Wimberly Lawson
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Briefly

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IS "TAKING A KNEE" PROTECTED ACTIVITY? IT CAN BE

Fredrick J. Bissinger

"Solutions need to be based on legitimate, non-discriminatory/ non-retaliatory reasons and not otherwise expose the employer to claims of race discrimination (including reverse discrimination), harassment, and retaliation."

The issue of race in the workplace is longstanding and complicated. If there were easy solutions to this issue, the EEOC, employers, and employees would have identified them by now. Current events have highlighted and exacerbated race-related issues in the workplace. Many times, simple miscommunications and misunderstandings that have no racial context can easily take on a racial context, if they go unaddressed. Additionally, it is clear that White and Black people view many race-related issues differently. Given these potentially problematic issues, it is critical for employers to apply thoughtful and critical analysis to race-related issues in the workplace. Solutions need to be based on legitimate, non-discriminatory/non-retaliatory reasons and not otherwise expose the employer to claims of race discrimination (including reverse discrimination), harassment, and retaliation.

The controversial subject of professional football players "taking a knee" during the National Anthem has now expanded to the workplace. In a recent case, an employer – The U.S. Postal Service - was confronted with an African-American employee protesting his employer's alleged racial mistreatment by taking a knee during a meeting. A supervisor asked the plaintiff to step into his office following the kneeling incident. The supervisor termed the conversation an "official discussion" which by the terms of the collective bargaining agreement in place was not a disciplinary action. Nevertheless, the conversation became heated. The supervisor felt threatened and asked the plaintiff to leave. He refused and the local U.S. Postal Inspector and local police were called. The plaintiff was placed on leave without pay pending an investigation. He grieved the suspension without pay under the collective bargaining agreement and later received pay for that time away.

The Plaintiff claimed that the suspension was retaliatory. A federal district court in Arkansas found that the plaintiff had established a prima facia retaliation claim under Title VII because he had engaged in protected activity by protesting what he viewed as discriminatory treatment and had suffered an adverse employment action by being suspended without pay. Although he was later paid, there was no assurance of this in the beginning. Accordingly, the Court ruled that a jury could find that the unpaid suspension was a materially adverse action because being suspended without pay could dissuade a reasonable employee from engaging in protected activity. The Plaintiff's claim failed, however because he did not present evidence showing that the employer's stated reason for the suspension – the supervisor felt threatened and the employer desired to investigate - was a pretext for retaliation. Notably, the Plaintiff alleged that the supervisor made comments supporting President's Trump's comments about black people, bashed Hilary Clinton, and made negative comments about NFL anthem protestors. The Court found these allegations insufficient to support a finding of retaliation or to show pretext in the suspension decision.

Editor's Note: The case is Raynor v. Brennan, (U.S. District Court, E.D. Ark., 8/27/20. This case is illustrative of situations in which an employee may engage in protected conduct and unprotected conduct at roughly the same time. In such situations, the employer must discipline an employee only for the unprotected conduct, as discipline for protected conduct, like kneeling in the Raynor case, might be considered retaliation prohibited by the employment laws. Suspension pending investigation can be a wise choice. Even so, if there

Continued on page 4

DOL REVISES FFCRA REGULATIONS

Courtney C. Hart

"In early August, a federal judge … struck down portions of the DOL's regulations, finding the DOL exceeded its authority."

While April feels like a lifetime ago, you likely remember the U.S. Department of Labor (DOL) issuing a final rule implementing the Families First Coronavirus Relief Act (FFCRA, or "the Act"), under which, most public-sector employers and private sector employers with fewer than 500 employees are required to provide up to two weeks of Emergency Paid Sick Leave (EPSLA) to employees unable to work for one of six COVID-related reasons. Further, those employers must also offer up to 10 weeks of partially paid leaved under the expanded Family and Medical Leave Act (EFMLA) coverage to care for a child whose school or place of care is closed because of the pandemic.

Shortly after enactment, the State of New York filed suit claiming the regulations unduly restrict an employee's right to paid leave. In early August, a federal judge in the Southern District of New York struck down portions of the DOL's regulations, finding the DOL exceeded its authority. The court, specifically, invalidated the work availability requirement, much of the health care provider exception, the employer consent requirement for intermittent leave, and the employer's right to require documentation in advance of leave.

In response, on September 11, 2020, the DOL issued revised regulations in line with the New York court's decision. In its revised regulations, the DOL reaffirms that EPSLA and EFMLA leave may be taken only if the employer has work available for which an employee can take leave; confirms that intermittent leave under FFCRA can only be taken with employer approval; provides an amended definition of "health care provider" that is narrower than its original regulations; and clarifies the timeline for when an employee must provide notice of the need for leave and supporting documentation.

A. Work Availability Requirement

Under the DOL's original rule, one of the requirements for taking FFCRA leave was that the employer must actually have work available for the employee to perform when the need for FFCRA leave occurs. If the employee is not scheduled to work – whether due to furlough, business closure or otherwise – there is no work from which to take leave. The court found, in vacating the ruling, that the DOL's explanation for the work availability requirement was deficient in that it did not provide sufficient analysis as to the reason why work must be available for leave to be available. In its new final rule, the DOL responded by setting out a 'but-for" standard with the following statement:

> "If there is no work for an individual to perform due to circumstances other than a qualifying reason for leave – perhaps the employer closed the worksite (temporarily or permanently) – that qualifying reason could not be a but-for cause of the employee's inability to work. Instead, the individual would have no work from which to take leave. The Department thus reaffirms that an employee may take paid sick leave or expanded family and medical leave only to the extent that any qualifying reason is a but-for cause of his or her inability to work."

The DOL did note that employers may not arbitrarily withhold work in order to thwart an employee's ability to take leave, and emphasized that the unavailability of work must be due to legitimate, nondiscriminatory, nonretaliatory business reasons.

B. Intermittent Leave

In its new ruling, the DOL held firm to its position that *intermittent FFCRA leave* is available only when the employer consents, but noted an interesting situation that may change how many employers defined "intermittent." The DOL supported its position to uphold its prior ruling by reiterating the classic FMLA regulations, which require that when the need for leave is foreseeable, it must be scheduled in a way that is minimally disruptive to business operations. It was further noted that FFCRA leave obligations should "balance the employee's need for leave with the employer's interest in avoiding disruptions by requiring agreement by the employer for the employee to take intermittent leave."

The main concern for employers stems from the DOL's analysis of employees' children partaking in some hybrid-type schooling situations, where children are attending school on a part-time basis. The DOL provides that in these situations, each day of school closure "constitutes a separate reason for FFCRA leave that ends when the school opens the next day." As a result, intermittent leave is not required in these situations because the school closes and opens repeatedly. More simply put, a full single day of leave is not intermittent, and an employee does not need employer consent to take of every Tuesday and Thursday due to their child's school being closed, because Tuesday and Thursday are two separate school closures, each entitling the employee to FFCRA leave. However, an employee whose child participates in a part-time schooling plan that requires the child to attend school only in the morning or afternoon, the employee will need to take continuous leave or obtain employer consent to use

Continued on page 4

OSHA UPDATE: COVID-19 AND *SMITHFIELD FOODS*

Mary C. Moffatt

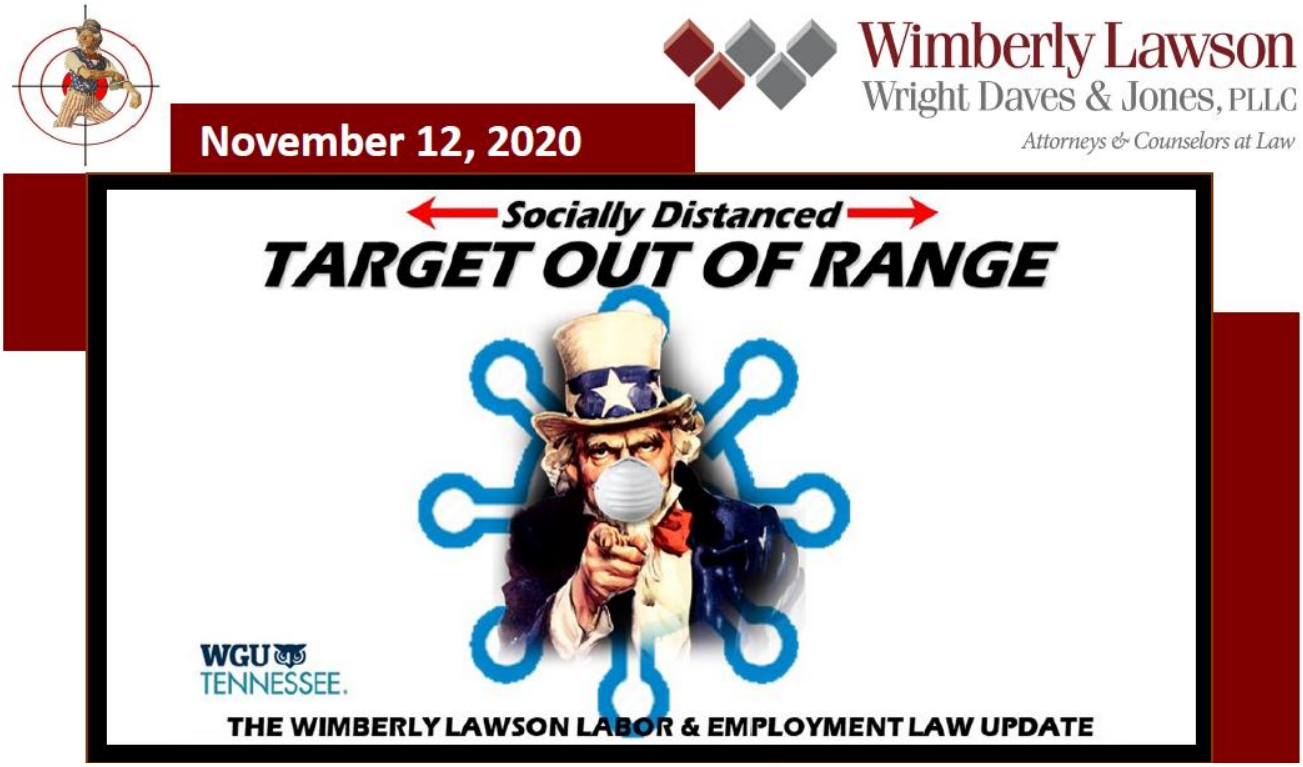
"Critics on both sides are reacting …"

In our May 2020 newsletter "BRIEFLY," we reviewed a case involving Smithfield Foods Inc.'s plant in Missouri and the efforts Smithfield took to protect its workers from COVID-19. Readers will recall a lawsuit in federal court was filed against Smithfield, wherein the plaintiffs requested the Court to compel the company to institute certain workplace measures in response to the pandemic. Smithfield moved to dismiss the case on the grounds that OSHA has primary jurisdiction in the area of workplace safety, rather than the court system. In that case, the District Court granted Smithfield's Motion to Dismiss, but it did so "without prejudice" explaining that if OSHA failed to act, the plaintiffs could seek emergency relief under other measures.

OSHA is not reluctant to take action with respect to COVID-19 measures, as evidenced by a recent Citation issued on September 10th against a different Smithfield plant located in South Dakota, with a resulting fine of $13,494. The Citation is based on a coronavirus-related inspection which evidently took place in March of 2020, after which OSHA cited the company for one violation of the "General Duty Clause" (29 U.S.C. §654, 5(a)) for failing to provide a workplace free from recognized hazards that can cause death or serious harm. Smithfield has indicated it plans to challenge the fine.

Critics on both sides are reacting, with the United Food and Commercial Workers International Union and the former Assistant Secretary of Labor for OSHA, David Michaels, on one side - saying the fine is "not even a slap on the wrist" for Smithfield while the North American Meat Institute accuses OSHA of "revisionism" and attempting to enforce a standard that was not in existence when the alleged violation took place (i.e., March of 2020). OSHA and the CDC issued workplace guidance for the meat packing industry on April 26, 2020.

OSHA has already issued several Citations related to the coronavirus and workplace safety, so there is no question OSHA is active in this area. Employers should contact any of the attorneys at Wimberly Lawson for assistance before responding to any inquiry from OSHA.



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"TAKING A KNEE" continued from page 1

is an element of protected activity involved it would be well to let the employee know from the outset that the suspension could be paid or unpaid depending on the outcome of the investigation and to proceed as quickly as reasonable under the circumstances. As noted in Raynor, an unpaid suspension of indefinite duration can be an adverse action in and of itself, exposing the employer to a claim for retaliation.

One of our primary suggestions for navigating race in the workplace is to focus and insist upon RESPECTFUL behavior in the workplace. When an employer identifies behavior that is not respectful, regardless of whether it constitutes harassment or discrimination, it needs to be dealt with in a timely and effective manner. Dealing with behavior at the fundamental level of respect can go a long way in preventing behavior that rises to the level of harassment, discrimination, or retaliation.

"DOL REVISES FFCRA REGULATIONS" continued from page 2

leave intermittently in partial-day increments.

C. Health Care Provider

The FFCRA permits employers to exclude "health care providers" from the Act's leave benefit provisions. If you read the DOL's definition of "health care provider" under the first ruling, then you know why the court had concerns. Essentially, under the first ruling, anyone and everyone who worked for a company providing medical care in any way, or for a company that contracted with these institutions, was a health care provider.

In response to the court's holding, the DOL revised and narrowed the exclusion to only include those individuals capable of providing health care services, which include "diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care," or otherwise meet the definition of the term found in the FMLA. The FMLA definition includes "doctors of medicine or osteopathy" authorized to practice in their State or other medical professionals such as podiatrists, dentists, clinical psychologists, optometrists, many chiropractors, nurse practitioners, nurse midwives, clinical social workers, physician assistants, and other similar professionals. Under the new rule, employers may also elect to exempt nurses, nurse assistants, medical technicians, and laboratory technicians who process test results; they too are considered "health care providers." Employers may also elect to exempt employees who perform diagnostic, preventative, treatment, or other integrated and necessary services. The DOL further gave the following examples of employees who may not be excluded: information technology (IT) professionals, building maintenance staff, human resources personnel, cooks, food service workers, records managers, consultants, and billers.

D. Notice

The court found several inconsistencies in the DOL's initial ruling, with respect to the timeline for employee's giving notice and providing supporting documentation. The DOL tried to remedy those inconsistencies in its new ruling, by requiring employees provide notice and supporting documentation "as soon as practicable." The DOL warns that employers should be careful not to require supporting documentation as a precondition to providing FFCRA leave and should provide employees a reasonable opportunity to provide the required documentation.