The Employment Brief

Updates in Labor and Employment Law to Help Your Business Succeed

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Immigration

USCIS Releases New I-9 Forms

by Ken C. Gauvey

USCIS has finally issued new Employment Eligibility Verification Form I-9s. This marks the first time the form has been updated since 1997. In 1997, the INS eliminated some of the documents that were listed on the previous I-9 as valid employment authorization documents. However, the I-9 was never changed to reflect those new regulations. Employers were left with a document that was only of partial use and worse yet, could result in penalties and fines if the form was relied upon.

For the most part, the new I-9 is relatively benign. Five documents have been eliminated from the list of acceptable List A documents. These are the Certificate of U.S. Citizenship (N-560 or N-561), Certificate of Naturalization (N-550 or N-570), Alien Registration Receipt Card (I-151), Unexpired Reentry Permit (Form I-327) and the Unexpired Refugee Travel Document (Form I-571). In addition, USCIS added a new employment authorization document, the I-766, as a new, acceptable List A document.

A more significant change is that employees are no longer required to include their social security number on the I-9 unless the employer participates in the government's E-Verify program. While the social security number is obviously still required for tax purposes on other forms, it is no longer necessary on the I-9. The instructions for the I-9 state that employers may not ask an employee to provide a specific document with their social security number on it, even if participating in the E-Verify Program. All an employer can do is ask that the social security section on the I-9 be completed by the employee and that is only if the employer is participating in E-Verify.

Another significant addition to the I-9 instructions is a section for electronic retention of I-9 forms. Employers who have the proper systems in place to retain, verify, secure and search specific data contained in the I-9 and store them electronically. The electronic storage of I-9 Forms is a significant issue and requires specific steps be taken. Please check the www.kollmanlaw.com website for in depth discussion of electronic storage of I-9's in the future or future newsletters.

Finally, USCIS has also expanded the warnings for unlawful discrimination in the newest instruction for the I-9 Form. It is important to note that the I-9 is not a license to treat employees different based on national origin or race. Employers must request the same information of all employees, regardless of national origin.

The I-9 Form appears to be very simple. However, improperly completing this form can lead to dramatic consequences for employers. If you ever have any questions regarding the I-9, you should ask someone knowledgeable about them.

Sexual Harassment

Between Snow White and Linda Lovelace

by Peter S. Saucier

Few topics command universal fascination more than sex. That is no less true in the workplace than anywhere else. In 2005, some 58% of employees in the United States reported that they had been involved in office romances, with 22% of employees claiming that they met their spouse or significant other on the job. That activity was bound to give rise to interesting employee relation issues, and litigation with eye-raising facts.

One federal court tackled just such a case with an unusual twist in *Tenge v. Phillips Modern Ag Co.* Briefly, the plaintiff sued the company**,** and its owner, for sexual harassment – a relatively routine action in federal court. The added twist was a count for intentional interference with contractual relations against the owner's wife for forcing the termination based upon spousal jealousy.

Was Romance in the Air? – The Facts in *Tenge*

Maelynn Tenge enjoyed meteoric success at Phillips Modern, moving

from entry-level secretary to a position as the company's highest paid executive in less than nine years. Tenge never failed to perform an assigned task, and the owner of the company, Scott Phillips "was always satisfied with her work performance." The facts concerning the sexual relationship between Scott Phillips and Maelynn Tenge, however, remain cloaked in mystery.

Two incidents of touching form one-half of the revealed facts that defined the Tenge/Phillips sexual relationship. On one occasion, Tenge and her husband were out with Phillips and his wife (Lori) when Tenge pinched Phillips "in the butt in fun." Another time, when the four were together for a different social event, Phillips pinched Tenge "in the butt." According to the court, "Tenge agreed that this was physical contact that was suggestive and of a risque nature, and that Lori could have suspected the two had an intimate relationship."

The other half of the sexual relationship evidence took the form of five to ten love notes written by Tenge. The notes, although addressed to Phillips, were left in locations where they would be discovered by others. The notes had the effect of inciting jealous rage in Lori Phillips, who once dug a note out of the company dumpster and pieced it together. Eventually, Phillips fired Tenge, telling her that his wife was "making me choose between my best employee or her and the kids." The court never said whether Scott Phillips and Maelynn Tenge actually had a sexual relationship.

Analyzing *Tenge:* A Different Relationship

Individuals who suffer adverse employment actions in favor of someone who chooses to have a sexual relationship with the boss have no cognizable cause of action. Correctly describing the principle as uniformly followed, the Court wrote, "[W]here an employee engages in consensual sexual conduct with a supervisor, and an employment decision is based upon the conduct, [the law against sex discrimination] is not implicated because any benefits of the relationship are due to the sexual conduct, rather than the gender, of the employee."

Here, however, the court said: "The ultimate basis for Tenge's dismissal was not her sex, it was Scott's desire to allay his wife's concerns over Tenge's admitted sexual behavior with him. Tenge agreed that her sexually suggestive notes to Scott and their consensual touching could have led Lori to honestly believe that they were having an intimate relationship."

Tenge argued that the butt patting and love notes were just workplace banter. Tenge produced evidence that male employees attended strip clubs while on business, and that one man pulled his pants down at work for the amusement of others, all without discipline. The court dismissed those examples as not comparable.

Tenge's situation was unique. She did not allege that she was discriminated against because she had sex, or that any conduct to which she was subjected was harassment. Instead, it was the jealousy of Lori Phillips that formed the basis for her claim. That, the court said, is not sex harassment where objective cause for jealousy exists. The *Tenge* court left one curious footnote for consideration:

"The question is not before us whether it would be sex discrimination if Tenge had been terminated because Lori perceived her as a threat to her marriage but there was no evidence that she was engaged in any sexually suggestive activity."

That suggests that if Tenge had not been an active butt-pincher and love note scribe, she might have had a cognizable case of sex discrimination based upon Lori's jealousy.

Discrimination cases that are *sort of* sexual are likely to come to court with more regularity. The *Tenge* decision will go into the basket for review and consideration by other judges and their clerks. It remains to be seen where it will fit, and what authority it will carry. Between raw innocence and raw sex the legal treatment changes. When it changes remains unknown.

EEOC

Statements of Position Are Up For Grabs

by Darrell VanDeusen

In the past, the EEOC has treated the statement of position and supporting documentation provided by an employer in a relatively confidential manner during the course of an investigation. Sure, a complainant can get the file under the Freedom of Information Act (FOIA) after the investigation concludes and the EEOC closes the file, but not typically during the course of the investigation. Recently, however, the EEOC's Baltimore office announced that it (along with other EEOC locations presumably) has started simply mailing a copy of the statement of position to the charging party as soon as it is submitted. Think about that the next time you respond to an EEOC charge.

Arbitration Follies

My Tummy Hurts!

by Peter S. Saucier

Deborah Cook , an employee of Electrolux Home Products, Inc., was fired for attendance violations. Her last absence was a one day event when Cook left work because her stomach was hurting. A Physician's Assistant who saw her refused to certify Cook's absence as FMLA qualifying. *After* she was fired, and five days *after* the absence occurred, Cook met with a nurse without telling the nurse about her visit with the Physician's Assistant. Cook coaxed the nurse to say that the absence (for which the nurse had not been consulted when it happened) was the product of "ongoing gastroenteritis." Based upon the nurses note, arbitrator Neil N. Bernstein ordered Cook back to work with full back pay. Bernstein found that Cook should have been placed on FMLA leave despite the testimony of the Physician's Assistant that the absence was medically justified, and the Nurse's acknowledgment that she had no first hand knowledge of the illness or of the prior visit to the Physician's Assistant. On appeal, the decision was upheld to afford finality in arbitration. It's enough to upset your stomach.

Employment Discrimination

House Passes Bill to Prohibit Discrimination Based on Sexual Orientation

by Eric Paltell

On November 7, 2007, the United States House of Representatives passed the Employment Non-Discrimination Act (HR 3685). The bill, which is being referred to as "ENDA," prohibits employers of 15 or more employees from discriminating on the basis of sexual orientation. This is the first time that either chamber of Congress has approved legislation at the federal level to prohibit discrimination based on sexual orientation.

The bill makes it illegal for businesses with 15 or more employees to discriminate against individuals on the basis of their sexual orientation. It includes an exemption for armed forces, private clubs, and religious organizations. "Sexual orientation" is defined to include homosexuality, bisexuality, and hetero-

sexuality. Significantly, protections extend to an individual's actual and *perceived* sexual orientation, similar to the "regarded as disabled" protections afforded by the Americans with Disabilities Act.

Although many states and localities already prohibit discrimination on the basis of sexual orientation, the fight in the House of Representatives was very contentious. Much of the tension focused on a highly controversial provision to include transgender and gender identity protections in an earlier version of the bill. The language on gender identity would have prohibited discrimination based upon "gender related identity, appearance, mannerisms or other gender related characteristics, with or without regard to an individual's designated sex at birth." When this language was removed from the draft, a number of gay and lesbian rights groups pulled their support from the bill, fearing it would not do enough to protect the rights of individuals.

Senate Health, Education, Labor and Pensions Committee Chairman Kennedy has promised to work quickly to move similar legislation through the United States Senate. However, even if the bill passes the Senate, the White House has indicated that President Bush would veto the measure, and Democratic leaders have conceded they do not have the support needed to overcome a filibuster by conservative Senators.

We will continue to monitor the status of this legislation. At this point, we think it is unlikely that it will become law prior to the 2008 presidential elections. In the event that a Democrat wins the White House in 2008, we expect to see legislation prohibiting discrimination on the basis of sexual orientation (and possibly even gender identity) becoming the law of the land.

FMLA

Pay Attention to FMLA "Constructive Notice"

by Darrell VanDeusen

The amount and type of medical information an employee must give her employer to be protected under the Family and Medical Leave Act (FMLA) is perpetually a "hot topic" in unscheduled intermittent leave cases. Courts have held that an employee's unusual behavior may provide "constructive notice" of the possible need for FMLA. *See, e.g., Byrne v. Avon Prods., Inc.*, 328 F.3d 379 (7th Cir. 2003), *cert. denied*, 540 U.S. 881 (2003) (uncharacteristic conduct included beginning to sleep on the job after an unblemished four-year work history).

Nearly 15 years after its enactment, courts have not crafted "categorical rules" regarding what constitutes adequate notice. *See, e.g., Cavin v. Honda of Am. Mfg., Inc.*, 346 F.3d 713, 724, (6th Cir. 2003). On one hand, an employee who says nothing or says only "I'm sick" has not provided sufficient notice, while the employee who has her physician provide detailed medical information establishing a serious health condition has invoked the FMLA. *See Peeples v. Coastal Office Products, Inc.*, 203 F. Supp.2d 432 (D. Md. 2002), *aff'd*, 64 Fed. Appx. 860 (4th Cir. 2003). The area in between is gray.

Section 825.303 of the DOL regulations addresses the basic rules of notice. 29 C.F.R. § 825.303. An employee must provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, including the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention "FMLA." It is sufficient if the employee states that time off is needed for an expected birth or adoption, for example.

When an employee's need for leave is not foreseeable, the employee is to provide notice to the employer within one or two days of learning of the need for leave, except in extraordinary circumstances. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required.

The employee is expected to provide notice to the employer either in person or by telephone, fax or other electronic means. A member of the employee's family or other spokesperson may give the notice if the employee is unable to do so personally. Again, the employee need not expressly assert rights under the FMLA, or even mention the FMLA at all, but state only that leave is needed. 29 C.F.R. § 825.303(b). When this happens, the regulations provide that an employer will be "expected to obtain any additional required information through informal means."

The expectation is that the employee will be straightforward with his employer about the reason he needs leave. Communication between the employer and the employee, particularly when an absence from work is sudden, is paramount. This is why, unlike foreseeable leave, the Regulations provide that the employer is *expected* to obtain additional information through informal means when an employee takes unforeseen leave.

In *Stevenson v. Hyre Electric Co*, ___ F.3d ___, 2007 U.S. App. LEXIS 24197 (7th Cir. October 16, 2007), the court held that an employee could get to trial on her FMLA claim because her bizarre behavior at work after a stray dog came into the workplace gave the employer enough notice to suggest she might need FMLA leave. For nearly eight years, Stevenson had no documented history of misconduct or health problems at Hyre. She was, by all accounts, a dependable receptionist and clerical assistant. But on a cold day in February all that changed when a stray dog climbed through the window of the warehouse where Stevenson worked.

Stevenson had an immediate and bad reaction to the dog. She became agitated and started spraying room deodorizer around the area. Seeing her supervisor, Stevenson began yelling and cursing, screaming that "f**king animals shouldn't be in the workplace." The supervisor found Stevenson to be "very intimidating" and belligerent, and noted that her agitated behavior lasted three or four minutes. Two hours later, Stevenson told the accounting manager that she was ill and needed to go home. This behavior did not change over the course of the next week. Eventually, the company changed the locks and fired Stevenson.

Letting the case get to trial, the court said: "we conclude that a trier of fact could find that [Stevenson's] behavior was so bizarre that it amounted to constructive notice of the need for leave." Of course, said the court, "the fact finder could find that Stevenson just had a bad temper that erupted during the period in question. The point here is that this is not a decision the court can make as a matter of law."

What's the lesson here? For employers, it brings home the need to make sure that supervisors, managers and human resource employees are trained to recognize a request for leave that involves family or medical issues as at least potentially invoking FMLA rights, and to proceed with the notice and certification requirements imposed by the Regulations. But cases like *Stevenson* make it difficult. Do employers now need to guess just how unusual an employee's behavior has to be to trigger FMLA constructive notice. And, at least according to *Stevenson*, it all depends on the extent of the difference from the employee's past behavior. For example, the quiet, unassuming employee who begins to act out may be providing constructive notice of a serious health

condition, while the employee who regularly throws tantrums will not.

The development of the FMLA "constructive notice" standard may prove difficult to predict. Meanwhile, employers should look to balance the need for protecting their workforce from an employee's inappropriate behavior with the need to be attentive and supportive of an employee who may be having substantial problems that could give rise to FMLA entitlement -- particularly an employee with an otherwise unblemished work record -- should be reviewed carefully before the employee is terminated.

Kollman's Corner

Management Gets No Respect

by Frank L. Kollman

The other night, I was at a trade association meeting, and several employers asked me the best way to challenge ridiculous governmental regulations hampering their businesses. In particular, this industry has different safety standards for the same kind of work, depending on whether they are in Maryland, Virginia, or the District of Columbia. I believe the industry has a shot at knocking down the Maryland and Virginia standards, but mounting a legal challenge could be prohibitively expensive for one employer. Someone asked about the possibility of going to elected officials to get the inconsistent regulations changed.

Unfortunately, management – and by management, I mean employers – gets no support from either the Democrats or the Republicans. One would think that the Republicans would be natural supporters of management, but that is not how politics works when it comes to labor and employment law. Democrats have for years been supported by big labor unions, and the Democrats have responded as one might expect by taking pro-union and anti-business views. Republicans, on the other hand, have not been supported by big labor unions or minorities, yet Republicans have been behind several major pieces of pro-employee legislation.

Richard Nixon was president when OSHA was created. George Bush the elder was president when the ADA was enacted and when the most anti-employer amendments to Title VII of the Civil Rights Act were passed. Republican appointments to the National Labor Relations Board or the Department of Labor are, at best, neutral ones designed not to get labor unions agitated. Quite frankly, Republicans do not care enough about labor issues to call themselves pro-management.

Management is out there alone, and the various management organizations have no real power to do anything but block, and sometimes only temporarily, overreaching anti-management legislation. Democrats do not care about management, and Republicans care too much about the feelings of groups that never support the party anyway. Federal judges sympathetic to management are being blocked, and the federal and state benches are being filled with more people who fail to understand the importance of business and managers to this nation's economic wealth.

Management needs to fight back. Managers need to be heard. Unfair legislation needs to be repealed, and inconsistent regulations need to be addressed. Calvin Coolidge once said the business of America is business. It's a shame no one in power feels that way anymore.

For more thoughts and comments by Frank Kollman, visit his blog at http://kollmanlaw.com/blogs

Firm News

Up & Coming Events with Kollman & Saucier

by Ken C. Gauvey

There are several exciting events going on with Kollman & Saucier. First off, Eric Paltell has been named as one of five new board members of The American Red Cross of Central Maryland. To read the full press release please go to our website, under the "What's New" section.

In addition, Frank L. Kollman, Peter S. Saucier, Darrell VanDeusen and Ken C. Gauvey will be presenting on 2007 Employment Law Developments in Maryland on December 5, 2007, for Lorman Education Services. You can get the details at www.lorman.com.

On that same day, December 5, 2007, Eric Paltell will be teaching "The Foundations of Labor Relations" at the National Public Employers Labor Relations Association's Labor Relations Academy at the University of Delaware.

Finally, On January 23, 2007, Frank L. Kollman, Peter S. Saucier, and Ken C. Gauvey will be teaching a seminar on Advanced Workplace Investigations in Maryland. For more information on this seminar, please go to www.lorman.com.

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