



ROBINSON & COLE LLP

## Labor, Employment & Benefits



### **Employee Not Entitled to FMLA Leave for Adoption of Foster Child Already Living in Employee's Home**

The U.S. Department of Labor, Wage and Hour Division, issued an [opinion letter](#) (9/28/05) on the application of the Family and Medical Leave Act to an employee who adopts a foster child who has been living in the employee's home for more than one year. The inquiry focused on whether the employee was eligible to take FMLA leave on the date of the child's foster placement or at the time the employee adopted the child, or both. The DOL concluded that the initial date of a child's placement with an employee determines an employee's right to FMLA leave, and thus, in this situation, the foster care placement was the only FMLA-qualifying event.

The DOL relied on the regulation which states that an eligible employee is entitled to a FMLA leave for "the placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child." Because the child in this case was "newly placed" with the employee at the time of its foster care placement, the employee was entitled to leave under the FMLA as of the date of the child's foster placement. The employee's adoption of the foster child did not trigger the employee's entitlement to additional FMLA leave since the child was already living in the employee's home at the time of the adoption.

### **Supreme Court Hears Arguments Regarding Compensability of Walking and Waiting Time under the FLSA**

On October 3, 2005, the Supreme Court heard argument on two cases which addressed the issue of whether the Fair Labor Standards Act requires that employees be compensated for their time spent walking to or waiting in a designated area to begin and end the workday.

In [Alvarez v. IBP Inc.](#), the Ninth Circuit held that employees at a meat processing plant must be compensated for time spent walking and waiting to change into and out of required protective clothing and safety gear. The court observed that employees working on the production line were required to gather their assigned equipment and clothing, walk to the locker room to change clothes, and organize their tools before heading out to the floor. At the end of a shift, employees had to clean and exchange their tools and safety gear before leaving the plant. The court found that such "donning and doffing" and "waiting and walking" constitutes work and was compensable under the FLSA because the employees performed them for the employer's benefit.

In [Tum v. Barber Foods](#), the First Circuit held that employees' time spent walking and waiting in line to receive clothing and punch in constitutes work, but is not compensable under the FLSA. A group of employees at a poultry processing plant sued their employer for FLSA violations because they were not compensated for time spent waiting in line to receive required clothing and punch in at the time clock before entering the production floor. The court found that "donning and doffing" required safety attire was compensable because it was an "integral and indispensable part of the employees' principal activities." With respect to waiting and walking time, the court noted that an employee's time spent walking and waiting in line to receive clothing and punch in constitutes "work," but such time was excluded from the FLSA's definition of compensable activities because they were merely "preliminary."

The Supreme Court is expected to resolve this conflict and clarify whether such walking and waiting time is compensable. R&C e-news will report on the Supreme Court's decision when it is issued.

### **Connecticut Recognizes Out-of-State Civil Unions and Domestic Partnerships but Not Same-Sex Marriages**

Connecticut Attorney General Richard Blumenthal issued a legal [opinion](#) (9/20/05) concluding that after Connecticut's Act Concerning Civil Unions goes into effect on October 1, 2005, Connecticut will recognize out-of-state civil unions and same-sex domestic partnerships, but not same-sex marriages.

The Attorney General explained that same-sex marriages violate Connecticut's public policy because they are expressly prohibited by the language of the Act which defines "marriage" as "the union of one man and one woman." In light of this language, Connecticut will not recognize same-sex marriages performed in Massachusetts or any other states. An individual who is a party to a same-sex marriage in Massachusetts, however, is free to enter into a Connecticut civil union because out-of-state same-sex marriages have no legal effect in Connecticut.

On the other hand, Connecticut's public policy supports same-sex civil unions. Thus, although the Act does not explicitly address whether Connecticut will recognize civil unions entered into in other states, the Attorney General reasoned that Connecticut will recognize out-of-state civil unions involving Connecticut residents, except for those which are contrary to Connecticut law (such as civil unions involving individuals under the age of eighteen or related by certain degrees of kinship). The Attorney General also stated that Connecticut would recognize Vermont civil unions and California same-sex domestic partnerships because the requirements under those laws are similar to those for Connecticut civil unions. Therefore, a party to a same-sex relationship in Vermont and California may not later enter into a Connecticut civil union, because the individual is already in a "civil union or marriage" recognized as valid under Connecticut law.

### **Massachusetts Supreme Judicial Court Upholds Sanctions against Employer for Losing Records in Employee's Claim for Unpaid Commissions**

Corrie Wiedmann worked as a recruiter on a commission-only basis for the Bradford Group. Wiedmann voluntarily left the company in October 2000 and requested her unpaid commissions. When her employer failed to compensate her for the balance of her outstanding commissions, Wiedmann sued under the Massachusetts wage claim law. The employer was unable to produce Wiedmann's employment records upon her request. The trial court found that the employer had sufficient notice of Wiedmann's claim for unpaid commissions because Wiedmann's attorney had sent a letter within weeks after she ended her employment demanding payment and requesting Wiedmann's employment records, commission schedules, and fees received. Despite being aware of the possibility of litigation, the employer failed to preserve Wiedmann's personnel file and other records relating to her employment, in violation of a recordkeeping statute directing Massachusetts employers to retain employees' wage records and hours of work documentation for two years.

In [Wiedmann v. The Bradford Group, Inc.](#) (7/21/05), the Supreme Judicial Court of Massachusetts upheld the sanctions imposed on the employer by the trial court. The trial court held that the employer's destruction of the documents "unfairly prejudiced" Wiedmann by placing an "unfair burden" on her to show what the documents would have revealed had they been produced. Furthermore, without the employment records, the employer was barred from challenging Wiedmann's calculations of her earned commissions. The trial court ordered the employer to pay Wiedmann's outstanding commissions along with her attorney's fees.

### **OFCCP Issues Final Rule Defining "Internet Applicant" for Covered Federal Contractors**

The Office of Federal Contract Compliance Programs issued a [final rule](#) on October 7, 2005 pertaining to contractors' obligations to solicit race, gender, and ethnicity data for internet applicants. This regulation provides substantial guidance to contractors in the definition of an internet applicant, the obligation to solicit race, ethnicity and gender information, and recordkeeping requirements. The final rule applies "to jobs for which the contractor accepts expression of interest

via the internet and related technologies, such as e-mail, commercial and internal resume databanks, and employer websites.”

The final rules state that to be considered an “internet applicant,” an individual must satisfy four requirements: (1) the individual submits an expression of interest in employment through the internet or related technologies; (2) the contractor considers the individual for a particular position; (3) the individual’s expression of interest indicates that he or she possesses the basic qualifications for the position; and (4) the individual at no point in the selection process prior to receiving an offer of employment from the contractor, removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in employment in the position.

Contractors are not required to retain all “expressions of interest” but they are required to all records of “expressions of interest by individuals” in which the contractor “considered the individual for a particular position.” This recordkeeping rule applies to both internet applicants and traditional applicant processes.

### **Implied Contract of Employment May Exist in Employer’s Operations Manual Despite Disclaimers in Employee Handbook**

Jesus Ruiz worked for Dunbar Armored, Inc. He was discharged after failing to take a required driving test. Ruiz sued his employer for wrongful discharge, claiming that he was subject to an implied contract of employment as set forth in the company’s operations manual and employee handbook, and that his discharge by his employer was a breach of contract. The employer responded that there was never an existing contract of employment because the employee handbook stated, in bold-faced language, that employment with the company was at will. However, such a disclaimer of contract was notably absent from the operations manual. Ruiz argued that the terms and conditions of the company’s operations manual could be construed as a “contractual promise of employment,” and that he was entitled to continued employment so long as he adhered to the safety procedures outlined in the operations manual.

In Ruiz v. Dunbar Armored, Inc. ( 7/19/05), the Connecticut Superior Court denied summary judgment for the employer, finding that it did not sufficiently prove that there was no implied employment contract between the parties. While the court noted that “in Connecticut, an employer and employee have an at will employment relationship in the absence of a contract to the contrary,” it also held that statements in an employer’s personnel manual can create an implied contract between an employer and employee. Due to the conflicting information in the company’s employee handbook and operations manual, a jury would have to decide whether Ruiz was bound by a contract of employment or was an employee at will.

### **U.S. Supreme Court Declines Further Review of Tenth Circuit Decision Invalidating DOL Regulation Defining “Worksite” For Jointly Employed Workers In Determining Eligibility for FMLA Leave**

On October 3, 2005, the U.S. Supreme Court denied review of a Tenth Circuit decision refusing to follow a Department of Labor regulation defining an employee’s “worksite” for purposes of determining whether workers employed by two employers are eligible for FMLA leave.

Nancy Harbert was jointly employed by Sunset Manor Nursing Home and Health Services Group, Inc. She worked out of Sunset Manor’s office, which was located more than seventy-five miles from Health Services’ regional office. Harbert communicated with her manager at Health Services via telephone or through submission of written reports, and only visited the regional office for an occasional meeting. In Harbert v. Healthcare Services Group, Inc., Harbert successfully sued Health Services after it denied her request for medical leave under the FMLA.

The basis for the decision was a Department of Labor regulation stating that workers jointly employed by two or more employers are covered by the FMLA only when “the employee’s worksite is the primary employer’s office from which the employee is assigned or reports.” On appeal, Health Services challenged the validity of the DOL regulation defining the “worksite” of jointly employed employees. The Tenth Circuit observed that the DOL’s definition of “worksite” was contrary to the term’s ordinary meaning as an employee’s regular place of work. In addition, the DOL rule rendered an employee’s eligibility for FMLA dependent on whether the employer was a sole or joint employer. On this basis, the Tenth Circuit held that the DOL regulation was not entitled to any deference when applied to a jointly employed worker like Harbert who worked at a fixed worksite.

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