

WILLCOX & SAVAGE

EMPLOYMENT LAW O U T L O O K



TEN PRACTICAL TIPS FOR MANAGING INTERMITTENT LEAVE UNDER THE FMLA

William M. Furr



We frequently hear clients complain about their employees' use of intermittent leave under the Family and Medical Leave Act (FMLA). The FMLA allows employees to take leave on an intermittent or reduced schedule basis if the employee's serious health condition (or the serious health condition of a family member) renders intermittent or reduced schedule leave medically necessary. (Intermittent leave for the birth or placement of a child is not required under the Act, but the employer and the employee may agree to such an arrangement.) The employee must give the employer as much notice as practicable before the need for intermittent leave and must make a reasonable effort to schedule the leave so as not to disrupt business operations. Employers should consider the following ten practical tips for managing intermittent leave under the FMLA.

1. Always require your employees to submit medical certification forms from their physicians. We recommend using the Department of Labor's medical certification form because it has been approved by the Department of Labor and the courts. You should insist that the employee's physician fill out the form completely.
2. Return the form to the employee if it is incomplete or incomprehensible. Instruct the employee to resubmit the form to his or her physician, pointing out those areas on the form that are either incomplete or incomprehensible.
3. Require the employee to get a second medical opinion from a physician of your choice if you doubt the employee's physician's opinion expressed on the certification. You have a right under the FMLA to require the employee to see a second physician provided that you pay for the physician's visit. If the second physician disagrees with the first physician, the employee should be seen by a third physician whose opinion will control.

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LITTLE ADO ABOUT VERY LITTLE: 2006 GENERAL ASSEMBLY

Samuel J. Webster



With apologies to The Bard of Avon, the 2006 General Assembly really did very little in the labor and employment arena. Most of the enactments were specialized or technical. New laws:

- Make it a crime to coerce or threaten an individual to declare falsely his or her employment status for the purpose of evading withholding or other employment related taxes;
- Allow sole shareholders of stock corporations and sole members of limited liability companies to purchase workers' compensation insurance for themselves;
- Allow school boards to maintain personnel files in digital or paper format;
- Increase the maximum weekly unemployment compensation benefit from \$330 to \$347 for claims after July 3, 2006;
- Modify the method of calculating temporary partial disability benefits under Workers' Compensation;
- Exempt Workers' Compensation benefits from the Structured Settlement Protection Act;
- Expand the definition of "salesperson" under the Motor Vehicle Dealer statutes;
- Provide for background checks for public school contract employees;
- Provide for background checks for persons who enter the homes of others, family day homes, and day care centers;
- Clarify the effect of a promise not to plead the statute of limitations;
- Require employers to prorate child support withholding if more than one child support withholding order exists against an employee. ■

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4. When intermittent leave is requested, determine how long the employee will need to work intermittently, the frequency with which the employee will be out of work and the anticipated dates and times that the leave will be necessary. This will allow you to prepare for the employee's departure from work.
5. If the intermittent leave is to care for a family member, make sure that a physician has certified that the employee is "needed to care for" the family member. The mere fact that a family member has a serious health condition, alone, may not be sufficient.
6. Train the employees who will be overseeing FMLA administration. These employees need to be aware of the eligibility requirements, the employer's right to request additional documentation, the right to request ongoing certification regarding the employee's status and the limitations on the employer's ability to terminate the employee's employment during FMLA leave.
7. Use a "rolling" twelve-month period to calculate eligibility for FMLA leave. The FMLA allows eligible employees to take up to twelve weeks of FMLA leave in a twelve-month period. The "rolling" method measures backwards from the dates that the employees use FMLA leave to determine whether the twelve-weeks maximum has been reached. A rolling twelve-month period allows employers to keep employees from combining FMLA leave at the end of one eligibility year with FMLA leave at the beginning of a new eligibility year. (Keep in mind that the Department of Labor's regulations require employers to provide sixty-days notice to employees before changing to a "rolling" twelve-month period.)
8. Require employees on intermittent leave to comply with your call-in procedures. If your policies require employees to call their supervisors or to call Human Resources if they are going to be absent or late to work, we recommend requiring employees on intermittent leave to be held to that policy. This is especially important if the intermittent leave is neither predictable nor scheduled in advance.
9. Track intermittent leave so you will know when the twelve weeks of eligibility has expired.
10. Keep in mind that the FMLA allows employers to dock the pay of exempt and non-exempt employees who have depleted their paid leave banks without jeopardizing the employees' exempt status under the Fair Labor Standards Act.

Intermittent leave can create unusually difficult issues for employers. By actively managing your intermittent leave procedures, you can minimize abuses by employees while complying with the FMLA. ■

EXECUTIVE ORDER ADDS SEXUAL ORIENTATION TO LIST OF PROTECTED CLASSES IN STATE EMPLOYMENT

Ruby W. Lee



Prior to leaving office, former Governor Mark Warner issued an Executive Order prohibiting employment discrimination based on sexual orientation by all state agencies in the Commonwealth. The other characteristics protected by the Executive Order include race, sex, color, national origin, religion, age, political affiliation, veterans' status, and qualified persons with disabilities. The addition of sexual orientation to the list will prohibit state employers from making employment decisions based on an individual's real or perceived sexual orientation. Governor Tim Kaine reaffirmed the policy upon taking office in January 2006.

Federal courts have consistently rejected the notion that Title VII of the Civil Rights Act of 1964 - the statute that protects individuals from employment discrimination "based on ... sex" - extends to protect individuals from employment discrimination based on sexual orientation. This interpretation of Title VII has led many states and municipalities to adopt their own rules prohibiting discrimination based on sexual orientation at the state and/or local levels. Currently, over a third of states bar employment discrimination based on sexual orientation for private sector employees (Virginia is not one of them). An even greater number - now including Virginia - bar employment discrimination based on sexual orientation for state employees.

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Attend Our May 10 Business Immigration Seminar! Employing Foreign Nationals in the U.S.

*A Complimentary Seminar for Managers and
Human Resource Professionals*

Willcox & Savage attorneys Susan R. Blackman and Ruby W. Lee will address what employers need to know about U.S. immigration, including procedures for green cards and visas.

Wednesday, May 10, 2006 8:00 AM – 10:30 AM
Holiday Inn Select, Norfolk, Virginia

Registration:

*<http://www.willcoxsavage.com/nep/seminars.php>
or call 757/628-5635. Seating is limited for this
informative and free seminar.*

TERMINATION OF BENEFITS

Stephen R. Jackson and Robert L. "Bo" Foley



Employers are often faced with the issue of how to properly terminate workers' compensation payments when an employee returns to unrestricted work. While employees are entitled to lifetime medical benefits related to the injury by statute, return to unrestricted work amounts to a change in condition which must be documented with the Virginia Workers' Compensation Commission. Often employees and their insurance carriers assume they can simply terminate the payment of benefits. Wrong. Only the Commission can terminate an outstanding award.



In 2002, the Virginia Court of Appeals in *Lam v. Kawneer Co., Inc.*, offered employers some hope that they did not need to always jump through the administrative hoops established by the Workers' Compensation Commission if a former employee was no longer eligible for benefits previously awarded due to a change in condition.

Under the statutory provisions of the Workers' Compensation Commission, an employer is required to file a Termination of Benefits form signed by all parties with the Commission or request a hearing date in order to have an award officially terminated. If the employee or his attorney refuses to endorse the Termination of Benefits form, then the employer is required to notice a hearing and put on evidence that circumstances have changed warranting a termination of the award. These steps can seem cumbersome to overwhelmed employers, especially when an employee has notified the employer of the changed circumstance and did not complain when the workers' compensation checks stop arriving. However, employers must always follow the requirements of the Virginia Workers' Compensation system or face stiff penalties, including payment of benefits even after the undisputed return to work. The leniency potentially offered to employers in *Lam* has all but evaporated in subsequent decisions.

The *Lam* Court granted Lam's employer a reprieve from the necessity of following the precise requirements of the Workers' Compensation provisions. Lam had failed to comply with the statutory requirement that he notify his former employer that he had returned to employment and received an increase in his earnings. He then sought to enforce his award of benefits after his employer had ceased paying benefits and after it learned independently that Lam had returned to work at a higher rate of pay. While the employer did not respond to the Commission's annual letter informing it that Lam's award was still enforceable, the Court reasoned that "when a worker does not suffer a loss of wages, receipt of compensation benefits would unjustly enrich the worker and result in manifest injustice." Thus, the Court felt that the Commission properly utilized its equitable

powers when it denied Lam's claim for the unpaid benefits totaling \$58,049.30.

Unfortunately, since the issuance of the *Lam* opinion, the Virginia Supreme Court and subsequently the Virginia Court of Appeals, has taken every opportunity to restrict its application with costly results to employers. The Virginia Supreme Court's restriction of the scope of the *Lam* opinion began in earnest in 2004 with *Washington v. United Parcel Service of America*. In that case, the Supreme Court overturned the Court of Appeals' decision to uphold the Commission's application of the doctrine of imposition to avoid imposing both a 20% penalty on the employer for failure to pay ordered benefits as well as the previously unpaid benefits. The Court held that Virginia law does not give an employer or its carrier the unilateral right to cease paying compensation benefits to the disabled employee when that employee returns to work. That same rationale was extended in *Uninsured Employers Fund v. Peters*. There the Court held that "an employer's failure to follow to Commission rules on termination benefits will not be condoned even if the result would have been the same." The Commission is required to follow the principles established by statutes and rules construing them.

All employers must follow the requirements of the Virginia Workers' Compensation Act and file the required Termination of Benefits form with the Commission. If an employee refuses to cooperate by signing the Termination of Benefits form, then counsel for the employer should notice a hearing in order to properly terminate the employee's benefits. Failure to do so could lead to a significant penalty against the employer. Failure to do so within two years from the last day that compensation was paid can result in the Commission losing jurisdiction to rule that a change in condition has occurred. Getting the Commission's blessing to terminate benefits is less painful and expensive than the alternative. ■

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TO LIST OF PROTECTED CLASSES IN STATE
EMPLOYMENT**

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Additionally, many of the Commonwealth's private sector and nonprofit employers are opting to amend their employment discrimination policies to prohibit employment discrimination based on sexual orientation. According to Equality Virginia, a nonprofit organization dedicated to supporting the rights of gay, lesbian, bisexual, and transgender Virginians, at least eight out of the Commonwealth's top ten employers have sexual orientation protections in their nondiscrimination policies: Wal-Mart, Northrop Grumman Newport News, Food Lion, Inova Fairfax Hospital, Capital One Bank, Science Applications International, Booz Allen Hamilton, and 7-Eleven.

It should be noted that the Virginia Senate General Laws Committee voted against SB 700 (8-6-1), which would have codified the language of the Executive Order and prohibited discrimination based on sexual orientation by the Commonwealth's cities, counties, and other political subdivisions. Nevertheless, the growing trend is to protect employees from discrimination based on sexual orientation, even when the law does not mandate such protection. ■

**Immigration Alert: CIS Currently Accepting
H-1B Visa Petitions for Fiscal Year 2007**

Ruby W. Lee

H-1B visas for Professionals in Specialty Occupations are subject to a congressionally-mandated annual cap of 65,000 visas per year. CIS started accepting H-1B petitions for Fiscal Year 2007 (October 1, 2006 through September 30, 2007) on April 1, 2006, and will continue to do so until the cap runs out. Last year, employers submitted H-1B petitions beginning April 1, 2005 for FY 2006. By August 10, 2005, the annual cap had been reached, and no new H-1B visas were available for the remainder of FY 2006 (with limited exceptions). We expect that this year, the cap will also be reached very quickly. For this reason, if you plan to submit a petition to employ an individual in H-1B status during FY 2007, we highly recommend that you get the petition prepared and filed as soon as possible.

Please note that the visa cap does not apply to individuals currently in H-1B status who will be seeking renewals or extensions in FY 2007. Similarly, the cap does not apply to individuals currently in H-1B status who will be changing employers in FY 2007.



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