For many years, companies have been outsourcing certain functions to third party contractors, that were previously performed in-house. In recent years, however, increased attention has been given to a different type of outsourcing, known as off-shoring, sending work abroad. In some cases a company will directly outsource a function to a service provider in another country. In another type, the company outsources a function to a U.S. service provider who in turn outsources all or part of it outside the U.S.

Off-shoring, particularly the off-shoring variety, has human resource, marketing, and even political implications. According to a new survey by Watson Wyatt, 85% of U.S. workers believe that off-shoring has a negative impact on the U.S. economy, but less than 10% of them are strongly concerned that their own job is in danger of being sent overseas. In a separate Watson Wyatt survey of 33 multi-national organizations, the majority of which had already off-shored business functions, 65% of them found the practice to be effective in lowering production costs, and 61% said it improved operational efficiency. However, most respondents indicated it was simply too early to tell the possible adverse impact on marketplace image, customer satisfaction and human resource management.

In another study by business research firm Gardner, 80% of participants acknowledged the backlash surrounding off-shore outsourcing. State and local governments may start exerting pressure as well. Various bills have been proposed in Congress banning off-shoring companies from competing in the bidding process for government contracts and state contracts funded by the federal government, and legislatures in more than 15 states also are considering bans or restrictions on off-shoring. Many companies are examining whether their operations may be subject to local government pressure to avoid off-shoring. Much of the rhetoric may be attributed to the November elections, however.

Economists generally agree that free trade in the long run promotes higher economic growth. The Government Accountability Office (GAO) in September, in response to a Congressional inquiry, reported that the practice of “off-shoring” sophisticated service jobs to India, China, and other low-wage countries is growing, but that there was no evidence it had affected the U.S. job market. U.S. high-tech jobs have been evaporating since the tech bubble burst in 2000, but “the reasons for these declines cannot be specifically linked to off-shoring,” the GAO concluded. Moreover, while sending U.S. work off-shore can cause some job losses, the trend also may offer benefits, “including lower prices, productivity improvements, job creation, and overall higher growth,” it found. Further, the GAO said predicting job losses is difficult. For example, federal trade data shows that in 2002 U.S. firms imported more than $1 billion in computer and data processing services. At the same time, they exported more than $3 billion in such services. Imports and exports have risen sharply in recent years, making the impact of off-shoring unclear.

Some businesses report that outsourcing off-shore entails hidden costs. According to one company official whose company has moved all of its off-shore operations back to the U.S., productivity at off-shore operations can be half of that expected in the U.S., and labor turnover can be quite high. In addition, costly vendor training may not fully offset cultural habits that conflict with the company’s...
established policies and procedures. Another controversial issue relates to the effort to insure quality of work and protection of confidential and proprietary information. These issues sometimes drive companies to attempt to exercise control over the workers of the outsourcing business. This exercise of control can expose a company to various employment-related claims related to the employees of the service provider.

Outsourcing in one form or another, however, is here to stay. Even unions have joined the practice. Various sources report that many labor unions are now looking for other jobs, turned down offers from other companies and incurred expenses in preparing to begin work for PriceWaterhouseCoopers. As the economy declined in 2001, the recruiters allegedly made repeated assurances to the graduates that the jobs were secure. However, the graduates never received jobs and were not paid the bonuses.

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In most states, claims for breach of promise for failure to implement a job offer are
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It is well known that FMLA absences are protected from discipline or retaliation. However, when an employee refuses to follow a company’s procedures that would qualify the employee for FMLA leave, sometimes the courts find that the employee was disciplined for violating the policy, and not for the FMLA leave.

An example of the successful defense of such a case occurred when an employee was absent from work for two days, and did not call in her absence, but her boyfriend delivered a medical leave request form to her employer’s medical department the next day. However, it was not processed before she was discharged for being absent without notification for three consecutive days in violation of the employer’s attendance policy. Under that policy, employees must notify their supervisors, not their medical department. The employee sued, alleging that her employer interfered with her FMLA rights. A federal district court, as affirmed by the federal appeals court, granted the employer’s motion for summary judgment, concluding that the employee failed to give proper notice under the FMLA, or in the alternative, the employer proved that she would have been discharged for violating the attendance policy regardless of her request for FMLA leave. Bones v. Honeywell International, Inc., 336 F.3d 869 (C.A. 10, 2004).

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internal procedures will not permit an employer to deny an employee’s FMLA leave.

The court in the Honda case found that other circuits have held that if an employee is able to comply with an employer’s notice requirements and fails to do so, the employer may deny FMLA leave. Disagreeing with this interpretation, the court found that the regulations suggest that notice requirements for unforeseeable leave are more relaxed than the requirements for foreseeable leave. Thus, the court concluded that Honda could not deny the plaintiff FMLA leave for which he was otherwise qualified by enforcing its own notice requirements.

The court then addressed whether the plaintiff had provided sufficient notice for FMLA purposes. The court noted that the plaintiff told Honda he had been in a motorcycle accident and had just left the hospital. While this information did not automatically mean that the plaintiff had a serious health condition, he also informed Honda that he had been in the hospital and was unable to work due to his injury. Thus, the court concluded that Honda was on notice and had a duty to collect additional information from the plaintiff that would be necessary to make his leave comply with the FMLA requirements.

EDITOR'S NOTE - The bottom line in the above two cases is that if an employee minimally meets the FMLA notice requirements, the employer may be on shaky ground in relying on its own notice requirements to discipline the employee. At least advice of counsel should be sought in such situations. It does appear that the employer is on much stronger ground in relying on the FMLA regulations, where if the need for leave is unforeseeable, notification must be provided to the employer within two business days or as soon as practical after learning of the need for leave. If the need for leave is foreseeable, 30 days notice to the employer is required if practical or as soon as it is practical to give notice. See Brenneman v. MedCentral Health System, 366 F.3d 412 (C.A. 6, 2004 (although the notice provided by the employee was sufficient, it was untimely when there were no extraordinary circumstances that prevented him from notifying the employer earlier).