

# LABOR WATCH

A MONTHLY REPORT ON THE DEVELOPMENTS IN LABOR RELATIONS, EMPLOYMENT LITIGATION, IMMIGRATION, AND HUMAN RESOURCE MANAGEMENT

## PREVIOUS SERVICE MAY COUNT TOWARD FMLA LEAVE

According to a recent decision from the United States Court of Appeals for the First Circuit (Connecticut, Maine, Massachusetts, New Hampshire, and Rhode Island), more employees may be eligible for leave under the Family and Medical Leave Act than many employers contemplate. The court in *Rucker v. Lee Holding Co., d/b/a Lee Auto Malls*,<sup>1</sup> is requiring employers to include prior periods of employment—in this case, up to five years in the past—in determining whether employees qualify for statutory leave.

In the facts of the case, Rucker was a car salesman for Lee Auto Malls. Rucker had worked for the dealership for five years and then left his employment. He later returned to work at the dealership after a five-year lapse. Seven months after rejoining the company, Rucker suffered a back injury and missed 13 days of work. After almost two months of intermittent absences from the job, the company terminated the Rucker's employment. He subsequently filed suit against the dealership for violating the FMLA.

Lee filed a motion to dismiss, arguing that Rucker was not an eligible employee because, although he had worked 1,250 hours, he had worked less than 12 months. Rucker, on the other hand, claimed his employment at the dealership over five years earlier should have been included in calculating whether he had been employed for at least 12 months prior to applying for FMLA leave, to make him eligible for leave under the Act.

The FMLA allows "eligible employees" to take medical leave for a serious health condition that prevents the employee from performing the functions of his or her job, among other things. To qualify, the leave applicant must have been employed "(i) for at least 12 months by the employer with respect to whom leave is requested . . .; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period." Thus, while the hours requirement refers to a "previous" 12-month period, the months employed requirement does not. The United States Department of Labor at one time attempted to clarify this by stating, "The 12 months an employee must have been employed by the employer need not be consecutive months." However, the DOL never addressed how far in the past an employer should look when including the non-consecutive periods of employment.

In *Rucker*, the First Circuit found that both the FMLA and the DOL's regulation were ambiguous. Therefore, it relied on the preamble to the regulation and a friend-of-the-court brief submitted by the DOL at the Court's request. The DOL rejected the exclusion of employment experience more than two years prior to the date of re-employment and, further, indicated that a break in service of over five years would be at the "outer bounds of what is permissible." The Court, thus, accepted and applied the DOL's position, holding that the complete separation from employment for a period of

### WHAT'S INSIDE

Overtime Miscalculation =  
Monetary Exposure . . . . . 2

SPECIAL FOCUS:  
A Perfect Storm . . . . . 3

Oh! My Aching Back! . . . . . 4

OSHA Reminds Employers to  
Take a Look Back at 2006 . . . . . 5

Plan Ahead for  
Employee Vacations . . . . . 6

(Continued on Page 2)

# OVERTIME MISCALCULATION = MONETARY EXPOSURE

## PREVIOUS SERVICE MAY COUNT TOWARD FMLA LEAVE

*(Continued from page 1)*

five years did not prevent the employee from counting an earlier period of employment in satisfying the FMLA's 12-month requirement.

In their brief, the DOL's rationale for counting periods of employment within two years of the renewed employment relationship seemed to rest, in part, on the federal requirement for employers to retain FMLA records for three years. However, this reasoning certainly does not justify the DOL's willingness to look at employment five years distant from any current FMLA leave application. We will keep you updated on whether the DOL will issue further clarifying regulations to explain their somewhat obscure reasoning. Until then, though this decision came out of the First Circuit, it would be wise for employers throughout the country to aggregate past periods of employment, at least up to five years, when calculating the 12-month employment period for FMLA leave eligibility.

---

--JENNIFER M. THIEL  
jennifert@berenstate.com

<sup>1</sup>No. 06-1633 (1st Cir. 2006).

Recently, Wal-Mart Stores, Inc. agreed to pay nearly \$34 million in back wages and interest for calculating overtime incorrectly for approximately 86,000 employees over a span of almost five years. When Wal-Mart discovered its mistake, it self-reported the miscalculation to the Department of Labor. The miscalculation was identified after an internal audit raised concerns regarding how overtime was calculated.

Specifically, Wal-Mart says it failed to include periodic bonuses and other earned income in determining some employees' regular rate of pay for overtime purposes. Additionally, some overtime payments were based on a regular rate calculated for each two-week payroll period when they should have been calculated weekly. By self-reporting and directly negotiating with the DOL, Wal-Mart was apparently able to avoid paying any interest or penalties (including double damages) that it likely would have had to pay had this been brought as a lawsuit against the company. This expensive mistake should serve as a lesson for all employers.

### Lessons Learned

The first lesson learned from Wal-Mart's mistake is the opportunity to self-report to the DOL upon discovery of an error. Many times, significant penalty and damage exposure can be reduced by "coming clean" with the DOL. Secondly, employers should be reminded of the strict criteria required under the Fair Labor Standard Act to calculate overtime. As most of us know, nonexempt workers must be paid overtime for all hours worked over 40 hours in a workweek. The overtime rate under federal law is one and one-half times the employee's regular hourly rate. The most common problem employers have in calculating overtime is their failure to include certain payments other than traditional wages when computing an employee's regular hourly rate of pay and, in turn, the overtime rate.

To properly calculate an employee's regular hourly wage for overtime purposes, an

employee's total pay must be divided by the hours worked. Because overtime is calculated on a weekly basis, so must the regular rate. The FLSA provides that an employee's regular rate must include all remuneration paid to or on behalf of the employee unless specifically excluded. Generally, this includes nondiscretionary bonuses and other remuneration that is not considered a gift, a profit-sharing payment or a discretionary bonus.<sup>1</sup>

Many employers create significant liability for themselves by failing to include nondiscretionary bonus payments in an employee's regular rate when determining overtime pay. Failure to do this can lead to significant damages and time consuming litigation under the Fair Labor Standards Act. Many employers conduct annual internal audits to ensure compliance with the FLSA. This is highly recommended especially in light of the recent calculation mistake found by Wal-Mart.

---

--CHRISTOPHER E. HOYME  
hoyme@berenstate.com

<sup>1</sup>For more information regarding the definition of discretionary bonus, gift and profit-sharing, please contact Christopher E. Hoyme at hoyme@berenstate.com.

## A PERFECT STORM

A storm is brewing in Washington, D.C. over the highly publicized struggles of America's middle-class worker. In recent months, there has been an increasing focus on the disparity between the "haves" and the "have-nots" in this country.<sup>1</sup> And, from all appearances, labor unions look to be the primary beneficiary of any resulting storm clean-up efforts. Consider the following storm warnings:

- For the first time since 1994, the labor-friendly Democratic Party has regained a majority of seats in both the House and the Senate;
- Labor unions invested heavily, in time and treasury, to help ensure this change in the balance of power in Washington;
- In the meantime, the latest data indicates that union membership in the private-sector workplace dropped to an all-time low of 7.4% in 2006;<sup>2</sup>
- Despite the drop in union membership, a recent poll (commissioned by the AFL-CIO) revealed that 53% of nonunion, non-managerial workers would vote for a union in their workplaces if given the opportunity;<sup>3</sup>
- In the midst of these developments, the House Education and Labor Committee opened the first in a series of Congressional hearings on January 31st to address the economic plight of the nation's middle class;
- Various professors and economists, as well as AFL-CIO Secretary-Treasurer Richard Trumka testified during these hearings that strengthening the collective bargaining process is part of the solution to the economic problems of the middle class;
- During a press release on January 24, the AFL-CIO's Organizing Director, Stewart Acuff, quoted a study conducted by the Center for Economic and Policy Research in which it was estimated that roughly 20% of all pro-union activists are fired because of their union organizing activities;<sup>4</sup>

***“By suggesting that the decline of unions is causally related to the disparity between low-wage earners and the wealthy elite, union supporters have created the perfect platform to spread their propoganda and to do so in a very public manner under the auspices of Congressional hearings.”***

- On February 5, House Education and Labor Committee Chairman George Miller (D-Calif.), re-introduced the Employee Free Choice Act,<sup>5</sup> which seeks to make union organizing much easier by allowing the certification of a union simply on the basis of a showing that a majority of the employees have signed authorization cards designating the union as their bargaining representative.

Why is this a perfect storm? The sponsors of the Employee Free Choice Act have linked the issue of organizing rights and union density to middle-class economic woes in a way that

has never been done before. By suggesting that the decline of unions is causally related to the disparity between low-wage earners and the wealthy elite, union supporters have created the perfect platform to spread their propoganda and to do so in a very public manner under the auspices of Congressional hearings.

As noted above, the EFCA would allow union certification upon a simple showing that a majority of employees in an appropriate unit have signed authorizations designating the union as their collective bargaining

representative. The National Labor Relations Board would be required to develop model authorization language.

This represents a significant departure from current practice, wherein—absent the employer's agreement to voluntarily recognize the union—the union's only recourse is to petition the NLRB to hold a secret ballot election. The election is typically held within 45 days following the union's request, but during that interval, the employer is free to try to combat the union's organizing attempt by advising employees of its position on unionization. In other words, the affected employees get to hear from both the employer and the union, not just the union.

Obviously, the changes proposed by the EFCA would dramatically alter the current playing field as far as union organizing is concerned. In reality, the employees would only

(Continued on Page 4 1st Column)

# OH! MY ACHING BACK!

## A PERFECT STORM

*(Continued from page 3)*

hear the union's sales pitch. And, as anyone who has ever been through an election campaign can attest, union organizers aren't necessarily bound by the truth. The current process allows for public debate of each party's claims and counterclaims, allowing for more reasoned decision-making. This aspect of the EFCA is akin to holding one-party elections.

But, there's more. The EFCA would require that the parties' first contract be mediated by the Federal Mediation and Conciliation Service at the request of either party, if the parties are unable to come to an agreement within 90 days. If an agreement cannot be reached within 30 days following involvement of the FMCS, then the parties are required to submit their dispute to binding arbitration. This aspect of the EFCA eviscerates the employer's bargaining strength by allowing a third party to determine the outcome of the parties' contract dispute.

Finally, the EFCA would change the current remedies available to employees found to have been wrongfully discharged because of their union activities. The EFCA would impose treble damages (current law simply makes the employee whole for any lost wages). In addition, the

*(Continued on Page 5 1st Column)*

Some employers and insurance companies argue that the way our country treats back pain for work-related injuries is not only ineffective, it's actually destructive. More specifically, they argue that employees and physicians give up too quickly and proceed down the road to surgery without sufficient utilization of non-operative techniques and pain management. Is there any truth to these assertions? Is surgery the only option for eliminating pain? In November 2006, the Journal of American Medical Association published a study which compared recovery results between surgery and non-operative treatment. Based upon the results of the study, surgery may not be the best, or only, option after all.

The study specifically involved over 500 patients suffering from sciatica, which is pain or weakness in the buttocks and/or leg(s) generated from a ruptured spine disc impinging on the root of the sciatic nerve. Half of the patients were randomly assigned surgical treatment while the other half were treated non-operatively with physical therapy, medications, and counseling. At the end of the day, the results of the study did not show that surgery provided better long term improvement. In fact, patients improved substantially within two years regardless of whether they treated with or without surgery.

So, can we simply deny surgery requested by an injured worker based on the results of the above study? No. The choice of whether to proceed with surgery is ultimately up to the injured worker. Although you may be able to deny workers' compensation benefits and coverage based upon a contradictory expert medical opinion or other circumstantial evidence, the injured worker can proceed with surgery and submit it under your company's sponsored health plan or other private health plan. Thereafter, the injured worker can file a lawsuit with the compensation court to determine who is ultimately responsible for the bills.

The difficult decision of surgery comes down to two fundamental issues: pain and time.

With respect to pain, injured workers have to weigh how long they can tolerate the pain versus whether to proceed with surgery to make the pain go away sooner. In addition, each injured worker must ask whether it is worth the risk to alleviate the pain through anti-inflammatory and narcotic medications under the assumption that the pain will eventually go away without developing dependence on the medications?

***“Although you may be able to deny workers' compensation benefits and coverage based upon a contradictory expert medical opinion or other circumstantial evidence, the injured worker can proceed with surgery and submit it under your company's sponsored health plan or other private health plan. Thereafter, the injured worker can file a lawsuit with the compensation court to determine who is ultimately responsible for the bills.”***

The issue of time involves both the injured worker and the employer. Again, the injured worker must decide how long to tolerate the pain. Whereas, during a prolonged period of disability where the worker is waiting to get better, employers must consider the possibility that the injured worker may get used to the idea of being paid not to work. Indeed, indemnity appears to offer a perverse incentive: as long as the pain lasts, the worker gets paid not to work. As soon as the pain goes away, indemnity checks stop and the worker must go back to work. So for those workers who either dislike their job, their supervisor, or working altogether, the idea of receiving continued payment can be very enticing and counterproductive.

*(Continued on Page 5 2nd Column)*

# OSHA REMINDS EMPLOYERS TO TAKE A LOOK BACK AT 2006

## A PERFECT STORM

*(Continued from page 4)*

EFCA authorizes monetary penalties of up to \$20,000 in the event an employer is found to have engaged in an unfair labor practice.

Passage of the EFCA is THE top priority of organized labor. With its passage, unions are virtually guaranteed significant growth in the coming years. Without it, their long, spiraling decline in membership will likely continue unabated. Whatever the ultimate outcome, and regardless of whether there is or is not a connection between prosperity and unionization, organized labor's strategy to date has been nothing less than brilliant!

---

--TIMOTHY D. LOUDON  
timl@berenstate.com

<sup>1</sup> See, e.g., A Democracy – For the Wealthy, The New Republic, B. Plumer (1/31/07).

<sup>2</sup> See, U.S. Bureau of Labor Statistics Report (1/25/07).

<sup>3</sup> The poll was conducted by Peter D. Hart Research Associates in late December; results were announced by Stewart Acuff, the AFL-CIO's Organizing Director on 1/24/07.

<sup>4</sup> See, Dropping the Ax: Illegal Firings During Union Election Campaigns, the Center for Economic and Policy Research, J. Schmitt and B. Zipperer (January 2007).

<sup>5</sup> H.R. 800.

From February 1, 2007 to April 30, 2007, OSHA requires employers to post a summary of all illnesses and injuries that occurred in 2006. Employers do not need to post the OSHA 300 log that lists employee names, title, nature of the injury, etc., instead they simply need to post OSHA Form 300A, which provides a summary of job-related illnesses and injuries occurring in 2006. Certain industry groups and employers with less than 10 employees are exempt from the OSHA record-keeping and posting requirements.

If your company was fortunate enough to have zero recordable injuries or illnesses in 2006, the summary must still be posted, and zeroes should appear on the total line. Otherwise, the summary must include the total number of job-related injuries and illnesses that were put in the OSHA 300 log in 2006, the annual average number of

employees for 2006, and the total hours worked during 2006.

Posting of OSHA Form 300A must be done in an area where notices to employees are regularly posted, and those employees that do not have a fixed worksite must have a copy of the summary made available to them. An easy way to deliver a copy to employees without a fixed worksite is to include a copy with their paycheck. The posting of OSHA Form 300A should serve as a reminder for employers to evaluate how injuries and illnesses occurred over the last year and to prepare a strategy to reduce injuries and illness in 2007.

---

--CHARLES L. KUPER  
chazk@berenstate.com

---

## OH! MY ACHING BACK! *(Continued from page 4)*

Perhaps one way to curb the current belief that surgery is the only way to recovery is to help provide active recovery as opposed to passive recovery. Willem van Mechelen, MD, PhD conducted a study in late 2003 which found that an active recovery path can decrease the overall recovery period. In turn, this may also diminish the likelihood of surgery. After the study, Dr. van Mechelen commented that we need to instill some of the ideals and motivation of an injured athlete into our injured workers because athletes generally have high self esteem and are highly motivated to keep doing what they have always done.

While instilling the motivation of an athlete into your injured workers may not be possible, you can consider assisting your injured workers through modified duty. Implementing an early return to work program via modified duty can help foster an active (but not necessarily pain free) recovery. If you believe and recognize that

the vast majority of back injuries resolve themselves over time, with little or no treatment required, the need for proactive job placement and assistance is paramount. By providing modified duty, you provide an injured worker a reason for getting up in the morning and a place to go. You provide meaningful tasks, which helps take the mind off the pain. Above all, you help maintain the worker's identity as a productive worker.

---

--PAUL E. LARSON  
paul@berenstate.com

# PLAN AHEAD FOR EMPLOYEE VACATIONS

Most forward-thinking employers attempt to forecast and pre-plan most aspects of their business. In fact, many employers plan for contingencies that are extremely remote. Unfortunately, all too often these same employers fail to properly plan for a potential problem that is ever-present and could be easily remedied. Despite this, employee vacations have left more than one employer scrambling.

With Memorial Day, summer vacation, and Labor Day fast approaching, prudent employers should consider the following when managing employee vacation scheduling:

- 1. Limit concurrent vacations.** In order to avoid insufficient manpower and the potential hiring of temporary employees, employers should consider limiting the total number of employees who may take vacation at any one time. This limitation should also be department specific.
- 2. Watch for spring fever.** It is human nature to start thinking about your vacation prior to actually taking it. Employers must insure that vacationing employees complete their assignments prior to departing.
- 3. Hold a pre-vacation meeting.** For employees in knowledge-intensive positions, it is beneficial to hold a meeting prior to their departure. The employee can provide detailed instructions on how to handle situations that only he or she has handled in the past.
- 4. Inform customers and vendors.** All parties that deal with the vacationing employee should be timely informed. This could be as simple as an e-mail indicating they are out or as detailed as a face to face meeting to address anticipated needs.
- 5. Require advance notice.** All vacation time should be required to be

requested in advance. Additionally, no vacation time should be taken unless approved by the employer.

- 6. Inventory tasks.** Prior to the employee's departure, all of his or her tasks should be specifically passed to remaining employees. Building in this ownership of the tasks should eliminate claims of "it is not my responsibility."

Not every situation can be perfectly planned for. However, by reference to the above suggestions, temporary employee cost can be reduced, efficiency can be protected, and customers, both internal and external, can be better served.

---

-- TOM C. ANSCHUTZ  
toma@berenstate.com

**BERENS & TATE**  
YOUR EMPLOYMENT LAW SPECIALISTS

LABORWATCH (ISSN 1084-2160)  
is published monthly.

To order, write:  
Laborwatch Circulation Dept.,  
10050 Regency Circle, Suite 400,  
Omaha, NE 68114  
call: (800) 729-1441 or (402) 391-1991  
fax: (402) 391-7363  
email: Laborwatch@BerenTate.com  
visit our website: www.BerenTate.com

© 2007 Berens & Tate, PC, LLO,  
10050 Regency Circle, Suite 400,  
Omaha, NE 68114 (402) 391-1991.  
Berens & Tate, PC, LLO is a law  
firm with a nationwide practice  
specializing in labor relations,  
employment litigation, and human  
resource management.

*Publisher:*  
Kelvin C. Berens

*Legal Content Editor:*  
Rachel K. Alexander

*Copy and Layout Editor:*  
Debra A. Finke

LABORWATCH is designed to provide general information regarding recent developments in labor and employment law as well as human resources issues. It is not intended to substitute for legal advice based on specific facts in any individual case. For further information regarding any matters discussed in this publication, or on any labor or workplace issues, please feel free to contact any of the attorneys at the address above or e-mail us at [berens@berenstate.com](mailto:berens@berenstate.com).