

Wimberly Lawson
 Wright Daves & Jones, PLLC

Attorneys & Counselors at Law

Briefly
 February 2012 Volume 12, Issue 02

THREE LEAVE POLICIES BEING SUBJECT TO EEOC ATTACK -
 LACK OF LEAVE FOR NEW HIRES, ADMINISTRATIVE SEPARATION POLICIES,
 AND "100% HEALED" POLICIES



Edward Trent.....
 "The EEOC is regularly attacking such policies, including bringing class actions against employers who have them."

Many employers have inflexible leave policies which may have served them well over the years, but which are now coming under increasing legal attack. One such policy denies any type of leave of absence during a probationary period or before some other set period of time after hiring. A second common policy provides for an employee to be administratively separated from employment or terminated after being absent for a set period of time, such as twelve months. The third policy that some employers use, while not necessarily stated in written policies, requires an employee to be "100% healed" before returning from a leave of absence. Unfortunately, in today's legal environment, each of these three policies carries legal risks.

The problem with the first of the three policies, of denying any type of leave of absence to an employee who has not been employed a sufficient period of time, is that it denies leave to employees who might be entitled to leave as a reasonable accommodation under the Americans with Disabilities Act ("ADA"). While an employer might argue that such objective policies apply to everyone, and thus are consistent with equal employment opportunity, sometimes even an objective employment policy has to be modified to reasonably accommodate those with disabilities, provided there is no undue hardship on the company. Further, if a company makes exceptions for those with job-related injuries, it would be hard for that company to argue that providing a leave as a reasonable accommodation is an undue hardship. In addition to creating a potential claim under the ADA, an employee could argue, as some have, that a "no-leave" policy, even during a probationary period, discriminates against females, because it prevents them from taking maternity leave.

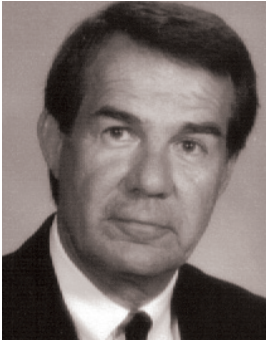
The second of the three suspect policies, administrative separation policies, suffers some of the same legal disadvantages as the "no-leave" policies. If an employee is automatically separated after a set period of time of absence, such as twelve weeks (after FMLA runs out), the employee might later argue that he or she should have been provided with additional leave time as a reasonable accommodation for a disability. While supporters of administrative separation policies would make much the same arguments as under "no-leave" policies - that the administrative separation policy equally applies to all employees - for the same reason as stated above with respect to "no-leave" policies, the argument will likely fail.

Additionally, in support of an administrative separation policy, an employer could argue that an employee who is not able to work is not qualified or is not able to fulfill the essential job function of being present. Although there are cases holding that the ability to be at work is an essential job function, there are many cases holding that leave can be, and must be provided as, a reasonable accommodation, even in this context. The ADA requires an individualized assessment on a case by case basis and not a blanket or blind application of a mandatory termination policy after a set period of time.

The third controversial leave policy, the "100% healed" policy, is rarely set forth in written company policies, but is often applied by unknowing managerial and supervisory personnel and often documented in internal reports or even leave forms. These written or unwritten policies require an employee to have completely recovered from some type of impairment before being allowed to return to work. Such a policy is conceptually inconsistent with the purpose of the ADA, that an employee with a disability be "reasonably accommodated" in order to enable him or her to perform the "essential job functions" and that an employee not be terminated if he or she is unable to perform marginal or non-essential job functions. Workers' Compensation policy may promote the return to work of an injured employee on light duty and if such an accommodation can be made for one

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Our Firm Wimberly Lawson Wright Daves & Jones, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.



Ronald G. Daves ...

"The new rule was passed without the traditional three-member majority that the Board has historically used to implement major policy changes in its cases."

NLRB PUSHES THROUGH QUICKIE ELECTION RULES

The NLRB has followed up on its June 22, 2011 Notice of Proposed Rule Making, and on its November 30, 2011 resolutions, and adopted a final rule for union election procedures to be effective on April 30, 2012. The comment period on the new proposed rules did not end until September 6, 2011 and some 66,000 comments were received. Nevertheless, the two member NLRB majority, both former union attorneys, rushed through the rule in order to take a vote before the end of the year, and the expiration of Democrat appointee Craig Becker's interim appointment. The new rule was passed without the traditional three-member majority that the Board has historically used to implement major policy changes in its cases. Member Hayes, the lone Republican on the Board, dissented, indicating that the future partisan pendulum would swing and the very precedent the two Democrats established by changing the law with only two votes may facilitate reversal of that law. The two Democratic members delayed the effective date of the final rule so that Member Hayes will have the traditional 90 days after receiving the final draft to write a dissent and have it published prior to the effective date of the rule. The NLRB majority indicates that it has had sufficient time to evaluate the comments and certain changes, leaving other issues for further review and action.

According to the NLRB, future hearings held following union petitions for an election will be explicitly limited to issues relevant to the question of whether an election should be conducted, rather than getting into more detailed issues on voter eligibility. Pre-election eligibility issues or appeals will basically be postponed until after the election, in order to expedite the election date. NLRB hearing officers will have the authority to limit evidence and to deny the use of post-hearing briefs in order to expedite determination of what is an appropriate voting unit, and post-election appeals as to the voting unit or eligibility to vote will be at the discretion of the NLRB, rather than a matter of right.

The final rule leaves the rest of the proposed rule changes for continued consideration by the Board. Among the items not included in the final rule are the electronic filing of petitions, the requirement that hearings be set for seven days after service of the notice of hearing, the requirement of the statement of position filing, inclusion of e-mail addresses and phone numbers in the voter list, and the changing of the period for filing the voter list from seven to two work days.

Senator Mike Enzi (R-Wy) has already announced his intention to challenge the new rule under the Congressional Review Act, and undoubtedly there will be litigation attempting to test the new rules in court. Due to the Democratic majority in the Senate and the likelihood of a veto, any congressional effort to negate the new rule is very unlikely to be successful, as is any early successful challenge to the new rules in court. It is more likely that the real test of the new rule will not come until NLRB cases are reviewed by federal appeals courts, and such appeals will take one or two years to develop. Ironically, the new rules may have the effect of shifting much of the election litigation from the NLRB to the federal appeal's courts, although employers will have no need to litigate such cases unless they lose the election and contest the union certification.

ARE YOU PREPARED?

An important practical question is how soon elections will be conducted under the new rule. Currently, the median time period between a filing of a union election petition with the NLRB, and the holding of the election, is approximately 38 days. Wimberly Lawson believes that the median election date will be shortened by about two weeks to approximately 25 days from the time a union files an election petition with the NLRB. As a practical matter, this means that an employer may receive a copy of the NLRB election petition, not even knowing that a union campaign was going on, and face the prospects of a secret ballot union election among its workforce in just over three weeks. During that time, the employer will have to locate counsel or other expert advisors, determine the appropriate voting unit and make some judgment as to eligibility of voters, litigate and/or agree to the election procedures, learn the campaign rules of what can and cannot be said to employees, determine the cause of the union organizing and an appropriate employer response, and educate its workforce as to the advantages and disadvantages regarding union representation. Such a task over such a short time period will indeed be challenging for even the most sophisticated and prepared employers.

The natural next question is what, if anything, can employers do to protect themselves from this type of "crisis" in the future? This question is broad enough to warrant a lengthy article or book. Nonetheless, a few basic ideas will be offered.

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SUPREME COURT HEALTHCARE REVIEW AND OTHER HEALTH PLAN DEVELOPMENTS



Catherine Shuck

"The main issue before the Court is whether Congress has the power to require consumers to purchase health insurance or pay a penalty as part of its power to regulate interstate commerce."

On November 14, 2011, the U.S. Supreme Court announced that it will hear several legal challenges to the Patient Protection and Affordable Care Act. The Court will hear an almost unprecedented five and a half hours of argument over three days in March 2012, with a ruling expected in June 2012. The main issue before the Court is whether Congress has the power to require consumers to purchase health insurance or pay a penalty as part of its power to regulate interstate commerce. The Court will also address whether the entire law should be set aside if the individual mandate is found to be unconstitutional; whether challenges to the mandate are premature pursuant to the Anti-Injunction Act, which provides that a tax cannot be challenged in advance; and whether the Medicaid expansion written into the law is unconstitutionally coercive, because it forces the states to expand Medicaid in accordance with the law or lose federal Medicaid funds altogether.

As of this writing, two federal judicial circuits have upheld the healthcare law and one has found the individual mandate portion to be unconstitutional.

A portion of the healthcare law has been dropped by the Obama Administration and another portion has been repealed by Congress. The portion dropped by the Administration is the "Community Living Assistance Services and Supports" or "CLASS" program, which would have created a long-term care insurance program funded by optional payroll deductions. CLASS proved to be financially unsustainable, however, and the Department of Health and Human Services announced in October 2011 that it would halt implementation of the program. In addition, in April 2011 Congress repealed the portion of the law requiring federal tax form 1099's to be issued to all corporate contractors receiving an excess of \$600.00 revenue annually. Other legislative changes to the program remain on hold pending the Supreme Court's ruling.

Assuming that the Court does not repeal the law entirely, the debate continues as to how many covered employers will opt not to provide healthcare pursuant to the law when the employer mandate goes into effect in 2014. One study concluded that as many as 30% of covered employers would opt to pay the penalty rather than providing health insurance. In general, the fine is \$2,000 per employee. Employers with fewer than 50 full-time-equivalent employees are exempt from the mandate.



Wimberly Lawson's 2012 Labor and Employment Law Update Conference

November 15 – 16, 2012
Downtown Marriott Hotel
Knoxville, Tennessee

Save the Date

More information to come!

KNOW YOUR ATTORNEY MAELENA A. HOLMES

MAELENA A. HOLMES is an Associate in the Cookeville, Tennessee office of the Firm, which she joined in 2011. Her law practice includes an emphasis in workers' compensation and employment discrimination defense, as well as ADA and FMLA compliance. Maelena obtained her Bachelor of Arts in Political Science from the University of Tennessee, Knoxville, and her Doctor of Jurisprudence Degree from the Nashville School of Law in 2006.



Maelena spent two years in private practice in Cookeville, Tennessee, where she focused on real estate, probate, civil litigation and mediation. Prior to that, she was Assistant General Counsel for the Department of Children's Services in Tennessee's Thirteenth Judicial District for two and one-half years. Maelena is a past member of the BNI Powerhouse Chapter in Cookeville, Tennessee, and the Better Business Bureau.

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group of employees then it must be considered for disabled employees. Accordingly, these policies are almost always unlawful and should be avoided.

While arguments can be made that the policies may not always be illegal and inappropriate, the theme of this article is that having such set policies without providing for exceptions for employees with disabilities, and possibly pregnant women, is probably not worth the legal risk. The EEOC is regularly attacking such policies, including bringing class actions against employers who have them. Plaintiffs’ lawyers are also increasingly attacking such policies. Moreover, employers do not look like a good corporate citizen if they insist on following such policies, and the employer could suffer public and employee relations criticism problems as a result of having these kinds of policies discussed. Finally, employers should know that there are adjustments and “tweaks” that can be made to these policies to reduce their vulnerability to legal challenge, without jeopardizing employers’ legitimate business interests.

While this article will not address all of the specific and many adjustments or “tweaks” an employer can make to reduce the vulnerability of a policy like those discussed, a simple example will be given. Employers could easily adopt written policies like those described above including a statement that reasonable accommodation will be made for those with disabilities and requiring employees to come forward and request such an accommodation from the normal rules. The ADA laws specifically indicate that it is the obligation of an employee, subject to some exceptions, to raise the issue of a disability, and to request an accommodation. In most cases an employer is not supposed to ask employees if they have a disability or if they need to be accommodated. The adoption of such an approach puts the burden on the employee rather than the company, and allows policies to be adjusted to reasonably accommodate an employee with a disability.

An obvious suggestion is that employers will need to pay increasing attention to keeping up with what is going on in their workplaces, in terms of morale and dissatisfaction issues, and try to address those issues early, before they lead to union organizing campaigns. Similarly, employers will need to let their position or philosophy toward unions be known to employees very early in employment, so that employees will be familiar with the company’s position well before rather than during the crisis situation three weeks after the filing of the union election petition. A possible early opportunity for employers to make known their position toward unions ironically occurs on April 30, 2012 (delayed, again, from January 31, 2012 to allow for legal review in a federal court challenge), when the new mandatory NLRB federal notice regarding rights of union organizing is required to be posted by all employers subject to the jurisdiction of the NLRB. Many employers are posting “side notices” or taking other steps to educate their workforces on union issues in connection with a posting of this new required federal notice. Wimberly Lawson believes that such “side notices” should be carefully considered and should be worded to reflect the culture of your particular employer-employee relationship. They should also be worded to project an appropriate “tone” in the way you communicate within your culture. Many employers will put into their pre-hire or orientation program statements of company policy toward unions, and find other occasions to set forth the company’s policy. Most labor experts feel that workforces that know the company’s position toward unions are more likely to remain union free and report to the company any efforts that a union makes to get union cards signed and initiate a union campaign. While the above steps are fairly obvious, employers are well-advised to take other steps to avoid a crisis prior to the filing of a union election petition. Such steps might include setting up the employer’s administrative and managerial structure to maximize the determination of a favorable voting unit, including the determination of who is and who is not a statutory supervisor, as well as what particular groups of employees may constitute an appropriate bargaining unit. The NLRB has also indicated, by previous recent actions that it intends to make it easier for unions to “carve out” bargaining units within a particular facility.

Employers should also train supervisors regarding union matters, set up appropriate internal employee complaint procedures and communications programs, prepare and/or revise appropriate employee handbooks in order to negate the union promise of a “written” document of rights, and other such long-term planning.

Wimberly Lawson suggests that you have legal counsel review the wording of any existing “no solicitation” rules, as well as your practices and procedures regarding current enforcement or lack of enforcement of such rules. Employers would also be well-advised to develop “action plans” and immediate-response procedures that would be activated quickly in the event of notice of union activity and/or the receipt of a petition or of a demand for recognition sent or presented by a union.