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WOODS ROGERS PLC

# Labor & Employment Update

## ITEMS OF INTEREST IN THIS EDITION:

- OFCCP RECORDS THIRD CONSECUTIVE RECORD-BREAKING YEAR
- FOURTH CIRCUIT AFFORDS ADA PROTECTION TO EMPLOYEE WHO IS NOT "DISABLED" UNDER THE ADA
- WOODS ROGERS RECENT HIGHLIGHTS
- UPCOMING WOODS ROGERS SPEAKING ENGAGEMENTS

## A WORD ABOUT EMPLOYMENT PRACTICES LIABILITY COVERAGE

By Thomas M. Winn, III

With employment litigation continuing its surging trend, there should be little wonder that some companies turn to Employment Practices Liability Insurance ("EPLI") to manage this risk. As its name implies, EPLI policies insure against liability associated with employment litigation, which otherwise typically is an uninsured risk. Such claims might include lawsuits or charges arising under federal law, such as discrimination, harassment, and the like, as well as state law claims such as negligent hiring/retention, defamation and intentional infliction of emotional distress. Employers are cautioned to ensure the broadest scope of coverage possible, as this area of the law is constantly expanding.

EPLI policies generally cover claims against directors, officers and employees, in addition to the company, itself. Some policies expressly exclude coverage for part-time, temporary, leased and/or seasonal employees, as well as independent contractors. Employers should try to ensure their coverage reaches claims involving these contingent worker classes.

Although EPLI policies vary from carrier to carrier, most EPLI policies pro-

vide "duty to defend" coverage, requiring the insurance company to defend you against claims brought under the policy. With the duty to defend, however, usually comes the carrier's right to choose the counsel who will defend the company against the claim. If you have a preference for a particular defense counsel, you should address that issue before you have a claim and take steps to name your preferred counsel in an endorsement to the policy.

If your attorney is experienced in employment law, the insurer should accommodate your request. Otherwise, the carrier will select counsel from a list of panel counsel. Counsel selected from the panel may be less experienced than your regular labor counsel and likely will be unfamiliar with the history of your organization, your corporate culture and the specifics surrounding your employment practices.

EPLI policies can be excellent tools to minimize your exposure, but you should give thought to these issues when you secure or renew such coverage.

### **SAVE THE DATE FOR WOODS ROGERS' ANNUAL LABOR & EMPLOYMENT SEMINARS**

**Roanoke: September 10, 2008**  
**Lynchburg: September 16, 2008**  
**Danville: September 18, 2008**

## OFCCP RECORDS THIRD CONSECUTIVE RECORD-BREAKING YEAR

By Elizabeth Hope Cothran

The Office of Federal Contract Compliance Programs (“OFCCP”) recently announced recovery of approximately \$51.7 million dollars in back pay and other monetary relief for federal contractor employees in fiscal year 2007. OFCCP, the agency responsible for enforcement of laws prohibiting federal contractors from discrimination on the basis of race, color, sex, religion, national origin, disability and military veteran status, attributed the increased recoveries to an emphasis on fighting systemic discrimination.

OFCCP’s new emphasis reflects a shift in focus by the Agency to target employers who use discrimination as their “standard operating procedure.” As a result of this work, 98% of the \$51.7 million dollar recovery is attributable to collection in systemic discrimination cases. 2007 also marked the third

consecutive year in record-breaking amounts recovered and employees assisted by OFCCP.

2007 also marked an increase in the number of OFCCP’s compliance evaluations, reflecting use of the Agency’s new active case management (“ACM”) system. The ACM system uses statistical tools to rank and prioritize establishments for further review based on the probability of uncovering discrimination. Thus, OFCCP is better able to screen contractor establishments more quickly and accurately to determine the contractors most likely to discriminate.

As a result of OFCCP’s increased vigilance, contractors should carefully assess their practices to ensure compliance with applicable federal laws.

## FOURTH CIRCUIT AFFORDS ADA PROTECTION TO EMPLOYEE WHO IS NOT “DISABLED” UNDER THE ADA

By Daniel C. Summerlin

A recent Fourth Circuit decision underscores the potential danger of trying to assist an employee who may have a health condition but may not be disabled under the Americans with Disabilities Act. In *Wilson v. Phoenix Specialty Mfg. Co.*, No. 06-1818 (4<sup>th</sup> Cir. January 23, 2008), the Fourth Circuit found that Wilson’s health condition did not meet the legal definition of disability under the ADA but that he was nevertheless protected under the ADA because his employer “regarded” him as disabled. As a result, the Fourth Circuit affirmed a judgment of \$197,783 in favor of Wilson because Phoenix Specialty’s decision to terminate Wilson was in violation of the ADA.

In 1988, Wilson was hired as a shipping supervisor for Phoenix Specialty. In 1999, ten years into his employment with Phoenix Specialty, Wilson was diagnosed with Parkinson’s disease. In August, 2002, Phoenix Specialty informed Wilson that Phoenix was downsizing and eliminating his position. The Fourth Circuit held that at the time of his termination, Wilson’s condition had not deteriorated to the extent that he was disabled under the ADA. Nevertheless, the Court held that Wilson was entitled to the protection of

the ADA because Phoenix Specialty’s management regarded Wilson as disabled. Evidence in support of this finding included an email from the owner of Phoenix to the HR Department that Wilson “qualified for ADA designation and we will have to consider accommodations.”

The Wilson case emphasizes the need for all employers (particularly those who have in excess of 15 or more employees) to be aware that how you treat employees can have unintended and costly consequences. By accommodating an employee’s requests or through internal communications such as email, the employee may be protected by the ADA regardless of whether they meet the disability definition under the ADA.

Employers need to make sure that human resource personnel, managers and supervisors understand the nuances of the ADA through training and education. Woods Rogers PLC advises clients daily on ADA issues and has ample experience in training management in the drafting and implementation of proper ADA policies.

## **Woods Rogers Recent Highlights:**

**CASE RESULTS DEPEND UPON A VARIETY OF FACTORS UNIQUE TO EACH CASE. CASE RESULTS DO NOT GUARANTEE OR PREDICT A SIMILAR RESULT IN ANY FUTURE CASES.**

### **Employment Litigation:**

#### **U.S. Court of Appeals for the Fourth Circuit**

- Secured the affirmance of summary judgment on two ERISA claims arising out of denial of LTD claims.

#### **U.S. Court of Appeals for the Third Circuit**

- Secured affirmance of summary judgment on race and national origin Title VII claims.

#### **U.S. District Court for the District of Hawaii**

- Removed and secured dismissal of whistleblower and contract claims based on Section 301 preemption.

#### **U.S. District Court for the Eastern District of Virginia:**

- Secured the dismissal of race, national origin claims.
- Secured the dismissal of FMLA claims.

#### **U.S. District Court for the Western District of Virginia:**

- Secured the dismissal of ADA disability claims.
- Secured summary judgment on Title VII sex discrimination claims.

### **National Labor Relations Board:**

#### **Region 31 (California)**

- Secured deferral to arbitration of unfair labor practice charge.

#### **Region 11 (Virginia)**

- Secured the dismissal of an unfair labor practice charge relating to termination of employee.

### **Labor Arbitrations:**

- Scheduling for continuous operations. (Virginia)
- Discharge for falsification of company records. (West Virginia)
- Demotion. (New York)
- Discharge for inappropriate conduct. (Georgia)
- Discharge for attendance issues. (New York)

### **EEOC:**

- Successfully mediated Title VII gender discrimination claims. (Richmond)
- Successfully mediated Title VII race discrimination claims. (Tampa)

### **DOL:**

- Successfully calculated FMLA investigation.

### **Other:**

- Drafted anti-piracy agreements for a Fortune 500 company for its employees nationwide.
- Represented employers in Virginia, North Carolina and Oklahoma in successful union avoidance.
- Assisted in collective bargaining negotiations for two unionized employers. (Virginia)

## UPCOMING WOODS ROGERS SPEAKING ENGAGEMENTS:

**May 15, 2008** - Dan Summerlin will present *"Employment Issues Facing Small Businesses"* at the Women & Veterans Small Business Conference at Virginia Western Community College.

**May 15, 2008** - Victor Cardwell & Tom Winn will present *"Workplace Investigations"* to an Employee Benefits Management Group.

**May 23, 2008** - Victor Cardwell & Tom Winn will present *"Fair Labor Standards Act"* for Executive Development In-Service Training for Virginia Chiefs of Police at Radford University.

**May 24, 2008**—Dudley Woody will present a workshop on the *FMLA* for Central Virginia Industries in Lynchburg.

**May 29, 2008** - Victor Cardwell, Tom Winn & Dudley Woody will present a Lorman Seminar *"Workplace Investigations"* in Roanoke.

**June 4, 2008** - Agnis Chakravorty will present *"An Overview of HR Audits"* to the HR Connections Group in Blacksburg.

**July 22, 2008** - Agnis Chakravorty, Tom Winn & Dudley Woody will present a Lorman Seminar *"Employment Law A to Z"* in Roanoke.

**September 11, 2008** - Victor Cardwell & Tom Winn will speak at the SHRM Summit addressing *"FMLA/ADA Issues"*

### Woods Rogers 27th Annual Labor & Employment Seminars: *Roanoke, September 10, 2008* *Lynchburg, September 16, 2008* *Danville, September 18, 2008* (details to come)

**September 24, 2008** - Tom Winn will present a Woods Rogers Seminar *"Top Reasons Non-Profits Get Sued"* at the Higher Education Center in Roanoke. (details to come)

**September 25, 2008** - Victor Cardwell, Tom Winn & Dan Summerlin will present a Lorman Seminar *"Employment Law A to Z"* in Richmond.

*If you have any ideas, suggestions, or would like more information on any of these seminars, please email Emily Adams at [eadams@woodsrogers.com](mailto:eadams@woodsrogers.com)*



### Labor & Employment Group:

**THOMAS R. BAGBY, Chair**  
540.983.7766  
[bagby@woodsrogers.com](mailto:bagby@woodsrogers.com)

**VICTOR O. CARDWELL**  
540.983.7529  
[cardwell@woodsrogers.com](mailto:cardwell@woodsrogers.com)

**AGNIS C. CHAKRAVORTY**  
540.983.7727  
[chakravorty@woodsrogers.com](mailto:chakravorty@woodsrogers.com)

**ELIZABETH HOPE COTHRAN**  
540.983.7525  
[hcothran@woodsrogers.com](mailto:hcothran@woodsrogers.com)

**BAYARD HARRIS**  
540.983.7717  
[bharris@woodsrogers.com](mailto:bharris@woodsrogers.com)

**RJ LACKEY**  
434.797.8202  
[rjlackey@woodsrogers.com](mailto:rjlackey@woodsrogers.com)

**ANTHONY H. MONIOUDIS**  
434.797.8202  
[monioudis@woodsrogers.com](mailto:monioudis@woodsrogers.com)

**WILLIAM B. POFF**  
540.983.7649  
[poff@woodsrogers.com](mailto:poff@woodsrogers.com)

**DANIEL C. SUMMERLIN**  
540.983.7546  
[summerlin@woodsrogers.com](mailto:summerlin@woodsrogers.com)

**THOMAS M. WINN, III**  
540.983.7702  
[winn@woodsrogers.com](mailto:winn@woodsrogers.com)

**DUDLEY F. WOODY**  
540.983.7683  
[woody@woodsrogers.com](mailto:woody@woodsrogers.com)