

Employment Law Newsletter

*by Carrie A. Brantley**edited by L. Anthony George*

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Holme Roberts & Owen LLP
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THE FMLA MAY NOW APPLY TO SAME SEX PARENTS

On June 23, 2010, the Department of Labor publicly announced its position that benefits available to parents of newborns and newly-adopted children under the Family and Medical Leave Act (FMLA) may apply to same sex couples.

The Department "clarified" the definition of "son or daughter" under Section 101(12) of the FMLA to give family rights to people who assume the role of caring for a child, regardless of whether a legal or biological relationship exists with the child. Specifically, the Department confirmed that employees who intend to assume the responsibilities of a parent and provide either day-to-day care or financial support may be eligible for FMLA leave upon the child's birth/adoption/foster placement or to care for the child if he or she becomes seriously ill. In other words, neither a biological or legal relationship is required to establish a parent/child relationship under the FMLA.

This interpretation leaves employers with no bright-line test for determining who is a "parent" under FMLA. This is especially true given that the Department of Labor noted that "a simple statement asserting that the requisite family relationship exists is all that is needed in situations such as 'in loco parentis' where there is no legal or biological relationship." Under the interpretation, it appears that anyone can qualify as a parent if he or she provides day-to-day care or financial support to the child. For example, it appears that "parent" would include: (a) an employee who provides day-to-day care for his or her unmarried partner's child (with whom there is no legal or biological relationship) but does not financially support the child; and (b) a same-sex partner who contributes equally to the financial support of the child but assumes no responsibility for day-to-day care.

Although the Department's Interpretation is not law, it is a public announcement of the agency's view on what the law is, which is entitled to some deference. However, the courts will ultimately decide what the law is and may take a narrower view, particularly in light of the Secretary of Labor's public statement that the Department had "expanded" the reach of the Act, which is beyond an administrative agency's power to do.

DEPARTMENT OF LABOR INTERPRETATION EXPANDS THE "COMPENSABLE WORKDAY"

The Department of Labor issued an "Administrator's Interpretation" under the Fair Labor Standards Act (FLSA) that expands the compensable workday for many employees who change clothes at work or don any form of protective clothing.

Section 203(o) of FLSA provides that time spent "changing clothes or washing at the beginning or end of each workday" is excluded from compensable time. Based on the language of Section 203(o) and its legislative history, the Administrator found that the 203(o) exemption does not extend to protective equipment worn by employees that is required by law, by the employer, or by the nature of the job. Thus, it appears to be the Department of Labor's view that time spent donning and doffing any "protective equipment" is a compensable activity. This interpretation is broader than the United States Supreme Court's holding in *IBP, Inc. v. Alvarez*, which held that employees must be compensated for the time they spend donning and doffing required "specialized protective gear." By interpreting this section so broadly, the Department has arguably expanded the compensable workday to include time spent by employees changing into protective clothing, such as simple smocks and/or plastic aprons.

The Department of Labor also stated that the noncompensable activity of "changing clothes," as opposed to donning protective clothing, can be a "principal activity" that starts the workday and renders all subsequent activity (including travel time, walking to and from the job site and/or waiting time) compensable. Therefore, employees who change clothes at work may be entitled to compensation for all walking or other time after the clothing change, even though the clothing change itself would not be compensable time. The Department of Labor's expansion of the compensable workday may significantly impact those employers whose workforce wears protective clothing or changes into work clothing at work.

▶ CONTACTS

DENVER/BOULDER

1700 Lincoln Street
Suite 4100
Denver, CO 80203-4541
ph 303.861.7000
fax 303.866.0200

Tracy L. Ashmore

Carrie A. Brantley

Eve G. Burton

Shane R. Cross

L. Anthony George

Ashley W. Jordaan

Christopher J. Massey

Andrew B. Mohraz

Bobbee J. Musgrave

K. Preston Oade, Jr.

Timothy M. Reynolds

Donald L. Samuels

James G. Sawtelle

Sheldon H. Smith

David A. Tonini

David B. Wilson

COLORADO SPRINGS

90 South Cascade
Avenue
Suite 1300
Colorado Springs, CO
80903-1615
ph 719.473.3800
fax 719.633.1518

Jennifer S. Bielak

Susan D. Campbell

C. Onye Ikwuakor

Richard L. Nagl

Brent E. Rychener

DUBLIN

11 St. Stephen's Green
Dublin 2, Ireland
ph (U.S.)
011.353.1670.6165
fax (U.S.)
011.353.1670.6174

Stephen Noonan

FAIR CREDIT REPORTING ACT AFFECTS MORE EMPLOYERS EFFECTIVE JULY 1, 2010

Under a rule recently issued by the Federal Trade Commission (FTC), the Fair Credit Reporting Act (FCRA) will now impose greater burdens on employers who furnish employment-related information, effective July 1, 2010. Although a "furnisher" is typically thought of as a bank or credit card company that provides credit-related information about a consumer to one of the three major credit bureaus, employers may be considered "furnishers" in certain circumstances. Because the FTC recently determined that unemployment processing and reference checking companies, such as TALX, are consumer reporting agencies, employers who provide payroll or other employee-related information to third parties in connection with services such as unemployment processing and/or reference checking will be considered "furnishers" within the meaning of the FCRA—and, therefore, subject to its regulations.

The final rule requires employer "furnishers" to implement and maintain policies/procedures designed to ensure the "accuracy and integrity" of information provided to those third-party entities. The "accuracy and integrity rules" within the new regulations require data furnishers to "establish and implement reasonable written policies and procedures regarding the accuracy and integrity of the information relating to consumers that it furnishes to a consumer reporting agency."

The term "accuracy" is defined as information that a furnisher provides to a consumer reporting agency about an account or other relationship, such as employment, that correctly:

- reflects the terms of the relationship with the individual (e.g., the terms of the employment relationship);
- reflects the individual's performance with respect to the relationship; and
- identifies the appropriate individual.

The term "integrity" is defined as information that a furnisher provides to a consumer reporting agency about an account or other relationship that correctly:

- is substantiated by the data furnisher's records at the time it is furnished;
- is furnished in a form and manner that is designed to minimize the likelihood that the information may be incorrectly reflected in a report about the individual;
- includes any information in the furnisher's possession, the absence of which would likely be materially misleading in evaluating the individual's character, general reputation, personal characteristics or mode of living.

The final rule also requires employers to investigate "direct disputes" from a current or former employee regarding the accuracy of information that the employer provided to a consumer reporting agency—e.g., an employee's work history, positions held, compensation, and reason for termination. The consumer is required to submit a dispute notice to the employer at: (1) the employer's address indicated by the employer on the consumer report; or (2) at a location clearly and conspicuously identified by the employer for submitting direct disputes. The dispute notice must include sufficient information to identify the relationship, the information in dispute with a description of the inaccuracy, and all supporting information reasonably required to substantiate the dispute.

Once the employer receives notice of a dispute, the employer must conduct a reasonable investigation and must, in most circumstances, conclude that investigation and report the outcome to the employee within 30 days. If the employer finds that inaccurate information was provided to the consumer reporting agency, the employer must promptly notify the agency and provide the correct information.

Employers are not required to investigate direct disputes that are considered "frivolous or irrelevant," such as where the employee fails to provide sufficient information to the employer to enable it to investigate. However, the employer must notify the employee within five (5) business days after making a determination that the direct dispute is frivolous or irrelevant, and that notice must include the reasons for the employer's determination and must identify any information necessary to investigate the dispute.

▶ CONTACTS

LOS ANGELES

800 West Olympic Blvd.
4th Floor
Los Angeles, CA 90015
ph 213.572.4300
fax 213.572.4400

Lawrence P. Ebner

Nicole D. Gomes

MUNICH

Leomax
Rosental 4
D-80331 Munich
GERMANY
ph (US):
011.49.89.383980.0
fax (US):
011.49.89.383980.99

Ulrich Fülbier

Sebastian Rockstroh

SALT LAKE CITY

299 South Main Street
Suite 1800
Salt Lake City, UT
84111-2263
ph 801.521.5800
fax 801.521.9639

Blaine J. Benard

Elizabeth T. Dunning

SAN FRANCISCO

560 Mission Street,
25th Floor
San Francisco, CA
94105-2994
ph 415.268.2000
fax 415.268.1999

Laurie J. Rust

Donald L. Samuels

SUPREME COURT TO REVIEW THIRD PARTY RETALIATION CLAIMS

On the final day of its 2009-2010 term, the United States Supreme Court agreed to hear a case involving the question of whether one individual may assert a Title VII retaliation claim based on someone else's protected activity. In *Thompson v. North America*, 567 F.3d 804 (6th Cir. 2009), the court of appeals held that a fired employee lacked standing to bring a Title VII retaliation suit as the fiancé of a woman who had filed a discrimination suit against their mutual employer. In other words, the court held that close relational status alone is not enough to support a retaliation claim.

In his suit, Thompson claimed that the employer retaliated against him when it fired him three weeks after his fiancée brought a sex discrimination claim against the company. The employer claimed that he was fired for performance-based reasons. Thompson did not allege that he opposed the discrimination himself or that he participated in his fiancée's charge against the company. The Sixth Circuit held that a plaintiff must engage in protected activity (i.e., opposing discrimination) in his or her own right or as an actual party to the case of another claimant. Although there is currently no split among federal circuit courts regarding third-party retaliation claims, the Supreme Court decided to consider the viability of such claims under Title VII.

While this case will not be briefed or argued until the next term begins in the fall, it should be on employers' radars. The Supreme Court has considered attenuated retaliation claims several times in recent years and has consistently expanded the reach of such claims. See, e.g., *Burlington N. & Santa Fe RR. Co. v. White*, 548 U.S. 53 (2006) (retaliation need not involve employment action or occur in the workplace); *Crawford v. Metro. Gov't of Nashville and Davidson Cty.*, 129 S.Ct. 846 (2009) ("protected activity" need not be actual complaint of discrimination; sufficient that plaintiff alleged harassing conduct when questioned in investigation of co-worker's complaint). If the Supreme Court continues to expand retaliation claims as it did in these lines of cases, and allows third-party retaliation claims, employers may expect to see an increase in retaliation claims.

SAWTELLE, NOONAN JOIN HRO EMPLOYMENT AND LABOR GROUP



James G. Sawtelle

303-417-8516 | jim.sawtelle@hro.com
1700 Lincoln Street | Suite 4100 | Denver, Colorado 80203-4541

DENVER/BOULDER, CO — Welcome to James G. Sawtelle, who has joined HRO as a partner in our Denver/Boulder office. He will focus on labor and employment.

James G. Sawtelle has nearly 20 years of first-chair trial experience and regularly provides counsel and litigation services to employers in a wide range of employment-related matters, including discrimination and harassment, breach of contract, non-compete and trade secrets disputes, and breach of fiduciary duty. Mr. Sawtelle graduated Phi Beta Kappa from the University of Iowa in 1988 and earned his law degree from the University of Iowa's College of Law in 1991.



Stephen Noonan

363 (0) 1 670 6165 | stephen.noonan@hro.com
11 St. Stephen's Green | Dublin, Ireland

DUBLIN, IRELAND — Welcome to Stephen Noonan, who has joined HRO as a partner in our Dublin office. He will focus on labor and employment.

Mr. Noonan has practiced as a solicitor since 1989 and advises extensively on employment matters for clients including schools, academic institutions and sports clubs. He has appeared personally before the various employment tribunals in Ireland and has been involved extensively in litigation in the High Court relating to Director removal, restraint of trade and employment disputes. He is a graduate of the University of Dublin.



HRO's Going Green

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Holme Roberts & Owen LLP
Attorneys at Law

Experience Listens. Be Heard.™

1700 LINCOLN STREET, SUITE 4100
DENVER, COLORADO 80203-4541

California Corner *by L. Anthony George*

NO PRIVATE RIGHT OF ACTION IN TIP-POOLING CASES, HIGH COURT RULES

This month, the California Supreme Court held unanimously that Section 351 of the California Labor Code does not create a private right of action for employees. In *Lu v. Hawaiian Gardens Casino, Inc.*, 2010 Cal. LEXIS 7623 (Cal. Aug. 9, 2010), a card dealer in a casino alleged that his employer's mandatory tip-pooling program violated Section 351, which prohibits employers from taking any part of a gratuity left for an employee and provides: "Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for." The trial court dismissed the claim, holding that Section 351 did not provide a private right to sue, and the Court of Appeal affirmed. However, another Court of Appeal expressly disagreed with that holding several months later, creating a conflict that the Supreme Court has now resolved.

The Court first noted that there is not always a private cause of action for violation of a statute and that the question is whether the Legislature has "manifested an intent to create such a private cause of action." Because the language of Section 351 neither expressly created a private right of action nor referred to a specific existing remedy for violations, the Court looked to the legislative history and found "no clear indication that the Legislature intended to create a private cause of action under the statute." In such a case, the Court held that the party claiming such a right "bears a heavy, perhaps insurmountable, burden of persuasion." The plaintiff failed to meet that burden. The Court rejected his arguments that the Legislature "implicitly created" a private right of action, and the Court distinguished an earlier case suggesting that courts may imply a private right of action, *Katzberg v. Regents of Univ. of Cal.*, 29 Cal.4th 300 (Cal. 2002), holding that *Katzberg* applied only to constitutional violations rather than statutory violations. Finally, the Court noted that employees are not without a remedy for violation of Section 351, because the Department of Industrial Relations may prosecute employers for misdemeanor violations of the Labor Code, a common law conversion action may be available to employees "under appropriate circumstances," and the Legislature may choose to create a private right of action if it wishes to do so.

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