



# LABOR & EMPLOYMENT LAW ADVISER

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## Message from the Firm

We would like to welcome you to our new, redesigned quarterly Firm newsletter – *Labor & Employment Law Adviser*. The revised newsletter represents our continuing effort to bring significant developments and issues of interest in the area of labor and employment law to the attention of the clients and friends of the Firm.

Of note, states have been increasingly active in governing terms of employment. In this issue we address the growth of state-specific immigration laws. On the family leave front, New Jersey has recently become only the third state to implement paid leaves of absence for employees. Beginning in July 2009, certain employees in New Jersey will be eligible to receive disability benefits for up to six weeks of leave from their jobs to care for a sick family member, or a newborn or newly adopted child.

We have also seen increased activity at the federal level, as the EEOC more actively pursues claims of employment discrimination and the Employee Free Choice Act – representing a potential sea change in labor relations – remains active on the desks of many members of Congress.

We look forward to continuing to provide you with the information you need to effectively manage human resources and thank you for your decades of support, allowing us to continue serving management in labor and employment law matters for over a century.

## Grappling with the Frustrations of an Absent Employee on FMLA Leave

A workplace can be greatly affected by an employee who is absent on FMLA leave, because the employee's duties and responsibilities remain despite his or her absence. While this may be frustrating, employers may not discipline an employee for taking FMLA leave – a right the employee is entitled to under the Family and Medical Leave Act. Otherwise, the employer may be subject to a retaliation lawsuit, as in the case of *Lewis v. School District #70*.

In *Lewis*, a federal court of appeals concluded that a bookkeeper provided sufficient evidence to establish that her employer, the school district, retaliated against her for taking intermittent FMLA leave. During the 2004 school year, Lewis was absent almost one-third of the time to care for her terminally ill mother. However, the school district did not offer Lewis the opportunity to take FMLA leave; rather, Lewis was permitted to work a flex-schedule.

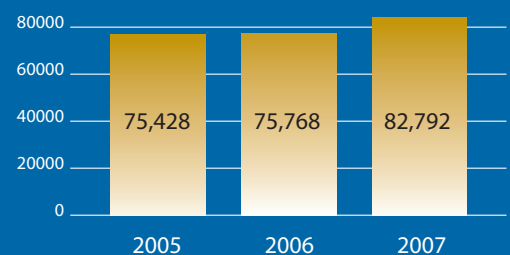
The following school year, Lewis returned to a regular schedule. When she again began to be absent to care for her mother, the school district offered her FMLA leave. Once Lewis began to take her unpaid intermittent FMLA leave, the school

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## Employment Statistics

In 2007, the U.S. Equal Employment Opportunity Commission recorded the filing of 82,792 charges of discrimination, a 9.3% increase over the prior year and the second highest level of activity over the past 10 years.

Source:  
U.S. Equal Employment Opportunity Commission



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district became frustrated by her inability to perform the functions of her position. In a letter, the school district offered her the opportunity to resign from her position or be reassigned to a different, lower-paying position based on her “miss[ing] too much work to meet the essential functions of [her] present assignment.”

Ultimately, the appeals court held that a reasonable jury could conclude that Lewis’ intermittent leave was a substantial or motivating factor for her replacement. First, there was the direct evidence in the letter stating that she could not meet the essential functions of her position because she was absent too frequently. As for circumstantial

evidence of impermissible motivation, the court noted that at no time in the 2004 school year did the school district inform Lewis of her rights under the FMLA. Therefore, an argument existed that the school district allowed her to be absent in order to build a case for her discharge. In addition, once Lewis took intermittent leave, the school district made no effort to take appropriate measures to lessen the impact that Lewis’ intermittent leave would have on the school district’s operations, making the alleged difficulties from intermittent leave “illusory.”

While Lewis’ frequent absences were undoubtedly a nuisance to the school district, the ensuing litigation against

the school district reveals a series of missteps in handling an employee entitled to FMLA leave. The school district failed to notify Lewis in 2004 of her rights under the FMLA, despite Lewis informing the school district of a qualifying reason for leave. In addition, Lewis’ responsibilities remained that of a full-time employee, when she was working and being paid essentially as a part-time employee. An employer in such a situation could, for example, have considered hiring temporary assistance for when the employee would be absent. The *Lewis* case is a stark reminder for employers not to allow frustration with the challenges of an absent employee to cloud efforts at compliance with the FMLA.

## EEOC Targets Race Discrimination in Construction

Certain industries continue to provide fertile ground for employment litigation. Employment litigation typically results from a failure to adopt effective policies or a failure to ensure that supervisors properly administer those policies—deficiencies that can be common among players in particular industries. These shortfalls can be costly. Recently, for example, four construction firms agreed to pay \$1.65 million to settle racial harassment claims brought by the U.S. Equal Employment Opportunity Commission.

As in many cases, the firms’ real liability arose not from the workers’ misconduct, but from the supervisors’ mishandling of the subsequent complaints. The harassment itself was offensive by any standard. Black workers on the

job site were allegedly subjected to racist graffiti and comments, including repeated use of the “n-word” and a hangman’s noose. The graffiti included references to the Aryan Nation and the Ku Klux Klan. However, when a worker complained, supervisors failed to take remedial action, commenting that the noose was “funny” and a “joke.” In other words, the line supervisors made a bad problem worse by failing to appreciate the significance of the reported incidents. Had the supervisors initiated an investigation that concluded in disciplinary action against responsible parties, a different result might have occurred.

Workers are becoming increasingly cognizant of the rewards available to a successful litigant, putting employers

increasingly at risk. In many industries, like construction, some employers have been slow to respond. Some companies have no formal employment policies. Others have written policies but lack training to ensure the policies are uniformly applied. For better or worse, all employers need to develop a “corporate culture” to minimize the risk of exposure from employment law claims. That is to say, employers must develop and implement strong employment policies. Equally important, workers and supervisors alike should be trained by employment professionals to understand those policies.





## Industry



# E-Mail Systems Continue Under Close Scrutiny by NLRB

In late 2007, the National Labor Relations Board (the “Board”) decided the case of *The Guard Publishing Company d/b/a The Register-Guard*, (“*Register Guard*”). In *Register Guard*, the Board held that employees have no statutory right to use an employer’s e-mail system. Hence, an employer’s policy prohibiting employee use of its e-mail system for non-job related solicitations was lawful. However, the Board also held that an employer unlawfully discriminates against its employees if it treats differently activities or communications of a similar character because of their union or other legally protected nature.

Following the *Register Guard* decision, the Board’s General Counsel directed that all discrimination cases relating to e-mail systems be submitted to the Division of Advice in Washington, D.C. for review. In May 2008, the General Counsel reported on the position of his office on several cases that had been referred for advice.

- Limitations on how an incumbent union was permitted to use an e-mail system, as opposed to a prohibition on the content of communications, was determined to be lawful.
- In two similar cases, the General Counsel advised that the decision in *Register Guard* does not protect an employer alleged to have applied a facially valid non-solicitation rule in a discriminatory manner.
- An e-mail complaining of working conditions sent to a company’s Board of Directors was found to be protected because employees were permitted use of the e-mail system for personal reasons.
- A change in posting policies, in direct response to union activity, was determined to be unlawful.

Moving forward, as Board law under *Register Guard* continues to develop, employers should take care in drafting, implementing and enforcing e-mail usage policies. While restrictions on the use of communication systems can be lawful, such limitations must not be applied in a discriminatory manner.

# State-by-State, Employers Facing New Immigration Compliance Requirements

Without the guidance of satisfactory federal immigration laws to regulate employment matters, state legislatures are taking matters into their own hands. In the first quarter of this year alone, 31 different states introduced 179 immigration bills addressing employment. This makes employment law one of the top three areas of immigration activity in the country.

The proposed laws focus on a number of issues in the employment arena. Most notable are various plans that would impose sanctions on employers for hiring unauthorized workers, and those that either mandate or prohibit use of

the federal E-Verify system. E-Verify is the free, internet based system that provides an automated link to federal databases to help employers determine employment eligibility and validity of social security numbers. While E-Verify is available to all 50 states, use of the system is divided between states like Mississippi, that are moving towards requiring all employers to use it, and states like Illinois, that view E-Verify as plagued with accuracy problems and an invasion of workplace privacy. Other measures being discussed at the state level include unemployment compensation for immigrants, identity theft legislation specific to employment,

wage withholding for nonresident aliens, and state guestworker programs.

As a result of this flurry of legislative activity, employers nationwide are faced with the possibility of changes to their immigration compliance requirements. An employer with employees in multiple states may be confronted with conflicting state laws governing different locations. Whether multi-state or not, all employers must be prepared to adjust their immigration policies to the adapting state laws, or may risk strict financial penalties.

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