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WIMBERLY LAWSON SEALE WRIGHT & DAVES, PLLC

ATTORNEYS & COUNSELORS AT LAW

THE EAGLE'S VIEW

OURSOURCING OFF-SHORE GETS CONTROVERSIAL

For many years, companies have been outsourcing certain functions to third party contractors, that were previously performed in-house. In recent years, however, increased attention has been given to a different type of outsourcing, known as off-shoring, sending work abroad. In some cases a company will directly outsource a function to a service provider in another country. In another type, the company outsources a function to a U.S. service provider who in turn outsources all or part of it outside the U.S.

Outsourcing, particularly the off-shoring variety, has human resource, marketing, and even political implications. According to a new survey by Watson Wyatt, 85% of U.S. workers believe that off-shoring has a negative impact on the U.S. economy, but less than 10% of them are strongly concerned that their own job is in danger of being sent overseas. In a separate Watson Wyatt survey of 33 multi-national organizations, the majority of which had already off-shored business functions, 65% of them found the practice to be effective in lowering production costs, and 61% said it improved operational efficiency. However, most respondents indicated it was simply too early to tell the possible adverse impact on marketplace image, customer satisfaction and human resource management.

In another study by business research firm Gardner, 80% of participants acknowledged the backlash surrounding off-shore outsourcing. State and local governments may start exerting pressure as well. Various bills have been proposed in Congress banning off-shoring companies from competing in the bidding process for government contracts and state contracts funded by the federal government, and legislatures in more than 15 states also are considering bans or restrictions on off-shoring. Many companies are examining whether their operations may be subject to local government pressure to avoid off-shoring. Much of the rhetoric may be attributed to the November elections, however.

Economists generally agree that free trade in the long run promotes higher economic growth. The Government Accountability Office (GAO) in September, in response to a Congressional inquiry, reported that the practice of "off-shoring" sophisticated service jobs to India, China, and other low-wage countries is growing, but that there was no evidence it had affected the U.S. job market. U.S. high-tech jobs have been evaporating since the tech bubble burst in 2000, but "the reasons for these declines cannot be specifically linked to off-shoring," the GAO concluded. Moreover, while sending U.S. work off-shore can cause some job losses, the trend also may offer benefits, "including lower prices, productivity improvements, job creation, and overall higher growth," it found. Further, the GAO said predicting job losses is difficult. For example, federal trade data shows that in 2002 U.S. firms imported more than $1 billion in computer and data processing services. At the same time, they exported more than $3 billion in such services. Imports and exports have risen sharply in recent years, making the impact of off-shoring unclear.

Some businesses report that outsourcing off-shore entails hidden costs. According to one company official whose company has moved all of its off-shore operations back to the U.S., productivity at off-shore operations can be half of that expected in the U.S., and labor turnover can be quite high. In addition, costly vendor training may not fully offset cultural habits that conflict with the company's

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Wimberly Lawson Seale Wright & Daves, 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, Nelson & Schneider, P.C., Atlanta, Georgia; Wimberly Lawson Daniels & Brandon, Greenville, South Carolina.; Wimberly, Lawson, Suarez & Russell, Tampa, Florida; and Holifield & Associates, P.C., Knoxville, TN.

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established policies and procedures.

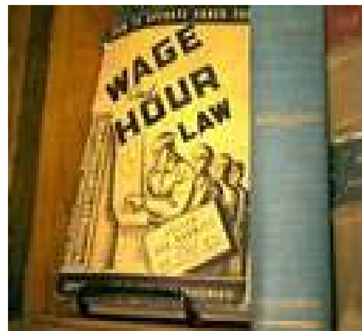
Another controversial issue relates to the effort to insure quality of work and protection of confidential and proprietary information. These issues sometimes drive companies to attempt to exercise control over the workers of the outsourcing business. This exercise of control can expose a company to various employment-related claims related to the employees of the service provider.

Outsourcing in one form or another, however, is here to stay. Even unions have joined the practice. Various sources report that many labor unions are now "outsourcing" their picketing activities to persons from the various state unemployment rolls. The unions report that their members are too busy to picket, so the unions simply contract out the picketing to persons on the unemployed rolls at state unemployment offices.

STATE LAWS AFFECT WAGE-HOUR CHANGES ALSO

The new Wage-Hour white collar regulations went into effect August 23, and employers should have been reviewing their salaried workforces to determine which categories are exempt and which are non-exempt. However, this task is more complicated for employers in states with different requirements than the federal law.

It appears that at least 18 states have Wage-Hour exemption rules that vary from the federal rules, including Alaska, Arkansas, California, Colorado, Connecticut, Hawaii, Illinois, Kentucky, Maryland, Minnesota,



Montana, New Jersey, North Dakota, Oregon, Pennsylvania, Washington, West Virginia and Wisconsin. For example, these states may have state rules defining exempt executive employees, or exempt outside sales employees, different from the definition in the new federal rules. Thus, employers in these states will have to analyze whether the new federal rules or existing state rules provide better coverage for the employee and comply with the state or federal rule that provides the greatest protection for the employee.

KNOW YOUR ATTORNEY

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Fred is a Member in the Nashville, Tennessee office of Wimberly Lawson Seale Wright & Daves, PLLC. His law practice includes an emphasis in workers' compensation, employment discrimination and wrongful discharge litigation, ADA and FMLA compliance, and general liability. Mr. Bissinger received his Bachelor of Science, *cum laude*, in Economics from Washington & Lee University and his law degree from the Seton Hall University School of Law. Prior to entering private practice, Mr. Bissinger served in the United States Navy Judge Advocate General Corps from 1993-1997. Mr. Bissinger is a member of the Tennessee Bar Association and the Mid-South Workers' Compensation Association.

EMPLOYERS MUST EXERCISE CARE IN JOB OFFERS

Sometimes unmet promises in job offers, whether made verbally or in writing, can cause problems down the road. In a recent settlement, PriceWaterhouseCoopers LLP agreed to pay $1.8 million to approximately 270 recent college graduates who did not receive management consulting jobs and signing bonuses as promised. According to the lawsuit, recruiters working for the defendant who were assigned to major colleges in the eastern U.S. made written offers of employment to students slated to graduate in Spring 2001. The graduates alleged that after

accepting the company's job offer, they stopped looking for other jobs, turned down offers from other companies and incurred expenses in preparing to begin work for PriceWaterhouseCoopers. As the economy declined in 2001, the recruiters allegedly made repeated assurances to the graduates that the jobs were secure. However, the graduates never received jobs and were not paid the bonuses.

PriceWaterhouseCoopers made no admission of liability in settling the graduates' claims for breach of contract, promissory estoppel, breach of implied covenant of good faith and fair dealing, fraud, and negligent misrepresentaiton.

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***EDITOR'S NOTE** - In most states, claims for breach of promise for failure to implement a job offer are*

usually thrown out of court on the grounds that at-will employment can be ended at any time, and so the withdrawal of a job offer can be made at any time without liability. However, today's plaintiffs come up with a variety of theories to use against an employer who revokes such an accepted offer as indicated in the PriceWaterhouseCoopers case. In general, offer letters should be reviewed by counsel to be sure that any commitment made in the job offer is intended. Although employers usually win these cases it is better to do it right the first time and avoid the litigation.

SURVEY REVEALS TOP LITIGATION CONCERNS, NUMBER OF CASES

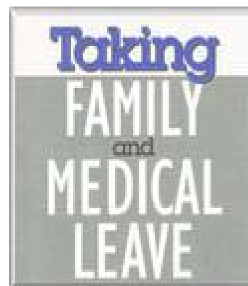
A recent survey of corporate in-house counsel in 300 companies in various industries in 41 states reveals that their top litigation concern was labor and other employment-related cases, followed by contract disputes, intellectual property cases, product liability, and class-actions. Counsel at the largest companies ranked class-actions as their biggest problem, while counsel at smaller companies with less than $100 million in annual revenue, said intellectual property litigation was their top concern. Companies having gross revenues of $1 billion or more reported a median number of 86 pending cases, while the average number of cases pending among all U.S. companies in the survey was 15. The survey was conducted during 2004 by an independent research firm in Houston, Texas, Greenwood, Inc.

COURTS DISAGREE WHETHER EMPLOYERS' ATTENDANCE NOTICE POLICY TRUMPS FMLA

It is well known that FMLA absences are protected from discipline or retaliation. However, when an employee refuses to follow a company's procedures that would qualify the employee for FMLA leave, sometimes the courts find that the employee was disciplined for violating the policy, and not for the FMLA leave.

An example of the successful defense of such a case occurred when an employee was absent from work for two days, and did not call in her absences, but her boyfriend delivered a medical leave request form to her employer's medical department the next day. However, it was not processed before she was discharged for being absent without notification for three consecutive days in violation of the employer's attendance policy. Under that policy, employees must notify their supervisors, not their medical department. The employee sued, alleging that her employer interfered with her FMLA rights.

A federal district court, as affirmed by the federal appeals court, granted the employer's motion for summary judgment, concluding that the employee failed to give proper notice under the FMLA, or in the alternative, the employer proved that she would have been discharged for violating the attendance policy regardless of her request for FMLA leave. Bones v. Honeywell International, Inc., 336 F.3d 869 (C.A. 10, 2004). The appellate court noted that the employee had a history of attendance problems and had been warned that her failure to notify her supervisor of her absences could result in her discharge. Based on this evidence, the appeals court concluded that a reasonable jury could not find that she was discharged for requesting FMLA leave.



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Another federal appeals court, however, reached a different result in Cavin v. Honda of America Manufacturing, Inc., 346 F.3d 713 (C.A. 6, 2003). Honda disallowed a portion of the plaintiff's leave under the FMLA on the grounds that the absences were not approved. Honda claimed that the plaintiff failed to call the leave coordination department within three consecutive days of his first day of leave. On another absence, although the plaintiff did submit a leave coordination form, he failed to complete it with dates of treatment or incapacity. He was then terminated for violating the leave policy a second time.

The plaintiff argued that Honda's policy was inconsistent with the FMLA in that the FMLA does not permit employers to deny otherwise qualifying leave simply because an employee fails to follow a company's internal notice requirements. Looking to the regulations, the court noted that an employer is permitted to require an employee to comply with certain notice requirements requesting leave. However, the regulations also state that failure to follow such

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internal procedures will not permit an employer to deny an employee's FMLA leave.

The court in the Honda case found that other circuits have held that if an employee is able to comply with an employer's notice requirements and fails to do so, the employer may deny FMLA leave. Disagreeing with this interpretation, the court found that the regulations suggest that notice requirements for unforeseeable leave are more relaxed than the requirements for foreseeable leave. Thus, the court concluded that Honda could not deny the plaintiff FMLA leave for which he was otherwise qualified by enforcing its own notice requirements.

The court then addressed whether the plaintiff had provided sufficient notice for FMLA purposes. The court noted that the plaintiff told Honda he had been in a motorcycle accident and had just left the hospital. While this information did not automatically mean that the plaintiff had a serious health condition, he also informed Honda that he had been in the hospital and was unable to work due to his injury. Thus, the court concluded that Honda was on notice and had a duty to collect additional information from the plaintiff that would be necessary to make his leave comply with the FMLA requirements.

EDITOR'S NOTE - *The bottom line in the above two cases is that if an employee minimally meets the FMLA notice requirements, the employer may be on shaky ground in relying on its own notice requirements to discipline the employee. At least advice of counsel should be sought in such situations. It does appear that the employer is on much stronger ground in relying on the FMLA regulations, where if the need for leave is unforeseeable, notification must be provided to the employer within two business days or as soon as practical after learning of the need for leave. If the need for leave is foreseeable, 30 days notice to the employer is required if practical or as soon as it is practical to give notice. See Brenneman v. MedCentral Health System, 366 F.3d 412 (C.A. 6, 2004 (although the notice provided by the employee was sufficient, it was untimely when there were no extraordinary circumstances that prevented him from notifying the employer earlier).*

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