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Purdham *underscores the complexity of designating school coaches as volunteers for purposes of the FLSA, an issue that is of equal concern to both public and private schools.*

Are Your School's "Volunteer" Coaches Actually Entitled To Overtime Pay?

By Paul Dubois

The United States Court of Appeals for the Fourth Circuit recently ruled in *Purdham v. Fairfax County School Board* that a public school employee who also coaches a high school golf team is not owed overtime pay for his time spent coaching due to his "volunteer" (as opposed to "employee") status under the Fair Labor Standards Act (the "FLSA"). *Purdham* underscores the complexity of designating school coaches as volunteers for purposes of the FLSA, an issue that is of equal concern to both public and private schools. This article discusses the *Purdham* decision – which examines the designation of coaches as volunteers in the public school setting – and also provides guidance on the steps that private schools must take to properly designate their coaches as volunteers.

Factual Background Of *Purdham*

The plaintiff, James Purdham ("Purdham"), had worked for the Fairfax County Public School District (the "School District") as a safety and security assistant for approximately 20 years. The School District properly classified Purdham's position as non-exempt under the FLSA. During his past 15 years of employment, Purdham also served as a golf coach for one of the School District's secondary schools.

In addition to his safety and security duties, Purdham spent approximately 400 hours each golf season (which ran from early August through November) performing coaching duties.

The School District paid Purdham a stipend for his coaching duties and reimbursed him for his expenses and mileage in relation to his coaching activities. When Purdham began coaching, his annual stipend was between $500 and $800. Over time, the stipend increased to more than $2,000 per golf season. The School District paid the same stipend to all coaches, regardless of the sport or success of the team.

In 2004, the School District decided – out of an abundance of caution stemming from ongoing FLSA-related litigation – to pay its non-exempt employees, including Purdham, retroactive overtime wages for time spent coaching during the 2003-2005 athletic seasons. Further, for the 2005-2006 school year, the School District entered into contracts with its coaches, agreeing to pay them $14 per hour for coaching duties, plus one and one-half times their regular hourly rate for all overtime hours worked.

In 2006, the United States Department of Labor ("DOL") issued an opinion letter clarifying that public school employees who perform coaching duties may properly be considered volunteers under the FLSA if there is no expectation of compensation (excluding a nominal stipend) and the coaching duties are performed without pressure or coercion. Relying on this opinion, the School District concluded that its non-exempt employees had, in fact, been properly deemed volunteers in connection with their coaching duties, and that the employees were thus not entitled to overtime compensation under the FLSA. As a result, the School District resumed paying annual stipends to its coaches, including Purdham, and announced that time spent in coaching would no longer be considered in determining overtime pay.

Trial Court's Decision

Purdham subsequently filed an action against the School District claiming that he was an "employee" within the meaning of the FLSA with respect to his services as a golf coach and, thus, that the School District owed him unpaid overtime wages pursuant to the FLSA.

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Don't Get Clawed By The Cat's Paw

By Brian D. Carlson

Suppose that you are a human resources manager and that your job duties include deciding whether to approve employee discipline recommendations submitted by lower-level supervisors. One of your company's supervisors tells you that he wants to discharge an employee who has disregarded work instructions and failed to perform up to the supervisor's expectations.

In fact, that supervisor *actually* wants to get rid of the employee not because of any legitimate performance concerns, but out of some discriminatory motive – for instance, the employee's sex, religion or military service. However, you are unaware of any such bias on the supervisor's part, and when you review the employee's personnel file, you see that he has received repeated warnings for disciplinary and performance issues. Thus, you see no reason to question the supervisor's judgment, and you approve the termination recommendation.

Can the employee then sue your employer for discrimination based on the supervisor's unlawful bias, even though you were unaware of that bias and decided to approve the termination for what you believed to be entirely legitimate reasons?

Under a recent U.S. Supreme Court decision, *Staub v. Proctor Hospital*, the answer is *yes*. The Court held that an employer can be liable for taking adverse action against an employee based on information provided by a biased supervisor, even where the manager who actually carries out the disciplinary action has no such animus and is unaware of the supervisor's bias. (Such cases are known as "cat's paw" claims, based on a French fable involving a monkey that persuaded a cat to pull chestnuts out of a fire for the monkey, thereby burning the cat's paw.)

As a result of the Court's *Staub* decision, employers need to be vigilant for proposed disciplinary actions that could result in "cat's paw" claims, and take appropriate steps to protect themselves against potential liability for such claims.

Facts

The plaintiff, Vincent Staub, worked as an angiography technician for Proctor Hospital, in Peoria, Illinois. Staub was also a member of the U.S. Army Reserves, which required him to devote one weekend per month and an additional two to three weeks per year to military training.

Two of Staub's managers – his immediate supervisor, Janice Mulally, and Mulally's supervisor, Michael Korenchuk – took an openly negative attitude toward Staub's military service, viewing his mandatory training absences as a burden to his department's operations. For instance, Mulally asked another employee to help her "get rid" of Staub, and Korenchuk opined that Staub's reserve service was a "waste of taxpayers' money." Mulally also issued a formal "corrective action" to Staub, stating that he had repeatedly been absent from his work area without permission, and requiring that Staub report to one of his supervisors whenever he had temporarily exhausted his angiography caseload.

Subsequently, Korenchuk reported to the Hospital's Vice President of Human Resources, Linda Buck, that Staub had violated this corrective action. Buck ultimately decided to terminate Staub's employment, based on Korenchuk's input (which Buck did not know was tainted) and Buck's review of Staub's personnel file, which reflected several additional complaints about Staub by other supervisors.

Upon learning of his termination, Staub filed an internal grievance claiming that his supervisors were biased against him because of his military reserve service, and that the incidents underlying the corrective action had been fabricated. Buck, however, did not follow up on Staub's allegations by speaking with Mulally and Korenchuk, and, consequently, the termination remained in effect.

Staub then filed suit against the Hospital, claiming that he had been discharged because of his reserve service, in violation of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). A jury ruled in Staub's favor, but the U.S. Court of Appeals for the Seventh Circuit reversed, holding that Staub could not prevail because he had failed to show that his biased supervisors exercised a "singular influence" over the Hospital's decision to terminate his employment.

Such cases are known as "cat's paw" claims, based on a French fable involving a monkey that persuaded a cat to pull chestnuts out of a fire for the monkey, thereby burning the cat's paw.

Supreme Court's Decision

In an opinion by Justice Antonin Scalia, the Supreme Court unanimously reversed the Seventh Circuit's decision. Rejecting the narrow standard applied by the Seventh Circuit, the Court held that "if a supervisor performs an act motivated by anti-military animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action," then the employer is liable under USERRA.

Thus, because Mulally and Korenchuk's biased actions were a "proximate cause" – *i.e.*, a significant contributing factor – of Buck's decision to discharge Staub, the Supreme Court concluded that the Hospital could be found liable to Staub under USERRA, even though there was no evidence that Buck herself held any anti-military animus.

Justice Scalia also noted in his opinion that the relevant language of USERRA is very similar to that of Title VII. This suggests that

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Supreme Court Gives Green Light To Third-Party Retaliation Claims

By Brian D. Carlson

Retaliation claims against employers – which are already at an all-time high – are likely to skyrocket further as a result of a recent U.S. Supreme Court decision that broadens the universe of potential plaintiffs who are permitted to raise such claims.

Federal law prohibits an employer from retaliating against any employee for engaging in protected conduct (*e.g.*, filing a complaint alleging discrimination). In *Thompson v. North American Stainless, LP*, the Supreme Court held for the first time that a third-party who did not engage in protected conduct can nevertheless bring a retaliation claim if he or she is subjected to an adverse employment action as a result of a discrimination complaint made by *another* employee with whom the third-party has a close relationship. Significantly, the Supreme Court did not clearly define the scope of third-party retaliation claims, leaving employers with many more questions than answers.

Thompson is of major significance to employers. The Equal Employment Opportunity Commission ("EEOC") recently announced that during fiscal year 2010, retaliation claims became, for the first time ever, the most common type of discrimination claim, appearing in 36 percent of all EEOC charges. In addition, more federal discrimination charges as a whole – nearly 100,000 – were filed against private-sector employers during fiscal year 2010 than in any preceding year. And this number is likely to increase following *Thompson*. Thus, it is vital for employers to be aware of the issues raised by the Court's holding and to take appropriate steps to prohibit retaliation against all employees, whether they have engaged in protected conduct or not.

Facts

The plaintiff in the case, Eric Thompson, was engaged to a fellow employee of North American Stainless ("NAS"), Miriam Regalado. In February 2003, NAS learned that Regalado had filed a sex-discrimination charge against NAS with the EEOC. Three weeks later, NAS terminated Thompson's employment.

Thompson filed suit against NAS, claiming that the company had violated the federal anti-discrimination law, Title VII, by firing him in retaliation for the discrimination charge brought by his fiancée, Regalado. A U.S. District Court judge in Kentucky awarded summary judgment to NAS on Thompson's retaliation claim, holding that Thompson could not maintain such a claim in the absence of a showing that he himself had engaged in some form of protected conduct. The U.S. Court of Appeals for the Sixth Circuit affirmed this ruling, and then the Supreme Court agreed to review the case.

Supreme Court's Decision

In an 8-0 decision authored by Justice Scalia (with Justice Kagan not participating), the Supreme Court reversed the lower courts' dismissal of Thompson's retaliation claim. The Court first held that NAS's firing of Thompson qualified as an adverse employment action for purposes of Title VII. Noting that a retaliation claim can be founded on any action that "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination," Justice Scalia concluded that Thompson's discharge in alleged retaliation for his fiancée's EEOC charge against NAS easily met this standard.

The second, and "more difficult," question for the Court was whether, in these circumstances, a retaliation claim could be brought by Thompson, as opposed to Regalado, since only Regalado had engaged in activity protected under Title VII. The Court decided that Thompson could maintain such a claim, holding that a retaliation claim can be brought by any person falling within the overall "zone of interests" that Title VII was intended to protect, and that Thompson clearly fell within that zone due to his close relationship with Regalado. Notably, the Court declined to formulate a rule for determining what types of relationships are sufficiently close to meet this standard. Instead, Justice Scalia indicated that such determinations will need to be made on a case-by-case basis.

Thus, following *Thompson*, employers are now on notice that Title VII prohibits retaliation against any employee who is in a close relationship with another employee who engages in protected activity.

Recommendations For Employers

Thompson significantly broadens the circumstances in which Title VII retaliation claims can be brought, raising the stakes even more for employers in this ever-expanding area of the law. We recommend that all employers:

- Ensure that managers, supervisors and human resources personnel understand that *any* form of retaliation against any employee in response to a discrimination complaint (whether formal or informal) is impermissible;
- Consider revising anti-retaliation provisions of existing policies to clarify that retaliation against any employee is expressly prohibited in any circumstance; and
- Carefully review the situation and consult with legal counsel before terminating or taking other adverse action against any employee who has a close relationship with another employee who has made a discrimination complaint.

Please do not hesitate to contact us if you have questions about Thompson *or if we can be of assistance in any way.*

Get Ready For A Form I-9 Audit: The ICE Agent Is Coming

By William E. Hannum III

In 2010, the innocuous-looking Form I-9 (it is only one page long) led to record penalties, criminal charges and federal-contract debarments against employers. And all indications are that federal immigration-law enforcement focused on Form I-9 audits is likely to be even more aggressive in 2011. Indeed, the government just announced another massive number of audits of employer records.

The Rise Of Form I-9 Audits

By way of background, the federal government's focus on Form I-9 began in April 2009, when the Obama administration announced a new worksite enforcement strategy. The new strategy is to penalize *employers* that knowingly hire illegal workers, marking a dramatic shift from the prior decade, when the focus was on detecting and apprehending illegal *workers*.

As the focus of the federal government's immigration policy shifted from targeting *employees* to targeting *employers*, so too did its means for carrying out this policy. In short, workplace raids have largely been replaced with Form I-9 audits.

Form I-9 has its roots in the Immigration Reform and Control Act of 1986, which makes it unlawful for employers to knowingly hire unauthorized workers. This law correspondingly requires employers to verify that the employees they hire are eligible to work in the United States. Form I-9 is the tool for implementing these mandates, making it the logical starting point for government investigators geared toward ferreting out noncompliant employers.

Aggressive Enforcement By ICE

The federal agency tasked with carrying out Form I-9 audits is U.S. Immigration and Customs Enforcement ("ICE"), the principal investigative arm of the U.S. Department of Homeland Security ("DHS"). ICE has approached its work with tenacity.

Penalties, criminal charges, audits conducted, and debarments *all* increased *dramatically* in fiscal year ("FY") 2010 (*i.e.*, October 1, 2009 through September 30, 2010) as compared to FY 2009. Specifically, in FY 2010, ICE agents:

- Recovered record high penalties of $6.9 million from businesses, compared with $1.03 million in FY 2009;
- Criminally charged 187 business owners or managers with immigration violations, compared with 114 in FY 2009;
- Conducted 2,196 Form I-9 audits, compared with 1,444 in FY 2009; and
- Debarred 146 businesses or individuals from holding federal contracts, compared with 83 in FY 2009.

ICE has also launched massive "audit initiatives" on a nationwide, regional or industry-wide basis. For instance, in July 2009, ICE audited 654 employers nationwide; in November 2009, ICE audited 1,000 employers involved in "critical infrastructure" (*i.e.*, in industries involving public safety and national security); in March 2010, ICE targeted 180 companies in five southern states; and in September 2010, ICE audited yet another 500 companies nationwide. And this past February, ICE issued notices of inspection to 1,000 employers.

Pitfalls Of Electronic Completion And Storage

Employers that have switched from a manual system for completing and storing Form I-9 to an electronic one may be particularly vulnerable. ICE's recent audit of clothing retailer Abercrombie & Fitch ("A&F") illustrates this point.

A&F agreed to pay a fine of $1.05 million following a Form I-9 audit of its Michigan stores. This penalty was particularly significant because *no unauthorized workers were found among A&F's employees*. Rather, the fine resulted from "numerous technology-related deficiencies" in A&F's system for carrying out its Form I-9 obligations.

In short, many employers fail to take the audit seriously, which is a serious mistake – and typically results in a notice of significant fines

ICE requires employers that electronically complete and/or store Form I-9 to follow detailed, highly technical compliance regulations. To illustrate, one of ICE's many requirements is for employers to retain an audit trail (a record showing who has accessed the system and the actions performed within or on the system during a given period of time) when a Form I-9 is created, completed, updated, modified, altered, or corrected.

As the A&F fine suggests, these and ICE's numerous other technical requirements present a trap for unwary employers. Further, employers must ensure that any Form I-9 electronic completion and storage activity also complies with any applicable state law imposing independent obligations to protect personal information, such as the Massachusetts data security law.

(Note: The electronic completion and storage of Form I-9 is separate from the federal Internet-based "E-Verify" system.)

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Faith-Healing Vacation Not Covered Under FMLA, Rules First Circuit

By Paul Dubois

An employee who was fired for taking an unauthorized leave of absence to accompany her medically ill husband on a faith-healing vacation had no recourse against her employer under the federal Family and Medical Leave Act (the "FMLA"), the U.S. Court of Appeals for the First Circuit recently ruled.

The overall purpose of the employee's leave was to accompany her husband on a personal vacation, not to enable him to obtain medical care, explained the First Circuit. The fact that the employee provided actual care to her husband as an "incidental consequence" of the vacation did not render the vacation an FMLA-covered event. Accordingly, termination of employment was warranted when the employee took the vacation over her employer's objection.

The decision confirms that FMLA leave is to be used only in connection with FMLA-covered purposes — which do not include enabling a seriously ill family member to travel for personal reasons unrelated to medical treatment — and that employees take serious risks by going on unauthorized leaves.

Factual Background

The plaintiff, Maria Tayag ("Tayag"), was a Health Information Clerk at Lahey Clinic Hospital ("Lahey"). Throughout her employment, Tayag routinely took authorized intermittent FMLA leaves of absence to take her husband (who had numerous chronic medical conditions) to doctor's appointments and to help him with household activities.

In June 2006, Tayag requested seven weeks of vacation time, which Lahey did not approve. The following month, Tayag again requested seven weeks off, this time claiming that she was requesting a leave of absence under the FMLA in order to care for her husband, who was recovering from a recent heart surgery.

As the medical documentation Lahey had on file did not support Tayag's request, Tayag's supervisor asked Tayag to provide new FMLA medical certification. Tayag provided medical certification from her husband's primary care physician, but it did not support Tayag's leave request. When Lahey requested additional medical certification, Tayag failed to provide it.

As a result of Tayag's failure to provide sufficient medical certification, Lahey denied Tayag's request for FMLA leave. Nevertheless, Tayag and her husband left for the Philippines, where they remained for seven weeks.

While the Tayags were in the Philippines, Lahey received additional medical certification from Tayag's husband's cardiologist. This new information confirmed that Tayag's husband did, in fact, have serious health conditions but did not indicate that Tayag needed to take seven weeks off in order to provide necessary medical care. After making numerous unsuccessful attempts to contact Tayag, Lahey terminated Tayag's employment based on her unapproved leave.

Significantly, Tayag's husband did not receive traditional medical treatment or visit a health care professional at any point during the trip to the Philippines. Instead, Tayag's husband sought "miraculous healing" at the Pilgrimage of Healing Ministry at St. Bartholomew Parish for approximately half of the trip. The rest of the trip was spent visiting friends and family. However, because of her husband's serious medical ailments, at all times during the seven-week trip, Tayag carried her husband's bags, pushed his wheelchair, provided psychological support, and administered his medication.

First Circuit's Decision

Following Lahey's termination of her employment, Tayag filed suit against Lahey, claiming, among other things, that Lahey unlawfully interfered with her rights under the FMLA. Tayag claimed that her husband's pilgrimage treated the psychological aspect of his medical condition, and that he could not travel without her assistance.

Lahey countered that Tayag was not eligible for FMLA leave in connection with her travel to the Philippines, as her husband sought "miraculous healing" as opposed to medical treatment. Further, Lahey contended, nearly half of Tayag's trip was spent simply vacationing, which it claimed was not a covered FMLA purpose.

The trial court dismissed Tayag's case on summary judgment, and Tayag appealed, presenting the First Circuit with the novel issue of whether an employee may take FMLA leave to care for a spouse with a serious health condition who seeks to travel abroad for the purpose of faith-based healing.

The First Circuit found that Tayag's husband did, in fact, suffer from serious chronic health conditions, but that the leave was not in furtherance of seeking medical treatment and therefore had been appropriately denied. Concluding that the purpose of the trip was to go on vacation, not to seek medical care, the First Circuit affirmed the dismissal of Tayag's case on summary judgment. In reaching this conclusion, the Court reasoned as follows: "Even if caring for a sick spouse on a trip for faith-healing were protected because of its potential psychological benefits, it is undisputed that nearly half of the Tayags' trip was spent visiting friends,

The fact that the employee provided actual care to her husband as an "incidental consequence" of the vacation did not render the vacation an FMLA-covered event.

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Hidden Trap In Employee Investigations: Potential FCRA Liability

By Frances S. P. Barbieri

Imagine that an employee comes to you and reports that a co-worker has been subjecting her to prolonged, severe sexual harassment and will not stop calling her personal phone number. You immediately arrange for an investigation. You want your investigation to be airtight, so you engage a human resources consultant to conduct it. The outside party investigates and finds the complaint substantiated, so you decide to terminate the alleged harasser. You immediately do so, revealing little to the alleged harasser about the nature and substance of the investigation. After all, you are convinced that he is guilty and knows it. Now, you expect that your company may face a legal claim from the victim. *But, what about the alleged* harasser? *Well, …*

Under the federal Fair Credit Reporting Act ("FCRA"), employers that engage third parties to conduct investigations into alleged employee misconduct (such as theft, harassment, violence in the workplace, and noncompliance with laws, rules, regulations or policies) and take adverse action based on the investigation *must provide the employee with a summary of the "nature and substance" of the investigation*. Fortunately, however, employers do not need to disclose the investigation to the employee or get the employee's authorization prior to the investigation, as with other third-party reports under the FCRA. Additionally, in the summary, employers need not identify the sources of the information obtained in the investigation.

This article discusses the extension of the FCRA to employee investigations, identifies the purposes for which employers can use third-party reports in connection with employment decisions, and clarifies the procedures that employers must follow.

Extension Of FCRA To Employee Investigations

The FCRA generally requires employers to provide notice and obtain authorization from applicants and employees prior to engaging a third party "consumer reporting agency" to run a background check or conduct certain other types of investigations concerning them. The term "consumer reporting agency" is interpreted broadly and generally includes any outside party engaged to investigate an applicant's or an employee's background or workplace conduct.

In 1999, the Federal Trade Commission (the "FTC"), the agency that enforces the FCRA, issued an opinion letter stating that sexual harassment investigations conducted by third parties were subject to the advance notice and authorization requirements of the FCRA. This concerned employers, who believed that having to provide the subject of an investigation with advance disclosure of the investigation and to obtain the subject's authorization to conduct the investigation would greatly hamper the investigation itself.

In response to this concern, Congress amended the FCRA in 2003 to set forth a new procedure for investigations of employee misconduct. This procedure applies whenever a consumer reporting agency furnishes communications to an employer "in connection with an investigation of (i) suspected misconduct relating to employment; or (ii) compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer."

Under the 2003 FCRA amendment, an employer may engage an outside organization to investigate allegations of employee misconduct without first notifying and obtaining authorization from the employee. *However, if the employer takes adverse action, such as termination or suspension, as a result of the investigation, then, after taking the adverse action, the employer must provide the employee with a summary of the nature and substance of the investigation*. The amendment does not specify the time period within which the employer must provide the summary.

Significantly, the summary does not need to identify the sources of the information obtained in the investigation. Therefore, if co-workers, vendors, customers, patients, or other individuals (depending on the nature of the business) provided the investigator with damaging information about the employee, then their identities would not need to be disclosed to the employee in the FCRA summary.

Under the federal Fair Credit Reporting Act ("FCRA"), employers that engage third parties to conduct investigations into alleged employee misconduct…and take adverse action based on the investigation must provide the employee with a summary of the "nature and substance" of the investigation.

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Hidden Trap In Employee Investigations: Potential FCRA Liability

Different FCRA Requirements For Different Purposes

While the 2003 FCRA amendments cleared the way for employers to conduct workplace investigations without tipping off the subjects of the investigation in advance, they also resulted in different procedures for obtaining third-party reports about applicants and employees, depending on the purpose of the report. It is important for employers to understand the various types of third-party reports that may be obtained about applicants and employees under the FCRA and the corresponding procedural requirements.

Technically speaking, when an employer uses a third party (most of which will constitute "consumer reporting agencies" under the law) to provide a report about an applicant or employee, the employer is obtaining a "consumer report." There are two types of consumer reports, a "consumer report" and an "investigative consumer report."

A "consumer report" includes "any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living," including criminal history.

An "investigative consumer report" is "a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information."

The reports obtained through third-party background checks on applicants and employees are generally considered to be consumer reports. And when the third-party background check involves interviews to assess character, general reputation, personal characteristics and the like, this portion of the report is generally considered to be an investigative consumer report.

FCRA Requirements Applicable To Background And Reference Checks

When employers use third parties to conduct background and reference checks on applicants and employees, the following steps generally must be followed.

Step 1: Disclosure and Authorization. Prior to obtaining a "consumer report," the employer must provide the applicant or employee with a detailed disclosure and obtain a signed authorization from the applicant or employee. If the consumer report will be an "investigative consumer report" in whole or in part, then the disclosure must (a) specify that an investigative consumer report including information about the individual's character, general reputation, personal characteristics and mode of living may be made, and (b) notify the applicant or employee of the right to request an additional disclosure regarding the specific nature and scope of the investigative consumer report. If an employer initially seeks only a "consumer report" but later decides to request an "investigative consumer report," then the employer must provide this specialized disclosure within three days after making the request.

Step 2: Pre-Adverse Action Notice. If an employer decides to take adverse action against an applicant or employee based in whole or in part on a consumer report or investigative consumer report, then the employer must provide the applicant or employee with (a) a copy of the consumer report or investigative consumer report, and (b) a Summary of Rights under the FCRA sufficiently in advance of the adverse action that the applicant or employee has a reasonable opportunity to dispute the information contained in the report. (The FTC has stated that the employer must provide at least five days' notice, but courts have suggested that five days may not be enough.)

Step 3: Adverse Action Notice. At the time that the employer takes an adverse action against an applicant or employee based on a consumer report or an investigative consumer report, the employer must provide the applicant or employee with an adverse action notice, along with another copy of the Summary of Rights under the FCRA.

FCRA Requirements Applicable To Employee Investigations

When employers use third parties to investigate potential employee misconduct or noncompliance with laws, rules, regulations or policies, the following steps generally must be followed.

Step 1: Engage the consumer reporting agency to conduct the investigation.

Step 2: If the employer takes an adverse action based on the investigation, then the employer must provide a summary of the nature and substance of the report to the employee. The summary need not be written, but we recommend that it be written to establish that the summary was provided. As noted, the summary does not need to identify the sources of the information contained in the report. We recommend that this summary be provided when the employee is first advised that the employer intends to take adverse action. If at all possible, this should be prior to taking adverse action.

Employer Liability For Noncompliance With FCRA

An aggrieved individual may bring a civil action—including a class-action lawsuit—based on alleged violations of the FCRA. For negligent noncompliance, actual damages, attorneys' fees, and costs may be awarded to successful plaintiffs. For willful noncompliance, punitive damages also may be assessed. The FTC also may bring administrative actions based on alleged FCRA violations.

Don't Forget To Check State Laws

Many states have enacted fair credit report laws that impose obligations above and beyond those required by the FCRA. The FCRA provides that similar state laws must be followed "except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency." This standard can be confusing, so we recommend seeking counsel

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Don't Get Clawed By The Cat's Paw

courts will extend the *Staub* holding to other forms of employment discrimination, such as race, sex, religion and national origin. In addition, it is possible that "cat's paw" liability will extend to claims under the Age Discrimination in Employment Act, as well as retaliation claims under various federal statutes, such as the Occupational Safety and Health Act, which protects employees who complain of unsafe workplace conditions.

Indeed, "cat's paw" retaliation claims may crop up in numerous contexts after an employee exercises a statutory right (*e.g.*, by taking family and medical leave) and later is disciplined or discharged, especially when the employee and his or her supervisor have not gotten along, fueling suspicion that the supervisor was just waiting for a reason "to get rid of" the employee.

Notably, the Court specifically declined to rule that conducting an independent investigation into an employee's claims of unlawful animus will automatically shield an employer from possible "cat's paw" claims. Instead, the Court stated that such an investigation would simply be one factor in determining whether a lower-level supervisor's unlawful bias played a significant role in an adverse employment action.

In addition, the Court declined to address the potential implications of actions by biased *non-supervisors* that influence an adverse employment decision. Thus, it seems possible that future court rulings could hold employers liable for unwittingly acting on the basis of information provided by biased co-workers as well.

Recommendations For Employers

In light of the *Staub* decision, there are a number of actions that employers should consider taking to shield themselves against possible "cat's paw" claims:

- Provide anti-discrimination and anti-retaliation training to *all* supervisors, including those who do not have independent authority to discipline employees.
- Train managers who approve and implement terminations and other disciplinary actions to recognize potentially questionable performance evaluations and warnings, and to seek guidance from their own supervisors (or Human Resources) when a proposed disciplinary action rests on a seemingly questionable foundation.
- Ensure that Human Resources thoroughly investigates all proposed terminations and other significant disciplinary measures.
- Consult with counsel whenever there is reason to believe that unlawful animus may have tainted a disciplinary recommendation.

These steps should help to minimize the possibility that an organization might unknowingly base disciplinary action, or a negative performance appraisal, upon a protected characteristic. Understanding these issues should also help avoid even the *appearance* of impropriety in dealings with employees, which should help to reduce the risk of discrimination and retaliation claims.

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Hidden Trap In Employee Investigations: Potential FCRA Liability

whenever there is a potential inconsistency between the FCRA and an applicable state law.

In addition, many states are considering legislation that would significantly restrict an employer's right to obtain and use credit reports in connection with employment decisions. It has been reported that such laws are being considered in Arkansas, California, Connecticut, Georgia, Indiana, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, New York, Ohio, Oklahoma, Pennsylvania and Vermont. Hawaii, Illinois, Maryland, Oregon and Washington have already passed such laws. Thus, all employers – particularly multi-state employers – must follow these developments closely to ensure compliance.

Recommendations For Employers

Whether your organization presently uses third parties to conduct background checks, reference checks and employee investigations, or is just considering doing so, you should confer with counsel to ensure that all required forms are being used and all required processes are being followed.

We also recommend providing training to those supervisors, managers and human resources personnel involved in conducting background checks, reference checks and employee investigations to ensure that they are versed in all applicable FCRA and state law requirements and in how to handle any negative results.

The Firm has developed an FCRA Compliance Package to assist employers and conducts seminars, as well as individually-tailored training sessions, on numerous topics relating to background and reference checks, employee investigations and the use of third-party reports in employment decisions. We would be happy to answer any questions that you may have about this topic or assist in any way.

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Get Ready For A Form I-9 Audit: The ICE Agent Is Coming

Is There Such A Thing As A "Friendly" ICE Auditor?

Another common mistake employers make is to receive a notice of inspection from ICE and not take the audit seriously. Form I-9 audits do not usually entail multiple ICE agents arriving with guns, as was common during worksite raids in the past. As a result, many employers let their guard down when the "friendly ICE auditor" arrives at the door. In short, many employers fail to take the audit seriously, which is a serious mistake – and typically results in a notice of significant fines, when it is generally too late to address problems that would have mitigated the fine amount.

Recommendations For Employers

Employers are encouraged to confer with employment counsel *now* to ensure that they are administering, completing and storing Form I-9 in a timely and appropriate manner. As ICE's audits typically entail little advance notice, implementing best practices *now* is highly recommended.

In addition, it is crucial to be sure that the entire workplace is ready for a government audit on short notice. In this regard, ICE will advise other federal agencies of any other violations observed during ICE's visit (*e.g.*, report apparent safety violations to OSHA, or report the failure to post required notices to the Department of Labor, etc.)

An excellent way to get started, or to maintain an existing compliant Form I-9 program, is to provide on- or off-site training to those supervisors, managers and human resources officials involved in the Form I-9 function.

Finally, employers that complete and/or store Form I-9 electronically should confer with both employment counsel and information-technology experts to ensure compliance with ICE's numerous technical requirements.

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Faith-Healing Vacation Not Covered Under FMLA, Rules First Circuit

family, and local churches. The FMLA does not permit employees to take time off to take a vacation with a seriously ill spouse, even if caring for the spouse is an 'incidental consequence' of taking him on vacation."

In making this ruling, the First Circuit left open the question of what types of faith-healing, psychological treatment, or other alternatives might support such a leave request if (a) medical certifications supported the request, and (b) substantially all of the trip would be spent in pursuit of such care.

Recommendations For Employers

Tayag illustrates how complicated FMLA requirements can be, particularly if an employee requests leave to assist a family member in obtaining medical care. Employers should proceed cautiously when confronted with such leave requests by, among other things, obtaining all necessary medical certifications and determining whether the request has a significant non-medical component.

Additionally, to minimize the risk of generally running afoul of the FMLA, we recommend that employers take the following steps:

- Revise, as necessary, their FMLA policies and/or managers' guides to ensure that they are accurate and up-to-date;
- Train managers and human resources staff about the rights and obligations under the FMLA; and
- Confer with employment counsel as to any leave request that is unusual or raises difficult questions.

The Firm offers an FMLA Compliance Package that includes all required FMLA forms, tailored to each employer's specific policies and practices. In addition, the Firm offers a three-hour "Nuts and Bolts of Compliance with the Amended FMLA" seminar that covers all aspects of the FMLA. If you are interested in attending this seminar, please see the brochure and registration form on the Firm's website.

As always, please do not hesitate to contact us with any questions you may have about the Tayag *decision or FMLA compliance in general.*

Schwartz Hannum PC

is pleased to announce that

Michelle-Kim Lee

has joined the Firm as an Associate

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Are Your School's "Volunteer" Coaches Actually Entitled To Overtime Pay?

In its defense, the School District pointed to section 3(e)(4)(A) of the FLSA, the statutory provision that was the basis for DOL's 2006 opinion. This provision states that the term "'employee' does not include any individual who volunteers to perform services for a public agency" if "the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered" and "such services are not the same type of services which the individual is employed to perform for such public agency." The School District argued that Purdham acted as a volunteer during the course of his coaching duties, as he was not doing the same type of work that was required by his safety and security assistant position, and because the stipend he received was a "nominal fee" authorized by law to be paid to volunteers.

The trial court dismissed Purdham's case on summary judgment, and Purdham appealed, presenting the Fourth Circuit with the issue of whether the School District violated the FLSA by failing to pay him overtime wages for his golf coaching services.

Fourth Circuit's Decision On Appeal

Concluding that the School District properly deemed Purdham a volunteer relative to his coaching activities, the Fourth Circuit affirmed the dismissal of Purdham's case on summary judgment. In its ruling, the Fourth Circuit explained that "where a public employee engages in services different from those he or she is normally employed to perform, and receives 'no compensation,' or only a 'nominal fee,' such work is exempt from the FLSA and the public employee is deemed a volunteer."

Consequently, public and private schools may compensate teachers at a rate of less than $455/week and need not provide additional compensation to those teachers who also coach athletic teams and/or otherwise assist with extracurricular offerings.

Purdham Does Not Affect Public And Private School *Teachers* Who Coach Athletic Teams

Significantly, *Purdham* involved a non-exempt public school employee (a safety and security assistant) who assumed coaching responsibilities. If *Purdham* had involved a *teacher* seeking extra pay for coaching duties, then the case would have been even more straightforward.

Applicable FLSA regulations state that public and private school teachers who spend a considerable amount of their time on extra-curricular student activities, such as coaching athletic teams or acting as advisors in such areas as drama, speech, debate or journalism, are engaged in teaching while undertaking these activities. Accordingly, the salary paid to teachers as "exempt" employees (teachers are exempt from the FLSA's minimum wage and overtime requirements) covers all teaching duties, including those related to coaching and other extracurricular student activities.

In fact, teachers are even exempt from the FLSA's salary basis requirement of $455 per week, which is the threshold salary that generally must be paid to an employee in order to properly classify the employee as exempt from the statute's minimum wage and overtime requirements. Consequently, public and private schools may compensate teachers at a rate of less than $455/week and need not provide additional compensation to those teachers who also coach athletic teams and/or otherwise assist with extracurricular offerings.

"where a public employee engages in services different from those he or she is normally employed to perform, and receives 'no compensation,' or only a 'nominal fee,' such work is exempt from the FLSA and the public employee is deemed a volunteer."

Applicability Of *Purdham* To Non-Exempt *Non-Teachers* At Private Schools

Technically, *Purdham* does not apply to private schools because it was based on a statutory provision of the FLSA that is specific to public schools and their employees. However, DOL recognizes volunteer status for workers at private schools and other private nonprofit institutions under certain circumstances.

Specifically, DOL considers the following factors in determining whether a worker at a private nonprofit institution should be accorded volunteer status under the FLSA: 1) the nature of the entity receiving the services; 2) the receipt by the worker of any benefits, or expectation of any benefits, for his or her work; 3) whether the activity is less than a full-time occupation; 4) whether regular employees are displaced by the "volunteer"; 5) whether the services are offered freely without pressure or coercion; and 6) whether the services are of the kind typically associated with volunteer work. Unfortunately, these factors do not provide employers with a bright-line rule.

Some additional guidance can be gleaned from the Field Operations Handbook of DOL's Wage and Hour Division ("WHD"), which provides the following examples of activities generally considered to be nonprofit volunteer work. While some of the descriptions used in these examples are dated, and even politically incorrect by today's stan-

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Are Your School's "Volunteer" Coaches Actually Entitled To Overtime Pay?

dards, these examples nonetheless shed some light on when workers may permissibly be categorized as volunteers.

- "[M]embers of civic organizations may help out in a sheltered workshop";
- "[W]omen's organizations may send members or students into hospitals or nursing homes to provide certain personal services for the sick or the elderly";
- "[M]others may assist in a school library or cafeteria as a public duty to maintain effective services for their children"; and
- "[F]athers may drive a school bus to carry a football team or band on a trip."

The Field Operations Handbook also states: "Similarly, individuals may volunteer to perform such tasks as driving vehicles or folding bandages for the Red Cross, working with children with disabilities or disadvantaged youth, helping in youth programs as camp counselors, scoutmasters, [or] den mothers, providing child care assistance for needy working mothers, soliciting contributions or participating in benefit programs for such organizations *and volunteering other services needed to carry out their charitable, educational, or religious programs.*" (Emphasis added.)

*Generally speaking, the FLSA supercedes less-protective state laws, **but not more-protective state laws.***

WHD appears to acknowledge that the existing framework for determining when workers may permissibly be treated as volunteers is not a model of clarity. In this regard, WHD states in one of its recent fact sheets that it is reviewing the need for additional guidance on volunteers in the private non-profit sector.

Don't Forget To Check State Law

Generally speaking, the FLSA supercedes less-protective state laws, *but not more-protective state laws*. Thus, public and private schools should be sure that any designation of a worker as a volunteer also satisfies applicable state law.

In Massachusetts, for example, the Executive Office of Labor and Workforce Development, Division of Occupational Safety, which administers the Commonwealth's Minimum Fair Wage Law, looks to federal law for guidance on such issues, and, as such, is in accord with the DOL on the issue of school volunteers. Some states, however, are more restrictive.

Recommendations For Public And Private Schools

We advise all schools, both public and private, to audit their employee classifications to ensure that non-exempt employees, especially those with coaching and/or other extracurricular duties, are paid appropriately. Specifically, we recommend a wage-and-hour compliance audit that addresses the following topics:

- Are employees improperly classified as exempt when they should be non-exempt?
- Are non-exempt employees being compensated for all compensable overtime hours (which may include holidays and weekends) at the proper overtime rate?
- Are individuals or employees who perform "volunteer work" appropriately categorized as volunteers under federal and state law?
- Are employees being paid in a timely manner?
- Are employees being paid for all time actually worked?

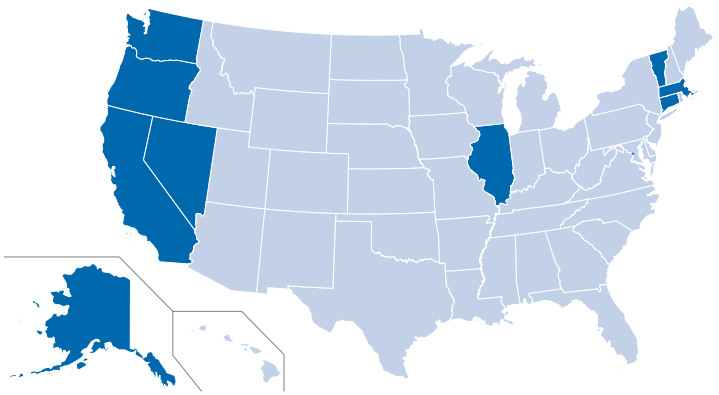
Please contact us if you have any questions about the Purdham *decision, the volunteer rules applicable to your school or organization, or FLSA compliance in general.*

Do You Know ...

The Highest 10 State Minimum Wages?

Washington	$8.67	Nevada	$8.25
Oregon	$8.50	Vermont	$8.15
Connecticut	$8.25	California	$8.00
District of Columbia	$8.25	Massachusetts	$8.00
Illinois	$8.25	Alaska	$7.75

Source: U.S. Department of Labor, Wage and Hour Division (May 2011)



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SEPTEMBER

Facebook, MySpace, YouTube And Other Social Media
September 15th

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September 26th

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NOVEMBER

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November 2nd

Nuts And Bolts Of Compliance With The Amended Family And Medical Leave Act
November 17th

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November 30th

Fall 2011 Seminars For Independent Schools:

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October 13th

Bullying: Are You Truly Prepared For The Next Incident On Your Campus? Will You Know Exactly What To Do?
October 25th

Criminal And Sex Offender Records: Best Practices For Minimizing School Liability
November 10th

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