



ATTACKS ON NO-FAULT ATTENDANCE POLICIES EMPLOYERS' WORST NIGHTMARE



Jerome D. Pinn...

"They will argue that a no-fault attendance policy does not meet employers' obligations to reasonably accommodate their disability."

Most employers and probably commentators believe that the best attendance control system is some type of "no-fault" attendance policy. In the old days, personnel department employees and supervisors "grilled" absent employees as to the reasons for their absences, and based progressive discipline on whether or not there was "just cause" for absences. Later, these systems were felt to be difficult to administer consistently, likely to antagonize employees and infringe on employee privacy, mostly subjective, and contrary to "modern" thinking. Hence, the "no-fault" system developed in which employees received a certain number of points for their absences, regardless of the reason for the absence, subject to a few notable exceptions such as FMLA, jury duty, funeral leave, paid leave, etc.

Fast forward to the amendments to the American with Disabilities Act (ADA), which became effective January 1, 2009, under which most absences due to any type of physical or mental impairment are covered by the ADA, whereas in the past they were not serious enough to constitute a "disability" under the ADA. Thus, many more plaintiffs than previously can now claim that they were terminated because of their "disability," because of absences due to their disability. They will argue that a no-fault attendance policy does not meet employers' obligations to reasonably accommodate their disability.

This argument was made in a case involving a settlement entered into on July 6, 2011 between the Equal Employment Opportunity Commission (EEOC) and Verizon Communications. *EEOC v. Verizon Del. LLC*, D. Md. No. 1: 11-cv-01832, Settlement Agreement filed 7/6/11. According to

the EEOC, this settlement is the largest disability discrimination settlement of a single lawsuit in the EEOC's history. Under the settlement Verizon will pay \$20 million and provide various other forms of relief to a class of claimants. The additional relief includes modifying attendance policies to include measures for accommodating qualified individuals with disabilities, and excusing a disability-related absence as "non-chargeable" as reasonable accommodation under the ADA.

Many employers believe that claims attacking "no-fault" attendance policies lack merit, inasmuch as the policy itself is a form of accommodation, and an employee not at work at all cannot really be "qualified." In any event, employers can expect large numbers of these claims to be brought, and apparently some employers are settling these types of claims rather than defending such claims on the merits.

The EEOC also reported that in fiscal year 2010, private sector workplace discrimination charge filings with the EEOC hit an unprecedented level of 99,922, which included a record-high number of disability charges (25,165) – an increase of 17.3 percent in disability charges over the prior fiscal year.

The settlement between EEOC and Verizon provides some insight into the EEOC's view on how employers should deal with ADA issues relating to no-fault attendance policies. Section 20.03 of the settlement agreement provides:

20.03. In determining whether a Current Associate's absence should be "nonchargeable," Verizon will evaluate on an individual case-by-case basis whether each of the following is satisfied: (a) the Current Associate has a mental

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ARRIVAL OF THE TENNESSEE LAWFUL EMPLOYMENT ACT OF 2011



James W. Friauf....

"In a nutshell, the TLEA directs virtually all employers to use the federal E-Verify system to verify the immigration status of new employees."

Welcome to Tennessee. We have all seen the signs going to and from our fair State. We now get to welcome our newest resident, E-Verify, courtesy of the Tennessee Lawful Employment Act of 2011 (the "TLEA"). In a nutshell, the TLEA directs virtually all employers to use the federal E-Verify system to verify the immigration status of new employees. Note that this requirement is in addition to the federal requirement that employers complete a Form I-9 on each new employee.

In the July 2011 issue of *Briefly*, Anita Patel explained *Chamber of Commerce v. Whiting* in which the United States Supreme Court upheld Arizona's State E-Verify Mandate, which is similar to the TLEA. The clearing of this hurdle means that it is much more likely that the TLEA is here to stay.

The TLEA phases in gradually, depending on the size and type of employer. First, beginning January 1, 2012, all state and local governmental entities and all private employers of 500 or more employees are subject to the TLEA. Private employers of 200 to 499 employees are covered beginning on July 1, 2012. Finally, as of January 1, 2013, all private employers employing 6 to 199 workers will be covered. If you are an employer of 6 employees or less, you may stop reading.

Note that the TLEA is silent as to whether employees located outside Tennessee are covered for purposes of the phase-in and the six-employee threshold. The TLEA authorizes the commissioners of labor and workforce development and safety to promulgate rules and regulations, so the coverage issue may be clarified in the rule-making process.

The TLEA does not explicitly state that it applies to newly-hired employees only. However, it defines "employee" as any individual for whom an employer must complete an I-9. Pursuant to federal law and regulations, I-9s must be completed within three days of hire; thus, it would appear that the TLEA only requires employers to verify the immigration status of employees hired after the effective date.

The TLEA requires that covered employers demonstrate that they are hiring and maintaining a legal workforce. Employers may do so by either using E-Verify or collecting copies of one of several enumerated documents (valid Tennessee driver's license, birth certificate, passport, valid alien registration document, etc.). However, in order to receive a rebuttable presumption that the employer has not violated the TLEA, employers must enroll in the federal E-Verify program and use it to verify employment eligibility. If an employer chooses not to enroll in the program, but rather uses an enumerated document to verify employment eligibility, the employer will not receive the rebuttable presumption of compliance with the Act.

Additionally, the TLEA requires covered employers to "request and maintain" a copy of one of the enumerated documents from *non-employees* to verify their immigration status. A "non-employee" is defined as "any individual, other than an employee, paid directly by the employer in exchange for the individual's labor or services." This would appear to include, at a minimum, independent contractors paid directly by the employer. Note again that a valid Tennessee driver's license or photo identification license issued by the department of safety satisfies this requirement.

The TLEA includes a work-around for employers without an internet connection. A new office has been created within the Tennessee Department of Labor and Workforce Development ("TDOL") to conduct work authorization requests through E-Verify on behalf of employers without internet access. To utilize this service, the employer must sign an affidavit stating that it has no internet connection. If the employer uses this program, it has not violated the TLEA. However, be sure to notify the TDOL if you gain an internet connection to avoid a violation.

Steep penalties are imposed for violations of the TLEA. For "knowing violations," a first offense carries a \$500 fine. Second and third offenses subject employers to \$1,000 or \$2,500 fines, respectively. Employers are fined an *additional*

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OSHA WINS SUBPOENA BATTLE, INSURER FORCED TO DISCLOSE DAMAGING REPORT



Mary M. Helms.....

"If you think this sounds like another example of "Another good deed goes unpunished," you're right..."

.....
Reinsurance Co., No. 3:11-CV-50014 (N.D. Ill., May 2, 2011).

If you think this sounds like another example of "Another good deed goes unpunished," you're right; the company had its insurer perform a risk assessment, and now OSHA is likely to use the insurer's report against the company. That's the bad news. The good news is that it doesn't have to be that way.

If an employer goes through legal counsel to conduct a risk assessment, any resulting report will be subject to the attorney work product privilege. While this is not an ironclad guarantee against disclosure, if the privilege is asserted it will be much more difficult for OSHA to compel disclosure through a subpoena enforcement proceeding. This is equally true if the attorney hires an independent consultant; so long as it is the company's lawyer who commissions the study.

In this case, if the employer had gone through counsel to get the risk assessment, the court would have been much less likely to force the company to disclose the results. This avoids discouraging employers from identifying workplace risks for fear that the information will be used against them promoting workplace safety, while protecting the employer from the risk of enhanced OSHA penalties. The cost savings, not only in term of decreased exposure to OSHA fines, but also of insurance rate hikes and potential loss of business due to a history of violations, will pay for the attorney's fee many times over.

PPACA UPDATE: APPLICATIONS FOR ANNUAL LIMIT WAIVER MUST BE SUBMITTED BY SEPTEMBER 22, 2011

Catherine E. Shuck

The Department of Health and Human Services (HHS) has announced that the program granting waivers from the Patient Protection and Affordable Care Act's (PPACA) minimum annual limit requirement will stop accepting applications on September 22, 2011. Plans that currently have a waiver from PPACA's annual limit requirement may apply to renew the waiver through 2013. Additionally, plans that have not yet obtained a waiver may still apply, and waivers may be granted through 2013. However, both types of applications must be submitted by September 22, 2011. As of January 1, 2014, all annual limits will be prohibited. For plans that do not have a waiver, PPACA requires that annual limits be no less than \$1.25 million for plan years beginning on or after September 23, 2011. More information on annual limit waivers and the application process is available at <http://cciio.cms.gov/>.

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

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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2009, as amended through the ADA Amendments Act of 2008; (b) the Current Associate's absence was caused by a disability; (c) the Current Associate or someone else on the Current Associate's behalf requested through the Company's designated process a period of time off from work due to a disability; (d) the Current Associate's absences have not been unreasonably unpredictable, repeated, frequent or chronic; (e) the Current Associate's absences are not expected to be unreasonably unpredictable, repeated, frequent or chronic; (f) Verizon was able to determine, from the request by or on behalf of the Current Associate or through the interactive reasonable accommodation process, a definite or reasonably certain period of time off that the Current Associate would need because of a disability; and (g) the Current Associate's need for time off from work as a reasonable accommodation does not pose a significant difficulty or expense for Verizon's business. If each of the foregoing is satisfied a Current Associate's absence shall be "nonchargeable." If (a), (b), (c), (d), (e), (f), or (g) is not satisfied, Verizon may, as Verizon deems appropriate, determine that an absence is "chargeable."

In other words, the settlement suggests a way for employers to modify their procedures to require that a disabled employee (or someone acting on behalf of the disabled employee) request leave of a definite duration so that the employer can evaluate whether the accommodation would pose significant difficulty or expense.

What Should Employers Do?

For those who want to avoid the ire of the EEOC, or a plaintiff's attorney, prepare to engage in a multi-step analysis when an employee is absent from work for personal medical reasons. First, does the employee have an impairment that substantially limits one or more activities? Second, was the absence caused by the disability? Third, did the employee or his representative request time off from work because of a disability? Fourth, are the employee's absences unreasonably unpredictable, repeated, frequent or chronic? Fifth, does the employee need a definite or reasonably certain period of time off because of the disability? Sixth, would granting the employee time off pose a significant difficulty or expense for the employer?

Assuming the employer wants to be quite conservative and avoid these type claims being made (regardless of their ultimate validity), the important question becomes how the employer can design or modify its no-fault policy to meet these requirements. Even in the Verizon settlement, there is a key phrase that the employee has "requested through the company's designated process for a period of time off from work due to a disability." This key phrase as well as the rationale of the issue suggests that an employer can make a minor modification to its no-fault policies to allow for such an exception, as the law requires an employee with a disability to initiate the request for a reasonable accommodation, following the employer's published policies. Thus, through the use of this concept, many of the problems associated with the Verizon-type issue can be safely handled without a significant burden on employers.

For employers who are willing to accept some risk, there are some simpler procedures. First, implement an ADA accommodation policy that applies to all other policies and procedures of the company. Second, wait to see if an employee requests an accommodation in accordance with the ADA accommodation policy. Third, if the disabled employee requests an accommodation, evaluate whether the accommodation will enable the employee to do the job. Fourth, if not, then engage in an interactive process with the employee to determine whether there is any accommodation that will enable the employee to perform the job. At the same time, remember that you cannot discriminate against a disabled employee because of the disability. In other words, if other similarly situated employees receive leave, be sure that you treat the disabled employee fairly.

“TENNESSEE LAWFUL EMPLOYMENT ACT” continued from page 2

\$500, \$1,000, or \$2,500 if the employer fails to use E-Verify or request employment eligibility documentation (i.e., birth certificate, driver's license, etc.). If a violation of the TLEA is found, the employer must submit evidence of compliance with the TLEA to the TDOL within 60 days.

Beware the Scarlet Letter! In addition to the fines an employer may be subjected to, beginning February 1, 2012, the TDOL will post a list of violators on its website, which will include the name, place of the business of the employer, a description of the violation, and will state what penalty was assessed. The lesson to be learned is that, unless the statute is found unconstitutional, which now seems less likely after *Whiting*, an employer would be well advised to use E-Verify to ensure that it has a legal workforce.



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We invite you to attend our 32nd Annual Labor and Employment Law Update

TARGET OUT OF RANGE



THE WIMBERLY LAWSON LABOR & EMPLOYMENT LAW UPDATE

Knoxville Marriott Downtown
500 Hill Avenue, Knoxville, Tennessee
November 3 & 4, 2011



KEYNOTE SPEAKER

Dr. Farris Jordan

Licensed Psychologist
and author of

"Stress! Are You in Control?"

SPECIAL GUESTS EEOC OFFICIALS

Opportunities to participate in panel discussions entitled *"EEOC Officials Talk Directly With You"* with guest speakers Sarah L. Smith, Director, Sylvia Hall, Enforcement Supervisory Federal Investigator, and Sally Ramsey, Senior Trial Attorney, with the Nashville, Tennessee office of the EEOC.

A FEW COMMENTS FROM LAST YEAR

- “ A wealth of beneficial information ”
- “ Very informative, helpful and enjoyable ”
- “ All pertinent areas of HR covered ”
- “ Well presented, understandable, relevant ”

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The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit.



Wimberly Lawson

Attorneys & Counselors at Law

TARGET OUT OF RANGE



Dear Clients and Friends:

Our Annual Fall Conference is truly the high point of the year for us -- a time to gather with friends and discuss important, contemporary employment issues. **PLEASE PLAN NOW TO JOIN US.**

Our day and a half program covers important legal decisions and societal trends affecting employment. Topics are carefully selected to address the concerns of all employers and to give you an opportunity to select from a wide array of topics dealt with in detail. Some of the thirty-five or more topics are:

- Healthcare Reform Headaches for 2012
- FLSA Hot Buttons and Enhanced Federal Enforcement
- Social Media in the Workplace – Unforeseen Dangers for Employers
- Nuts and Bolts of Unemployment Claims
- Employment Contracts and Agreements – How They Can Protect Employers
- Wage and Hour Compliance Tips/Class-Action Alerts
- Employer Policies/Handbooks – For Better or Worse
- Records Retention Guidelines/Litigation Holds
- Employee Conduct and Appearance – On and Off the Job
- Workplace Crisis/Violence in the Workplace – How to Prevent and Protect
- Workers Compensation Update/Strategies – One of Your Biggest Employment Costs
- EEOC Compliance/Charge Responses – EEOC Officials Talk Directly With You
- USERRA (Uniformed Services Employment and Reemployment Rights Act)
- Labor Update/Impacts of Continuing Recession/Union Initiatives
- Employer Access to Employee Medical Information: GINA, ADA and FMLA
- Affirmative Action Requirements – Who and What

Join us in Knoxville on November 3rd and 4th! We promise you an informative, but light-hearted, thorough and practical journey through today's workplace issues.

Hope to see you there!

Respectfully,

Ronald G. Daves
Managing Member



South Carolina
Greenville

Tennessee
Knoxville Morristown Cookeville Nashville

Georgia
Atlanta Athens

AGENDA

Thursday, November 3, 2011 (9:15 a.m. - 5:15 p.m.)

8:00 a.m. – 9:00 a.m. Registration and Continental Breakfast

9:15 a.m. - 10:45 a.m. - General Session

The Year in Review
Overview of Department of Labor Initiatives
Healthcare Reform Headaches
Labor Unions Impact on Upcoming Elections
Class Actions and Implications for Employers

11:00 a.m. - 12:00 p.m. - Breakout Sessions

Social Media Implications in Employment/Labor
FLSA Hot Buttons and Enhanced Federal Enforcement
Overview of EEOC Initiatives
ADAAA - Forget What You Always Knew
Practical Strategies to Defend Workers' Compensation Claims
Handbooks and Policies - Do We Really Need All This?
Labor/NLRB Update in Depth

12:00 p.m. - 1:15 p.m. - Lunch (*As Guests of Wimberly Lawson*)

1:30 p.m. - 2:30 p.m. - General Session

Keynote Speaker, Dr. Farris Jordan, *"Staying Motivated Through Comic Vision"*

2:45 p.m. - 3:45 p.m. - Breakout Sessions

EEOC Compliance - EEOC Officials Talk Directly With You
How to Avoid Class Action Litigation/Consequences
ICE Enforcement and Current Trends in I-9 Audits
Employee Contracts: Who Needs 'Em?
Affirmative Action Update
FMLA - Beyond the Basics
HR Jeopardy - Interplay Between ADA, FMLA and WC

4:00 p.m. - 5:15 p.m. - General Session

Legislative Developments in Workers' Compensation
Constitutional Impact on Employment Issues
Whistleblowing Gone Wild
Internal Investigations
Challenges for Corporate General Counsel

5:15 p.m. - 7:00 p.m. Reception (*please join us for scrumptious hors d'oeuvres*)

Friday, November 4, 2011 (8:30 a.m. - 1:00 p.m.)

8:00 a.m. - 8:30 a.m. - Continental Breakfast

8:30 a.m. - 9:30 a.m. - General Session

USERRA
Independent Contractors - More Dangerous Than Ever
Sexual Harassment - Still Don't Get It!
Employment Litigation Trends

9:45 a.m. - 10:45 a.m. - Breakout Sessions

FMLA - Beyond the Basics
There's Something About "GINA"
OSHA 2011: Bigger and Meaner, and Heading Your Way
Practical Strategies to Defend Workers' Compensation Claims
EEOC Compliance - EEOC Officials Talk Directly With You
Strategies for Hiring Criteria - Using Unemployment History, Credit Checks,
Criminal Arrests, Convictions and the Like
Unemployment Claims - Tactics and Strategies

11:15 a.m. - 1:00 p.m. - General Session

Records Retention and Litigation Holds
Workers' Compensation Case Law Update
Jury Waivers/Mandatory Arbitration
Documentation Do's and Don'ts
Employment Issues That Will Affect 2012 Political Elections

1:00 p.m. Conclusion



The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit.

This program has been approved for 9.50 recertification credit hours toward PHR, SPHR and GPHA recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI home page at www.hrci.org.

This program has been accredited by Tennessee CLE for 9.50 general credit hours.

This program has been approved for 9.50 general credit hours by the National Association of Legal Assistants (NALA).



Wimberly Lawson

Attorneys & Counselors at Law

Thirty-Second Annual Labor & Employment Law Update Conference

**Knoxville Marriott - Knoxville, Tennessee
November 3-4, 2011**

COST:

Early Bird (registration AND payment received by Sept. 30)

\$309 per person

\$299 for each additional person from same company

\$259 for eight or more from same company

Registration and payment received AFTER October 15

\$349 per person

\$339 for each additional person from same company

\$299 for eight or more from same company

REGISTRATION INCLUDES:

Seminar (1 1/2 days), materials, two continental breakfasts, lunch and evening reception on Thursday, November 3, 2011

CANCELLATION CHARGE:

50% cancellation fee will be incurred for cancellations after October 12. Cancellations made after October 25, 2011 will forfeit registration fee (registrants will receive the conference materials post-seminar). Substitutions of attendees within the same company will be permitted at any time.

HOTEL ACCOMMODATIONS

Knoxville Marriott • 500 Hill Avenue

SPECIAL RATES AVAILABLE

Be sure to state you are attending the Wimberly Lawson conference in order to receive the room rate of \$105.00/standard.

800-836-8031

RESERVE ONLINE at www.marriott.com/TYSMC
(use the Group Code LAWLAWA to reserve at the conference rate)

FIVE WAYS TO REGISTER

1. Mail to: Bernice Houle
Wimberly Lawson Wright
Daves & Jones, PLLC
P.O. Box 2231
Knoxville, TN 37901
2. Fax to: 865-546-1001
3. Email to: [bhoul@wimberlylawson.com](mailto:bhoule@wimberlylawson.com)
4. Via website: www.wimberlylawson.com
5. Phone: 865-546-1000



KEYNOTE SPEAKER

Dr. Farris Jordan

Licensed Psychologist
and author of

"Stress! Are You in Control?"

No one is immune from stress, but Dr. Farris C. Jordan can teach anyone how to make it productive instead of damaging. And he is a master at having fun and laughing while he does it.

Dr. Jordan is a licensed psychologist who knows what it means to take control of stress. After receiving four degrees from the University of Tennessee, he has been extensively involved in stress research.

Dr. Jordan is the author of four books and numerous articles on the prevention of mental and physical illness. He has received national recognition for his "hands on" research on the effects of stress by becoming personally involved in highly stressful events such as Brahma Bull riding, NASCAR race driving, sky diving, Giant Canadian Bear wrestling, alligator wrestling, 13 consecutive Boston Marathons, completion of the 2,150 mile Appalachian Trail from Georgia to Maine in 139 days, and the 2,552 mile Mississippi River in a small canoe in 57 days. These experiences have enabled him to teach others how to control stress and stay motivated without fear or hesitancy.

Dr. Jordan's presentation will help you learn:

- what your stress-coping behavior reveals about you
- if you have a stress-prone or stress-tolerant personality
- why you experience worry and depression
- how well you are satisfying your 6 basic psychological needs
- your happiness IQ
- your social awareness score
- if you are in the right job

Name _____

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BPR and State for CLE: _____ No. Attending Reception: _____

Special Needs? If you should have any special needs, such as wheel chair access or special dietary requirements, please contact Bernice Houle at 865-546-1000 no later than 10 days before the event.