
ROSSWAY MOORE & TAYLOR

ATTORNEYS AND COUNSELORS AT LAW

JOHN E. MOORE, III*
BRADLEY W. ROSSWAY
HELEN E. SCOTT
JAMES A. TAYLOR, III*
THOMAS W. TIERNEY**

THE OAK POINT PROFESSIONAL CENTER
5070 NORTH HIGHWAY A-1-A, Suite 200
VERO BEACH, FLORIDA 32963
TELEPHONE (772) 231-4440 FACSIMILE (772) 231-5155
Web site: www.verobeachlawyers.com

SHANNON BANITT
LOUIS LUPIN
DEBORAH MARTIN-LEE
VENKATA PATURI

MICHAEL J. SWAN
Of Counsel

February 2008

*also admitted in
The District of Columbia
**also admitted in California

LEGAL AND LEGISLATIVE UPDATE

The following is provided as a complimentary service to the firm's clients. It is designed to assist the reader in keeping informed of selected developments in employment law. It is not intended to be nor is it a treatment of all new developments in the field of labor and employment law. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of the applicable laws than can be provided in this format. This summary is not intended to be a substitute for legal advice.

New Legislation

Expanded Family & Medical Leave for Families of Military Personnel

On January 28, 2008, President Bush signed the National Defense Authorization Act into law which adds two provisions to the FMLA, expanding the Act to assist service members and their families. The FMLA changes do not include an effective date, however, it should be considered to be effective immediately. Enforcement is not expected until the Department of Labor issues regulations.

The existing FMLA regulations require each covered employer to post and keep posted on its premises a notice explaining the FMLA's provisions to employees, regardless of whether the employees working at that site are eligible for FMLA leave. If you meet the definition of a covered employer (50 or more employees for 20 or more work weeks

this year or last year) you have an obligation to update your FMLA postings.

While the U.S. Department of Labor (DOL) has not produced a new FMLA poster, an employer may meet its posting obligation by adding an attachment to the poster. On its website, the DOL has a sample page explaining the new FMLA rights. An employer likely can meet its posting obligations by including this posting with its existing poster to advise employees of their FMLA rights. When the new poster is available, you can download it from the DOL web site. To view the DOL FMLA military leave poster attachment, go to <http://www.dol.gov/esa/whd/fmla/NDAAAmndmnts.pdf>. Employers should also update the FMLA policies in their employee handbooks. While the FMLA does not require that an employer have a handbook, if a covered employer does have a handbook, the handbook must contain a policy describing the FMLA and an employee's leave rights under the statute.

New Palm Beach County Ordinance

Palm Beach County recently approved an ordinance prohibiting discrimination on the basis of gender identity or expression in employment, housing and public accommodations. The new ordinance applies to employers, public and private, with at least 15 employees.

Proposed Legislation

Gender Identity or Expression

Florida House Bill 191 and Senate Bill 572 would include sexual orientation, familial status and gender identity or expression as impermissible grounds for employment discrimination under the Florida Civil Rights Act.

Employee Leasing Companies

Florida House Bill 239 and Senate Bill 454 would impose new requirements on employee leasing companies including a requirement that they get workers' compensation coverage from insurers authorized to write comp policies in Florida and similar requirements; notify employees of cancellation of coverage; and jointly assume with client companies, the status of employer for purposes of workers' compensation laws.

Discrimination

No Religious Discrimination Found in Discharge

An employee was terminated for refusing to work on his Sabbath. The U.S. Court of Appeals for the Fourth Circuit found that the employer's leave policies provided the employee with a reasonable accommodation. The Court rejected the EEOC's provision that was previously adopted by the Second and Ninth Circuits

requiring employers to eliminate the conflict between a work requirement and a religious practice. The Court said that to follow the EEOC's position, employers would be required to adopt a total accommodation rather than a "reasonable" accommodation to the religious beliefs of an employee that did not pose an undue hardship. "The problem with appellants' 'total' accommodation interpretation is that such a construction ignores the plain text of the statute, namely the inclusion of the word 'reasonably' as a modifier of accommodate. If Congress had wanted to require employers to provide complete accommodation absent undue hardship, it could easily have done so." The employer reasonably accommodated the employee's religious practices, the court ruled, because it had a seniority-based bidding system for shifts, provided 15 vacation days and three floating holidays, allowed employees to swap shifts twice each quarter, and provided 60 hours unpaid leave. *EEOC v. Firestone Fibers & Textiles*, 2008 U.S. App. LEXIS 2949 (4th Cir. 2/11/08)

Proposed Regulations

FMLA Proposed Rule Changes

On February 11, 2008, the Department of Labor published proposed changes to its rules concerning the Family and Medical leave Act in the Federal Register (73 Fed. Reg. 7875) which can be obtained on the Internet at

<http://www.gpoaccess.gov/fr/index.html>.

This site takes you to the index and you can do a quick search using the "page 7875" option. Comments are due April 11, 2008.

Some areas addressed in the proposed regulations include:

- Clarification of the time period within which an employee must have two visits with a medical provider when

there have been three consecutive days of incapacity. The proposal would require two visits within 30 days of incapacity.

- Employees with chronic health conditions must demonstrate they have seen a doctor twice per year.
- No change proposed to current regulations allowing workers to take leave in the smallest increment of time permitted under the employer's timekeeping system for intermittent leave.
- Employees would be required to follow the workplace call-in procedures if they want to take unscheduled intermittent leave.
- Employers will be able to contact medical providers directly to obtain clarification or authentication of documentations rather than requiring the company's doctor to make the contact. To overcome any HIPPA objection, the employee would be required to give authorization for his or her doctor to speak to the employer or risk failing to provide proper certification.

Supreme Court

Supreme Court Rules on "Me Too" Evidence

On February 26, 2008, the U.S. Supreme Court issued its decision in *Sprint/United Management Co. v. Mendelsohn*, No. 06-1221 deferring to district courts any evaluation of whether "me too" evidence should be permitted. Ms. Mendelsohn was laid off at the age of 51 along with 15,000

other Sprint employees. She alleged she was the oldest manager laid off and rated by her supervisor as the weakest performer. Ms. Mendelsohn sought to present the testimony at trial of five other employees who were over 40 and also selected for layoff. None of these individuals were employed in her department and none reported to her supervisor. The trial court judge limited the testimony to Sprint employees who were similarly situated to Ms. Mendelsohn. Sprint prevailed at the trial court but the Tenth Circuit Court of Appeals overturned the trial court on the "me too" evidence, finding the judge had applied a *per se* ruling barring such evidence. The Court said that evidence of the employer's general discriminatory propensities may be relevant and admissible to prove discrimination. Sprint argued that the "me too" evidence was properly excluded because it was not relevant as to whether Mendelsohn's supervisor was motivated by age when he selected her to be laid off.

The Supreme Court ruled that the Tenth Circuit should not have overturned the trial court's ruling on "me too" evidence because trial courts have significant discretion in determining the admissibility of evidence. The focus of the Tenth Circuit, the Supreme Court said, should have been on whether this discretion had been abused as opposed to whether the probative value outweighed the prejudicial effect. The Supreme Court overturned the Tenth Circuit's ruling and sent the case back to the trial court to clarify the basis for its decision to exclude the evidence.