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Employment Law Update

Miriam J. McKendall, Esq.*
Holland & Knight LLP

Introduction¹

Employment cases decided by the United States Supreme Court during 2007 resulted in limited division among the Supreme Court. Overall, those decisions supported the perspective of employers. One decision that did divide the Court and is viewed as a significant “win” for employers is the Supreme Court’s rejection of a plaintiff’s paycheck accrual theory of pay discrimination, and confirmation that a new violation of Title VII does not occur with the issuance of a paycheck that is a product of prior discriminatory acts occurring outside the statute of limitations period. That decision and the pending legislation it generated is discussed in more detail in Section I. Also included in Section I are summaries of other important 2007 Supreme Court employment decision and related legislation.

The Supreme Court is scheduled to hear and decide a number of employment cases during this current term. One case of particular interest addresses the admissibility of certain testimony, often referred to as “me too” testimony, in a case brought under the Age Discrimination in Employment Act. A case with direct bearing on the intersection of an employer’s policy for filling job vacancies and its obligations in regard to reasonable accommodation requests under the Americans with Disabilities Act was scheduled to be heard by the Supreme Court this term. Although that case was settled in January of 2008 and will not be decided by the Supreme Court, it raises important considerations for most employers. A discussion of those cases, along with a summary of other employment cases now pending before the Supreme Court, appears in Section II.

In addition to the decisions rendered by the Supreme Court in these employment cases, employers must be cognizant of a number of decisions issued by various circuit courts of appeal

¹ This paper includes summaries of selected cases and developments in employment law during 2007. This paper does not provide a comprehensive listing of all cases and developments relating to employment law, nor is it intended to provide legal advice. Instead, it presents developments and cases in federal law that are of general interest to employers. Readers should consult with their own legal counsel in regard to the application of any of these developments to their own situations. Readers are encouraged to become advised of any further legal updates which occur after this paper was prepared in January of 2008.

*Miriam J. McKendall is a partner in the law firm of Holland & Knight LLP. The author acknowledges contributions to this paper made by members of the Holland & Knight Labor and Employment Law Group.

in 2007 involving the Family and Medical Leave Act, as well as proposed legislation to expand the FMLA and the Report on the Department of Labor's Request for Information issued in June of 2007. These developments are discussed in Section III.

In 2007, employers also experienced a number of "starts and stops" and uncertainties in matters impacting their compliance with immigration laws and the National Labor Relations Act. These matters are discussed in Section IV and V.

Finally, during 2007 employers began addressing the on-going challenge of complying with electronic discovery rules and the implementation of effective electronic discovery policies, in response to the amendments to the Federal Rule of Civil Procedure that became effective in December of 2006. This is discussed in Section VI.

Section I: Significant Employment Decisions by the United States Supreme Court and Legislative Action During 2007

Employers view as significant the United States Supreme Court's decision in the case of *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, ___ U.S. ___, 127 S.Ct. 2162 (2007). In that case, the Supreme Court rejected a liberal interpretation that past discriminatory actions resulting in an issuance of a current pay check may be viewed as timely under applicable statute of limitations.

A brief discussion of the facts of that case is warranted. Ledbetter worked for Goodyear from 1979-1998. She was the only female in her position. By the time of her retirement in November of 1998, she earned significantly less pay than her male counterparts. In March 1998, she submitted a questionnaire to the EEOC and then filed a formal EEOC charge of discrimination in July of 1998. In November 1998, she elected early retirement and filed a lawsuit against Goodyear asserting, among other claims, a Title VII pay discrimination claim and a claim under the Equal Pay Act. Ledbetter's Title VII pay discrimination claim proceeded to trial. At trial, Ledbetter introduced evidence that during course of her employment several supervisors had given her poor evaluations because of her sex and that as a result of these evaluations, her pay was not increased as much as it would have been if she had been evaluated fairly. She argued that those past pay decisions continued to affect the amount of her pay throughout her employment.

The jury found for Ledbetter and awarded her damages. Goodyear appealed, arguing that Ledbetter's pay discrimination claim was time-barred with respect to all pay decisions made prior to September 26, 1997 (180 days before Ledbetter filed her EEOC questionnaire). The Court of Appeals for the Eleventh Circuit ruled in favor of Goodyear, and held that a Title VII pay discrimination claim cannot be based on any allegedly discriminatory events that occurred prior to the last pay decision that affected the employee's pay during the EEOC charging period.

Ledbetter appealed to the United States Supreme Court. She sought review of whether a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.

In a divided decision, the Supreme Court held that plaintiffs claiming pay discrimination must file their complaints within 180 or 300 days (depending upon the state) of the allegedly discriminatory pay decision or lose the claim despite continuing receipt of paychecks reflecting the decision. The Court held that in the discriminatory pay context a discrete employment act occurs when the allegedly discriminatory pay decision is made and communicated to the employee.

The Supreme Court in *Ledbetter* rejected the plaintiff's argument that a new violation of the law occurred, and a new charging period commenced, with the issuance of each paycheck, even when unaccompanied by any discriminatory intent. *Id.* at 2172. The Court explained that an employer violates Title VII and triggers a new EEOC charging period only when the paycheck is the product of a discriminatory act that occurred during the relevant period. In doing so, the Court specifically rejected the suggestion that "an employment practice committed with no improper purpose and no discriminatory intent is rendered unlawful nonetheless because it gives some effect to an intentional discriminatory act that occurred outside the changing period." *Id.*

There is a strong dissent voiced in response to the majority's holding. The dissent distinguishes pay disparities from other adverse actions, such as termination, failure to promote or refusal to hire, stating those actions, unlike pay disparities, typically involve fully communicated discrete acts, easy to identify as discriminatory. *Id.* at 2179. The dissent states further that pay disparity claims have a closer kinship to hostile work environment claims than to a single episode of discrimination. *Id.* at 2181. Finally, the dissent states that the "ball is in Congress' court" and calls to the legislature "to correct this Court's parsimonious reading of Title VII." *Id.* at 2188.

There has been legislative reaction to the *Ledbetter* decision. The House Legislation and Labor Committee has proposed legislation to counter the Court's decision in *Ledbetter*. (See *Ledbetter Fair Pay Act*, H.R. 2831). That Legislation, if passed, will amend various federal employment discrimination laws to specify that an unlawful employment practice occurs each time an employee receives pay resulting from a discriminatory compensation decision. Further related proposed legislation is the *Paycheck Fairness Act* (S. 766) which is intended to update the *Equal Pay Act*, and include a provision which prohibits employers to forbid employees from sharing information regarding their pay. (The *National Relations Labor Act* also prohibits employers from banning employees from talking about their salaries.) It is predicted that such legislation will not likely pass in the current Bush administration.

The case of *E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476 (10th Cir. 2006), *cert. granted*, 127 S.Ct. 852 (U.S. Jan. 5, 2007) (No. 06-341), was scheduled to be decided by the Supreme Court in 2007. This case raised the question of whether the fact that the decision maker did not have knowledge of the employee's race was a proper defense to a racial discrimination claim. Specifically, in that case, a black employee worked for BCI as a merchandiser for six years in a facility where 60% of the 200 employees were Hispanic, and fewer than 2% were black. The employee's direct supervisor (Grado, a Hispanic male) told the employee he had to work on a Sunday. The employee called in sick (and spoke to a different supervisor) and did not report on Sunday. On the following Monday, Grado reported to the human resources department that the employee was insubordinate, and the human resources

department made the decision to terminate the employee without knowing if he was sick (and without knowledge of his race). The EEOC brought a racial discrimination case on behalf of the employee, and presented evidence of Grado's racial bias, including racist comments he made about black employees. The trial court granted BCI's motion for summary judgment, rejecting EEOC's "cat's paw" or "rubber stamp" theory -- that is, that the human resources manager was manipulated by Grado's misinformation, resulting in Grado's goal of terminating the employee. (As the Tenth Circuit explained, in the employment discrimination context "cat's paw" refers to "a situation in which a biased subordinate, who lacks decision-making power, uses the formal decision-maker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *Id.* at 484.)

A unanimous appeals panel reversed the trial court's decision, commenting that the employer could have avoided liability by conducting an independent investigation rather than making a decision based on one account of the facts presented by Grado.

The Supreme Court accepted BCI's request for oral argument. The issue presented was whether the fact that the decision maker did not have knowledge of the employee's race was a proper defense to a racial discrimination claim. BCI subsequently moved to dismiss the case and it was not heard by the Supreme Court. The case instructs employers that it is prudent to verify facts presented by its supervisory and management personnel before taking adverse employment actions.

Another significant employment decision during 2007 included *Long Island Care at Home, Ltd. v. Coke*, ___ U.S. ___, 127 S.Ct. 2339 (2007). In that case, the Supreme Court held that the exemption to the FLSA involving in-home health care providers also applies to workers employed by third party corporations (and not the family receiving care).

In the case of *Beck v. Pace Int'l Union*, ___ U.S. ___, 127 S.Ct. 2310 (2007), the Supreme Court reversed the Ninth Circuit, and held that an ERISA plan sponsor did not breach its fiduciary duty when it failed to consider a union proposal to merge the plans with the union's multiemployer plans and opted instead for plan termination through the purchase of annuities. The Supreme Court stated that in order for PACE to prevail on a claim that the plan sponsor breached its fiduciary duties by purchasing annuities instead of merging its plans with the union's plans, it first would have to show that merger is a permissible form of plan termination under ERISA. The Supreme Court found that plan mergers were not a permissible means of terminating plans under ERISA, and therefore PACE could not show that the plan sponsor breached its fiduciary duties.

Legislation in 2007

- EEOC – Coverage Under the Age Discrimination in Employment Act. Effective July 6, 2007, the EEOC published a final rule in light of the United States Supreme Court's decision in *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 124 S.Ct. 1236 (2004), that the ADEA only prohibits discrimination based on relatively older age, not discrimination based on age generally. The final rule deletes language in EEOC's ADEA regulations that prohibited discrimination against relatively younger individuals. The new rule explains that

the ADEA only prohibits employment discrimination based on old age and, therefore, does not prohibit employers from favoring relatively older individuals. See 72 Fed. Reg. 36873 (2007) (to be codified at 29 C.F.R. section 1625). See also *E.E.O.C. Website* (Jan. 2008) <http://www.eeoc.gov/>.

- EEOC – Age Discrimination in Employment Act; Retiree Benefits. In its final rule published on December 26, 2007 (72 Fed. Reg. 72938-72945), the EEOC creates a narrow exemption from the prohibitions of the ADEA for the practice of coordinating employer-sponsored retiree health benefits with eligibility for Medicare or comparable state health benefit programs. A petition for certiorari was filed with the Supreme Court in November of 2007 to review the Third Circuit’s decision in the related litigation, *American Association of Retired Persons v. E.E.O.C.*, 489 F. 3d. 558 (3d Cir. 2007), *petition for cert. filed*, 76 USLW 3288 (U.S. Nov. 19, 2007) (No. 07-662). (At the time this paper was written, the petition was not yet acted upon.)
- Amendments to the Fair Labor Standards Act. This Amendment increases the minimum wage to \$5.85, effective July 24, 2007 (and to \$6.55, effective July 24, 2008, and to \$7.25 effective July 24, 2009). Fair Minimum Wage Act of 2007, Pub. L. 110-28, 121 Stat. 112 (2007).
- The Pension Protection Act. Signed into law in August of 2006, this law takes full effect in January of 2008. The law establishes a variety of disclosure requirements for plan administrators. The Department of Labor has issued regulations regarding civil penalties for failure to comply with the disclosures. Employee Benefits Security Administration, 72 Fed. Reg. 71842 (2007) (to be codified at 29 C.F.R. section 2560).
- Proposed Ledbetter Fair Pay Act of 2007 (H.R. 2831). Sponsored by House Education and Labor Committee Chairman Miller (D-Calif.), this proposed bill seeks to amend various federal employment discrimination laws to specify that an unlawful employment practice occurs each time an employee receives pay resulting from a discriminatory compensation decision. (It is believed that the President will veto any such bill.)
- Proposed Genetic Information Non-discrimination Act (GINA) (H.R. 493). The proposed bill prohibits employment discrimination based on one’s genetic make-up. The proposed bill also includes confidentiality requirements for handling documents containing genetic information. (It is believed that the President will sign such a bill.)
- Proposed Employment Non-Discrimination Act of 2007 (“ENDA”) (H.R. 3685). This proposed legislation prohibits discrimination based on sexual orientation. (Many states currently prohibit discrimination on the basis of sexual orientation.)
- Proposed Health Information Privacy and Security Act of 2007 (HIPSA) (S. 1418). The proposed bill introduced by Senators Leahy and Kennedy on July 18,

2007 places restrictions on disclosures of personal health information, prohibiting the disclosure or use of personal health information without authorization from the patient/employee in most cases. It also allows patient/employees to opt out of electronic systems that store or transmit health records and requires that individuals be notified if their information is disclosed without authorization. If passed, this bill would not supplant the Health Insurance Portability and Accountability Act of 1996, but would require the Health and Human Services Department to revise HIPAA rules.

Other Federal Law Developments During 2007

- New FLSA poster containing new federal minimum wage rate. The new poster was issued by the DOL on July 3, 2007. FLSA Minimum Wage Poster (effective July 24, 2007) <http://www.dol.gov/esa/regs/compliance/posters/flsa.htm>.
- New EEO-1 report form for 2007 EEO-1 filings. Employer Information Report (EEO-1) (effective September 30, 2007) <http://www.eeoc.gov/eeo1/index.html>.
- New EEOC Enforcement Guidance, issued May 23, 2007, addresses discrimination against employees who have caregiving responsibilities. E.E.O.C. *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, No. 915.002 (May 23, 2007) <http://www.eeoc.gov/policy/docs/caregiving.html>.
- Revised Employment Verification Form (I-9), issued by United States Citizenship and Immigration Services (USCIS). Published at 72 Fed. Reg. 65974 (2007). The revised I-9 updates the list of documents an employee may submit to establish work eligibility and identity. Form I-9, Employment Eligibility Verification (effective November 7, 2007) <http://www.uscis.gov/files/form/i-9.pdf>.

Section II: Significant Pending Employment Cases to be Decided by the United States Supreme Court in 2008

With its review of *Mendelsohn v. Sprint/United Management Co.*, 466 F.3d 1223 (10th Cir. 2006), *cert. granted*, 127 S.Ct. 2937 (U.S. Jan. 11, 2007) (No. 06-1221), the Supreme Court will address the admissibility of certain testimony in an age discrimination case. Specifically, the issue presented is whether in a lawsuit brought under the Age Discrimination in Employment Act (“ADEA”) testimony about perceived age discrimination from another former employee who worked for supervisors different than those for whom the plaintiff worked may be admitted into evidence at the trial court level. (This type of testimony, often referred to as “me-too” testimony, is also presented in other types of discrimination cases.)

A jury had returned a verdict in favor of the employer, Sprint, where Mendelsohn, a former employee, alleged age discrimination in connection with her termination arising from a company-wide reduction in force. Specifically, Mendelsohn argued that the trial court committed reversible error by requiring her to show she and the other employees shared a

supervisor as a precondition for admissibility of their testimony. Mendelsohn argued that the testimony of other employees in the protected age group who were subject to substantially similar lay-offs was relevant and admissible as reflecting Sprint's discriminatory intent in selecting Mendelsohn for the lay-off. Sprint argued that evidence of its treatment toward other employees is not relevant because the evidence does not make it more likely that Sprint discriminated against Mendelsohn. Mendelsohn appealed on the grounds that the trial court erred in excluding testimonial evidence from former Sprint employee who alleged similar discrimination during this same reduction in force. The Tenth Circuit agreed with Mendelsohn, and reversed the jury's verdict, finding that the testimony of other employees concerning Sprint's alleged discriminatory treatment and similar lay-offs is relevant to Sprint's discriminatory animus toward older workers.

The case of *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007), *cert. granted*, 128 S.Ct. 742 (U.S. Dec. 7, 2007) (No. 07-480) (dismissed following settlement January 14, 2008), raises the issue of whether an employer violates the American with Disabilities Act ("ADA") when it gives a job to the most qualified person rather than to an employee who has become disabled. In that case, Pamela Huber, who worked for Wal-Mart as a dry grocery order filler, suffered a permanent injury rendering her unable to perform her job. Huber asked to be assigned to a vacant router position. Wal-Mart, who agreed that Huber was disabled, made her compete against other applicants for the job and eventually awarded the position to someone else who it claimed was more qualified than Huber. Huber sued Wal-Mart under the ADA.

The Eighth Circuit affirmed the lower court's grant of summary judgment to Wal-Mart. Huber appealed to the Supreme Court. Huber argued that an Equal Employment Opportunity Commission enforcement guidance issued in 2002 requires employers to reassign employees who become disabled to a vacant position if they are qualified to perform it. In addition, the ADA lists "reassignment to a vacant position" as one example of a reasonable accommodation. The Eighth Circuit stated that "the ADA is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate." *Id.* at 483. The Eighth Circuit noted that the Seventh and Tenth circuits had split on the issue. *Id.*

Before the case was scheduled to be heard before the Supreme Court, the parties entered into a confidential agreement in January of 2008. Although the case will not be heard by the Supreme Court, it instructs employers to review carefully their policies regarding assessing reasonable accommodation requests, along with its policies regarding re-assignments and applying for and filling vacant positions. Employer must be certain to follow those policies with uniformity and rely on solid documentation in making its decision.

Additional employment cases pending before the Supreme Court this current term include the following:

Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee, 211 Fed. Appx. 373 (6th Cir. 2006), *cert. granted*, 76 U.S.L.W. 3021 (U.S. Jan. 18, 2008) (No. 06-1595).

Issue: Is participation in an internal investigation considered a protected activity for the purposes of Title VII's anti-retaliation provision?

Current Holding: The Sixth Circuit, in an unpublished decision, held that an employee's action of cooperating and participating in an internal sexual harassment investigation conducted by her employer was not opposition under the meaning of Title VII's opposition clause and did not constitute a protected activity under the participation clause.

Meacham v. Knolls Atomic Power Laboratory, 461 F.3d 134 (2nd Cir. 2006), *cert. granted*, 75 U.S.L.W. 3623 (U.S. Jan. 18, 2008) (No. 06-1505).

Issue: Whether an employee alleging a claim under the Age Discrimination in Employment Act bears the burden of persuasion as to his employer's defense that an employment practice with a disparate impact on older workers is permissible based on a reasonable factor other than age.

Current Holding: The Second Circuit held that in an ADEA disparate impact action an employer defeats a plaintiff's *prima facie* case by producing a legitimate business justification, unless the plaintiff is able to discharge the ultimate burden of persuading the fact finder that the employer's justification is unreasonable.

Holowecki v. Federal Express Corp., 440 F.3d 558 (2nd Cir. 2006), *cert. granted*, 127 S.Ct. 2914 (U.S. June 4, 2007) (No. 06-1322).

Issue: For the purpose of the ADEA's statute of limitations is submission of an intake questionnaire along with a sworn and notarized affidavit to the EEOC the equivalent of actually filing a charge?

Current Holding: In March of 2006, the Second Circuit reversed the lower court's dismissal of claims of violations of the ADEA filed with the EEOC by fourteen employees of Federal Express. The lower court dismissed the suit because the claims were not filed within 300 days of the alleged violation. In making its decision, the Second Circuit held that the ADEA regulations (at 29 C.F.R. section 1626) provide that a charge is sufficient if the EEOC receives a writing (or information that an EEOC officer reduces to writing) from the person making the charge that names the employer and generally describes the alleged discriminatory acts, and if with the writing the person seeks to activate the administrative investigation and conciliatory process. The Second Circuit also agreed that the notice to the EEOC must be of a kind would convince a reasonable person that the person has demonstrated an intent to activate the agency's process.

Gomez-Perez v. Potter,
476 F.3d 54 (1st Cir. 2002), *cert. granted*, 128 S.Ct. 29 (U.S. Sept. 25, 2007) (No. 06-1321).

Issue: Does the ADEA prohibit federal government employers from retaliating against employees for filing age discrimination claims?

Current Holding: The First Circuit held that the language of ADEA does not contain prohibition of retaliation for filing an age claim in the federal sector (although it does so in the private sector).

LeRue v. DeWolff, Boberg & Associates, Inc.,
450 F.3d 570 (4th Cir. 2006), *cert. granted*, 127 S.Ct. 2971 (U.S. June 18, 2007) (No. 06-856).

Issue: Can a participant in a 401(k) retirement savings plan bring a suit under ERISA to recover losses caused by his employer's failure to implement the participant's investment instructions?

Current Holding: In June of 2006, the Fourth Circuit held that a plan participant cannot bring suit under section 502(a)(2) or (a)(3) of ERISA for losses caused by a breach of fiduciary duty because the losses affected that individual participant only, and because such losses do not constitute equitable relief. (It should be noted that the plaintiff may bring claims under common law contract and tort theories, in the absence of available claims under ERISA.)

E.E.O.C. v. Jefferson County Sheriff's Department,
467 F.3d 571 (6th Cir. 2006), *cert. granted*, 128 S.Ct. 36 (U.S. Sept. 25, 2007) (No. 06-1037).

Issue: Can a *prima facie* case of age discrimination be established on the basis of a retirement plan that facially discriminates on the basis of age?

Current Holding: The Sixth Circuit held that the EEOC established a *prima facie* case of age discrimination where the Kentucky Retirement Systems Plan facially discriminates against older employees because it disqualifies employees holding hazardous jobs from receiving disability retirement benefits if they become disabled after age 55 (or 65, if they hold non-hazardous jobs) where they are eligible for retirement benefits.

Humphries v. CBOCS West, Inc.,
474 F.3d 387 (7th Cir. 2007), *cert. granted*, 128 S.Ct. 30 (U.S. Sept. 25, 2007) (No. 06-1431).

Issue: Can a claim of retaliation for opposing race discrimination be brought under section 1981, as amended by the Civil Rights Act of 1991?

Current Holding: The Seventh Circuit held that claims of retaliation for opposing race discrimination may be brought under section 1981, as amended by the Civil Rights Act of 1991.

Employers with employees in California may be interested in the cases of *Ferrer v. Preston*, 145 Cal. App. 4th 440 (2006), *cert. granted*, 128 S.Ct. 31 (U.S. Cal. Sept. 25, 2007) (No. 06-1463), and *Chamber of Commerce of U.S. v. Lockyer*, 463 F.3d 1076 (9th Cir. 2006), *cert. granted*, 128 S.Ct. 645 (U.S. Nov. 20, 2007) (No. 06-939). In the *Preston* case, the Supreme

Court will address whether the Federal Arbitration Act preempts a California law that gives the state labor commissioner exclusive original jurisdiction over a contract dispute between a television celebrity and his manager. In the *Lockyer* case, the Supreme Court will address whether a California law that bars employers from using state funds to assist or deter union organizing is preempted by the NLRB.

Section III: The Family Medical Leave Act

The Family and Medical Leave Act (“FMLA”) was reviewed, interpreted and enforced in a number of different ways during 2007. One common theme emerged: the implementation of the FMLA remains in flux and continues to provide great challenges to employers.

Decisions issued by a number of circuit court of appeals during 2007 regarding the FMLA provide some guidance to employers. Summaries of the more significant decisions are set forth below.

FMLA: Waiver of Retrospective Rights

Taylor v. Progress Energy, Inc.

493 F.3d 454 (4th Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3226 (U.S. Oct. 22, 2007) (No. 07-539).

Issue: Does the FMLA regulation, 29 C.F.R. section 825.220(d), which provides: “Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA,” prohibit both prospective and retrospective waiver of FMLA claims, unless the waiver has prior approval of the Department of Labor or a court?

Current Holding: The Fourth Circuit Court of Appeals held that 29 C.F.R. section 825.220(d) did prohibit such waivers. In making this holding, the Fourth Circuit focused on the meaning of “rights under FMLA.” The Fourth Circuit characterized an employee’s rights under the FMLA as substantive, proscriptive, and remedial. Substantive rights include an employee’s right to take unpaid leave and to receive reinstatement following the leave. Proscriptive rights include an employee’s right not to be subjected to discrimination or retaliation for exercising their substantive FMLA rights. Remedial rights include an employee’s right to bring a claim and recover damages for a violation of the FMLA. The Fourth Court concluded that because the regulation specifies “rights under FMLA,” its prohibition also applies to waivers of prospective and retrospective claims.

The Fourth Circuit’s holding is contrary to the Department of Labor’s interpretation, which is that only prospective FMLA rights cannot be waived. It should be noted that in January of 2008, the Supreme Court asked for the solicitor general’s views on the Fourth Circuit’s holding in this case. (*Progress Energy Inc. v. Taylor*, U.S., No. 07-539, *invitation to file brief* 1/14/08). This may signal a review of the holding by the Supreme Court.

FMLA: Holidays “Counted” Towards Intermittent Leave

Mellen v. Trustees of Boston University,
504 F.3d 21 (1st Cir. 2007).

Issue: Do holidays that occur during an employee’s intermittent FMLA leave count towards the employee’s total FMLA entitlement if the intermittent leave is taken in increments of a week or more?

Current Holding: The First Circuit Court of Appeals, in a case of first impression, held that holidays are counted as part of intermittent leave actually taken if the intermittent leave consists of increments of one week or more. In making its decision, the First Circuit addressed two seemingly conflicting Department of Labor regulations:

- 29 C.F.R. section 825.205(a): If an employee takes leave on an intermittent or reduced schedule, only the amount of leave actually taken may be counted toward the 12 weeks of leave to which an employee is entitled.
- 29 C.F.R. section 825.200(f): For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave.

The First Circuit concluded that the two regulations can co-exist. It concluded that if an employee’s intermittent leave includes a full, holiday-inclusive week, section 825.200(f) governs and provides that the amount of leave used includes holidays. The court reasoned that the language in section 825.205(a) that defines intermittent leave as “leave actually taken” is meant only to “ensure that an employer does not claim that an employee who takes off one day during a five-day work week has taken off the entire week . . . Its purpose is not to give an advantage to an employee who takes off five weeks but designates it as intermittent leave over an employee who takes off five weeks as continuous FMLA leave.”

FMLA: Substitution of Paid Leave

Repa v. Roadway Exp., Inc.,
477 F.3d 938 (7th Cir. 2007).

Issue: Does the FMLA provision requiring substitution of paid leave apply where the employee is receiving disability benefits from third party plan during her FMLA leave?

Current Holding: The Seventh Circuit addressed the application of 29 C.F.R. section 825.207(d)(1) and 29 U.S.C. section 2612(c) to a FMLA leave taken for the employee’s own serious health condition where the employee was receiving disability benefits from a third party plan. Under 29 U.S.C. section 2612(c), an employer may require an employee to substitute accrued paid time off for FMLA leave. Section 825.207(d)(1), which places limitations on that provision, provides as follows:

Disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave permitted under FMLA. Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employer may designate the leave as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement. If the requirements to qualify for payment pursuant to the employer's temporary disability plan are more stringent than those of FMLA, the employee must meet the more stringent requirements of the plan, or may choose not to meet the requirements of the plan and instead receive no payments from the plan and use unpaid FMLA leave or substitute available accrued paid leave.

(Similarly, 29 C.F.R. section 825.207(d)(2) provides that since worker's compensation is not an unpaid leave, the provision for substitution of the employee's paid leave is not applicable.)

The Seventh Circuit rejected the employer's argument that section 825.207(d)(1) applies (a) only to disability leave for birth of a child, and (b) only to an employer's disability plan, and not a third-party plan. Of interest is employer's (belated) contention that section 825.207(d) is invalid on the grounds it contravenes Congressional intent, and in effect would permit employees to extend leave beyond the twelve week period provided by FMLA. The Seventh Circuit did not address this claim because the employer had not preserved it as required for an appeal.

FMLA: The "75 Miles" Provision

Hackworth v. Progressive Casualty Insurance Co.,
468 F.3d 722 (10th Cir. 2006), cert. denied, 127 S.Ct. 2883 (U.S. May 29, 2007) (No. 06-1300).

Issue: How is the "within 75 miles" FMLA requirement interpreted?

Current Holding: During 2007, the Supreme Court declined to review the Tenth Circuit's decision regarding the interpretation of the provision of the FMLA at 29 U.S.C. section 2611(2)(B)(ii) which provides that if an employer does not employ at least 50 people within 75 miles of an individual's worksite, that individual is not an eligible employee for FMLA purposes. The Tenth Circuit held that the Department of Labor "within 75 miles" regulation is measured by reference to "surface miles," using surface transportation over public streets, rather than linear miles from point to point. 29 C.F.R. section 825.111(b).

FMLA: The Twelve Month Eligibility Requirement and Previous Periods of Employment

Rucker v. Lee Holding Co.,
471 F.3d 6 (1st Cir. 2006).

Issue: Does an employee's previous period of employment with an employer count toward the requirement that an employee must have worked for the employer for at least twelve months in order to be eligible for FMLA?

Current Holding: In December of 2006, the First Circuit Court of Appeals, in a case of first impression, addressed 29 U.S.C. section 2611(2)(A)(i), which provides that an employee's eligibility for FMLA depends (in part) on the employee having been employed by the employer for at least twelve months. The First Circuit held that the FMLA itself was ambiguous as to whether previous periods of employment count toward this twelve month requirement, but that the regulations promulgated by the Department of Labor (DOL), as interpreted by the DOL, establish that previous periods of employment do count. Specifically, 29 C.F.R. section 825.110(b) provides:

The 12 months an employee must have been employed by the employer need not be consecutive months. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (e.g., workers' compensation, group health plan benefits, etc.), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/causal employment qualifies as "at least 12 months," 52 weeks is deemed to be equal to 12 months.

The First Circuit gave substantial deference to the DOL's view that the first sentence of section 825.110(b) allowing for non-consecutive months is not limited by the remaining sentences, and held that previous periods of employment do count toward the twelve month eligibility requirement. The First Circuit noted that this ruling does not impact the hours of service eligibility requirement. (Under 29 U.S.C. section 2611(2)(A)(ii), in addition to having worked for the employer for twelve months, the employee must also have worked at least 1,250 hours during the twelve months prior to the start of the FMLA leave.)

Proposed Legislation to Expand the FMLA

H.R. 1585, 110th Cong. (2007-2008)

In what would have marked the first expansion of the FMLA since its enactment in 1993, Congress voted in December of 2007 to grant additional FMLA leave rights to family members of those called to active duty from reserve status and to workers who need leave to care for family members wounded during military service.

The proposed legislation sought to require that employers provide up to 12 weeks of unpaid FMLA leave to immediate family members (spouses, parents and children) of members of the military reserves and National Guard who are called to active service, and to also require

leave for “exigencies” arising from the fact that the spouse, parent or child of an employee is on active duty military service. In addition, the legislation sought to require employers to allow immediate family members of wounded soldiers who have returned from service to take up to 26 weeks of FMLA leave to care for the wounded soldier. (Employees would have been limited to a maximum of 26 weeks of leave per year for all reasons covered by the expanded FMLA.)

Contrary to expectations, on December 31, 2007, President Bush pocket vetoed the military spending bill that included the expansions of the FMLA for military families. The President’s action was not based upon opposition to the FMLA amendments. Rather, the President vetoed the bill because it contained provisions that would expand the ability of U.S. citizens to seek financial compensation from countries that supported or sponsored terrorist acts. It is expected that provisions expanding the FMLA along the lines discussed above will be passed at some point.

Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request for Information

In late 2006, the Department of Labor published a Request For Information (“RFI”), seeking the public’s assistance by furnishing information in regard to the Family and Medical Leave Act (“FMLA”), and their questions and experiences in implementing it. (71 Fed. Reg. 69504).

The Department of Labor received over 15,000 comments in response to its RFI. In June of 2006, it issued an extensive report on the comments from the public, entitled *Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request for Information* (the “Report”), published at 72 Fed. Reg. 35550. A complete copy of the report is available at <http://www.dol.gov/esa/whd/fmla2007report.htm>.

The Report states there was significant comment about the medical certification process. Dissatisfaction with that process was shared by employers, employees and health providers. The Department also received many comments on the definition of serious health condition relating to a period of incapacity of more than three consecutive calendar days and treatment of two or more times by a health care provider, as set forth in 29 C.F.R. section 825.114. The Report describes as a “central defining theme” in the comments the prevalence of unscheduled intermittent FMLA leave taken by individuals with serious health conditions. *Id.* at 3552. The Report notes that intermittent FMLA leave is “the single most serious area of friction between employers and employees seeking to use FMLA leave.” *Id.*

The conclusion section of the Report summarizes the concerns of intermittent leave and notes that “to the extent that the use of FMLA leave has continued to increase in unanticipated ways, primarily in the area of intermittent leave taken as self-treatment for chronic serious health conditions, the Department has heard significant concerns.” The Report describes the following are as “unanticipated facets of the FMLA” which are the source of “considerable friction”:

- How serious is “serious”?
- What does “intermittent” leave mean and how long should it go on?

- What are the rules surrounding unforeseeable leave?
- How much information can an employer require before approving leave?
- What are an employee's responsibilities under the Act?
- What workplace rules may an employer actually enforce?
- How has other legislation, including the ADA and HIPAA, affected the FMLA?

Id. at 3556. At this time, it is not clear how the Department will proceed in regard to responding to or acting upon the comments.² (The Department states in the conclusion section of the Report that it “hopes that this Report will further the discussion of these important issues and is grateful to all who participated in this information-gathering process.” *Id.* at 3556.) The Department has reissued its FMLA Certification Form WH-380 and Request for Leave Form WH-381. Department of Labor Form WH-381 (Jan. 2008) <http://www.dol.gov/library/forms/go-us-dol-form.asp?formnumber=36>.

Section IV: The Status of the Safe Harbor Procedures for Employers Who Receive a No-Match Letter

In 2007, employers watched a number of “starts and stops” in regard to efforts from the Department of Homeland Security (“DHS”) and Social Security Administration (“SSA”) to address unauthorized workers in the United States. On August of 2007, DHS published a final rule on “Safe Harbor Procedures for Employers who Receive a No-Match Letter” (72 Fed. Reg. 45611, August 15, 2007), (the “Final Rule”). The Final Rule was to become effective on September 14, 2007. In addition, the DHS and SSA intended to send no-match letters to employers and guidance as to how to comply with the Final Rule during the period of September 4, 2007 through November 9, 2007. On August 29, 2007, the AFL-CIO filed the lawsuit to enjoin the implementation of the final rule. The lawsuit, *AFL-CIO v. Chertoff, et al*, N.D. Cal., No. 3:07-cv-4472-CRB, was filed in the United States Federal District Court for the Northern District of California. At the end of August, the court issued a temporary order enjoining DHS and SSA from implementing the Final Rule. On October 15, 2007, the court issued a further preliminary injunction enjoining and restraining those agencies from implementing and enforcing the Final Rule. On December 5, 2007, DHS appealed the court’s injunction to the Ninth Circuit.

In order to understand the scope and significance of the Final Rule, it is first important to review the underlying law. That is, under the Immigration Reform and Control Act of 1986 (“IRCA”), it is “unlawful for a person or other entity, after hiring an alien for employment ... to employ the alien in the United States *knowing* the alien is (or has become) an authorized alien with respect to such employment. IRCA 8 U.S.C. section 1324a(a)(2)(emphasis added).

² After this paper was written, the Department of Labor sent proposed FMLA regulations to the White House. This is expected to result in the issuance of proposed rules. See *BNA Daily Labor Report*, 1/25/08, No. 16, page AA-1.

With the underlying law, comes a focus on what constitutes an employer “knowing” that an employee is an unauthorized alien. Knowledge can be either actual knowledge or constructive knowledge. Constructive knowledge is defined as knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. 8 C.F.R. section 274a.1(l)(1). With the Final Rule, DHS sought to amend the “knowing” standard by adding as examples of constructive knowledge an employer’s receipt of a written notice from the SSA that the name and social security number do not match SSA records (typically, through an Employer Correction Request Form) and/or written notice from DHS that employment authorization document (presented with the I-9) was assigned to another person or is not valid (typically, through a Notice of Suspect Documents Form). In addition, with the Final Rule, DHS sought to provide employers with a process to follow in response to receiving no-match letters. Under that process, an employer who receives a no-match letter must check, within 30 days, its own employer records to determine if there is a clerical error resulting in the mismatch of the SSA numbers. If there is a clerical error, the employer must resolve it by verifying, correcting and notifying the applicable agency. If there is no clerical error, the employer is to ask the employee to confirm the accuracy. If the employee confirms the accuracy, the employer is to ask the employee to pursue the matter with the respective agency and to resolve it. If the employee determines that the number is not accurate, the inaccurate number should be corrected and resolved by verifying and notifying the agency. Under the Final Rule, a discrepancy is deemed to be resolved by the employer after verifying with the agency that the employee’s name and number matches SSA records and upon completion of a new Form I-9 within 93 days.

Under the Final Rule, if a discrepancy is not resolved within 90 days of the receipt of the no-match letter, an employer has the “choice” of taking action to terminate the employee, or face the risk that the employer is deemed to have constructive knowledge of the employee’s unauthorized status and continued employment in violation of INA.

The Final Rule does not create a new requirement that employers must resolve discrepancies within 90 days. Instead, it is intended to create a “safe harbor” for an employer to follow in order to avoid being deemed to have constructive knowledge. The Final Rule contemplates that there were other possible procedures for compliance, but such would depend on the totality of the circumstances and an employer would risk disagreement with an agency regarding its course of action.

After DHS filed its appeal, it also sought and was granted a stay of the proceedings. This allows DHS time until March of 2008 to amend the Final Rule. Further developments are expected in 2008, and employers are advised to keep a watchful eye.

Section V: The NLRB’s Decision Regarding An Employer’s Policy Prohibiting Use of Email for Non-Job Related Solicitations

In the case of *Guard Publishing Co.*, 351 NLRB No. 70 (Dec. 16, 2007), a divided National Labor Relations Board (NLRB) ruled (3-2) that employees do not have a statutory right to use an employer’s email system for union communications. The Board ruled that employers may maintain a policy prohibiting employee use of the employer’s email system for non-job related solicitations. It further held that an employer can enforce such a rule even if the

employer allows employees to use the email system for personal or charitable communications. Discriminatory enforcement of such a policy against legitimate union organizing remains prohibited.

With this decision, the Board modified its previous standard for determining whether an employer has discriminatorily enforced its communications policies against union activity by finding that there must be a specific finding of discriminatory motive. That is, non-discriminatory policies uniformly enforced, which also embrace union communications, will not be found unlawful. The Board offers, as examples, that an employer may draw a line between charitable and noncharitable solicitations, between solicitations for personal matters (i.e., used sofa for sale) and commercial matters (i.e., sale of Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business related use. *Id.* at 9. Thus, if an employer bans all email solicitations which are not job related, the employer may also ban union related solicitations. However, if an employer permits other non-job related emails, the employer may not ban similar informational emails solely because they involve union members or activities.

The dissent's analysis views email as a substitute for in person communication. Rejecting the majority's view that email is merely a piece of communications equipment, the dissent states that this decision confirms that the NLRB has become the "Rip Van Winkle of administrative agencies, . . . [for only] a Board that has been asleep for the past 20 years could fail to recognize that email has revolutionized communication both within and outside the workplace." *Id.* at 12.

Section VI: Implementing Effective Electronic Discovery Procedures

While a comprehensive discussion of electronic discovery and the corresponding rules of federal procedure is beyond the scope of this paper, this topic bears mention for 2008 and beyond.

Although the amendments to the Federal Rules of Civil Procedure regarding electronic discovery went into effect in December of 2006, the premise underlying those rules is not new. That is, a party has a duty to preserve evidence when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation. *Zubalake IV*, 220 F.R.D. at 216 (citing *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2nd Cir. 2001)). The determination of the scope of what evidence must be preserved is governed by what a party "knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request." *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991) (quoting *William T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1445 (C.D. Cal. 1984)). Such evidence includes electronically stored information, referred to as "ESI". Information which must be preserved includes that belonging to persons who are "likely to have discoverable information that the disclosing party may use to support its claims or defenses" (F.R.C.P. 26(A)(1)(a)), and documents and ESI prepared for those individuals, and information relevant to claims or defenses of any party, or that is relevant to the subject matter involved in the action

(F.R.C.P. 26(B)(1)). Elements of ESI are broad, and include emails and attachments, electronic documents, blackberry devices and other PDAs, home computers, backup tapes, and the like.

Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policies and put in place a “litigation hold” to ensure the preservation of relevant documents. Litigation holds must be monitored and reassessed during the course of litigation as appropriate.

Essential to any employer’s ability to meet its obligations to preserve evidence (both in hard copy and ESI) is an employer’s capacity to identify the location of relevant information, and to understand the parameters governing the accessibility of such information. This requires the employer to have in place a meaningful records management program. It also requires the employer to have a computer systems use policy for its employees. (Such policy must make it clear to the employee that the employee’s use of the employer’s computer systems (including email) is for business purposes and the employee should have no expectation of privacy in regard to such information. This allows the employer the flexibility it needs to conduct its business in many ways, including implementing effective document identification and preservation programs.) In addition, employers must now consider their IT personnel as an integral part of the discovery process. Therefore, well before a claim is filed, there must be communication and integration between the IT department and those persons managing litigation in order to make certain those parties have a clear understanding of the employer’s records retention/destruction policies, location of data, email and file server systems, back-up systems, and archiving procedures.

For readers with further interest in the judicial management of electronic discovery, *see* Barbara J. Rothstein, Ronald J. Hedges and Elizabeth Wiggins, *Managing Discovery of Electronic Information: A Pocket Guide for Judges*, Federal Judicial Center 2007, http://www.fjc.gov/library/fjc_catalog.nsf.

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