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**LABOR
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**Employee Handbooks:
The First Line of Defense**

STEVEN PARRISH

In the working world today, more and more employees are questioning disciplinary actions, terminations and other employer actions. Lawyers specializing in Plaintiff's employment law are easy to find. Employees and ex-employees are typically going to these lawyers whenever problems occur in the workplace. Employment claims are on the rise. These claims are expensive and time consuming to defend.

To help reduce and minimize the risk of employee claims, an employer must assume that all of its actions and policies will be scrutinized by Plaintiff lawyers. It is with this mindset that employers should implement and maintain employee handbooks that clearly explain the important policies of the company and take advantage of and exploit the many legal defenses available to employers.

HANDBOOK continued on page 6

**Hiring and Firing Foreign Specialty
Occupation Workers Becoming a Trend**

MAURA BOLIVAR

Although there is an increasing and controversial trend toward outsourcing, particularly in the information technology field, many computer, biotechnical, engineering and other "high tech" oriented businesses may have trouble finding qualified workers in the local job workforce. Such employers may seek to hire foreign nationals living in the U.S. or abroad.

Federal immigration law provides a visa category for such professionals: the H-1B visa. This visa is relatively easy to obtain and processing can be accomplished in several weeks upon payment of an expediting fee.

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The H-1B visa is generally sought by aliens who work in "specialty occupations." Such occupations are defined as requiring a "theoretical and practical application of a body of specialized knowledge," and generally require a bachelor's degree or higher, although experience can sometimes replace a degree.

Employers who wish to hire H-1B workers must file a petition with the U.S. Citizenship & Immigration Services (USCIS), an agency of the Department of Homeland Security which provides

HIRING continued on page 2

HIRING *continued from cover*

the services formerly offered by the INS. Prior to filing the petition, the employer must obtain a prevailing wage determination from the state (in Florida, the Agency for Workforce Innovation) and attest to the federal Department of Labor that the worker will be paid at least the prevailing wage.

There is a cap on the number of new H-1B visas issued each year. The cap of 65,000 visas for fiscal year 2004 was reached on February 17, 2004. New petitions may be filed on April 1st, with employment commencing in October 1, 2004.

The H-1B visa is good for three years and can be renewed for another three years. Such renewals are not subject to the visa cap. The visa is also now "portable," allowing workers to change employers, where once this option was not available. An employer seeking to hire an H-1B worker who is currently employed on this visa needs to file a petition with USCIS and the worker may then accept and start employment, subject, of course, to governmental approval (which is generally forthcoming). Prevailing wage information must still be determined for the new employment.

USCIS must be informed of material changes in the employment approved in the initial petition by the filing of an amended petition. Amended petitions are not subject to the visa cap. A material change is a change that directly impacts the alien's continued eligibility for H-1B classification. The regulations do not contain any specific examples of situations where an amended petition should be filed and the determination is made on a case-by-case basis.

Promotion to a higher position within the same occupation does not nor-

mally require the filing of an amended petition, provided that the employee is required to utilize the same academic training as was required in the former petition. For example, the promotion of an accountant to a supervisory accountant would not require the filing of an amended petition if the supervisory accountant would still be required to possess the theoretical knowledge of accounting normally possessed by an H-1B accountant. Similarly, a change in salary does not generally require filing an amended H-1B petition, unless the change is so dramatic that it indicates a significant change in responsibility or duties.

There is also nothing in the current regulations which specifies when an amended petition should be filed. Employers are generally advised to file the petition prior to the material change, but INS adjudicators have reported that filing is acceptable, at the latest, within a reasonable amount of time following the material change.

An amended petition is also required if the employer's corporate structure goes through a significant change, or if the H-1B worker is transferred to a different legal entity within the employer's corporate structure. This applies where there is a change in job location but not any other changes in employment. Also be aware that if an H-1B employee moves, he or she must submit Form AR-11 to notify USCIS of the new address within 10 days. In a new security conscious environment, failure to comply with this rule may subject the employee to civil fines, criminal liability and deportation.

Employers who expect to implement a reduction in force (RIF) affecting their H-1B employees must be aware that there is no explicit "grace period" allowing such employees to stay in good

immigration status while seeking new employment under the portability provision. This means that when the employment ends, they are required to either return home or change their immigration status in some way that allows them to remain in the U.S. For example, a RIFed employee could apply for a change to F-1 student status. The caveat is they must apply for the change in status before becoming unemployed.

However, USCIS can exercise its discretion and approve an untimely-filed request for extension or change of status if the delay was due to "extraordinary circumstances." Although a RIF is generally not considered an "extraordinary circumstance," immigration attorneys report that the agency has been exercising its discretion favorably in granting extension of stay requests where the employee has been unemployed for up to 30 days and in some cases, up to 60 days. It should be emphasized that there is no law that provides reliable guidance on this issue. The 30 and 60-day period discussed here is not law nor is it USCIS policy. The agency is currently considering regulations that would allow a 60-day grace period.

Always consult with an attorney specializing in Immigration and Nationality law for professional advice regarding specific situations.

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FMLA Does Not Protect Partial Days of Incapacity

KEITH WHITE & KIMBERLY DOUD

Pursuant to the Family and Medical Leave Act (FMLA), covered employers must provide eligible employees up to twelve workweeks of unpaid leave during any 12-month period because of, among other things, a serious health condition that makes the employee unable to perform the functions of his or her position. This leaves the question, however, of what constitutes a serious health condition.

In *Russell v. North Broward Hospital*, 346 F.3d 1335 (11th Cir. 2003), the Eleventh Circuit recently addressed this issue and in doing so evaluated the FMLA's definition of a serious health condition and the validity of the Department of Labor's (DOL) governing regulations, which require that a serious health condition involving continuing treatment by a health care provider include a period of incapacity of more than three consecutive calendar days. The Eleventh Circuit held that the DOL's regulation was valid and properly understood to require more than three consecutive full days of incapacity; consecutive partial days are insufficient.

FACTUAL BACKGROUND

Margaret Russell, a patient accounts adjustment representative for North Broward Hospital, was disciplined many times over the course of her employment for excessive absenteeism. Such discipline led to a three-day suspension without pay and a warning that further incident would result in termination. On May 31, 2000, Russell suffered a workplace injury when she slipped and fell. Russell fractured her right elbow, sprained an ankle, and aggravated a pre-existing wrist injury. The treating physician at the workers' compensation health care provider gave Russell a sling for her arm, prescribed pain medication and advised Russell to restrict the use of her right arm.

The following day, Russell reported for work but left after two hours due to severe pain. Russell returned to the clinic

and was instructed to seek the advice of an orthopaedist. Russell did not return to work. Instead, she called her supervisor and asked for the following day off; Russell's supervisor declined her request.

On June 2, Russell reported to work at 8:00 a.m., but left at 9:05 a.m. due to vomiting, allegedly from too much pain medication. Over the next week, Russell was intermittently absent from work. On two occasions, Russell failed to report to work entirely and only called in once to explain her absence (toward the end of her shift). Additionally, Russell worked five partial days and one full day. The hospital ultimately terminated Russell for excessive absenteeism.

Russell sued her former employer pursuant to the FMLA and alleged that she was entitled to protected leave due to a serious health condition. Russell contended that she had seven consecutive partial days of incapacity and satisfied the definition of "serious health condition." After being instructed that a "serious health condition" required three consecutive calendar days of incapacity, the jury ruled in favor of the hospital. Russell appealed to the Eleventh Circuit.

LEGAL ANALYSIS

As discussed above, the FMLA entitles an employee to unpaid leave due to a serious health condition. The FMLA defines a serious health condition as "an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." See 29 U.S.C. § 2611(11). Part A of the definition was not at issue in *Russell* because Russell's absences did not involve inpatient care. Instead, the Eleventh Circuit focused on part B of the definition.

The FMLA is silent as to what constitutes "continuing treatment by a health

care provider;" however, the DOL promulgated a regulation defining the phrase. See 29 C.F.R. § 825.114(a)(2)(i). In relevant part, the regulation provides that a serious health condition involving continuing treatment includes a "period of incapacity (i.e., inability to work, attend school, or perform regular daily activities...) of more than three consecutive calendar days...." Although Russell argued that she was incapacitated for seven consecutive partial days, she never claimed that she was incapacitated for more than three consecutive full calendar days.

In rejecting Russell's argument, the Eleventh Circuit relied on the plain language of the DOL regulation and the ordinary meaning of calendar days: "The period from one midnight to the following midnight." The court's interpretation upheld Congress's intent that "serious health conditions" be, in fact, serious, and are conditions that cause an extended period of incapacity." Thus, the Eleventh Circuit established a bright-line rule defining the period of incapacity necessary to invoke the FMLA's protection for serious health conditions involving continuing treatment. The decision is a blessing for employers because it provides a straightforward standard to be applied in certain situations under the FMLA.

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ADA: How Vulnerable is Your Business?

KELLY O'KEEFE & MAURA BOLIVAR

The Americans with Disabilities Act was passed nearly 14 years ago to recognize and protect the civil rights of disabled individuals. Title III of the ADA prohibits discrimination against individuals on the basis of disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation" by any person who owns, leases (or leases to), or operates a place of public accommodation.

Title III Requirements. Title III requires public accommodations that are newly constructed or renovated after January 1992 to be accessible to persons with disabilities, and mandates older facilities to remove architectural barriers that are "readily achievable." The vast majority of business owners and operators believe they are in compliance with Title III, but have a rude awakening when a suit is filed. This is primarily due to the complexity of the law, which makes compliance difficult. It contains hundreds of requirements ranging from the location and signage for disabled parking, the allowable height of countertops, the pressure of swinging entrance doors and where grab bars must be placed in restrooms. In addition, the law imposes on "ongoing obligation" to remove such barriers that is murkily fact specific to the circumstances of the individual business. The law provides insufficient guidance to determine where "too expensive" ends and "readily achievable" begins.

Barrage of Litigation

Businesses throughout the country and in Florida have witnessed a massive upsurge in lawsuits filed by disabilities rights advocacy groups and disabled individuals for alleged violations of Title III. It is estimated that thousands of such lawsuits have been filed in Florida in the past few years against restaurants, retail establishments, shopping malls and the hospitality industry and there seems to be no end in sight. Frequently these lawsuits are filed against businesses that have never received a customer complaint or by plaintiffs who are not acting in good faith. For example, a lessor of a small property was recently sued by a disabled individual who was angry because the commercial retail tenant would not extend the time period for a product discount.

Attorneys Fees

Title III is unfortunately structured to encourage lawsuits. The distasteful cottage industry of "drive-by" lawsuits filed by the group of attorneys who specialize in Title III plaintiff's work continues to grow. Adding insult to injury, many of these attorneys are well known for filing up to hundreds of lawsuits for the same plaintiff.

The ADA grants attorneys fees to the prevailing plaintiff, and the courts have applied a liberal standard to the meaning of "prevailing." A 2001 U.S. Supreme Court case, *Buckhannon Board and Care Home v. West Virginia Dept. of Health*, offered a glimmer of



hope when the Court ruled that no attorneys fees should be rewarded where the defendant voluntarily makes the changes demanded, i.e., the case has not ended in a final judgment on the merits, consent decree, or some other "judicially sanctioned change in the legal relationship of the parties." *Buckhannon* was initially interpreted to mean that a private settlement bars attorneys fees, but the predominant trend in the federal circuit courts is more generous.

For example, in the 2002 case of *American Disability Association v. Chmielarz*, the Eleventh Circuit held that a court-approved settlement, coupled with retention of jurisdiction to enforce its terms, was sufficient to render the association a "prevailing party" and allow for attorneys fees. Predictably, plaintiff's attorneys now generally refuse to agree to any settlement without such court approval and retention of jurisdiction. Thus, a plaintiff's attorney who files a boilerplate complaint and settles with a business owner who promises merely to restripe a parking lot, restructure a restroom, and decrease the pressure on entrance doors, can collect \$5,000 in attorneys fees. The business owner is also often required to pay several thousand to an "expert" (sometimes affiliated with the

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plaintiff) who has made a perfunctory survey of the property and issued a report.

A Legislative Solution?

U.S. Rep. Mark Foley of Palm Beach is outspoken about his efforts to eliminate abusive Title III ADA litigation. He has sponsored legislation known as the "ADA Notification Act" in Congress (reintroduced in 2003 as H.R. 728). This bill would amend Title III to require individuals to first notify the business and provide an opportunity to correct the alleged violation prior to filing any lawsuit, with a 90-day waiting period. The bill currently has nearly 60 co-sponsors but faces strident opposition from disability advocacy groups.

Preventative Steps

Business owners, particularly those who own or operate older properties, are well-advised to arrange for an ADA survey to be conducted by a professional with significant ADA experience, taking into consideration the fact that increased revenues and profits are a factor in deciding if an alteration is "readily achievable." Small business owners should be aware of the Disabled Access Tax Credit available in the amount of 50 percent of certain expenditures between \$250 and \$10,250 per tax year and that this tax credit is a factor in the court's "readily achievable" equation. A business that has an ADA compliance implementation plan completed or underway when it is sued has strong defenses available-being in compliance with barrier removal and that an injunction should not be issued where affirmative steps are already underway.

Most cases involve access to stores (doors, sidewalks), parking lots,

garages, restrooms and lack of proper signage, all of which are generally considered "readily achievable" by the courts and fairly inexpensive. Lessors should examine their leases, as the law requires both landlords and tenants to comply with Title III, and valuable time and resources are often wasted after a lawsuit is filed quibbling over who bears the financial responsibility for completing the alteration and splitting attorneys fees.

When a Suit is Filed

Your attorney can help you evaluate the case and the type of plaintiff involved. Individual plaintiffs may not have standing to sue for certain alleged violations: if the plaintiff is not visually impaired, for example, an argument can be made that they cannot make allegations regarding the lack of audible alarms. Retaining a Title III defense expert is well worth the cost. These experts are familiar with the ADA's technical requirements, can readily provide an estimate of the cost to fully comply with the plaintiff's demands and, more importantly, know how to analyze what alterations would be considered "readily achievable" by a court and assist with structuring an efficient settlement, if settlement is considered the best option.

Kelly O'Keefe is a partner, and Maura Bolivar is an associate, in the Tallahassee office of Broad and Cassel. They have experience representing business owners in Title III ADA lawsuits. O'Keefe was admitted to the Florida Bar in 1994 and to the Georgia Bar in 1999. She can be reached by email at kokeefe@broadandcassel.com. Bolivar was admitted to the Florida Bar in 2000 and can be reached by email at mbolivar@broadandcassel.com. By phone, both can be reached by calling (850) 681-6810. BC

Broad and Cassel Announces New Partners

Broad and Cassel is pleased to announce that labor and employment practice group attorneys Maureen Daughton and Kelly O'Keefe have been invited to become partners.

"The Firm is pleased to be inviting such dedicated lawyers to become partners with Broad and Cassel. It is anticipated that they each have the ability and commitment to meet future expectations of the partners," said C. David Brown, II, Chairman.

Ms. Maureen Daughton is with the Firm's Tallahassee office and a member of the Labor and Employment Practice Group. Daughton graduated from the University



of Florida with a Bachelor of Arts degree in 1983 and from the University of Florida School of Law with her J.D. in 1986. She has represented clients at the trial and appellate level on a wide variety of issues.

Ms. Kelly



O'Keefe was previously an Associate in the Tallahassee office of Broad and Cassel. She is a member of the Firm's Appellate, Labor and Employment, and Commercial

Litigation practice groups. O'Keefe graduated from Florida State University with her Bachelor of Science degree in 1990 and her J.D. from Florida State University School of Law in 1994. Her client base is diverse, ranging from major manufacturers in franchise litigation, governmental entities and healthcare associations.

HANDBOOK *continued from cover*

Employers should periodically review existing Employee Handbooks to make sure the written policies accurately reflect the actual practices of the Company and current state of the law, which is ever-changing and constantly evolving.

Clear, well-written policies in an Employee Handbook will avoid disputes over simple issues. One classic example where a clear policy pays off is a vacation policy. Employers frequently inquire about whether they need to pay a terminated employee their unused, earned vacation. From a practical point of view, these inquiries are indicative of a problem because if an employer doesn't know whether it needs to pay for unused vacation, how are its employee supposed to know? The answer to this question in Florida is that it depends on the employer's policy or practice.

Accordingly, every Florida employer has the ability to set up its own vacation policy — it can have a “use it or lose it policy” or it can pay under some circumstances (like lay offs) and not pay under others (like voluntary resignations). But the critical point is that the employer is in control and should put its policy in writing to avoid confusion.

Equally as important as an Employee Handbook's informational purpose, is the ability to take advantage of defenses with the policies in an employee handbook. Two of the primary claims facing employers are employment discrimina-

tion and breach of contract claims. A well-written employee handbook is the employer's first line of defense to the scrutiny of the plaintiff's lawyer and avoiding these claims.

Sexual harassment or hostile work environment claims can be defeated through a well-written anti-harassment policy because the law places the burden on the employee to follow the reporting components of the policy. As human

beings we joke and kid and sometimes say questionable or inappropriate things. Some people are more easily offended than others. A well-written anti-harassment policy should make clear that employees who are *actually* offended by discriminatory words or conduct must report the conduct to specifically designated members of management. If the employer has a anti-harassment policy with a reporting and investigation mechanism, and takes prompt and appropriate remedial

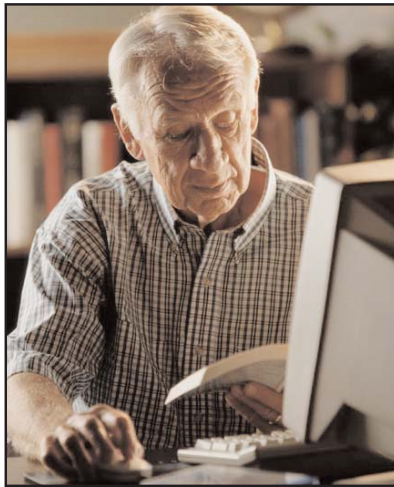
action when it receives well-founded complaints, then the employer will be in a position to defend (1) employee claims regarding conduct that was already remedied, and (2) unreported allegations of harassment of which the employer was not aware. In addition, prompt remedial action often appeases the reporting employee and assures

them that the employer is on their side thereby helping to defuse a potentially explosive situation before it turns into a charge of discrimination or a lawsuit.

With breach of contract cases, an employer's first line of defense is a policy reflecting the law in Florida on employment agreements. Florida is an “at will” employment state — which means employers can terminate employees for any legal reason and an employee can leave for any

reason. Many employees attempt to circumvent Florida's law by claiming the existence of an oral or written contract by someone with actual or apparent authority. An employer can help avoid such claims by clearly stating its adoption of Florida's “at will” employment doctrine. Further, the employer can take away an employee's claim that someone with “apparent authority” entered into an agreement. By clearly stating who within the company can bind the Company to an employment contract. At best, such a policy will discourage a Plaintiff's lawyer from filing breach of contract claims; at worst, it will give the employer real documented evidence showing that an employment contract never existed.

*If your company needs to implement a new Employee Handbook or revise an existing one, contact Steven M. Parrish, Esq. in Broad and Cassel's West Palm Beach office. Mr. Parrish was admitted to the Florida Bar in 1996 and specializes in Labor and Employment law, representing employers. He can be reached by calling (561) 832-3300 or by email at sparrish@broadandcassel.com. **BC***



EMPLOYERS SHOULD PERIODICALLY REVIEW EXISTING EMPLOYEE HANDBOOKS TO MAKE SURE THE WRITTEN POLICIES ACCURATELY REFLECT THE ACTUAL PRACTICES OF THE COMPANY AND CURRENT STATE OF THE LAW

Are your employment manuals up to date? Do they reflect the latest laws and regulations?

Protect yourself and your company, with a complimentary review by a Broad and Cassel labor and employment attorney.

For more information or to schedule a review, please contact **Connie Smekens, Director of Communications and Business Development, at csmekens@broadandcassel.com.**

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