EMPLOYERS COMBAT FMLA ABUSE

The federal Family and Medical Leave Act (FMLA) gives eligible employees the right to up to 12 weeks of leave per year, which may be taken intermittently for certain specified reasons, including the care of designated family members with serious health conditions.

The FMLA also prohibits an employer from interfering with, restraining, or denying the exercise of or the attempt to exercise any right given under the FMLA. One of the bases upon which an employer can defeat an FMLA "interference" claim is a showing by the employer that an employee did not, in fact, take leave for a purpose authorized under the FMLA. Naturally, the availability of this defense has prompted some employers to undertake investigations of (some might say "spying on") employees suspected of abusing the rights afforded by the FMLA.

At least two federal courts of appeals have effectively allowed at least some degree of employee surveillance by holding that in order to defeat an FMLA interference claim based on an employee's asserted right to reinstatement, an employer need only show that it refused to reinstate the employee based on an "honest suspicion" that the employee was abusing his or her leave. Sometimes the basis for such a suspicion is produced by detective work of the kind engaged in by private investigators.

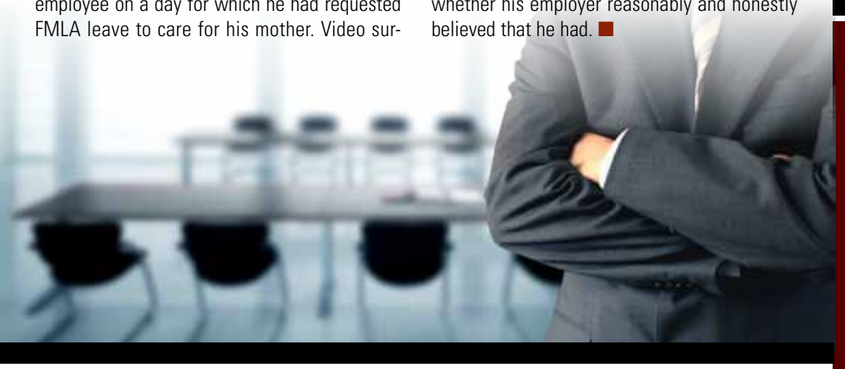
In one such case, the employer had an honest suspicion that an employee had misused his FMLA leave and, therefore, the employer's decision to terminate the employee did not interfere with the employee's right to reinstatement. The employer suspected that based upon the employee's prior absenteeism, the employee was misusing his FMLA leave, so the employer hired a private investigator to observe the employee on a day for which he had requested FMLA leave to care for his mother. Video surveillance revealed that the employee did not appear to leave his house that day.

When the employer questioned him, the employee could not recall what he had done on that day, but he asserted that he had not misused his FMLA leave. Although the employee later provided supportive documentation from his mother's nursing home and doctor's office, the paperwork did not clear the air but, rather, only raised further questions for the employer, as the documents were facially inconsistent and conflicted with the employer's internal paperwork.

In a second case, an employer was found to have had an honest belief that an employee had committed disability fraud in taking FMLA leave and, therefore, his termination for such fraud was found not to have been a pretext for FMLA retaliation.

It was not disputed that the employee suffered from a herniated disc and sciatica. However, although the employee had been approved for disability leave based upon his having reported excruciating pain and an inability to stand for more than 30 minutes, coworkers saw him at an Oktoberfest festival a few days later without any indication that his movements were painful or restricted. In fact, he was also able to walk 10 blocks and remain at the crowded festival for 90 minutes.

The employer's investigation included interviews with the coworkers, and the employee was permitted to submit documentation and other evidence in his defense. Still, when the dust settled, the court ruled that the employer had acted within its rights in terminating the employee. Importantly, the decisive question that sealed the employee's fate was not whether he had actually committed fraud, but whether his employer reasonably and honestly believed that he had. ■



Actual resolution of legal issues depends upon many factors, including variations of fact and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking any action on matters covered by this newsletter. Nothing herein should be construed to create or offer the existence of an attorney-client relationship.

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Super Lawyers, Best Lawyers, Legal Elite, & Rising Stars

New HIPAA Rule

Employers Combat FMLA Abuse

HUTCHISON & STEFFEN
ATTORNEYS

Legal Matters

Summer 2013

ARBITRATION AGREEMENTS CAN GO TOO FAR

Strong public policies support the appropriate use of arbitration over litigation in settling legal disputes and, in fact, such policies underlie the Federal Arbitration Act. That said, an agreement to arbitrate disputes is subject to well established principles rooted in the law of contracts. This means, among other things, that courts will step in and declare void an ostensible agreement to arbitrate if its effects are too heavily weighted in one party's favor. Two recent examples of this overreaching by the more powerful party illustrate the point.

In the first case, a former employee sued his former employer under the Fair Labor Standards Act for overtime wages. A federal appellate court prevented the employer from enforcing an arbitration agreement that was in the company's employee handbook. The fatal flaw in the arbitration provision was that rather than being a legitimate contract, the bargain was "illusory," a legal term meaning that one party, the employer, could effectively avoid its promise to arbitrate by amending the provision or even terminating it altogether.

Although the employer was required to provide an official written notice of any changes to the handbook, a change in terms clause gave the employer the "right to revise, delete, and add to the employee handbook" with retroactive effect. There was no savings clause excepting pending disputes from any changes made by the employer.

In the second case, the lopsided bargain that led a court to declare an arbitration agreement unenforceable was more a matter of dollars and cents. A couple purchased a home, contingent upon a satisfactory home inspection. They engaged the services of a home inspection company, which had an arbitration clause in its standard contract. The couple signed the contract, but its most objectionable parts were tucked away in the contract, either in fine print, or hidden among other clauses, or both.

The contract's provisions relating to arbitration were so one sided in favor of the home inspection company that it effectively "exculpated" the company from liability in a way that violated public policy. In particular, the contract limited the clients' recovery from the inspector for a negligent inspection to the $285 contract fee; it also required binding arbitration of any dispute, even requiring the party seeking arbitration to pay, among other costs, an initial arbitration fee of $1,350, plus $450 per day after the first day of a hearing.

In short, clients could well end up paying out in fees and costs many times the maximum amount they could recover from the company. Also influencing the court's decision were the facts that home inspection services are generally thought suitable for public regulation and that the services

Continued...

SUPER LAWYERS, BEST LAWYERS, LEGAL ELITE, & RISING STARS


Mark A. Hutchison


John T. Steffen


Michael K. Wall


Joseph "Sid" Kistler


Patricia Lee


Joseph R. Ganley


Todd L. Moody


James H. Randall


Christian M. Orme


Cami M. Perkins


Jacob A. Reynolds


Shannon R. Wilson


Richard L. Doxey


Z. Kathryn Branson


Jeffrey R. Hall


Jessica S. Taylor

Congratulations

TO ALL OF THE ATTORNEYS WHO MADE THE LISTS!

As a law firm that believes that clients deserve the best lawyers who know how to win, the Firm takes great care in selecting the attorneys who represent clients. These attorneys are dedicated to their professional craft and to becoming the best in the business. This summer, Hutchison & Steffen was recognized for the incredible legal talent within the Firm, when 16 attorneys were named to four different annual lists, highlighting their skill and work in the legal community. These lists–Mountain States Super Lawyers, Mountain States Rising Stars, Nevada Business Magazine's Legal Elite, and Nevada's Best Lawyers–are all highly regarded and well-respected in the profession, and inclusion is a significant honor.

Mountain States Super Lawyers recognized Richard L. Doxey, Joseph R. Ganley, Mark A. Hutchison, Joseph "Sid" Kistler, Todd L. Moody, James H. Randall, John T. Steffen and Michael K. Wall. The attorneys were selected using a rigorous, multiphase rating process in which peer nominations and evaluations were combined with third-party research.

Mountain States Rising Stars uses the same selection process as Super Lawyers, with one exception: to be eligible for inclusion in Rising Stars, a candidate must be either 40 years old or younger or in practice for 10 years or less. Named to this list from the Firm were Z. Kathryn Branson, Jeffrey R. Hall and Jessica S. Taylor.

Nevada Business Magazine publishes an annual list of attorneys selected for their accomplishments by their legal professional peers. The list is compiled using a strict voting process to select attorneys for the Legal Elite list each year. This year, 13 Hutchison & Steffen attorneys were selected. The Legal Elite list is split into multiple categories. Selected as the "Best Up and Coming" were Z. Kathryn Branson, Richard L. Doxey, Christian M. Orme, Cami M. Perkins, Jacob A. Reynolds, and Shannon R. Wilson. Within the "Southern Nevada Best" category were Joseph R. Ganley, Mark A. Hutchison, Joseph "Sid" Kistler, Patricia Lee, Christian M. Orme, Jacob A. Reynolds, John T. Steffen, Kumen L. Taylor, and Michael K. Wall.

Finally, Firm founding partner Mark A. Hutchison was recognized in the Best Lawyers in Nevada for his work in commercial litigation. The list, published in the 2013 edition of The Best Lawyers in America, is the oldest and most respected peer-review publication in the legal profession. A listing in Best Lawyers is widely regarded by both clients and legal professionals as a significant honor, conferred on a lawyer by his or her peers. For more than three decades, Best Lawyers® lists have earned the respect of the profession, the media, and the public as the most reliable, unbiased source of legal referrals anywhere. ■

Patricia Lee Honored with ABA National Pro Bono Award

Firm partner Patricia Lee received the American Bar Association's (ABA) national Pro Bono Publico Award–the first Nevadan to receive the award–for her demonstrated outstanding commitment to volunteer legal services for the poor and disadvantaged. Patricia was nominated for the award by the Legal Aid Center of Southern Nevada, where she formed a partnership in 2012 for Hutchison & Steffen to formally adopt an entire practice group (domestic violence), ensuring that all such cases would be handled completely and effectively.

Patricia, one of three attorneys in the country to receive the award this year, was honored at the Pro Bono Publico Awards Assembly Luncheon during the ABA Annual Meeting in San Francisco, on August 12, 2013.

Since joining Hutchison & Steffen in 2002, Patricia has been deeply involved in pro bono service. As the Firm's pro bono liaison, she has been tasked with finding and pursuing opportunities for the attorneys in her firm. Patricia personally works with Legal Aid as a member of the Legal Aid Advisory Council and attorney for the Children's Attorney Project, which represents abused and neglected children in Court. Judge Betsy Gonzales appointed Lee as a member of the Self-Help Center's Steering Committee to analyze and make recommendations to improve services and funding for the Center so that parties who can't afford attorneys can obtain easily accessible information in an efficient and useful manner. She was also appointed Chair of the Nevada Crime Commission by Governor Gibbons, and reappointed by Governor Sandoval. The primary purpose of the Commission is to act as an advisory board to the Governor on law enforcement and crime related issues, with an eye towards maximizing the safety, prosperity, and public awareness of citizens. ■

Continued from front.

provided by home inspectors are a matter of practical necessity for their clients and are crucial to the clients' decision to purchase a home.

To top it off, the court noted that the wife, who had been primarily responsible for the house purchase, had only a high school diploma and no expertise or experience in home construction and that the couple had never purchased a home and were entirely at the mercy of the inspector, without any means of protection if the inspector performed a careless inspection. ■

NEW HIPAA RULE

The U.S. Department of Health and Human Services has adopted a new rule concerning privacy and security for health information, to take into account changes that have occurred in health care since enactment of the Health Insurance Portability and Accountability Act (HIPAA) of 1996. Some of the key features in the 563-page final rule are outlined below.

Privacy notices given by covered entities, such as health care providers and health plans, must now include a statement about a patient's right to restrict the disclosure of his or her health information when paying out of pocket for the service.

"Downstream" business associates of covered entities are also covered by the new HIPAA rule. Thus, such subcontractors as billing and phone services, document and data storage companies, and other such entities whose functions involve the disclosure of protected health information are subject to liability for violations and the potential for agency enforcement action and penalties. This aspect of the new rule was meant to prevent covered entities from effectively skirting their HIPAA obligations by farming tasks out to subcontractors.

Before the new rule, a breach had to be reported to a patient if it posed a significant risk of financial, reputational, or other harm to the individual. Now, if health information is compromised, a data breach is presumed, with the attendant notification requirements, unless there is a low probability that the protected information was in fact compromised.

Factors to consider as to whether a breach must be reported are the nature and extent of the information, the person to whom the data was disclosed, whether that person actually viewed it, and whether the risk was mitigated in some manner.

While patients already had a right to a copy of their health records, the new rule changed the default form of production from a hard copy to an electronic copy when the information is maintained electronically. Entities may charge a reasonable fee for providing the information, and now the information must be provided within 30 days of the request.

The new final rule took effect on March 26, 2013, and compliance with all applicable requirements must occur by September 23, 2013. ■