



Wimberly Lawson
 Wright Daves & Jones, PLLC

Attorneys & Counselors at Law

Briefly
 March 2010 Volume 10, Issue 3

**FIRM CHANGES NAME TO
 WIMBERLY LAWSON WRIGHT DAVES & JONES, PLLC**

The firm is pleased to announce that effective March 1, 2010, the firm name was changed to Wimberly Lawson Wright Daves & Jones, PLLC, reflecting the addition of shareholder Jeff Jones's name. Jeff is also the Regional Managing Member of the firm's Cookeville, Tennessee office. Jeff has been a shareholder for five (5) years. His biography is included in this issue at page 3. William R. "Bill" Seale continues to be Of Counsel with the firm. Bill is Vice President and General Counsel for Bush Brothers & Company in Knoxville. Bush Brothers is a long-time client of the firm.

DEFENSE SPENDING LEGISLATION EXPANDED MILITARY FMLA LEAVE



On October 28, 2009 President Obama signed the Defense Department Fiscal Year 2010 authorization bill (H. Rept. 111-288) that includes an expansion of Family and Medical Leave Act provisions related to qualifying exigency leave and to military caregiver leave for families of active duty members.

The law extends to active duty members qualifying exigency leave, which is intended to help families of active duty members manage the members affairs while they are called to active duty status. Before the change in the law, the leave was available only to families of members of the National Guard and Reserve.

Fred Bissinger

"The law also would extend military caregiver leave provisions to family members of veterans."

Qualifying exigency leave includes a number of broad categories of reasons and activities, including short-notice deployment, military events and related activities, child care and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, and any additional activities agreed to by the employer and the employee.

Family members may use all or part of the regular allotment of 12 weeks of FMLA leave. The law also would extend military caregiver leave provisions to family members of veterans.

Under this leave, eligible employees who are family members of current servicemembers or veterans may take up to six months (26 workweeks) of leave in a single 12-month period to care for a servicemember who has a serious illness or injury that was incurred in the line of duty while on active duty. A "covered servicemember" is a veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces, including the National Guard or Reserves, at any time during the 5 years preceding the date on which the veteran undergoes the medical treatment, recuperation or therapy. The 12-month period commences when the employee starts using military caregiver leave.

Employers do not have the option of using the calendar-year method as they do for other types of FMLA leave. Entitlement to 26 weeks of military caregiver leave, in a 12-month period, is provided to families of each servicemember and for each illness or injury incurred, and covers more extended family members than those who may take FMLA leave for other reasons.

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.

DEPARTMENT OF LABOR PUBLISHES ANSWERS ABOUT EMPLOYEE HOURS AND PAY REDUCTIONS



**Carol Merchant,
Consultant**.....

"Defending such a collective wage-hour case can be quite expensive, and losing one even more expensive."

The Department of Labor's (DOL) Wage & Hour Division has published a list of frequently asked questions about furloughs and other reductions in pay and hours. The beginning point under the Fair Labor Standards Act (FLSA), is that employers are required to pay all non-exempt employees the full minimum wage and any overtime on the regularly scheduled pay date for a particular work week. Although an employer must pay non-exempt employees for all hours worked, employers legally may lower workers' hourly rates so long as the rate matches at least the minimum wage.

The full list of frequently asked questions is available at www.wagehour.dol.gov under the "frequently asked questions" tab.

An employer must pay an exempt employee the full predetermined salary for any week during which the employee performs any work, regardless of the number of days or hours worked. However, the Wage-Hour law does not require that the salary be paid if the employee does not work for an entire work week.

..... An employer is allowed to make prospective reductions in pay for a salaried exempt employee due to an economic downturn, provided the purpose of the reduction is to meet long-term business needs. Short-term, day-to-day or week-to-week deductions from a fixed salary based on operating requirements of the business are not permissible, and would result in the loss of the wage-hour exemption.

CORRECTING EMPLOYEE MISCLASSIFICATIONS UNDER THE WAGE-HOUR LAW

In recent years, wage-hour collective actions exceeded the number of all discrimination class actions combined. Defending such a collective wage-hour case can be quite expensive, and losing one even more expensive. Further, if the employer "corrects" misclassified employees, the correction process itself can put employees on notice that they have been "cheated" and suggest they bring wage-hour claims for back liability. Back liability in some circumstances can include liquidated damages (resulting in double back pay for up to 3 years), interest, and paying the plaintiffs' attorneys fees. A further problem is that if an employer only makes partial restitution for back liability, thinking the case is settled, such agreements are not enforceable unless the employees are represented by counsel and/or the settlement has been approved by DOL.

The good side of the picture, is that the sooner the misclassifications stop, the lower the potential future liability there is. That is, there is normally either a two or three-year statute of limitations, and thus the back liability is reduced for such time as the misclassifications have been corrected. It is critically important to confer with competent counsel well versed in wage-hour law, whose expert opinion is needed to address sensitive issues and conversations with legal counsel are privileged, allowing employers to assess their options.

Rather than providing full restitution, many employers will choose to correct the classification issues going forward without admitting that they were violating the law. If the employees are converted from exempt to non-exempt status, employers must be sensitive to the issue that some employees feel their exempt status is a status symbol and without careful handling, they may feel they have been demoted.

THE 2010 LABOR EMPLOYMENT UPDATE CONFERENCE
November 18 & 19, 2010



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DOES YOUR HEALTH PLAN COMPLY WITH MENTAL HEALTH PARITY LAWS?



Does your health plan provide mental health or substance abuse benefits? If so, then make sure that your plan complies with new mental health parity requirements that went into effect for plan years beginning after October 3, 2009. Although the law is currently in effect, it is expected that final regulations will give employers until the first plan year after July 1, 2010, to be in compliance.

Suzanne Roten..

"Although the law is currently in effect, it is expected that final regulations will give employers until the first plan year after July 1, 2010, to be in compliance."

Federal law prohibits group health insurance or self-insured plans covering more than 50 employees from imposing caps or limitations on mental health treatment or substance use benefits that are not also applied to medical and surgical benefits. Key changes include the following:

- If a group health plan includes medical/surgical benefits and mental health benefits, the financial requirements (e.g., deductibles and co-payments) and treatment limitations (e.g., number of visits or days of coverage) that apply to mental health benefits must be no more restrictive than the predominant financial requirements or treatment limitations that apply to substantially all medical/surgical benefits;
- If a group health plan includes medical/surgical benefits and substance use disorder benefits, the financial requirements and treatment limitations that apply to substance use disorder benefits must be no more restrictive than the predominant financial requirements or treatment limitations that apply to substantially all medical/surgical benefits;
- Mental health benefits and substance use disorder benefits may not be subject to any separate cost sharing requirements or treatment limitations that only apply to such benefits;
- If a group health plan includes medical/surgical benefits and mental health benefits, and the plan provides for out of network medical/surgical benefits, it must provide for out of network mental health benefits;
- If a group health plan includes medical/surgical benefits and substance use disorder benefits, and the plan provides for out of network medical/surgical benefits, it must provide for out of network substance use disorder benefits;
- Standards for medical necessity determinations and reasons for any denial of benefits relating to mental health benefits and substance use disorder benefits must be made available upon request to plan participants;

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KNOW YOUR ATTORNEY

JEFFREY G. JONES



JEFFREY G. JONES is Regional Managing Member of the Cookeville, Tennessee office of Wimberly Lawson Wright Daves & Jones, PLLC. His practice includes an

emphasis on commercial transactions, governmental law and creditors' rights, as well as insurance defense.

Jeff received his Bachelor of Science degree in History, graduating magna cum laude in 1984 from Tennessee Technological University. Jeff received his law degree from the University of Tennessee in 1987. Jeff is a member of the Putnam County Bar Association, Tennessee and American Bar Associations. In addition to being a member of the Upper Cumberland Trial Lawyers Association, Jeff was a District Representative for the Tennessee Young Lawyers Division of the Tennessee Bar Association.

Jeff is currently the County Attorney for Putnam County, Tennessee. In the community, Jeff is a member of the Cookeville Noonday Rotary Club. He is a member of St. Michael's Episcopal Church and is active in American Legion Boys State.

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WELLNESS PROGRAMS AND EMPLOYEE HEALTH RISK ASSESSMENT



Ron Daves

“The opinion concludes that an employer’s ‘requirement’ that all employees complete a health risk assessment to participate in an employer-funded health reimbursement arrangement, likely violates the Americans with Disabilities Act (ADA).”

.....

Perhaps because more employers are using health assessments, the Equal Employment Opportunity Commission (EEOC) has issued an opinion letter on the subject. The opinion concludes that an employer’s “requirement” that all employees complete a health risk assessment to participate in an employer-funded health reimbursement arrangement, likely violates the Americans with Disabilities Act (ADA). The opinion states that employers may ask only disability-related questions and require employees to undergo medical examinations if job-related and consistent with business necessity. These actions are also permitted where they are a follow-up to an employee’s request for a reasonable accommodation, in specific medical circumstances such as periodic medical examinations for positions affecting public safety, or if part of a “voluntary” wellness program. Further, other circumstances may arise involving a particular employee who cannot perform his or her job, to determine whether he or she will face a direct threat because of a medical condition.

The health assessment addressed in the opinion letter required employees to answer over 100 questions in various categories, such as family health history, self care, personal health, women’s health, older adult health, nutrition choices, physical activity, and alcohol and tobacco use. The opinion letter states:

“Although the Commission has not yet taken a formal position on the question you have asked, requiring employees to complete a health risk assessment that includes many disability-related inquiries - such as questions about how often they feel depressed; whether they ever have been told that they have certain conditions, such as asthma, cancer, heart disease, or diabetes; how many different prescription medications they currently take; or how much alcohol they consume - as a prerequisite to obtaining reimbursement for health expenses does not appear to be job-related and consistent with business necessity.”

The letter goes on to state that many questions in the assessment are not disability-related and may be asked of employees. These include questions such as whether the employee sees a personal physician for routine care or has a health care directive, how many servings of fruit and vegetables the employee eats, whether the employee takes vitamin supplements, whether the employee eats breakfast, and how much the employee exercises. Such questions “are not likely to elicit information about a disability and, therefore, are not subject to the ADA’s restrictions.”

Other relevant considerations are the prohibitions of the Genetic Information Nondiscrimination Act (GINA). That Act prohibits employers from obtaining any genetic information (which includes family medical history) from applicants or employees, except under certain very limited circumstances. A question would arise as to whether the wellness program is voluntary. If not, it could be a violation of GINA to ask such questions.

The letter addresses the issue about the health risk assessment being part of a wellness program. “Finally, even if the health risk assessment could be considered part of a wellness program, it is not voluntary because it penalizes any employee who does not complete the questionnaire by making him or her ineligible to receive reimbursement for health expenses.”

.....

“DOES YOUR HEALTH PLAN COMPLY WITH MENTAL HEALTH PARITY LAWS?”
continued from page 3

- The parity requirements under previously existing law (regarding annual and lifetime dollar limits) will continue and will be extended to substance use disorder benefits.

The government has not yet answered several questions about these law changes, including whether co-pays for mental health and substance abuse services can be the same as for specialist services and whether separate deductibles can be charged for mental health or substance abuse services.