Insight

KIENBAUM | HARDY
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EMPLOYMENT + COMMERCIAL LITIGATION

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Kienbaum Opperwall Hardy & Pelton PLC and Viviano Pagano & Howlett PLLC Have Merged

We are pleased to announce that these two Michigan-based boutique law firms have merged their practices, effective January 1, 2019. Now known as Kienbaum Hardy Viviano Pelton & Forrest (KHVPF), the merged firm offers both employment and commercial legal services under one umbrella, with offices in Birmingham and Mount Clemens, Michigan.

Both firms were founded by attorneys from large regional law firms. With their talents and experience in employment and commercial litigation, respectively, both grew specialized practices, one in Birmingham and the other in Mount Clemens. Merger discussions began last year as a result of both firms wanting to expand their services to clients, while at the same time maintaining their client-focused, cost-conscious boutique character.

"KOHP's attorney roster is known across the country for our specialty in employment litigation and labor law. We wanted to provide full commercial services to our clients and grow our roots," said Eric Pelton, managing member of KOHP and now also managing member of KHVPF. "The Viviano firm has a like-minded culture," he continued, "a great location from which to grow, and an ideal specialization—the full range of commercial litigation—that makes sense for our clients." KOHP founding member Ted Opperwall is continuing with the firm in an Of Counsel role focused on labor and employment advice for clients and mentoring of the firm's junior lawyers.

We plan to continue with our twice yearly *Insight* newsletter, and to include articles of commercial litigation interest along with our updates and commentaries on employment and labor law topics.

Inside This Edition

Are Those Brownies Duncan Hines Or Duncan Highs?

Regulating Recreational Marijuana In The Workplace

Michigan has officially become the tenth state, in addition to Washington D.C., to legalize the recreational use of marijuana. On November 6, 2018, Michigan voters passed Proposal 1 by a 12 percentage point margin, 56 to 44, creating the Michigan Regulation and Taxation of Marihuana Act (MRTMA), which allows individuals over the age of 21 to use marijuana, possess up to 2.5 ounces, and grow up to 12 plants in their residence for recreational use. (Yes, the Michigan statute does misspell marijuana.)

Public support for the legalization of the recreational use of marijuana was not overwhelming, but it is clear that public perception in Michigan about marijuana has shifted to acceptance. Yet, in the weeks since the law went into effect, employers probably have not noticed any major changes in their workforces. Employees who were not previously lighting up or consuming cannabis edibles before the last election are not likely to have suddenly jumped on the pot wagon. Although employers may not find many employees coming to work with the munchies tomorrow, research suggests that full legalization of marijuana may lead to more widespread use and addiction, particularly among adults.

At present, those seeking marijuana legally have to grow it for themselves or receive it locally in the form of a "gift," as it will not be commercially available until the state develops regulations governing this market and starts to award commercial and retail licenses. Because the state has a one-year deadline to develop these regulations, licenses are expected to be issued in early 2020. Under the Act, municipalities can opt out of allowing marijuana retail establishments. Over 60 municipalities so far have been reported as being "total buzzkills." In the metro-Detroit area, these include Grosse Pointe, Village of Milford, Northville, Allen Park, Plymouth, Troy, Pontiac, Livonia, and Birmingham.

Because marijuana is still considered an illegal drug by the federal government, it cannot be legally transported from Canada, shipped or mailed through either the U.S. Postal Service or other private carriers, or transported by either car or plane from a state that has legalized it. Until there are retail establishments in Michigan, most will purchase it from an unauthorized source. So long as a person is not caught unlawfully purchasing or transporting marijuana, the possession of 2.5 ounces or less—even if obtained illegally—will not result in criminal liability under Michigan law. For the time being, the demand for marijuana will exceed its lawful supply. Consequently, increased use could result in greater prevalence of distribution on work premises.

Employers still have wide discretion when it comes to regulating their employees' use or possession of marijuana at work. Employers are not required to accommodate the use of marijuana in the workplace, or on their property, and are not prohibited from "disciplining an employee for violation of a workplace drug policy or for working while under the influence of marihuana . . . [or] refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment because of that person's violation of a workplace drug policy or because that

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person was working while under the influence of marihuana." Significantly, Michigan does not have limits on private workplace drug testing, which includes testing for marijuana.

Given medical and recreational marijuana's potential impact on the workforce, employers should turn their attention to their personnel policies:

- Evaluate goals for regulating their employees' marijuana use.
- Review policies with those goals in mind.
- Create or update policies to reflect those goals while clearly identifying what is prohibited.
- Decide where you, as an employer, want to be on the wide spectrum between "zero tolerance" and "no possession/no impairment" only.

An overarching consideration for a policy regulating marijuana in the workplace should be the nature of the job and whether it is dangerous, involves operating heavy machinery, or involves the safety or caretaking of others. In those work environments, a "zero tolerance" policy may be the most desirable to mitigate the risk of harm to workers and others. In addition, employers that receive federal grants or are federal contractors may be required to maintain a drug-free workplace if they are covered by the federal Drug Free Workplace Act.

Employers that do not have these concerns or requirements may nonetheless choose to have a "zero tolerance" policy merely because it presents a lesser risk of disparate treatment claims compared to a policy that only prohibits possession or impairment on work premises. Employers with "zero tolerance" policies must still ensure the policy is enforced consistently—even against a highly valuable employee—to avoid claims that another employee has been treated differently based on a protected characteristic.

On the other hand, employers that require impairment as a predicate for disciplinary action must deal with the same difficult issue confronting law enforcement officers arresting individuals for driving under the influence of marijuana—determining whether a person is impaired is inevitably subjective. Employment decisions based on subjective observations often yield inconsistent results, exposing the employer to disparate treatment claims.

Many employers may find a "no possession/no impairment" policy best suits the needs of their business. Some employers may not care what their workers do on their free time, so long as their possession and use of marijuana does not adversely affect work performance. Some might face severe recruitment and retention problems if they had a "zero tolerance" policy, especially if pre-employment or random drug testing is used.

Regardless of whether the policy is "zero tolerance" or "impaired only," supervisors must have adequate training to identify common signs of being high, such as enlarged pupils, red glassy eyes, difficulty following directions, delayed reactions, poor muscle and limb coordination, distorted senses, panic, and anxiety. Unfortunately, this is not an easy task as research shows that THC (the psychoactive ingredient in marijuana) not only lingers in the body inconsistently depending on numerous factors, but also has unpredictable cognitive effects from user to user.

Employers with any type of drug testing policy are also advised to take affirmative steps to educate their employees on the adverse effects of marijuana, drug addiction and dependency, and how the body metabolizes cannabis. While employees surely understand the risk of ingesting marijuana immediately before or during work, many will not appreciate that THC can remain in their system for many weeks.

Michigan voters have spoken clearly in favor of decriminalizing what remains a Schedule One drug under federal law. While the stigma against recreational and medicinal use of marijuana seems to have quickly dissipated, there remains a haze around the long-term effects of high concentrations of THC and the impact increased use will have on the two activities most people participate in daily: working and driving.

Sarah L. Nirenberg

Banking Issues For The Marijuana Industry

The same day that Michigan legalized recreational marijuana for people over 21 (with the highest limit on possession at 2.5 ounces), Missouri and Utah legalized medical marijuana, bringing the total to 33 states allowing marijuana for medical purposes and 10 states allowing recreational use. However, the plant remains a Schedule One drug under federal law, raising a major question: Are banks doing business with a state-legalized marijuana industry subject to federal prosecution?

The short answer is yes. Banks are subject to federal law and regulations, and are generally federally insured by the FDIC. Federal law trumps state law, so cannabis remains illegal; but the federal government may not force state and local prosecutors to enforce federal law. The primary exposure for banks comes with the federal money laundering statutes, which make it a crime to conduct a financial transaction when a person or business knows that the money comes from an illegal activity, and intends to promote the crime, conceal the crime, or evade taxes. If the amount of marijuana industry deposits exceeds $10,000, the intent requirement is removed and a bank is liable when it *knows* about the illegal activity, even if the bank does not intend to promote or conceal it.

For this reason, banks are rightfully wary of dealing with the marijuana industry. The standard practice is that when a business is dealing with large amounts of cash, the bank will investigate the source of that cash. If the source is marijuana, the bank will close the account—even if the transactions at issue are legal at a state level. For that reason, about 70% of marijuana businesses operate entirely in cash.

Carrying around large amounts of cash, marijuana businesses argue, exposes them to an increased risk of theft and violence. Yet they are unlikely to see change on the federal level in the near future; so far, Congress is unwilling to alter its stance on the drug. Bills backed by national banking chains that were designed to allow banks to do business with these clients died in committee this past summer. The Attorney General's Office has also recently indicated its willingness to prosecute marijuana-related banking crimes. In 2013, then-Attorney General James Cole issued the "Cole Memo," directing federal attorneys to exercise prosecutorial discretion in this area, limiting prosecutions to cases that involved violence or the use of federal property or public lands. But in January 2018, then-Attorney General Jeff Sessions formally rescinded the Cole Memo, stating in his "Sessions Memo" that marijuana is "a dangerous drug" that remains "a serious crime," and specifically naming the possibility of prosecution under money laundering statutes, the unlicensed money transmitter statute, and the Bank Secrecy Act. We do not expect a change in this view at the federal level during the current administration.

But federal law enforcement has yet to prosecute a financial institution for marijuana-related business. In fact, a cottage industry has sprung up of banks seeking business specifically with these clients. These banks require extensive records and bookkeeping verifying that each dollar a marijuana business deposits is linked to a marijuana sale meeting state-legal standards. Because of the possible federal exposure, these banks profit from high fees they charge to marijuana industry clients.

More and more mainstream banks are beginning to allow cannabis customers as well; industry analysts estimate that marijuana-related banking has grown by 20%

Banking For Marijuana Industry *from page 4*

since President Trump took office. One safeguard for banks is the growing number of states attempting to provide a legal shield for doing business with the marijuana industry. California and Utah, for instance, have passed legislation attempting to protect banks and other businesses from liability. A rarely discussed provision in Michigan's recently passed law states: "It is the public policy of this state that contracts related to the operation of marihuana establishments be enforceable." The efficacy of these laws has yet to be determined. States cannot circumvent federal law, but these laws might influence a court's or a prosecutor's decision nonetheless.

Even the Sessions Memo emphasized that, in prosecuting marijuana-industry banking, federal prosecutors may exercise discretion. And the U.S. Attorney's Manual gives federal prosecutors specific direction to decide which cases to prosecute. Prosecutors can decline to pursue a case based on the crime's seriousness, the impact on a community, and whether or not prosecution will deter further crime. State legalization can also weigh on a prosecutor's decision whether to charge a bank with a crime.

Although marijuana remains illegal at the federal level and banks remain theoretically liable for federal crimes when doing business with the marijuana industry, the following practices could diminish a bank's liability:

- Limit the percentage of business linked to marijuana.
- Ensure that marijuana businesses conduct operations according to state law and are not associated with violent crime.
- Require meticulous record keeping from marijuana related businesses.
- Work with marijuana related businesses only indirectly linked to drug sales.

Ultimately, the marketplace is likely to pressure change in this area of the law. One recent estimate is that the market for recreational marijuana will grow from $9.2 billion in 2017 to $47.3 billion by 2027. Banks are unlikely to remain out of this market for very long.

Marianne J. Grano

Michigan Establishes Paid Medical Leave

Michigan's 2018 lame duck legislature adopted and the governor signed the "Paid Medical Leave Act." This Act in general requires Michigan employers to provide employees with 40 hours of paid leave annually for medical purposes. But numerous exceptions and exclusions render the Act much less onerous for employers than they would have faced if the legislature had not neutralized a ballot proposal through legislative maneuvering. Indeed, the impact of this law may prove minimal because it now applies only to employers with 50 or more employees, and it provides a "rebuttable presumption" of compliance for employers who offer at least 40 hours of paid vacation, personal days, or other paid time off. Most employers of 50 or more employees likely provide this benefit.

Covered Employers. The Act applies to public and private employers that employ 50 or more individuals. The U.S. government and "another state or a political subdivision of another state" are not covered. The term "another state" presumably refers to other state governments.

Eligible Employees. With important exceptions, employees for whom an employer is required to withhold federal income tax are covered. Exceptions include employees exempt from the overtime requirements of the federal Fair Labor Standards Act (FLSA); employees of air carriers as flight deck or cabin crew; other Railway Labor Act-covered employees, and individuals whose primary work location is not in Michigan. The exclusion includes employees in the private sector covered by a collective bargaining agreement, but language left in the Act may suggest this exclusion only applies during the term of a CBA in effect at the time the Act goes into effect. To be an eligible employee, the employee must also work more than 25 weeks in a calendar year and work, on average, more than 25 hours per week during the immediately preceding calendar year.

Michigan Establishes Paid Medical Leave *from page 5*

Amount of Paid Medical Leave. Covered employers have two alternatives for providing the required paid medical leave to each of the employer's eligible employees:

1. Eligible employees must accrue paid medical leave at a rate of at least one hour of paid medical leave for every 35 hours worked, capped at one hour accrued per calendar week and 40 hours per benefit year. Under this alternative, an employer is not required to allow an eligible employee to use more than 40 hours of paid medical leave in a single benefit year, and an employer is not required to allow an eligible employee to carry over more than 40 hours of unused accrued paid medical leave from one benefit year to the next.

2. An employer can instead provide at least 40 hours of paid medical leave to an eligible employee at the beginning of a benefit year. Under this alternative, eligible employees hired during a benefit year would be provided medical leave on a prorated basis. If an employer elects this alternative, it is not required to allow eligible employees to carry over any paid medical leave from one benefit year to the next.

Amount of Eligible Leave Time. Eligible employees may use paid medical leave for their own (or a family member's) mental or physical illness, injury, or health condition, medical diagnosis, care or treatment of such condition, or preventative medical care. The Act also covers eligible employees (or their family members) who are victims of domestic violence or sexual assault for medical care or psychiatric counseling, to obtain services from victim services organizations, to relocate, to obtain legal services, or to participate in any civil or criminal proceedings related to domestic violence or sexual assault. The Act also covers situations where the eligible employee's primary workplace is closed due to a public health emergency, or the closure of a child's school, or where the employee's or family member's presence in the community would jeopardize the health of others because of a communicable disease.

Rebuttable Presumption. The Act establishes a rebuttable presumption that an employer is in compliance with the Act if the employer provides at least 40 hours of paid vacation days, paid personal days, paid time off, or similar paid leave benefit.

Procedures. A covered employer must give an eligible employee at least three days to furnish the employer with documentation, and the employer can insist on its usual and customary notice and other procedural and documentation requirements. Paid leave must be used in one-hour increments unless the employer has a different increment policy and the policy is in writing in a handbook or benefit document.

Postings and Record Retention. An employer is required to display a poster in its place of business that contains details concerning the Act, and must retain records for not less than one year documenting the hours worked and paid medical leave taken by eligible employees.

Procedures for Violation and Penalties. Eligible employees affected by a violation of the Act have six months after the violation to file a claim with the Michigan Department of Licensing and Regulatory Affairs. The Act does not provide a private right to file a lawsuit in court. The Department may impose penalties that include payment of all medical leave improperly withheld, administrative fines of not more than $1,000 for failure to provide a paid medical leave in violation of the Act, and an additional administrative fine of not more than $100 for willfully violating the posting requirement.

For those readers curious about the legislative maneuvering, the Act actually amended legislation enacted just months earlier, in September 2018, by the Republican legislature that was significantly more onerous on employers and beneficial to employees. By enacting legislation in September, however, the legislature avoided an initiative that otherwise would have been on the November 2018 ballot with similar provisions. By proceeding in this manner, allowed by the Michigan constitution, the legislature could amend the initial Act by majority vote, rather than the two-thirds vote that would otherwise be required to overturn the November 2018 ballot proposal.

Michigan Establishes Paid Medical Leave *from page 6*

Among other employer-friendly features, the new Act reduced the number of covered employers, reduced the number of eligible employees by eliminating exempt and part-time employees, reduced the rate of accrual, placed a cap on the accrual and the year-to-year carry over, and eliminated extension of the Act's protections to medical conditions of domestic partners and their children. Perhaps the most significant change was to create the rebuttable presumption for employers that already provide 40 hours of paid time off, whether or not for medical purposes, such as paid vacation or personal time.

As of this writing, the Department has not announced an effective date for the Act. It is expected to take effect in late March 2019.

Eric J. Pelton

New Mandates Under The Fair Credit Reporting Act

Many of our readers know that the Fair Credit Reporting Act (FCRA) applies when an employer obtains a "consumer report" – a written, oral, or other communication of information by a consumer-reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living—for employment purposes. In other words, employers must comply with the FCRA when they use criminal history reports, driving records, and other background checks that were procured by a third party in making employment decisions. In contrast, where employers perform their own investigation into an applicant's or employee's background, the FCRA does not apply.

The FCRA requires employers to disclose that they may obtain and use consumer reports for employment decisions and to secure written consent from employees or applicants to obtain these reports. Before taking adverse action against an employee or applicant based on a consumer report, the employer must provide the individual with a copy of the report and notice of FCRA rights. The technical requirements of the FCRA are complex, and, with the 2018 enactment of the Economic Growth, Regulatory Relief, and Consumer Protection Act, they have become even more so. As a result of increasing concerns about data security breaches, Congress amended the FCRA to require that credit reporting agencies place "national security freezes" and fraud alerts on consumers' credit reports upon request without cost to the consumer beginning in September 2018.

The new law requires that whenever a consumer is required to receive a Summary of Consumer Rights under the FCRA, that document must provide notice that the security freeze is available. The Consumer Financial Protection Bureau has updated its form Summary of Consumer Rights to contain that information. It can be found at the following link: https://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act.pdf. Employers should ensure that they (and their third party background checking agencies) are using the most up-to-date forms containing this information.

In other FCRA developments, courts are continuing to address the issue of standing to sue for technical violations of the FCRA in the wake of the U.S. Supreme Court's ruling in *Spokeo v. Robins* (2016). In *Spokeo* the Court held that concrete injury for alleged violations of the FCRA was necessary for standing to sue, and that a consumer could not satisfy the constitutional injury-in-fact requirement by alleging a bare procedural violation of the FCRA. Although this sounds straightforward, courts have reached different results in subsequent analyses of these claims.

On July 13, 2018, in *Dutta v. State Farm*, the U.S. Court of Appeals for the Ninth Circuit affirmed a ruling in favor of an employer on the ground that a rejected job applicant did not have standing to sue under the FCRA. Dutta alleged that State Farm rejected

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him for employment based on information in his credit report, without first providing him with a pre-adverse action notice and an opportunity to contest the information. The employer actually had mailed a pre-adverse action notice to Dutta, but he asserted that the notice was not compliant with the FCRA because he had already been told over the phone that he was being rejected based on his credit report. The court concluded that, even though Dutta alleged a violation of the pre-adverse-action notice requirement, he did not demonstrate any actual harm or a substantial risk of such harm because the employer would have made the same decision even if the violation had not occurred.

In contrast, on August 29, 2018, the U.S. Court of Appeals for the Seventh Circuit issued its opinion in *Robertson v. Allied Solutions, LLC*, another case in which the plaintiff applicant alleged that an employer had rejected her for employment based on information in her background report, without providing her with a pre-adverse-action notice and an opportunity to contest the information in the report, as required by the FCRA. The trial court dismissed the lawsuit based on Robertson's lack of standing, but the Seventh Circuit reversed. It held that Robertson had established standing by asserting that Allied Solutions had failed to provide her information she was entitled to by law—a copy of the background report and a summary of her legal rights under the FCRA. The "informational injury" was found to be concrete because Robertson was deprived of the opportunity to use the information for a substantive purpose—to allow her to provide context for negative information in the background check, regardless of the information's truth.

The FCRA continues to be a fertile ground for lawsuits, including class actions, even after the Supreme Court's *Spokeo* opinion, which many thought would have a chilling effect on litigation as it was viewed as unfavorable to plaintiffs. Employers would be wise to ensure that all of the requirements of the recently amended FCRA are followed to the letter.

Sonja L. Lengnick

Michigan's Construction Lien Act Is Amended To Expand Lien Coverage For Design Professionals

One of many statutory changes passed during the legislature's lame duck session, this amendment modified Michigan's Construction Lien Act (CLA) to establish a procedure for "design professionals" to perfect construction lien rights for "professional services" provided during the planning stages of a project for improvements to real property—whether or not actual physical improvements ever occur. This amendment took immediate effect on December 12, 2018.

The CLA, enacted in 1982, is intended to protect the interests of contractors, laborers, and suppliers (including design services) through construction liens, while also protecting owners from excessive costs. Prior to the recent amendment, lien rights did not arise until the first "actual physical improvement" was made to the property.

The actual physical improvement requirement essentially meant that there had to be a physical change that was readily visible and would put a person making a reasonable inspection of the property on notice that improvements were being made to the property that may give rise to lien rights. That actual physical improvement requirement left those providing professional design services—for example, the type of services customarily provided by architects, engineers, and surveyors—without a claim of lien to secure their right to payment for services provided in the planning stages of a project if the project did not go forward.

The CLA now provides that "design professionals," *i.e.*, licensed architects, engineers, and professional surveyors under Michigan's Occupational Code, have a claim of lien for professional services rendered before the first actual physical improvement occurs. To perfect a claim of lien for these professional services, the design

Amended Construction Lien Act Expands Lien Coverage For Design Professionals *from page 8*

professional must comply with each of these technical requirements set forth in the amended CLA:

- The services must be provided pursuant to a written contract for erection, alteration, repair, or removal of a structure, or other improvement to real property.
- The claimant must record a "Notice of Professional Services Contract," which must substantially comport with the form set forth in Section 107(a) of the CLA.
- The Notice must be filed with the register of deeds for the county in which the property is located.
- The Notice may be filed anytime after the contract is executed, whether or not services have commenced or are completed.
- However, the Notice must be filed within 90 days of the last day services were provided.
- The Notice is valid for one year—consequently, an action to foreclose the lien must be brought within one year from the date the lien was recorded.
- If an actual physical improvement is made to the property, the notice is only effective from the date of the first actual physical improvement.

As with all other construction lien claims, the design professional's lien is of equal priority with all other construction lien claims and subordinate to other claims of interest in the property (such as a mortgage) recorded before the first actual physical improvement.

Gary D. Reeves

Assess Electronically Stored Information Early In Litigation

The landmark opinions arising out of the Zubulake v. UBS Warburg LLC *gender discrimination litigation have forever changed how litigants manage pre-trial discovery. The most well-known* Zubulake *opinions center on the scope of the parties' obligation to preserve electronically stored information (ESI), discovery cost shifting, and spoliation sanctions as a result of failing to preserve digital evidence. The discovery-related case law that has developed in the wake of* Zubulake *makes clear that the effective management and early assessment of a party's ESI is absolutely critical in today's litigation environment.*

Given the expansive information technology architecture that exists throughout organizations, both large and small, individual and corporate litigants will often need to involve e-discovery attorneys and digital forensic consultants early in litigation — especially in document-intensive cases. Your counsel's e-discovery and digital forensic team should be ready to quickly formulate a protocol designed to identify potentially relevant data for further analysis and assessment. The importance of having a legal team that is well-versed in this area of pre-trial litigation cannot be overstated.

We offer our clients some of the most talented attorneys and professionals in the e-discovery and digital forensic fields. We do not separately assign e-discovery duties to lawyers who are not the primary litigators on your case. Rather, our approach is to ensure each litigation and dispute resolution team is staffed with at least one attorney who has a history of successfully managing complex electronic discovery challenges. We also regularly work closely with other e-discovery and digital forensic professionals who serve as experts and special masters in complex electronic discovery disputes.

Donald R. Sheff II

Federal Drones? What About The Fourth Amendment?

Employers routinely encounter demands from the alphabet soup of U.S. Department of Labor (DOL) sub-agencies: OSHA, OFCCP, W & H (including FLSA and FMLA variations), among others. Not always as obvious or recognizable, however, are agency attempts to overreach in their demands. This is often found in the case of on-site inspections or audits. Moreover, in a currently developing situation, at least one agency is employing a potentially more invasive, less-controlled method of conducting on-site inspections – Unmanned Aerial Vehicles, more commonly known as drones.

While it has long been the case, a panel of the U.S. Court of Appeals for the Eleventh Circuit recently reminded employers that they may be overlooking a fundamental right. Simply because a DOL inspector shows up after a workplace accident or to audit an employee complaint does not entitle the agency to unfettered access to the employer's premises. Specifically, in *United States v. Mar-Jac Poultry, Inc.*, the court pointed employers to their Fourth Amendment protection against unreasonable searches.

The *Mar-Jac* case did not involve a drone, but rather arose out of an electrical injury at a poultry processing plant in Georgia. As required by law, Mar-Jac reported the electrical accident to the Occupational Safety and Health Administration (OSHA) the following day. Several days later, an OSHA inspection team arrived and demanded access, not only to the alleged hazards involved in the accident, but to the entire facility. Mar-Jac refused access except to the accident site and any tools involved in the accident, but allowed access to certain paperwork including its "OSHA 300 logs," in which it recorded other work-related illnesses and injuries. Based on this limited access, OSHA found nine potential OSHA violations, only three of which related to the accident. The remaining six citations involved the types of illnesses or injuries allegedly common to the poultry processing industry.

Using these findings, OSHA secured a federal warrant to expand its earlier inspection to include the entire facility. Mar-Jac, however, successfully quashed the warrant as to five of the nine potential violations.

Affirming the trial court, the Eleventh Circuit reminded employers that the DOL and its sub-agencies do not have a right to unlimited access to inspect employer premises. Rather, an agency's rights extend to two types of on-site inspections or audits. First, the DOL can select the facility based on a general administrative or legislative plan where the selection is based on neutral criteria. The second and only other basis for inspection is where the agency has specific identifiable evidence of an existing violation. While the DOL does not need a warrant to initiate either type of inspection, it must obtain a warrant if the employer refuses to consent on Fourth Amendment grounds, *i.e.*, that the search is not reasonable in its inception or scope. And the required probable cause to overcome the employer's objection is a higher burden for the government where the agency is relying on the second basis – the specific evidence of an existing violation. Somewhat higher scrutiny applies to alleged existing violations because, absent legislative or administrative standards, there is a greater possibility that the agency has either targeted the employer or unreasonably expanded the search for purposes of harassment.

The Eleventh Circuit agreed in the *Mar-Jac* case that OSHA had unreasonably expanded the search, primarily by using the OSHA 300 logs to equate the existence of a workplace injury or illness with an OSHA violation, without regard to causation. As the court observed, "the [OSHA] Regulations provide that 'recording or reporting a work-related injury, illness, or fatality does not mean that the employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for workers' compensation or other benefits.'"

OSHA is the same agency that is becoming increasingly reliant on drones to inspect workplaces, particularly after a workplace accident where entry to the site

Federal Drones? What About The Fourth Amendment? *from page 10*

poses a danger to the inspectors, such as an oil rig fire or building collapse. The practice of employing drones has become sufficiently commonplace that OSHA has directed all ten of its Regional Offices to appoint a staff member as its unmanned aircraft program manager. Employers should keep in mind that the same Fourth Amendment protections apply to OSHA's use of drones to gather data as apply to the agency's use of its inspectors' physical on-site inspections, including the right to require an inspection warrant.

The same standards pertinent to OSHA audits apply to on-site inspections by the other DOL subagencies, but there are two caveats to bear in mind. First, once the employer consents to the inspection – whether or not the consent is informed – it probably has waived its Fourth Amendment protection, at least to the extent of its consent. And second, employers should carefully consider the potential impact on their agency relationships before objecting. Both caveats suggest a reasoned approach based on advice and counsel before committing to either path.

Julia Turner Baumhart

Recent FMLA and ADA Decisions of Note

There are several recent federal court and agency decisions of interest applying the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA).

Court Dings Employer That Failed To Engage In Interactive Process Or Modify Policy. In *EEOC v. Dolgencorp LLC*, the U.S. Court of Appeals for the Sixth Circuit affirmed a jury verdict awarded to a Dollar General store clerk who was fired for drinking orange juice from the store cooler on two occasions during diabetic episodes. The clerk occasionally suffered from low blood sugar and needed to quickly consume glucose to avoid a seizure or passing out. When the clerk asked her manager if she could keep orange juice at her register in case of an emergency, her request was refused. When she suffered two episodes while working alone, she drank orange juice from the checkout cooler, paying for it immediately, and reporting it to her supervisor. Dollar General fired her after she admitted this during a store audit; management decided it violated Dollar General's "grazing policy." The Sixth Circuit affirmed a jury verdict that the clerk's termination was based on her disability, rejecting Dollar General's argument that it had no obligation to accommodate the clerk because she could have treated her hypoglycemia in other ways (such as glucose tablets or honey). The court found that there was evidence that those options were not practically equivalent, and that Dollar General failed to identify reasonable alternatives, specifically noting that once the clerk asked for an accommodation, the company had a duty to engage in the interactive process and explore the nature of her limitations, how they affected her work, and what types of accommodation could be made.

Employee Cannot Abandon Interactive Process and Maintain Viable Accommodation Claim. In *Brumley v. United Parcel Service, Inc.*, the Sixth Circuit affirmed summary judgment in UPS' favor and held that Brumley did not have a viable ADA failure to accommodate claim where she was responsible for the breakdown in the ADA-required interactive process with her employer about reasonable accommodation for her disability. Brumley was a UPS driver who attempted to return to work with medical restrictions related to lifting and driving after taking a leave of absence for a back injury. Her supervisor sent her home after reviewing her medical restrictions that included lifting restrictions that precluded her from performing her driver position, which required her to unload heavy packages. After denying her request to transfer to a different position that had limited lifting

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requirements, UPS asked Brumley to submit medical forms so that UPS could further consider her restrictions and possible accommodations. When UPS held a meeting with her to discuss potential accommodations, Brumley stated that she was asking her doctor to lift her work restrictions, and she wanted to discontinue the interactive process. Several months later, however, Brumley filed a lawsuit claiming that UPS had failed to accommodate her and sought damages for the time that she was off work during the interactive process. In affirming summary judgment in favor of UPS, the Sixth Circuit held that the ADA does not require employers to make on-the-spot accommodations of the employee's choosing. Instead, an employer must engage in an "informal interactive process" with the employee to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." UPS had attempted to do so, and was not liable where Brumley voluntarily abandoned the interactive process.

Extended Leave May Not Be a Reasonable Accommodation. In *Easter v. Arkansas Children's Hospital*, a federal court in Arkansas held that Easter's request for additional leave after the expiration of protected leave under the FMLA was not reasonable. After Easter, a nurse, exhausted her FMLA-protected leave for a throat condition, the hospital requested an update on her status. Easter requested additional time off until she was able to return, presumably after seeing a specialist for her condition, an appointment that was scheduled within 20 days. The hospital then received a note from her doctor stating that Easter was "unable to perform her current line of work for an indefinite amount of time." The hospital denied the request for additional leave and terminated Easter. The court dismissed Easter's claim for disability discrimination based on the rationale that Easter's request for additional leave amounted to a request for indefinite leave, which was not a reasonable accommodation. The court held that even if Easter's statement to the hospital could be construed as a request for a finite period (*i.e.*, until her medical specialist appointment and no longer), the request was still not reasonable because she could not establish that this proposed accommodation was reasonably likely to enable her to return to work. Any suggestion that Easter would have been able to return to work once she consulted with her doctor was belied by her own testimony that she did not see "marked improvement" until two to three weeks after seeing the throat specialist. While the court sided with the employer here, employers are cautioned to proceed very carefully when faced with an employee's request for additional leave, as the reasonableness of such a request will inevitably turn on case-specific facts.

Inflexible Maximum Leave and No-Fault Attendance Policy Could Violate the ADA and FMLA. The EEOC announced the simultaneous filing and settlement of a disability discrimination lawsuit against global metal goods manufacturer Mueller Industries, Inc., which agreed to pay $1 million along with injunctive relief. The EEOC claimed that Mueller Industries wrongfully terminated employees and/or failed to provide reasonable accommodations for those exceeding Mueller's maximum 180-day leave policy or those in violation of Mueller's attendance policy that assigned points to absences regardless of the reason. The EEOC asserted that Mueller's policies systemically discriminated against employees with disabilities because employers are required to provide reasonable accommodations for employees with disabilities, barring undue hardship, and that employees may request a leave of absence for medical treatment or recovery as a form of reasonable accommodation—notwithstanding an employer's no fault or maximum leave policy. Once an accommodation has been requested or a need for accommodation has been identified, according to the EEOC, the employer is responsible for initiating the interactive process to determine whether the employee can be reasonably accommodated.

What Constitutes A Request For FMLA Leave? In *Shoemaker v. Alcon Laboratories, Inc.*, the U.S. Court of Appeals for the Fourth Circuit addressed what consti-

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tutes sufficient notice that an employee is requesting FMLA leave. Shoemaker experienced pain and dizziness at work but did not tell her employer that her symptoms prevented her from performing her job. When she passed out at work on one occasion, her employer allowed her leave to recover. When she returned, she presented a doctor's note requesting that she work in a different area until further observation, but the employer had already moved her. When Shoemaker called in later to say she would not be at work, she provided no excuse, and was issued a final warning. She was ultimately fired for unexcused absence. Shoemaker then filed suit alleging that Alcon had interfered with her FMLA rights by failing to notify her of her eligibility to take FMLA leave. In affirming the dismissal of Shoemaker's FMLA claims, the Fourth Circuit acknowledged that an employee seeking leave for an FMLA-qualifying reason need not expressly assert rights under the FMLA or mention the FMLA. The court held, however, that the employee must provide sufficient information for the employer to reasonably determine whether the FMLA may apply to the leave request. The court found that Shoemaker did not make a request for leave due to a medical condition when she called in her absence, and her employer's knowledge of recent medical issues at work was not sufficient to put it on notice that her absence might qualify as FMLA leave.

Reduction In Hours Upon Return From Leave Could Be Adverse Action. In *Jones v. Aaron's Inc.*, the U.S. Court of Appeals for the Eleventh Circuit reversed summary judgment for the employer and held that an employee could assert FMLA violations against her employer where her hours were reduced upon her return from leave. When Jones, a customer service representative, returned from FMLA leave, her management scheduled her to work 32 hours per week rather than the 40 hours she had previously worked. The court held that reducing her hours was a materially adverse employment action because she lost pay and the opportunity for sales commissions.

FMLA Opinion Letters Address No-Fault Policies and Elective Surgery. The U.S. Department of Labor's (DOL's) Wage and Hour Division issued an opinion letter (FMLA 2018-1-A) addressing whether an employer's no-fault attendance policy violated the FMLA. Under the policy, employees accrued attendance points for tardiness and absences that remained on employees' records for the following 12 months of "active service." Employees did not accrue points for FMLA-protected leave; however, time spent on FMLA leave was not considered "active service" under the policy. Therefore, an FMLA leave would extend the employee's twelve-month period that the points would remain on his or her record. The DOL reasoned that the removal of absenteeism points is a reward for working and therefore a benefit under the FMLA, but that "[t]he FMLA does not… entitle an employee to superior benefits or position simply because he or she took FMLA leave." The DOL concluded that freezing an employee's attendance points during FMLA leave would not violate the FMLA as long as employees on equivalent types of leave received the same treatment. If the employer counts equivalent types of leave as active service under the policy, however, then the employer may be unlawfully discriminating against employees who take FMLA leave.

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In Opinion Letter FMLA 2018-2-A, the DOL considered whether organ donation surgery can qualify as a "serious health condition" under the FMLA even where the donor is in good health before the donation and chooses to donate the organ solely to improve someone else's health. The DOL concluded that it can qualify as an impairment or protected physical condition under the FMLA so long as it meets the definition of a serious health condition under the statute and implementing regulations (*e.g.*, if it requires "inpatient care" or "continuing treatment"). The DOL noted that organ donation surgery commonly requires overnight hospitalization and post-surgery recovery which qualify as a serious health condition.

Shannon V. Loverich

Supreme Court Addresses More Arbitration Issues

When I last wrote about arbitration developments (six months ago), I identified many issues that were still in need of resolution. Well, here come some of the answers from the U.S. Supreme Court.

In *New Prime, Inc. v. Oliveira*—decided on January 15 of this year—the U.S. Supreme Court issued a rare rejection of an argument in favor of arbitrating a work-related dispute. Section 1 of the Federal Arbitration Act (FAA) exempts from the Act's coverage "contracts of employment of … workers engaged in foreign or interstate commerce." Oliveira's contract with New Prime identified him as an "independent contractor truck driver" rather than an "employee," and New Prime argued that he therefore did not come within Section 1's exemption. The Supreme Court unanimously disagreed.

The Court began by holding that the FAA's "terms and sequencing" required a court to decide for itself whether the Section 1 exclusion applies before ordering arbitration, even when the contract purports to give an arbitrator the authority to decide whether the parties' dispute is subject to arbitration. The FAA would authorize such a delegation to an arbitrator *only* if the FAA applied in the first place. The Court went on to hold that the Section 1 exception should be interpreted according to the ordinary meaning given its words when Congress enacted the FAA in 1925. At that time, dictionaries, judicial opinions, and statutes did not use the term "employment contract" in a technical way, but rather meant it—as the Congress of that day must have—"in a broad sense to capture any contract for the performance of *work by workers*" (emphasis by the Court).

One week earlier, the case of *Henry Schein Inc. v. Archer & White Sales Inc.*, decided January 7, was the subject of Justice Brett Kavanaugh's first opinion. A unanimous Supreme Court settled a recurring question about the arbitrability of "gateway" issues: Does the court or an arbitrator decide whether an arbitration agreement governs *a particular dispute*? While a court will resolve the question if the parties have not agreed otherwise, the Supreme Court previously held that the FAA allows parties to an arbitration agreement to agree that they want an arbitrator to resolve such issues.

Some lower courts, however, had fashioned a judge-made exception for cases in which the claim of arbitrability appeared "wholly groundless." The Justices refused to bless this exception. Justice Kavanaugh reasoned that recognizing an exception allowing courts to deny "wholly groundless" requests for arbitration "would inevitably spark collateral litigation … over whether a seemingly unmeritorious argument for arbitration is wholly groundless, as opposed to groundless." In other words, the Court refused to open the door to wasteful collateral litigation over the gateway question of arbitrability.

A third arbitration case, *Lamps Plus, Inc. v. Varela*, has not yet been decided as of this writing. It involves whether certain contract language may be read to allow aggregated arbitrations. The Court's May 2018 decision

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in *Epic Systems Corp. v. Lewis* had settled that an employee's waiver (as part of an arbitration agreement with an employer) of the right to participate in a class or collective action was enforceable and took precedence over the employee's right to engage in "concerted activity" protected by the National Labor Relations Act. But *Epic* did not dry up the stream of technical issues that can flow from the interplay between such arbitration agreements and the desire of plaintiffs (or their lawyers) to pursue multi-party litigation.

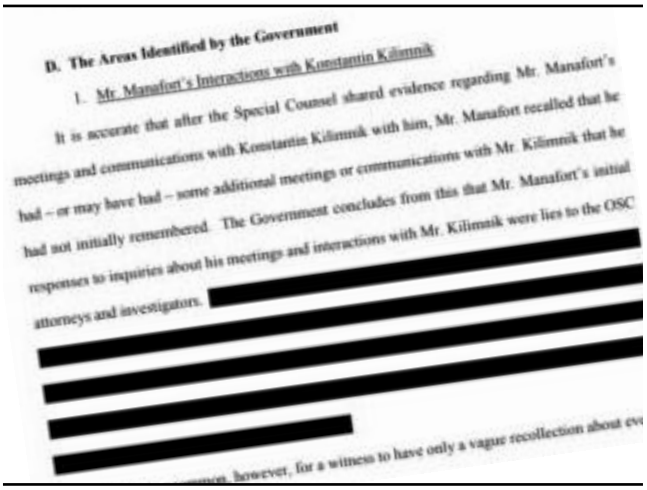
In August 2017, the U.S. Court of Appeals for the Ninth Circuit had construed the arbitration contract between Lamps Plus and its employee, Varela, as permitting class arbitration of Varela's claims arising from a data security breach that affected many Lamps Plus employees. The court had applied California state law to resolve arguable ambiguities against Lamps Plus. Lamps Plus claims, however, that federal law (principally the Court's 2010 *Stolt-Nielsen* decision) requires a clear expression of the parties' intention to permit arbitration of aggregated claims, without resorting to state-law rules for resolving contractual ambiguities. This arbitration agreement contained no express authorization for, or prohibition against, class arbitration, though there were several references to the employee in the first person singular.

If the Supreme Court agrees with the lower courts that the parties' arbitration agreement is ambiguous on the point, then what happens? Lamps Plus maintains that an express statement that does not rely on state law rules for resolving contractual ambiguity is required, and that the Court should, if necessary, take *Stolt-Nielsen* a step further by holding that only "clear and unmistakable language" can authorize class or other aggregated arbitration proceedings. Varela, of course, argues that Supreme Court precedents require arbitration contracts to be construed by applying state-law interpretive principles, and that those principles favor his position. A decision should be forthcoming soon.

Noel D. Massie

When Redaction Goes Wrong…

On January 8, 2019, we learned that former Trump campaign chairman Paul Manafort had shared 2016 election polling data with a former Russian military intelligence officer tied to Vladimir Putin. The source of this collusion-y bombshell? Manafort's own lawyers, who botched an attempt to electronically redact a document they filed on PACER, the federal court electronic filing system. Manafort's counsel inserted black bars over text they intended to conceal, while leaving the actual text in place underneath—text that remained accessible by simply copying and pasting that text into a new document.



D. The Areas Identified by the Government

1. Mr. Manafort's Interactions with Konstantin Kilimnik

It is accurate that after the Special Counsel shared evidence regarding Mr. Manafort's meetings and communications with Konstantin Kilimnik with him, Mr. Manafort recalled that he had – or may have had – some additional meetings or communications with Mr. Kilimnik that he had not initially remembered. The Government concludes from this that Mr. Manafort's initial responses to inquiries about his meetings and interactions with Mr. Kilimnik were lies to the OSC attorneys and investigators. [redacted]

[redacted] however, for a witness to have only a vague recollection about ev[redacted]

Manafort's attorneys are certainly not the first to make this mistake. To give an example from the other side of the aisle, in 2010 attorneys representing former Illinois governor Rod Blagojevich filed a redacted document in advance of his corruption trial. Through the same cut-and-paste technique, it was revealed that Blagojevich had asked the court to issue a trial subpoena for President Barack Obama. And for those seeking a non-political example, in August 2007, the Federal Trade Commission in an antitrust lawsuit improperly redacted descriptions of Whole Foods' marketing and negotiation strategies in a PACER filing.

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Attorneys asking themselves how to use the redaction function in their Adobe program can consult online resources—including a California federal court website explaining how and how *not* to redact, at https://www.cand.uscourts.gov/ecf/redaction. But make sure that you and your legal staff learn to redact properly, or else you are exposing yourself to all sorts of liability concerns, professional and otherwise.

Imagine that, in the midst of heated commercial litigation, you inadequately redact an exhibit containing your client's trade secrets. That may subject you to a malpractice action. A Wisconsin court recently held, in *Thiery v. Bye*, that an attorney had a duty of reasonable care to protect his client's confidential information, which he violated by not adequately redacting his client's identity from various documents.

Or what if you obtain your opponent's confidential information, and fail to correctly redact that information? You might get sued. In *Johnson v. Johnson & Bell, Ltd.*, an Illinois court heard an invasion-of-privacy case brought by a former federal plaintiff against her opposing counsel, after counsel did not redact plaintiff's social security number and financial information from a pretrial order filed on PACER. Fortunately for the attorneys, the suit was dismissed based on an Illinois privilege. But do you want to be the test case in your jurisdiction?

Finally, even if your client doesn't sue you for malpractice and your opponent doesn't sue you for negligence, the failure to properly redact can lead to sanctions or other professional liability. For instance, in *Reed v. AMCO Ins. Co.,* a Nevada court sanctioned the defendant for failing to redact personal identifying information in court filings, ordering the payment of attorney's fees incurred by the plaintiff in moving to have the information sealed and removed from the public docket. And in *Rose v. Kentucky Bar Ass'n*, the Kentucky Supreme Court issued a public reprimand against an attorney who failed to redact his client's social security number in a bankruptcy filing.

So remember to always redact your litigation filings correctly or else suffer the consequences!

Thomas J. Davis

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