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WORKPLACE CHRONICLE

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The Third Circuit Approves The Use of Truant Officers To Combat Sick Leave Abuse

Inside this issue:

USE OF TRUANT OFFICERS	...1
CLIENT VICTORIES	...1
DISPOSAL OF CONSUMER INFORMATION	...2
CLASS ACTION FAIRNESS ACT	...3

Recent Victories for Our Clients

PCT obtained dismissal of a class action complaint filed in Wayne County Circuit Court by the SEIU on behalf of 80 employees. The complaint alleged that the defendant breached a contract negotiated for the benefit of the class and tortiously interfered with the relationship between the class and a public body, which had awarded a contract for services to the defendant. The action was filed when the defendant did not hire the predecessor's workers even though they did not apply for work. PCT removed the case to federal court on the premise that the case was preempted by federal labor law. PCT then moved for dismissal arguing that federal law preempted the plaintiffs' state law claims. The Court agreed and the case was dismissed before a single deposition was taken or interrogatory served. ❖

In the April, 2004 *Workplace Chronicle*, we wrote about the difficulties employers face in administering attendance policies. We discussed the prospect of bringing back the truant officer as a way to combat employee abuse of attendance policies. Such a strategy harkened our memory of mothers telling us that if we were too sick to go to school, we were too sick to go outside and play. Of course, in the employment setting, employees who call in sick should not be missing work so they can run errands, go shopping, work on their cars or take their kids to Cedar Point.

We recommended limiting the investigation of employees off "sick" to the employee's scheduled work hours to avoid a challenge under the Michigan Bullard-Plawecki Act, which prohibits keeping records of an employee's activities during non-working hours. We also pointed out that using an employee as a truant officer rather than a third party avoids any challenge under the Fair Credit Reporting Act.

While we like to think that we are as creative as anyone when it comes to assisting employers with difficult employment problems, a recent decision from the Federal Third Circuit Court of Ap-

peals shows that someone else has devised a way to deter abuse of sick leave, which takes the truant officer concept to a whole new level. And, the best part is that the idea has recently survived challenge under the FMLA. *See e.g. Callison v. City of Philadelphia*, ___ F3d ___, 2005 WL 900029 (3rd Cir 2005).



In the *Callison* case, the City of Philadelphia had adopted an attendance policy with the following requirement:

"During regular working hours, when an employee is home on sick leave, the employee must notify the appropriate authority or designee when leaving home and upon return. An employee is to remain at home except for personal needs related to the reason for being on sick leave. While on sick leave an employee may be called or visited by a sick leave investigator unless the employee has 150 days or more of accumulated sick leave credit."

One employee, Callison, received a write-up when a sick leave investigator called his home while he was supposed to be sick and he was not there. Apparently Callison had left his home without calling the Hotline first. Subsequently, while off work on an approved FMLA

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- Relief of Charge
- Sample CCW Memo
- Sample Certification for Users of Consumer Report
- Severance Agreement and Release of Claims
- Severance Agreement and Release of Claims (In Compliance With Older Worker Benefit Protection Act)
- WH 380/381 Forms (under FMLA guidelines)
- Workplace Violence—Risk Factor Checklist

...Continued from page 1

leave, Callison left his home on two separate days without first calling the Hotline. When he returned to work at the conclusion of his FMLA leave, Callison was suspended without pay for violating the call-in requirement.

Callison brought suit, claiming the City had interfered with his rights under the FMLA. The federal district court disagreed and dismissed the case. The district court rejected the notion that the purpose of the FMLA was compromised by the City’s attendance policy. Instead, the district court found that the policy simply ensured that employees did not abuse their FMLA rights. On appeal, the Third Circuit agreed because the policy “merely sets forth obligations of employees who are on leave, regardless of whether the leave is pursuant to the FMLA...[and] provide[s] an additional safeguard against sick leave abuse by employees.” The Third Circuit concluded its analysis by determining that there is no right in the FMLA to be “left alone.”

The Callison decision is an important one, particularly for employers who have a high absenteeism rate and all the frustrations that go with it. The Callison case respects the right of employers to police attendance abuse and endorses the use of a truant officer or “sick leave investigator” to check up on absent employees during their regular scheduled hours. We believe that employers should fight back and adopt policies like the one used by the City of Philadelphia. Quite frankly, we do not believe it is a novel concept to insist that employees who call in sick do so because they are sick. And, as we indicated last April, “an employer need only catch a few attendance scammers before word would spread and abuse of the system would wind down.”



Disposal of Consumer Information

On June 1, 2005, the FTC's rule on the proper storage and disposal of certain “consumer information” goes into effect. This rule was issued by the FTC as part of its jurisdiction under the Fair And Accurate Credit Transactions Act or FACTA.

The latest FACTA rule requires any business “that maintains or otherwise possesses consumer information, or any compilation of consumer information, derived from consumer reports for a business purpose” to “properly dispose of such information or compilation.” FACTA disposal rules apply to any business that directly or indirectly has or uses “consumer information” regardless of the business' size or number of employees. Both FACTA and the new rule are supposed to cut down on the incidences of identity theft by, among other methods, restricting the ability of thieves to go “dumpster diving” for valuable consumer information contained in discarded business records. The term “consumer information” means any record about an individual, whether in

...Continued from page 2

paper, electronic, or other form, that is a consumer report or is derived from a consumer report. In other words, if your business has or obtains any consumer credit reports, employee background reports or similar reports that have been prepared by an outside agency or company, then the FACTA disposal rules apply to those records.

FACTA also covers any of your own company's records that are "derived" from a consumer credit report or employee background report. So if your company copies, uses or incorporates any information from a consumer credit report or employee background report that you obtained from an outside agency, then that report is also subject to FACTA disposal rules.

This "information derived from" rule apparently has no limit and can raise some interesting problems for businesses that handle a large amount of consumer information received from a variety of sources.


FACTA provides for a range of civil liabilities and penalties for noncompliance. For example, a business that fails to comply with the FACTA rules can be liable for actual damages in a civil lawsuit brought by anyone whose identity is stolen as a result. And, for those businesses that love the thought of being a defendant in a class action lawsuit, FACTA allows class action lawsuits to be filed.

Presumably, most businesses are already properly storing their valuable business records. The FACTA rule does not mandate specific disposal measures, and the proper disposal method can depend on the size and resources of the business. It does, however, indicate that "reasonable measures" are required -- such as the establishment of policies and procedures governing disposal, as well as appropriate employee training."

If a business decides to outsource the disposal, then the business is still on the hook. The FACTA rules require the business to "take reasonable steps to select and retain a service provider that is capable of properly disposing of the consumer information at issue; notify the service provider such information is consumer information; and enter into a contract that re-

quires the service provider to dispose of such information in accordance with the Rule."

In order to be sure you comply with FACTA, prior to the new law's implementation on June 1, 2005, business owners are well advised to become familiar with the rule, identify any consumer information, which they possess, and take great care when disposing of such information.

<http://www.ftc.gov/os/2004/11/041118disposalfrn.pdf> 


Class Action Fairness Act Is Signed Into Law

On February 18, 2005, President Bush signed into law the Class Action Fairness Act of 2005. The law significantly limits a plaintiff's ability to file a class action lawsuit in state court. Prior to February 18, a plaintiff could seek to represent a nationwide class of individuals in virtually any state county across the country. Of course, some state counties are notoriously friendly to plaintiffs and unfriendly to business, especially big business. Consequently, class action plaintiffs and their counsel "forum shopped" their cases and filed them in these hospitable counties regardless of where the business was located.

Now, however, federal district courts have original jurisdiction in class actions where the amount in controversy exceeds \$5,000,000, at least one class member is a citizen of a state different from any defendant, and the number of class members exceeds 100. The main exception to this is where the class is made of individuals of a state and is against a business headquartered in that state. An example would be a class of Michigan residents suing General Motors in Michigan. In such a case, there would not be federal jurisdiction based upon the new Act. There would have to be some other basis for federal court jurisdiction.

Class action litigation in federal court is generally better for businesses than it is in state court. There are two primary reasons for this. First, class certification standards are more difficult on



plaintiffs in federal court than in most state courts and a business is more likely to prevail on the merits without a trial. Second, there is less of a tendency that the plaintiffs will benefit from the “home field advantage” in federal court. The new law can be found at 28 USC §1332(d), as amended. 



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