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Briefly

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Catherine E. Shuck

"The theory of [the plaintiff's] case was that her employer's directives to work … interfered with her right under the FMLA to take leave."

CAN YOU EXPECT ANY WORK FROM AN EMPLOYEE ON FMLA LEAVE?

An extremely interesting federal appeals court case recently addressed whether an employer can request work to be performed by an employee on FMLA leave. In *Massey-Diez v. University of Iowa Community Medical Services, Inc.*, No. 15-2924, 26 WH Cases 2d 991 (8th Cir. June 27, 2016), the plaintiff employee was on FMLA leave for a broken foot. The employee was a physician assistant, and while on FMLA she continued to perform her charting responsibilities and to keep up with various tasks including responding to patient phone calls, handling prescription refills, and reviewing laboratory tests.

The employee also testified that at no point while on FMLA leave did she decline to perform the work requested of her, nor did she express any reservations about doing so. She testified: "When they were asking me to do things from home, I basically did it because I felt like I had to;" and "It wasn't a question of will you do this. It was basically I need you to do this." The theory of her case was that her employer's directives to work, which she believed she had no choice but to comply with, interfered with her right under the FMLA to take leave.

Federal regulations provide that one way an employer interferes with an employee's entitlement to FMLA leave is by "discouraging an employee from using such leave." 29 C.F.R. § 825.220(b). But the FMLA does not prohibit "an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a light duty assignment while recovering from a serious health condition." § 825.220(d).

The appeals court determined the issue was whether her employer coerced her into performing work duties while on FMLA leave, or whether she voluntarily agreed to do so. Courts sometimes have drawn the line along a distinction between, on the one hand, receiving non-disruptive communications such as short phone calls requesting the employee to pass on information, and on the other, requiring the employee to complete work-related tasks or work product. The court in the current case placed great significance on the fact that the plaintiff never expressed reservations to her employer about performing work while on leave. And the fact that the employer allegedly "directed her" to attend to in-boxes and the like, had to be viewed in the context of her voluntary agreement to attend to certain duties. From the facts, the court granted summary judgment to the employer, concluding that the plaintiff had not presented evidence that her employer's requests were a condition of her employment, nor that her compliance with them was anything but voluntary.

The second but related issue pertained to her subsequent termination for failure to complete timely documentation. The employee argued that certain timeliness requirements were held against her related to her FMLA leave. The court reasoned that employees on FMLA leave are entitled to be free of work responsibilities, and that this included meeting certain timeliness requirements. The court avoided this issue, however, by concluding that the reasons for the termination related to a general problem with timeliness rather than timeliness specifically occurring while the plaintiff was on FMLA leave.

Editor's Note: This case appears to adopt a very favorable standard for employers, but should be viewed with caution. First, the case originated in Iowa; the Eighth Circuit Appeals Court's ruling is not binding in Tennessee and other states in the federal Sixth Circuit. Second, the ruling appears contrary to the Department of Labor's position as well as to the limits other federal courts have placed on the FMLA. Nevertheless, the case is helpful to employers in stating that an employee can perform work on FMLA leave if the work is voluntary and/or can be characterized as "light-duty." Employers should seek legal counsel, however, if faced with a similar need to have an employee perform work while on FMLA leave.

Jerome D. Pinn.....

"The DOL gave little explanation for its decision to abandon its decades-old practice of treating service advisors as exempt."

SUPREME COURT REJECTS DOL'S NEW REGULATORY INTERPRETATION OF OVERTIME STATUTE

It is no secret that federal agencies have been very active in recent years in changing their regulations and interpretations of existing labor and employment law. Some commentators even assert that federal regulators are virtually out of control, writing laws as they see fit without democratic votes or review by anyone. There are numerous examples to be found where Congress refused to pass a law -- and the relevant federal agency then turned around and effectively made "law," through new regulations, often requiring what Congress had specifically rejected. Some examples come to mind including LGBT (lesbian, gay, bisexual, transgender) issues, paid sick leave, expedited union elections, minimum wage changes, pay discrimination issues, and many others. In June of this year, the U.S. Supreme Court in at least one case determined that federal regulators had gone too far and rejected the federal regulation that overturned many years of prior statutory interpretation. *Encino Motorcars, LLC v. Navarro*, 26 WH Cases 2d 877 (June 20, 2016).

The details of the *Encino Motorcars* case are less important to those outside the automobile and truck dealership industry, than the principles. The fact pattern dealt with an industry that had relied since 1978 on the Department of Labor's position that service advisors are exempt from the wage-hour law's overtime pay requirements. Abruptly, in a 2011 regulation, the DOL totally changed its previous regulations and interpretations in this regard. The DOL gave little explanation for its decision to abandon its decades-old practice of treating service advisors as exempt. When an industry employer was sued for failing to pay overtime to certain service advisors, the employer moved to dismiss the case, arguing that the wage-hour overtime provisions did not apply to service advisors because they were covered by a statutory exemption.

The Supreme Court addressed the right of federal agencies to change their regulations and interpretations and to what the extent the Court should defer to such regulations and interpretations. It stated that in the usual course, when an agency is authorized by Congress to issue regulations and make a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and if the agency's interpretation is reasonable. One ground for attacking a new regulation is whether it is "procedurally

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CONGRATULATIONS TO KAREN CRUTCHFIELD -- ELECTED TO THE *FELLOWS OF THE AMERICAN BAR FOUNDATION*!

KAREN CRUTCHFIELD, a Member of the Knoxville office of Wimberly Lawson Wright Daves & Jones PLLC, was recently named as a member of the distinguished ***Fellows of the American Bar Foundation***. Membership in The Fellows is highly selective and limited to one percent of lawyers licensed to practice in each jurisdiction. Established in 1955, The Fellows is an honorary organization of attorneys, judges, law faculty, and legal scholars whose public and private careers have demonstrated outstanding dedication to the welfare of their communities and to the highest principles of the legal profession. Members are nominated by their peers and elected by the Board of the American Bar Foundation. In addition to being named to The Fellows, Karen has received numerous awards including: listed in the ***Best Lawyers of America***® in the area of Workers' Compensation Law-Employers; participated as a delegate to the OECD-NEA Nuclear Law Program in 2013; received the ETLAW ***Spirit of Justice Award*** in 2014; and received the Tennessee Supreme Court ***Attorney for Justice Award*** in 2014 and 2015. Karen's legal practice focuses on the defense of general civil litigation for businesses and employers, including contracts, construction, premises liability, products liability, professional liability, environmental and workers compensation claims. She received her law degree from the University of Tennessee College of Law. Karen can be reached at KCrutchfield@WimberlyLawson.com.

Howard B. Jackson

FEDERAL COURT UPHOLDS NLRB'S QUICKIE ELECTION RULE

On June 10, 2016, the Fifth Circuit Court of Appeals upheld the NLRB's controversial "quickie election" rule. *Associated Builders and Contractors of Texas, Inc. v. NLRB*, No. 15-50497 (C.A. 5, June 10, 2016). Among other things, the quickie election rule cuts roughly in half the amount of time between the filing of the request for the election by a union, and the date of the election; defers employer challenges to voter eligibility issues until after the election; and requires an expanded early disclosure of employee contact information to the union. The appeals court ruled that the NLRB did not exceed its statutory authority in issuing the regulation. Regarding the new regulatory requirements to turn over employee information including home addresses, available personal email addresses, available home and personal cell numbers of all eligible voters, the court rejected a number of arguments that such provisions are arbitrary and capricious, including: 1) the rule disregards employees' privacy concerns, 2) it exposes employees to union intimidation and harassment, 3) it enables union misuse of the voter lists, and 4) it imposes a substantial burden on employers. The court also rejected an argument that the short time between the filing of the petition and the union election violates free speech and other rights because it is not so short a period as to be arbitrary and capricious.

Editor's Note: It would appear that the quickie election rule is here to stay. It was first implemented on April 14, 2015. During the time it has been in effect, the time period between the union's request for the election and the election itself has dropped from around 40 days to around 24 days. While the number of union elections has increased, somewhat surprisingly the overall number of employees voting in union elections has remained substantially the same. The union win rate in such elections is very high, almost 70%. This win rate lends support to something we have said for years: Engaging in preventive efforts so that no election ever occurs is well worth the effort. You cannot lose an election that is never held.

PERSUADER RULE TEMPORARILY STOPPED

In March of 2016, the U.S. Department of Labor (DOL) issued a revised rule which relates to reports employers are required to file with the DOL when they use consultants (including lawyers) to provide labor relations services for the purpose of persuading employees regarding union organizing or collective bargaining. The new rule requires consultants (including lawyers) to file similar reports containing information regarding the services provided and the amount of payment received. The most significant change in the new rule involves the "advice" exemption. Since the early 1960s, the DOL interpreted the advice exemption so that employers were not required to file reports, nor were counsel required to do so, when the employer hired counsel to assist with a counter-organizing campaign or other labor relation consultation and the counsel had no direct contact with non-supervisory employees. The revised rules now requires reporting by both employer and counsel where "an object" of the arrangement was to persuade employees in the exercise of their rights, irrespective of whether direct dealing with employees has taken place. The new rule was to take effect on July 1, 2016.

On June 27, 2016, a federal judge in Texas issued a preliminary injunction barring enforcement of this revised "persuader rule" nationwide. *Nat'l Fed'n of Ind. Bus. V. Perez*, No. 15-674. Per the order, the DOL is prohibited from implementing the rule until the case is resolved by the courts. The judge indicated that the new rule infringed upon the First Amendment rights of employers and their counsel and would create irreparable injury if implemented.

Meanwhile, an interesting exchange occurred in a similar case in federal court in Arkansas, in which the DOL filed a status report indicating that "the Department will not apply the rule to arrangements or agreements entered into prior to July 1, 2016, or payments made pursuant to such arrangements or agreements." Follow up conversations with DOL revealed that "services and payments made pursuant to a multi-year agreement, even if they occur after July 1, are not required to be reported on the new form LM-20, so long as the agreement was signed prior to July 1."

The DOL position in the Arkansas litigation triggered a nationwide move by employers, legal counsel and labor consultants to enter into multi-year agreements to provide such services prior to July 1. Given that the revised rule has been blocked via litigation, one would hope that in the event the DOL ultimately prevails and the new rule is upheld (a result that at the moment seems unlikely), the DOL would set a new date for the rule to go into effect. That should, in turn, create a new opportunity to enter consulting arrangements or agreements in advance of the rule's implementation date. But only time will tell.

"SUPREME COURT REJECTS..."

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defective," meaning that the agency has erred by failing to follow the correct procedures in issuing the regulation. One of the basic procedural requirements of administrative rule making is that an agency must give adequate reasons for its decisions. Further, agencies are free to change their existing policies as long as they provide a reasonable explanation for the change. But the federal agency must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy." In explaining its changed position, an agency must also be cognizant that long-standing policies may have "engendered serious reliance interest and it must be taken into account." It follows that an "unexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice."

After addressing the above general principles of the right of federal agencies to issue or change regulations, the Court found that the regulations in question were issued without the reasoned explanation that was required in light of the change in position and the significant reliance interests involved. When it came to explaining the "good" reasons for the new policy, the DOL said almost nothing. It stated only that it would not treat service advisors as exempt because "the statute does not include such positions and the Department recognizes that there are circumstances under which the requirements of the exemption would not be met." The Court cited that the DOL did not analyze or explain why the statute should be interpreted to exempt dealership employees who sell vehicles but not dealership employees who sell services (service advisors). Thus, the Court ruled that the statute must be interpreted without placing controlling weight on the DOL regulation. Under the circumstances, the federal regulation should not significantly affect the court's interpretation of the statutory provisions.

Editor's Note: This ruling is an informative and helpful description of the power of a federal agency to issue regulations, and to change its regulations and interpretations. Readers should note that many regulations that have existed for many years have been radically changed in recent years, particularly this year. Two such changes that come to mind include the NLRB "quickie election" rules and the DOL "persuader activity" regulations, both of which are discussed in other articles in this newsletter. This new Supreme Court ruling shows examples of how such regulations can be attacked by employers as being unreasonable.