Wimberly Lawson
Seale Wright & Daves, PLLC
Attorneys & Counselors at Law

Briefly

January 2007 Volume 7, Issue 1

NEW RULES CHANGES REQUIRE DEFENDANTS TO PRESERVE EVIDENCE

New court rules generally require employers who find out a matter may go into litigation, to preserve all evidence that might relate to the matter. An employer who doesn't preserve all this information may be deemed to have committed "spoliation" and can face serious penalties for doing so, including losing the entire case. As an example, remember the Arthur Andersen scandal involving the shredding of documents. Sometimes even a suggestion that an employer has not preserved evidence is enough to prejudice a judge or jury against a party.

Mary Moffatt Helms …
"An employer who doesn't preserve all this information may be deemed to have committed "spoliation," and can face serious penalties for doing so, including losing the entire case."

New federal rules also state rules for electronic evidence. Under a new federal rule, lawyers involved in litigation have to meet with opposing counsel for a scheduling conference to consider electronic discovery plans within 120 days of the start of a lawsuit. Thus, lawyers in litigation have to immediately think about ways to preserve discoverable evidence and forms in which documents will be produced. This means that the lawyers may have to find backup and other copies of documents, stop routine destruction, and learn their clients' communication systems. The hope is that when confronted with demands to see every potentially relevant communication within an organization, the attorney can draft a response that is both realistic and likely to disrupt business as little as possible. Although every single document may not be located, the object is to be able to show to a judge or opposing counsel where relevant communications might be stored and that you are making a good faith effort to track, find and produce those documents.

MAKING UP LOST TIME DOES NOT DESTROY EXEMPT STATUS

Many employers like paying a salary to employees, particularly since paying a salary to an otherwise exempt employee means that overtime pay is not required should the employee work more than 40 hours a week. However, to maintain exempt status, a salary must generally be paid in any week in which the exempt employee works any at all. This requirement frustrates some employers when exempt employees miss time from work, and yet receive their regular salaries. There are several techniques to avoid this result, one of which was exemplified by the recent case of Guerrero v. J.W. Hutton, Inc., 459 F. 3d 830 (C.A. 8, 2006).

Jeff Jones …
"… to maintain exempt status, a salary must generally be paid in any week in which the exempt employee works any at all."

In this particular case, the employer had a "flextime" policy for employees to make up absences between 15 minutes and 4 hours long within the same pay period. For absences longer than 4 hours, employees were required to use vacation or personal time.

The plaintiff argued that she was not paid on a salary basis because under her employer's flextime

Continued on page 4

Our Firm *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, Weathersby & Schneider, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.*

KNOW YOUR ATTORNEY

Jeffrey G. Jones

JEFFREY G. JONES is a Member in the Cookeville, Tennessee office of Wimberly Lawson Seale Wright & Daves, 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.

SAVE THE DATE

November 1-2, 2007

Annual Labor Relations & Employment Law Conference

Knoxville

INVESTIGATORY TECHNIQUES BRING DOWN TOP MANAGEMENT OF HEWLETT-PACKARD

Fred Bissinger ..... "Oftentimes employers resort to various forms of investigatory techniques that others might consider inappropriate."

In employment law and employee relations, employers are often called upon to conduct investigations into instances of employee misconduct, and other such matters. Oftentimes employers resort to various forms of investigatory techniques that others might consider inappropriate. Such investigatory techniques assumed national prominence this past year, and the Chairperson of Hewlett-Packard, its General Counsel, and various other corporate executive were forced to resign due to certain investigatory tactics they had responsibility over. The publicity given to this incident serves as a reminder to employers to make sure their investigatory tactics are not only effective, but also appropriate and legal.

The situation at HP developed when management became concerned that there were leaks of extremely sensitive confidential company information to the media from internal sources, and certain corporate directors were suspected because of significant divisions among the Board. A director who disclosed confidential company information would breach his legal duty of loyalty to the company, as well as various company policies prohibiting the disclosure of confidential information about the company. When the company was unable to determine the source of the leaks, private investigators were hired to use Social Security Numbers and other personal information to get phone companies to turn over detailed logs of home phone calls of reporters and company directors. Although these methods apparently have been often used, the technique known as "pretexting" is of questionable legality under both state and federal law. Investigators secured the phone records of 24 people, including directors, journalists, the wife of a Board member, the husband of one journalist and father of another, according to the California Attorney General's Office. Investigators considered planting a spy in various media newsrooms. Ironically, the person overseeing the investigation was promoted to HP's Ethics Director because of his fine work on the investigation. The techniques also included embedded spyware in e-mails to reporters. The techniques were reportedly approved by in-house HP counsel, and also outside counsel, although later outside counsel stated that his opinion was tentative and before he had fully reviewed and researched the tactics.

When the tactics came to public light, a scandal ensued in which HP officials were summoned to testify before members of Congress. The HP General Counsel refused to make a statement or answer questions, invoking her Fifth Amendment rights against self-incrimination. She was followed in doing so by 9 other HP attorneys and investigators. The company's chief executive testified that, while he was "responsible for HP," the tactics became "a rogue investigation" that he did not monitor. References in the testimony were made to the fact that officials had been told that the tactics were a "standard investigative technique," and several lawmakers made reference

Continued on page 4

NEWS FROM EEOC AND OFCCP

Mark Travis

"...those targeted for review may have something in their employment patterns that is of concern to OFCCP, thus requiring government contractors or subcontractors to take the matter quite seriously."

The U.S. Department of Labor during November notified approximately 120 federal contractors that some 2000 individual establishments could be selected during the coming year for review of their equal employment opportunity and affirmative action obligations. The letter advises that not all of the individual work sites may be targeted for review, but adds that other locations might be evaluated. According to OFCCP, the initial list of 2000 establishments was generated by a system that uses multiple information sources and analytical procedures to rank federal contractor establishments based on an indicator of potential workplace discrimination. The list also includes single establishments that were not sent the advance notice. The significance of this matter is perhaps that those targeted for review may have something in their employment patterns that is of concern to OFCCP, thus requiring government contractors or subcontractors to take the matter quite seriously.

The OFCCP has rescinded a mandatory equal opportunity survey that was developed in 1999, according to a rule published this fall. The survey had been developed during the Clinton Administration, requiring contractor establishments designated by the OFCCP to annually complete a survey regarding personnel activities, compensation and tenure data. An outside consultant hired by the agency had found the survey's predictive power "to be only slightly better than chance," in terms of usefulness as an enforcement tool. This survey had been critcized by the employer community as burdensome and not providing useful information.

In a related development, Leslie Silverman, Vice-Chair of the Equal Employment Opportunity Commission, in a presentation during November, offered some interesting advice to employers. She recommended self-audits and an increased awareness of possible "hidden bias," particularly in the interview process and in personnel decisions by first and second line supervisors. She stated that some companies are relying on committee-based hiring decisions to avoid unintentional bias by one interviewer, adding that it is always important to advertise broadly and to concentrate on specific job requirements in the hiring process. She emphasized that EEO training for supervisors should not be limited to sexual harassment issues, but should also incorporate race, age, disability and religious discrimination issues. She also reiterated the EEOC's caution against retaliation, stating that, "We take retaliation seriously, even when the underlying charge is unfounded."

HOW MUCH DO COMPANIES SPEND ON LITIGATION

Kelly Campbell

"Companies with less than $100 million in revenue spend an average of $178,000 in litigation, not including judgments and settlements."

According to a corporate counsel study, among companies that have in-house counsel, American companies face an average of 305 lawsuits, and pay an average of $12 million, or 71% of their legal budgets to litigation costs, not counting judgments and settlement payments. Companies with more than $1 billion in revenue face a heavier litigation load, carry an average of 556 pending lawsuits, and spend an average of about $19.8 million on litigation. Companies with less than $100 million in revenue spend an average of $178,000 in litigation, not including judgments and settlements.

Although litigation costs are the largest part of corporate legal budgets, the costs associated with internal investigations are also increasing. A majority of U.S. companies initiated at least one internal investigation requiring outside counsel in the past year.

According to another survey, it costs approximately $125.00 to file a lawsuit, with a plaintiff getting a contingent fee lawyer who takes approximately 40% percent of the recovery. The employer in turn pays about $135,000 to take the case to trial. More and more trial lawyers in various states are turning to employment law as a more lucrative area of practice. Should the plaintiff get to a jury, a complication is that a recent survey of jurors found than 59% had bad experiences with an employer and 30% had been fired or laid off. Some 68% of the polled jurors stated they would rule for an employee if the employee had been unfairly treated, regardless of the law.

MAKING UP LOST TIME continued from page 1

policy, her employer threatened to dock her pay based on absences of less than 1 day. She argued that because she was required to keep track of her hours worked and make up the time she missed, she was in jeopardy of having her salary reduced for absences of less than 1 day. The court disagreed, finding that no evidence showed that the employer actually docked her pay for lost time, or even threatened to do so, if her absences were not made up. The court further noted that at least two other circuits have "explicitly held an employer's requirement for an employee to make up time missed does not automatically transform the employee from salaried to hourly, provided the employee's pay was not reduced for the time lost."

Editor's Note - The critical point is that employers should not dock the base salary (which must be at least $455 a week). However, other creative means to control hours worked by salaried employees are permissible, such as, requiring such employees to make up time, docking leave balances, paying salaried exempt employees additional money for hours worked over 40, bonuses and other devices. The courts and Wage and Hour have given "permission" to employers to try various methods to insure work from exempt salaried employees so long as the employer does not deduct from the base salary except in carefully defined situations. We do suggest before instituting a creative system that you consult with an attorney knowledgeable in this field.

www.wimberlylawson.com

INVESTIGATORY TECHNIQUES continued from page 2

to the Enron corruption case and one Congressman drew a parallel to the Watergate scandal, saying HP launched a "plumbers operation that would make Richard Nixon blush if he were still alive." The California Attorney General has stated that he has sufficient evidence to indict certain people, both within HP as well as contractors, on criminal charges in connection with the leak probe. Further, the U.S. Justice Department and Securities and Exchange Commission investigated the matter.

There are many lessons to be learned from the HP situation. Although corporate executives get tired of hearing that "advice of counsel is recommended," in the HP situation it is possible that the company did not adequately secure a legal opinion for embarking on a tactic that did not pass the "smell test." Sometimes executives think an attorney should be able to immediately give a verbal opinion on a legal matter, but quite often the matter can require a great deal of legal research, as well as consideration of strategy of whether other investigatory techniques would reveal the same information at less risk. Further, many executives think that because "everybody else is doing it," it is okay, and in the HP matter, lawmakers were quick to point out that many companies were also backdating stock options. Just because something is often done doesn't make it legal!

Another lesson is that employers should consider whether their tactics sound appropriate in a courtroom, or are something that the company would feel it must keep secret. For example, questions often arise as to whether it is appropriate to use undercover investigators, secret tape recordings, secret photographs, and the like, and consideration should be given to the fact that a judge or jury may not think such tactics are "fair" even though they may not be prohibited by law.

Issues such as those raised in the HP case are likely to increase in the future, due to technology improvements so that many new investigatory techniques are presented. Remember, advice of counsel is recommended.