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EMPLOYMENT LAW DIGEST

Holland & Holland L.L.C.

1250 NE Loop 410 Ste. 808

San Antonio, Texas

78209

(210) 824-8282

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Michael L. Holland

Board Certified

Labor & Employment Law

Texas Board of Legal

Specialization

mholland@hollandfirm.com

*****

Susan Stone– Of Counsel

sstone@hollandfirm.com

*****

W. Lamoine Holland

lholland@hollandfirm.com

INSIDE THIS ISSUE:

TEXAS EMPLOYER LIABILITY FOR INDEPENDENT CONTRACTORS

Texas employers frequently hire independent contractors to perform certain tasks. Whether or not these employers are liable for the acts of independent contractors is an unsettled area of employment law.

The general rule regarding employer liability for independent contractors is that the employer controls the details or methods of the contractors' work to such an extent that the contractors cannot perform the work as they choose. The key issue is the amount of control the employer exerts over the contractor. The more control exerted, the fuzzier the line between independent contractor and employee becomes and the more likely the employer will be held liable. Essentially, in order to avoid employer liability, the independent contractor must determine the means and methods of work. The Texas Supreme Court recently issued an important decision regarding this issue in the case of *The Fifth Club v. Ramirez.*

This case involved Club Rodeo, an Austin nightclub that employs certified peace officers who are moonlighting as its security. One night, Roberto Ramirez arrived at the club after he had been drinking. The club would not allow him entry, and the security officers escorted off of the premises. Ramirez alleged that while he was being escorted out, one of the officers, David West, rammed his head against a concrete wall so that he was knocked unconscious and then hit him several times. Ramirez later sued West and the club for damages. The trial court and court of appeals held in favor of Ramirez, finding liability on the part of West and Club Rodeo. The Texas Supreme Court reversed, holding that Club Rodeo was not liable.

Ramirez had argued an exception to the general rule of employer liability for independent contractors that a number of states and some Texas courts have adopted. This exception, called the "personal character exception", provides that hiring for certain types of jobs, such as security personnel, is personal in nature because of the nature of the security work. Therefore, the employer is hiring a specialized worker with specialized skills. On this theory, Ramirez argued that the Club was liable for the acts of West, its independent contractor. The Supreme Court of Texas decided that this exception was not applicable in this instance. The Court found that Club Rodeo was not liable.

Another issue that arose in this case was negligent hiring. Ramirez claimed that Club Rodeo was negligent in hiring West as an independent contractor because it did not perform a background check, did not require a job application, and allowed a third party to hire him. However, all that a background check would have shown is that West violated peace officer regulations by moonlighting on occasion and that he had once been reprimanded for using profanity at a member of the public. Nothing in his background check would have shown a propensity for violent behavior. Ramirez failed to show the foresee ability of an altercation merely by Club Rodeo's hiring West or failing to perform background check. While it is true that Club Rodeo provided a condition—the hiring of West—that allowed for the altercation, that is not enough in and of itself show that something bad was likely to happen. Therefore, Club Rodeo was not negligent in hiring West and was not liable. *The Fifth Club, Inc. and David A. West v. Roberto Ramirez,* 196 S.W.3d 788 (Tex., 2006).

When is it Time to Pay for Employees' On-Call Time?

Generally, courts look to seven factors to determine whether an employee's on-call time must be compensated. The seven factors include:

1. Whether employees are required to live on the premises: If employees are required to stay on the premises while on call, their time spent waiting to be called will likely need to be compensated.
2. Whether the employer places excessive geographical restrictions on employee's mobility while on call: When considering this factor, examples are illustrative. A court ruled in one case that when forest rangers were required to stay within 50 miles of their workplace while on call, they had to be compensated. In contrast, a court ruled that police officers who had to remain within the city limits while on call were not entitled to compensation.
3. Whether the frequency of calls to the employees unreasonably restricts their personal time: When the employee receive 3 to 5 calls per day, courts have held that the on-call time must be compensated. However, another court held that an employee receiving an average of only six calls a year would not be enough to warrant compensation.
4. Whether there is a time limit for response that is unreasonably restrictive: Courts have held that employees who must respond to calls within 10 to 20 minutes must be paid for their on-call time. However, another court held that an employee who was given 20 to 30 minutes to respond was not entitled to compensation.
5. Whether on-call employees can easily trade their on-call responsibilities: If employees can do so, it is less likely that a court will find that they must be compensated for on-call time.
6. Whether the organization issues pagers: If the employer gives the employee a pager, it is less likely the employee's on-call time will be compensable because the employee is able to pursue personal activities while awaiting calls. However, the employee's time may be compensable even if he or she has a pager, if he or she receives frequent calls, must respond quickly, or cannot trade on-call responsibilities.
7. Whether employees are able to engage in personal activities while on-call: Whether employees actually engaged in personal activities is an important consideration for courts since compensation depends on whether employees are able to use their time for personal pursuits.

Brokers at A.G. Edwards Have Wage and Overtime Claims

The U.S. District Court for the Southern District of California rejected arguments by A.G. Edwards and Sons, Inc. that its financial consultants were exempt from federal and state overtime laws and decided that a lawsuit alleging overtime violations under the Fair Labor Standards Act and California law could proceed.

Brokers for the company are paid on a commission basis, and if their commissions do not meet a specified amount, the company will supplement their earnings with a "draw" amount. Employees argued that the "draw" operated more as a loan than as a salary because the draw figure would be deducted from the next paycheck in which the employee's earnings permitted. The District Court held that the deduction of the draw amount was impermissible because it reduced the employee's guaranteed salary.

The court also held that the lower court's dismissal of the administrative exemption claim was inappropriate because the broker's duties were in dispute. Furthermore, the court held that the company failed to demonstrate that it was a retail or service establishment whose commission-paid employees would be exempt from overtime protection. Therefore, the employees do have a claim for overtime compensation.

FMLA Complaint Policy Invalid

Certain tardiness and absence-control policies may be valid under the FMLA but, as applied, violate the ACT. How do employers find safe ground? It appears that the biggest cause of trouble when dealing with FMLA claims is that employers fire employees before considering all of the available information. Patience may be a virtue, but in an employment context, it might just save the employer.

Kanuf Fiberglass Company got into trouble with its absence policy, which provided that an absence from work is excused in the case of illness or emergency only if the employee notifies his supervisor at least an hour before the start of his shift that he will not be coming in that day. If an employee violates this policy, he or she will receive an unexcused absence. While this may seem simple enough, employee Joshua Spraggins was fired because of this policy.

In August of 2004, Spraggins had a poor attendance record and under Kanuf's policy, he would be fired if he got one more unexcused absence. His wife was having complications with her pregnancy, so he called in saying that he could not make it in to work each day from August 5 through August 7. The first two days, his absences were excused, but his absence on August 7, was not excused because he called in to work 54 minutes before his shift was to start. He was fired the next week. Spraggins did not violate the policy, and this kind of policy is allowable under the FMLA. However, he sued, claiming that the application of this policy violated the ACT.

The real issue in the case was whether it was reasonable to expect employees, under their individual circumstances, to give an hour's notice. The court in this case held that if the employee cannot meet this one-hour requirement, then the employee must give notice as soon as is practicable, up to one or two days learning of the need for leave, unless that time period is impracticable. In Spraggins' case, the court determined that if he did not have notice that he would need to stay home until the morning of August 7, then it would have been impracticable for him to meet the one-hour notice limit. However, if he had known the night before that he would not be able to go to work, then he could have met the requirement and his failure to comply was not protected by the FMLA. Because Kanuf Fiberglass Company did not ask him which was the case, Spraggins got to go before a jury.

In this case, Kanuf Fiberglass Company got into trouble because it did not wait to get all of the information before firing Spraggins, and therefore its policy was found to have violated the FMLA. The employer decided to fire him without asking for Spraggins' side of the story. Had the company gotten all of the information, it could have made the same decision to fire Spraggins, but its decision would have been more defensible. Had the company exercised a little patience in getting all of the facts, it could have saved itself the hassle of being sued and the expense of hiring a lawyer and defending itself. Courts generally defer to the employer's decision when the employer has weighed all of the information, so it is worth getting all of the information and avoiding the trouble of a lawsuit. *Spraggins v. Kanuf Fiberglass*, 401 Supp.3d 1235 (M.D.Ala., 2005)

"Before an employer disciplines an employee for tardiness or absence the FMLA must be considered, as the tardiness or absence may be protected under the law."

Michael Holland

ADHD Not a Disability for Workers

The U. S. Court of Appeals for the Sixth Circuit has held that Attention Deficit Hyperactivity Disorder, which is treated with Ritalin, is not a disability under the Americans with Disabilities Act. Therefore, three Ohio firefighters with the disorder were not entitled to accommodations in taking promotion tests. The ADA's coverage is restricted to those with the impairments that cannot be mitigated with corrective measures like medication or change of behavior.

EEOC Discrimination Charges Increase in 2006

The U.S. Equal Employment Opportunity Commission recently released information indicating that discrimination charges brought against private employers by the EEOC increased last year for the first time since 2002.

EEOC Litigation Recovery from 2006

According to the EEOC's 2006 Performance and Accountability Report posted on its website, the EEOC received 75,768 private sector charges of discrimination in 2006, which is slightly more than the 75,428 received in 2005. In 2006, the EEOC resolved 382 merit lawsuits for a total monetary recovery of over $44 million.

If you, or anyone in your office, would like a copy of this newsletter on a quarterly basis, at no cost, please contact Deanna Jennings at (210)824-8282. E-mail copies are also available.

My Address has Changed !

As many of you already know, after eight happy years with the Thornton Firm I have decided to open up my own law firm with my father, Lamoine Holland. Joining me will be Susan Stone and we will continue to provide advice and counsel to employers on a wide variety of employment law and human resource topics. My new address, phone number, fax and e-mail address are contained in this newsletter. I am looking forward to working with each of you in the future and I will continue to forward this newsletter to your firm as I have in the past!

About the Firm

Holland & Holland L.L.C. Represents management in a wide variety of employment law matters. Our primary goal for clients will continue to be claims avoidance through timely advice and counsel before events occur which can lead to lawsuits. However our firm has significant experience in jury trial litigation in a wide variety of employment related claims in different venues throughout the great state of Texas.

Our expertise includes the following areas:

—management counseling

—review and preparation of personnel policy and procedures including employee handbooks;

—representation in administrative matters before the Equal Employment Opportunity Commission;

—representation of management in state and federal court for employment related claims involving Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Worker Adjustment and Retraining Notification Act, Consolidated Omnibus Budget Reconciliation Act, Polygraph Protection Act, and a variety state court causes of action such as retaliation, defamation, invasion of privacy, negligence, assault and battery;

—protection of trade secrets and other confidential information through the use of covenant not to compete and non-interference agreements;

—preparation of arbitration agreements, non-subscriber programs and waivers of jury trial agreements;

—management training on proper techniques on hiring, disciplining and discharging employees including seminars on recent Supreme Court decisions;

Holland and Holland L.L.C.

1250 N.E. Loop 410, Ste. 808
San Antonio, Texas 78209

Phone: 210-824-8282
Fax: 210-824-8585
Email:
mholland@hollandfirm.com

Keeping Employers Out of the Courtroom for over 18 Years