PPE. Similarly, employers are not required to pay for ordinary clothing used solely for protection from weather, such as winter coats, jackets, gloves and parkas.

There is also special guidance in the general rule and the comments dealing with replacement PPE, workplace rules regarding PPE, options to pay for PPE, explanations as to which items are not considered PPE, and various miscellaneous provisions.



Patty Wheeler
 "A recent federal appeals court decision points out that collective decision making on the part of the employer is less susceptible to disparate treatment claims than a decision made by an individual. "

**COLLECTIVE DECISION MAKING LESS
 SUSCEPTIBLE TO DISCRIMINATION LIABILITY**

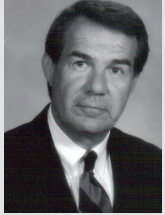
The most common type of discrimination claim pertains to disparate treatment - i.e., the plaintiff was treated differently than others because of his or her race, sex, national origin, etc.

The issue in such cases often turns upon the motive of the employer making a decision resulting in an adverse employment action to the plaintiff. A recent federal appeals court decision points out that collective decision making on the part of employer is less susceptible to disparate treatment claims than a decision made by an individual. Strong v. University Health Care Sys., 100 FEP Cases 544 (C.A. 7, 2007).

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KNOW YOUR ATTORNEY

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practices in the areas of labor and employment law, including litigation of employment discrimination lawsuits, union/management issues, EEO/ADA compliance and personnel policies and procedures. He is a member of the Litigation Section and the Labor and Employment Law Section of the American Bar Association and Tennessee Bar Association, serving as Chairman of the Labor and Employment Law Section of the Tennessee Bar Association, 2002-2003. Listed as Tennessee Supreme Court Approved Mediator and approved Mediator in the United States District Court for the Eastern District of Tennessee. Prior to entering private practice, Ron was Vice President - Personnel for Pilot Freight Carriers in Winston-Salem, North Carolina and served as Chairman of the Personnel Practices Subcommittee of the American Trucking Associations, Washington, D.C. He also served as an investigator for the Tennessee Human Rights Commission. He received his Doctor of Jurisprudence degree from the University of Tennessee in Knoxville where he was recipient of the American Jurisprudence Award for excellent achievement in the study of labor law and recipient of the Robert L. McKnight memorial scholarship in labor law. He served in the United States Marine Corps from 1962 to 1965.



FMLA COVERAGE REQUIRED WHERE IMPLIED IN EMPLOYEE HANDBOOK

Fred Baker
"The employee handbook discussed FMLA leave rights and procedures, but made no mention of the employee-numerosity requirements, or any other indication that the FMLA policy was not applicable to the smaller facility."

The general rule under the Family and Medical Leave Act (FMLA) is that an employer must employ at least 50 employees at the work site or within a 75 mile radius, in order for the FMLA to apply. Many employers routinely include FMLA provisions in their employee handbooks and other personnel policies, which do not limit the application to work sites with at least 50 employees. Occasionally a court will rule that such employer policies require FMLA coverage based on equitable estoppel principles, even as to work sites with less than 50 employees.

In a recent federal district court ruling, the plaintiff worked at a small plant with less than 50 workers, though employed by a company with larger facilities where the FMLA would have been applicable. The employee handbook discussed FMLA leave rights and procedures, but made no mention of the employee-numerosity requirements, or any other indication that the FMLA policy was not applicable to the smaller facility. An employee was fired for excessive absenteeism, and filed suit, arguing the employer should be estopped from challenging FMLA coverage, because of its representations regarding FMLA entitlement in the handbook. The court ruled that a reasonable fact finder could conclude that the handbook representation and a bulletin board poster were "unmistakenly likely to mislead" the plaintiff that he was covered under the FMLA. Thus, the employer was estopped from asserting that the plaintiff and other employees at this smaller facility were not covered under FMLA. *Myers v. Tursso Co., Inc.*, 254 LC ¶ 35,333 (N.D. Iowa 2007).

Editor's Note - This case presents a lesson to employers that do not want to apply the FMLA law company-wide. Employer policies on FMLA should limit coverage to those facilities that have 50 or more employees within a 75 mile radius.

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TRENDS TO WATCH FOR IN 2008

Because Democrats are becoming more assertive in Congress, a number of other employment issues are likely to see attention next year.

Mary Dee Allen

"Employees who are subject to discrimination based on their race or national origin can generally sue for damages under a different law, 42 U.S.C. 1981, that has no caps."

- Ledbetter Fair Pay Act** - In *Ledbetter v. Goodyear Tire and Rubber Co.*, the U.S. Supreme Court ruled in a 5-4 decision that Title VII's statute of limitations - 180 days or 300 days - begins to run when the allegedly discriminatory pay decision was made and communicated to the employee. The court rejected Ledbetter's argument that a new violation occurs and a new charging period begins with each subsequent paycheck that continues the adverse effects of the past discrimination. This legislation would reverse that ruling. This new law passed the House on a party-line vote, but the U.S. Chamber of Commerce and other employer representatives opposed the legislation, arguing that it does much more than reverse the Supreme Court decision and eliminates statutes of limitations for all pay discrimination claims.
- Equal Remedies Act** - Senator Edward Kennedy, Chairman of the Senate Health, Education, Labor and Pensions Committee, introduced a bill that would eliminate caps on compensatory and punitive damages that were added to the Civil Rights Act of 1991 for intentional violations of Title VII. Title VII limits compensatory and punitive damages to \$50,000 to \$300,000, depending on the size of the employer, in cases in which discrimination is based on race, color, sex, religion or national origin. Employees who are subject to discrimination based on their race or national origin can generally sue for damages under a different law, 42 U.S.C. 1981, that has no caps. Senator Kennedy argues that the difference makes no sense.
- Genetic Information Non-Discrimination Act** - This law has been pending in various forms for many years, and the House overwhelmingly passed the legislation this past April with bipartisan support. It would protect personal genetic information from discriminatory use by health insurers and employers.
- Employment Non-Discrimination Act (ENDA)** - This legislation prohibits discrimination on the basis of sexual orientation and gender identity. It is specifically directed to gay, lesbian, bi-sexual, and transgender employees.
- Family and Medical Leave Act** - Employee groups want to expand the coverage of this law, possibly providing for some form of paid leave, and employer groups want to limit or clarify its application, particularly concerning intermittent leave.
- Civil Rights Tax Relief Act** - This law would eliminate the award of non-economic damages (compensatory and punitive damages) from gross income and permit income averaging for lump sum payments for back pay. Both employer and civil rights groups have lobbied for its passage.
- Americans With Disabilities Restoration Act** - This law attempts to broaden application of the ADA as some groups believe the current judicial interpretations significantly narrow the definition of disability.
- Arbitration Fairness Act** - This law would limit or prohibit mandatory arbitration in both employment and consumer contracts.
- Union Card Check Bill** - This bill has already passed both Houses of Congress but not by a filibuster-proof margin. It provides mandatory recognition of a union based upon a card check, and requires mandatory arbitration of initial collective bargaining agreements if no agreement between the parties is reached. Other issues are not necessary legislative, but equally important.

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COLLECTIVE DECISION MAKING LESS SUSCEPTIBLE TO DISCRIMINATION LIABILITY continued from page 1

In the case, a hospital fired a nurse for inappropriate conduct, and the plaintiff nurse contended that the hospital's reasons were pretextual. The plaintiff nurse argued that the decision to fire her was made collectively by all of her supervisors, the hospital "constantly changed" its reasons, and that employees who acted worse were not discharged. The Fifth Circuit Court of Appeals stated that collective decision making is less susceptible to influence by an individual with a discriminatory or retaliatory motive, and that the hospital from the start cited various examples of the nurse's behavior as the reasons for its decision. The court also found that the plaintiff was not similarly situated to others who she claimed committed misconduct and yet were not terminated.

Editor's Note - Who the decision-maker is can have important ramifications in a case. For example, it looks suspicious if the person making the decision in the personnel action at issue is not the normal person making such decisions. Similarly, it helps to have several people involved in the decision making, as the court or jury is less likely to find that all of those individuals had a discriminatory intent. For similar reasons, it helps to have a person of the same protected class as part of the decision making group.

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PERSPECTIVE

WHAT IS “CAREGIVER” DISCRIMINATION



Mary Helms

“According to the EEOC, most caregiving discrimination falls into three categories - sex or race-based discrimination under Title VII or disability discrimination under the ADA.”

A new type of discrimination has been heavily publicized recently, both by the Equal Employment Opportunity Commission and other parties, called “caregiver” discrimination. Although no federal laws specifically ban discrimination against caregivers, the EEOC has recently issued guidance on the subject, and says that Title VII and the ADA extend protection to individuals caring for children, parents and others. The guidance stresses that it does not create new law, but explains and clarifies existing law. According to the EEOC, most caregiving discrimination falls into three categories - sex or race-based discrimination under Title VII or disability discrimination under the ADA. Specifically, the guidance highlights six areas in which employers are vulnerable to charges, including: sex-based disparate treatment of caregivers; stereotyping and disparate treatment of pregnant caregivers; disparate treatment of male caregivers; disparate treatment of women of color; disparate treatment based on a child’s or parent’s disability; and harassment of workers with care giving responsibilities.

The EEOC guidance gives certain examples of practices that could be indicative of sex-based discrimination against caregivers:

- Asking female applicants, but not male applicants, whether they are married or have young children or inquiring about their childcare and other caregiving responsibilities.
- Stereotypical or derogatory comments about pregnant workers, working mothers or other female caregivers.
- Subjecting pregnant employees to less favorable treatment as soon as their pregnancies are made known.
- Subjecting women to less favorable treatment after they assume caregiving responsibilities.
- Treating female workers without caregiving responsibilities more favorably.
- Steering women with caregiving responsibilities to less prestigious or lower-paid positions.
- Treating male workers with caregiving responsibilities more favorably than female workers.

An example of how such issues can generate litigation recently occurred in *Lettieri v. Equant Inc.*, 99 FEP Cases 1569 (C.A. 4, 2007). A female manager was discharged after earlier being quizzed about the fact that her husband and young children lived in New York while she worked in Virginia. The court found that there was no bona fide elimination of her position, but instead the Senior Vice President believed that women should not live away from home during the work week. In reversing the District Court’s summary judgment for the employer, the Fourth Circuit Court of Appeals concluded that was “powerful evidence showing a discriminatory attitude at Equant toward female managers - particularly female managers who have children at home and commute long distances.”

TRENDS TO WATCH FOR IN 2008 continued from page 3

10. **Immigration** - The immigration system in this country is broken, which everybody agrees, but there is no consensus on how to fix it. This is an issue that divides political parties and interest groups. For example, business groups have traditionally supported liberal immigration, but the majority of the Republican Party today appears to oppose such measures. At the same time, union groups have generally opposed liberal immigration, but the Democratic Party has yet to form a consensus on the issue.
11. **Healthcare** - Many employers say healthcare costs are the greatest source of cost pressure facing their businesses. The most important recent developments appear to be strategies aimed at reducing costs by

increasing employees’ understanding of - and responsibility for - their healthcare choices, and experiments with healthcare legislation on the state level.

COST OF REGULATIONS

According to various surveys, including those reported in the *Kiplinger Letter*, regulations cost a company \$5,400 per employee each year, on average. Kiplinger reports that this expense hasn’t changed much in 20 years if adjusted for inflation, but that in the past few years there has been an increase due to security-related regulations spawned by 9/11.