



## **CHANGES TO UNEMPLOYMENT INSURANCE LAW SHOULD BENEFIT TENNESSEE EMPLOYERS**



**Cathy Shuck** .....  
"The new law strikes the former definition of misconduct, which required a showing of willful and wanton behavior."

A number of employer-friendly changes to Tennessee's unemployment insurance compensation system finished phasing in as of September 1, 2012. Employers should see a decrease in compensable claims now that the "Unemployment Insurance Accountability Act of 2012," enacted in May, has fully taken effect. The Act's provisions are outlined below.

### **Revised Definition of "Misconduct"**

The unemployment law has for some time provided that a claimant is disqualified from receiving benefits if he was discharged from work for "misconduct connected with the claimant's work." T.C.A. § 50-7-303(a). The new law strikes the former definition of misconduct, which required a showing of willful and wanton behavior. Instead, the new law provides that "misconduct" includes:

- i. Conscious disregard of the rights or interests of the employer;
- ii. Deliberate violations or disregard of reasonable standards of behavior that the employer expects of an employee;
- iii. Carelessness or negligence of such a degree or recurrence to show an intentional or substantial disregard of the employer's interest or to manifest equal culpability, wrongful intent or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employee's employer;
- iv. Deliberate disregard of a written attendance policy and the discharge is in compliance with such policy;
- v. A knowing violation of a regulation of this state by an employee of an employer licensed by this state, which violation would cause the employer to be sanctioned or have the employer's license revoked or suspended by this state; or
- vi. A violation of an employer's rule, unless the claimant can demonstrate that:
  - a. The claimant did not know, and could not reasonably know, of the rule's requirements; or
  - b. The rule is unlawful or not reasonably related to the job environment and performance.

T.C.A. § 50-7-303(b). The first three prongs of the definition are essentially re-statements of the old standard. Items (iv), (v), and (vi) are new, however, and should provide a basis for employers to challenge some claims where the discharge was due to violation of an attendance policy or other policy clearly stated and communicated to employees.

As with the old definition of misconduct, though, a claimant will not be denied benefits if the discharge was due to mere "inefficiency" or to "failure to perform well as the result of inability or incapacity"; to "inadvertence or ordinary negligence in isolated instances"; or to "good faith errors in judgment or discretion." In other words, although benefits may be denied if the claimant was discharged for violation of a policy, benefits likely will not be denied if the claimant was discharged for being unable to do her job well.

### **Other Eligibility Changes**

The new law clarifies that where a claimant receives wages in lieu of notice, such as salary continuation paid pursuant to a severance agreement, the claimant is not entitled to draw unemployment benefits. Thus, when drafting severance agreements with a confidentiality clause, consider an exception to the clause permitting or requiring the parties to

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## THE ISSUE OF TEXTING OR USING HAND-HELD DEVICES WHILE DRIVING IS NOW A "FRONT AND CENTER" ISSUE



**Fred Baker**.....

"DOT regulations that apply to commercial driver's text messaging or using hand-held cell phones carry employer fines of as much as \$11,000 per violation."

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even if the cell phone is hands free. Cell phone use requires the brain to multi-task, thus decreasing the drivers' ability to focus on their surroundings, identify potential hazards, and respond to unexpected situations.

Employers can be held liable for an accident caused by an employee's distracted driving, if the employee is acting within the course and scope of his employment. There have been a number of significant jury verdicts against employers whose employees have traffic accidents while driving a company vehicle or engaging in company business, who engages in distracted driving. Some of the cases have attacked ambiguous language in company policies dealing with cell phone use and the use of other devices while driving. Therefore, it is important for employers that have employees driving in the regular course of the employer's business to adopt a written policy that clearly explains the company's policy on the use of cell phones and similar devices while driving. A written policy should ban the use of wireless communication devices while driving or while stopped at a traffic signal, and include repercussions for failing to follow company rules. In drafting such policies, employers should consider whether to have provisions that employees may never send or receive text messages, e-mail, or access the Internet while driving. As in the case of other company policies, it is important to publish the written policy and to reinforce the policy when providing company cell phones or company cars to employees.

One of the most discussed issues pertaining to safety and liability is undoubtedly the subject of texting or use of other hand-held devices while driving a motor vehicle. President Obama has issued an Executive Order prohibiting federal employees from texting while driving on official government business or using a government-provided electronic device while driving. As many as 39 states have enacted statutes that regulate using hand-held electronic devices while driving, and the U.S. Department of Transportation has issued similar regulations. DOT regulations that apply to commercial driver's text messaging or using hand-held cell phones carry employer fines of as much as \$11,000 per violation. The Secretary of Labor has called upon all employers to prohibit any policy or practice that requires or encourages workers to text while driving. The Occupational Safety and Health Administration takes the position that employers must provide a workplace free of serious recognized hazards, which could include eliminating financial incentives that encourage workers to text while driving. The Labor Department has an initiative which includes issuing citations to employers who require texting while driving, and is promoting an educational campaign calling on employers to prevent work-related distracted driving.

DOT reports that in 2009 more than 5,400 persons died in crashes linked to distraction and thousands more were injured. A study by the Federal Motor Carrier Safety Administration found that texting was the single riskiest action that affected driving ability. The Agency found that those texting were over twenty-three (23) times more likely to have a safety problem, such as an accident, than those driving without distractions. A study by the National Safety Council indicates the risks of using a cell phone while driving,

### KNOW YOUR ATTORNEY MARY MOFFATT HELMS

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MARY MOFFATT HELMS is a Member of the Morristown office of Wimberly Lawson Wright Daves & Jones, PLLC, which she joined in 1994. Prior to joining Wimberly Lawson, Mary was a partner in a law firm in Kingsport, Tennessee. Her law practice includes Labor and Employment Law, Commercial and Business



Law and Litigation. She received her Bachelor of Science degree, *magna cum laude*, from East Tennessee State University and her law degree from Washington and Lee University. Mary has served as a member on the Hearing Committee for Tennessee

Board of Professional Responsibility, Supreme Court of Tennessee. She is a member of the Tennessee Bar Association. Mary is a member of the Board of Directors of the Morristown Boys and Girls Club. Mary is a Rule 31 Listed General Civil Mediator and currently serves as Municipal Judge for the City of Morristown.

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## WITHHOLDING PAY FOR NOT RETURNING EQUIPMENT: A DANGEROUS PRACTICE



**Mary Dee Allen**.....

“Many states have enacted wage deduction laws that prohibit deduction from pay, except under certain circumstances.”

Many employers are rightfully upset when terminated employees fail or refuse to return certain company-owned equipment that they possess. A simple solution used by many such employers is to simply withhold the final paycheck or deduct the amounts from the final paycheck until the equipment is returned. It sounds easy, but the practice can sometimes lead to unintended consequences.

If the employee is salary-exempt, the employer is placing the exempt status at risk by making deductions from the salary. As far as the exemption is concerned, being salaried contemplates that amounts will be paid each pay period, subject to limited exceptions. Such deductions from salary can potentially negate the exempt status, resulting in payment obligations for overtime.

If the employee withholding the equipment is an hourly employee, the first problem in withholding the pay is that employers are obligated to pay employees at least a minimum wage for all hours worked, plus statutory overtime. If the deduction should cut below the minimum wage or into overtime, a violation has occurred. Also, many states have enacted wage deduction laws that prohibit deduction from pay, except under certain circumstances, the most common being written authorization from the employee.

If an employee is ‘owed’ pay for accrued but unused vacation time or other PTO, circumstances may be more favorable for withholding money owed to an employer. Generally, federal law only requires pay for time worked.

If the entire paycheck is withheld, employers may run afoul of state laws that require paychecks to be issued within a prescribed period of time. Similarly, under federal law, wages are due on the regular pay day for the pay period covered.

In spite of all these legal concerns, there may be some circumstances where a withholding or deduction is appropriate, but not without the advice of counsel.

## NLRB STARTS WEBSITE AIMED AT NON-UNION WORKERS



**Ron Daves**.....

“Besides describing cases, the NLRB webpage provides a list of questions and answers explaining what constitute protected concerted activity.”

The National Labor Relations Board (NLRB) has created a new website that explains an employee’s Section 7 rights under the Labor Act, and allows the user to click on various NLRB cases that address protected concerted activities. The focus of those examples is to explain to workers their rights under the Act, with or without the involvement of a labor union. The website is [www.nlr.gov/concerted-activity](http://www.nlr.gov/concerted-activity).

The NLRB had earlier enacted a regulation requiring most employers to post a notice of worker rights ensured by the National Labor Relations Act, but the posting requirement is now on hold after court rulings in April. The webpage almost reads like a follow-up to the federal notice posting requirement that has been delayed by court rulings, but it has the information on the internet rather than providing similar information on a notice NLRB had required employers to post.

The latest development is part of an NLRB move to expand the application of the Labor Act to non-union employers. While knowledge of many employers may think that, if they are non-union, they don’t have to worry about the NLRB, recent NLRB policy changes are directed to the rights of non-union employees. The website focuses on the right to engage in protected concerted activity, which includes the right of employees to discuss rates of pay with each other, the right to discuss other work-related issues such as safety or work conditions with each other, and the right to discuss employment policies and procedures such as discipline. For example, several memoranda have been prepared by the NLRB General Counsel dealing with employee comments in social media which can constitute activity protected under the Labor Act. A worker can go to the new NLRB webpage and click on cases such as one in which a person was fired after posting a work-related grievance on Facebook, and one in which poultry workers were fired after discussing their grievances with a newspaper reporter. Besides describing cases, the NLRB webpage provides a list of questions and answers explaining what constitute

protected concerted activity. The page explains that for an activity to be concerted, it generally requires that 2 or more employees act together to deal with their employer, to improve wages or to affect working conditions. However under certain circumstances, the action can be of a single employee if he involves co-workers before acting or acts on behalf of others. Employers, union or non-union, are well-advised to carefully educate managers and supervisors of the NLRA rights of employees. Abridgement of those rights, through employer policies or practices, can have costly results.

disclose the amount of the payment to the Department of Labor if the employee files an unemployment claim.

Additionally, the new law provides that claimants must substantiate their efforts to find work by submitting information to the department showing they contacted at least three employers per week or accessed the department's career center services. The law directs the department to conduct “random verification audits” of 1,000 claimants each week to ensure the requirement is being met. Claimants caught falsifying job search information will be disqualified from benefits for at least eight weeks.

The law also adds to the definition of what is “suitable work” for purposes of claimants re-entering the workforce. (A failure to apply for or accept suitable work disqualifies a claimant from benefits.) The law already provided that factors to be considered in determining whether work is “suitable work” include the degree of risk to the claimant's health, safety and morals; the claimant's physical fitness and training; the claimant's experience and prior earnings, the claimant's length of unemployment and prospects for securing local work in the claimant's customary occupation; and the distance of the available work from the claimant's residence. T.C.A. § 50-7-303(a). The law now also provides that work is suitable *only if* it meets all the other criteria *and* the work pays gross wages that equal or exceed the following percentages of the claimant's average wage during the quarter of the base period in which the claimant's wages were highest:

- One hundred percent (100%), if the work is offered during the first thirteen (13) weeks of unemployment;
- Seventy-five percent (75%), if the work is offered during the fourteenth through the twenty-fifth week of unemployment;
- Seventy percent (70%), if the work is offered during the twenty-sixth through the thirty-eighth week of unemployment; and
- Sixty-five percent (65%), if the work is offered after the thirty-eighth week of unemployment.

The law notes that it is not to be construed to require a claimant to accept a job paying less than minimum wage. Notwithstanding that qualifier, it appears that the new wage provisions may allow claimants to decline work more readily, at least in the early weeks of unemployment.

Finally, the new law provides that claimants are not eligible to draw benefits during any week in which they are incarcerated for four or more days.

### **Information Provided by Employers**

The new law provides that an employer may proactively supply information to the department, rather than waiting for the department to send its request for separation information. The department has revised its request for information to comport with the new law; the new form seeks much more detailed information than the old form.

Employers should continue to be cautious in completing these forms, as any information supplied—like any witness statements made during an unemployment hearing—can be used against the employer if the employee later files any type of charge or lawsuit. For example, the new form asks if the claimant violates company policy and if so, asks for specific information about the policy, the infraction, and any prior warnings. Employers who respond to these requests must be very careful to get the facts straight before submitting the form, because any discrepancies can and will be exploited by a plaintiff's lawyer later.

On the other hand, employers should also take comfort in the fact that the unemployment law has a privilege for information supplied by both employers and employees in the course of unemployment proceedings; the law provides that any information “shall not be made the subject matter or basis for any suit for libel or slander in any court.” T.C.A. § 50-7-701(c). Thus, employers should not be fearful of libel or slander lawsuits for providing truthful and accurate information, even if unkind to the employee. Nevertheless, the forms and other information that employers supply to the Tennessee Department of Labor could eventually be used as evidence in other proceedings, for example, if an employer asserts one reason for separation of employment when responding to the Tennessee Department of Labor and asserts a different reason in another form it could be problematic.

It remains to be seen how zealous the department will be in enforcing the new rules, as well as how strictly they will be interpreted by the courts. In the meantime, employers with questions or concerns should contact their Wimberly Lawson attorney for guidance.

**Be sure to visit [www.wimberlylawson.com](http://www.wimberlylawson.com) often for the latest legal updates, seminars, alerts and firm biographical information!**



# Wimberly Lawson

Attorneys & Counselors at Law

We invite you to attend our 33rd 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 15 & 16, 2012



### BACK BY POPULAR DEMAND OUR 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 *"New Developments and Strategies for Working with the EEOC"* with guest speakers Sarah L. Smith, Director, and Sylvia Hall, Enforcement Supervisory Federal Investigator, with the Nashville, Tennessee office of the EEOC.

### A FEW COMMENTS FROM LAST YEAR

Hard to choose – so many great choices for breakout

Very informative!

Great information that's affordable for small employers

A great refresher – keeps me up to date!

[www.wimberlylawson.com](http://www.wimberlylawson.com)



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. A few of the thirty-five or more topics are:

- Boasts, Hosts, and Posts – Developments in Social Media for Employers
- Drug Testing Policies, Procedures and Issues
- Workers' Compensation in Depth Legislative and Case Law Update
- Supervisor/Manager Training and Tips on First Level of Prevention
- New Developments and Strategies for Working With the EEOC
- Employer Liability? Tort Reform, Negligence, and Premises Liability
- Affirmative Action, EEO-1 Reports and Service Contract Act Compliance
- Workplace Harassment – More Than You Want to Know
- Employment Policies – Handbooks, Handguns, Intra-Net, Tobacco, Electronic Communications Devices and More
- Internal Dispute Resolution Systems
- USERRA and Veteran's Issues
- HR Audit – Get Ahead of the Game

Join us in Knoxville on November 15<sup>th</sup> and 16<sup>th</sup>! 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



# AGENDA

(Note: These are Pre-Conference Topics, Titles and Times.  
They may change – Please Check Final Conference Program on Day of Conference.)

## Thursday, November 15, 2012 (9:00 a.m. - 5:15 p.m.)

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

**9:00 a.m. - 10:45 a.m. - General Session**

The Year in Review and Impact of Recent Election Results  
Healthcare Reform - What's An Employer to Do?  
Workers' Compensation - Current Trends and Emerging Issues  
Wage & Hour Enforcement Activity Update

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

Employer Liability? Tort Reform, Negligence, and Premises Liability  
FMLA Basic Course on Application of Law, Regs and Compliance  
Drug Testing Policies, Procedures and Issues  
Workers' Compensation In Depth Legislative and Case Law Update  
ADAAA Basic Review and Developments of Law, Regs and Enforcement  
Supervisor/Manager Training and Tips on First Level of Prevention  
Wage and Hour – D.O.L. Initiatives, How to Comply and Avoid Liability

**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

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

New Developments and Strategies for Working With the EEOC  
Boasts, Hosts, and Posts - Developments in Social Media for Employers  
Affirmative Action, EEO-1 Reports and Service Contract Act Compliance  
Workplace Harassment - More Than You Want to Know  
Employment Policies - Handbooks, Handguns, Intra-Net, Tobacco,  
Electronic Communications Devices and More  
ADAAA Advanced Course and Application of Law, Regs and Enforcement  
Immigration – The Executive Order, E-Verify and Tennessee Lawful Employment Act

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

GINA Update  
Internal Dispute Resolution Systems  
Religion - The Bible in the Workplace  
USERRA and Veteran's Issues  
What Keeps Corporate Counsel Awake at Night?

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

## Friday, November 16, 2012 (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**

OSHA Crackdown - Recordability Requirements  
Guidance on Internal Investigations/Privileged Information  
Tips for Implementing Litigation Hold Requirements  
Protected Concerted Activity - What's That?

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

FMLA Advanced Examination of Recent Case Law and Difficult Issues  
Wage and Hour - Ask the Experts/Open Forum Re Compliance  
Getting Thicker Skin - The Law on Retaliation  
New Developments and Strategies for Working with the EEOC  
Labor Law - Update on NLRB Rulemaking and Union Activity  
Unemployment Claims and Hearings - Tactics for Employers  
Making Performance Reviews More Meaningful and Effective

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

HR Audit - Get Ahead of the Game  
Independent Contractor Classification - The Continuing Saga  
Class Action Waivers - Post *DR Horton Case*  
EEOC's Guidance and Court Cases on Arrests and Convictions  
Out and About - Issues Related to the Legal Protection of LGBT Persons

**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](http://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-Third Annual Labor & Employment Law Update Conference

Knoxville Marriott - Knoxville, Tennessee  
November 15-16, 2012

### COST:

Early Bird (registration AND payment received by Oct. 15)  
\$319 per person  
\$309 for each additional person from same company  
\$279 for eight or more from same company

Registration and payment received AFTER October 15  
\$359 per person  
\$349 for each additional person from same company  
\$319 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 15, 2012

### CANCELLATION CHARGE:

50% cancellation fee will be incurred for cancellations after October 15. Cancellations made after October 31, 2012 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 \$109.00/standard.

**800-836-8031**

**RESERVE ONLINE** at [www.marriott.com/TYSMC](http://www.marriott.com/TYSMC)  
(use the Group Code WLWWLWA to reserve at the conference rate)



### 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.

### 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](http://www.wimberlylawson.com)
5. Phone: 865-546-1000

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

Name \_\_\_\_\_  
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 City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_  
 Phone \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_ Fax \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_  
 Email \_\_\_\_\_  
 BPR and State for CLE: \_\_\_\_\_ No. Attending Reception: \_\_\_\_\_  
 For Credit Card Payments:  
 Type of Credit Card:  MasterCard  VISA  American Express  Discover  
 Credit Card No. \_\_\_\_\_ Expiration Date \_\_\_\_\_  
 Credit Card Code (3-digit number) \_\_\_\_\_  
 Name on Credit Card \_\_\_\_\_  
 Billing Street Address \_\_\_\_\_  
 City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_  
 Signature Authorizing Charge \_\_\_\_\_