



# HUMAN RESOURCES UPDATE

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## FMLA CHANGES

You may have heard that President Bush recently signed into law the first major changes to the Family Medical Leave Act since its inception 15 years ago. These changes have to do with your employees who have family members in the service. Specifically, the new military leave law requires employers to provide up to 26 weeks of FMLA leave to eligible employees to care for recovering injured or ill service members and 12 weeks of leave because of any qualifying “exigency” arising out of the fact that a covered family member is or has been called to be on active duty. The “qualifying exigency” provisions will not be effective until the DOL issues final FMLA regulations defining the term “qualifying exigency.”

Remember that the FMLA only applies to those companies who have 50 or more employees within a 75 mile radius. Employees also have to meet eligibility requirements.

There is a poster amendment available from the Department of Labor that must now be posted by covered employers. See poster at this url:  
<http://www.dol.gov/esa/whd/fmla/NDAAAmndmnts.pdf>.

## FLSA SUITS

In a stunning development under the Fair Labor Standards Act (“FLSA”), the federal appellate court for Texas recently permitted prevailing employees to recover over \$50,000 dollars in attorney’s fees despite the fact that the overtime wages due to them totaled only approximately \$4,500 (*Lucio-Cantu v. Vela*).

In this decision, several former employees sued their employer claiming it failed to pay them overtime as required under the FLSA. The matter was tried to a jury and the jury awarded overtime wages to each of them. The amounts awarded to the three prevailing employees, however, were nominal: \$3,348.29, \$1,296.00, and \$52.50. After these amounts were awarded, the Judge found that the company did not make the necessary showing to establish it make good faith efforts to comply with the law. Thus, the Judge awarded liquidated damages. There are no punitive damages or damages that “punish” the company under the FLSA. Instead, the amount of wages owed can be doubled as liquidated damages if the employer cannot make a showing of good faith. To add insult to injury, the Judge then awarded over \$50,000 in attorney’s fees to the former employees.

This decision is important for employers in several respects. The decision raises the stakes in FLSA cases. Even when small wage amounts are recovered at trial, if the company violated the FLSA, attorney’s fees may be recoverable. Thus, complying with the FLSA is more critical than ever, even if only nominal amounts of wages are involved.

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**NOTE THAT TAX FILINGS NORMALLY DUE ON APRIL 15 ARE NOT DUE UNTIL APRIL 17, 2008 THIS YEAR.**

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**HUMAN RESOURCES  
BUSINESS SOLUTIONS**

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## RETALIATION CLAIMS

Your company finds the need to terminate an employee for a legitimate work-related reason, but this need follows uncomfortably closely on the heels of the employee's "protected activity." What is the decision? In such a case, the employer will often hesitate to terminate the employee, based on the potential retaliation claim that will likely result. However, as recently recognized by the Fifth Circuit in *Strong v. University Healthcare System, L.L.C.*: "[we] affirmatively reject the notion that temporal proximity standing alone can be sufficient proof of "but for" causation. Such a rule would unnecessarily tie the hands of employers." 482 F.3d 802, 808 (5<sup>th</sup> Cir. 2007).

The *Strong* case addresses to what extent an employee may rely on *timing alone* to establish a link between protected activity and the employer's decision to terminate. By way of review, the elements of retaliatory discharge are (1) the employee engaged in a protected activity, (2) the employer discharged the employee, and (3) there is a causal connection between the protected activity and the discharge. Once the employee makes this preliminary showing, the employer must state a "legitimate, nondiscriminatory reason" for the plaintiff's termination.

The complaint was made on December 15, 2003. Ms. Strong was then terminated approximately three and a half months after her initial discrimination complaint. The hospital claimed the reasons for Ms. Strong's termination were work-related performance issues.

Ms. Strong filed a retaliation claim against UHS. In doing so, Ms. Strong asserted that the three-and-a-half-month time span between her complaint and termination was "solid

evidence of retaliation."

In contrast, Ms. Strong's work-place behavior, before and after her discrimination complaint, had been the subject of numerous complaints from patients, co-workers, supervisors and doctors. After several incidents, Ms. Strong was "counseled" by different supervisors. Despite the reprimands, Ms. Strong continued her disruptive behavior. Finally, she misdiagnosed a patient's suitability for a liver transplant. This incident led to Ms. Strong's suspension without pay and the ultimate decision to terminate her employment. UHS cited the reasons for the suspension and termination as poor performance and improper work conduct, including redirecting patients away from certain doctors; presenting patients in a negative fashion; arguing with superiors; and engaging in behavior obstructive to various department policies.

After considering Ms. Strong's evidence, the Fifth Circuit court emphasized that litigants generally cannot rely on "temporal proximity" alone to establish retaliation, unless the timing is "very close." However, if legitimate reasons for firing an employee are stated and the employee cannot put forth sufficient evidence to show those reasons are pretextual, then the retaliation claims, such as those asserted by Ms. Strong, must fail.

*... recent research has shown that there is still a disparity in pay equity between men and women – women still earn about 74 cents for every \$1 paid to men doing the same job. How does the pay at your company compare between men and women?*