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Minimizing FMLA Abuse - Use of "Intermittent Leave"

While most employees use Family Medical Leave Act (FMLA) legitimately and without abuse, it is important for employers to have an effective FMLA management system, ("FMLA Toolkit") in place to deal with the employees who may abuse the system.

FMLA allows employees to take 12 weeks of leave for their own or a family member's serious health condition and up to 26 weeks for military caregivers. Leave can be taken in one block, over several stretches of time or intermittently. Longer FMLA leaves are relatively straightforward, but an employee's ability to take FMLA on an intermittent basis generates administrative headaches for employers and raises concerns about employee abuse. The FMLA offers a number of tools – many of which are not widely employed – for an employer to discourage abuse of intermittent leave. In this article, I've outlined for you some strategies for getting a handle on this troubling problem. Note: each of these strategies can be employed individually, but are often more effective when used together.

Option 1: Question The Original Certification

To take intermittent leave an employee needs to provide a certification that there is a medical need for leave. You have a number of opportunities to ensure that the certification is sufficient, valid, and supports the need for intermittent leave. When an employee submits a certification for a chronic condition that will flare up and require intermittent leave – asthma or migraines, for example – the human resources professional reviewing the certification should consider these options: *(Continued on page 2 at FMLA Abuse)*

IN THIS ISSUE

Positive Train Control

Will the US rail system shut down on December 31, 2015?

If you're a gambler, the answer is – likely not. But then, you are either gambling on the Congress getting something done or gambling that Class I's and some of the largest commuter rail systems in the US will not carry through on threats to shut down their lines hauling TIH at year end if Congress doesn't extend the PTC deadline.

The House and the Senate have agreed on compromise language but must now agree on the mechanism by which the extension will leave Congress for the President's signature. Some want it attached to the transportation bill, some to the funding extension bill, and some want it to be a solo bill. The compromise language focusses primarily on the Class I's and passenger and commuter rail operations but it also includes extensions for Class II and III carriers who have operations on *(Continued on page 4 at PTC)*

(FMLA Abuse Continued from page 1)

Incomplete or insufficient certification

When a certification has entries missing or is vague or ambiguous, ask the employee to provide complete and sufficient information. This request must be in writing and must specify the reason the certification was considered incomplete or insufficient. The em ployee is then given 7 days to provide the additional information. If the employee fails to do so, leave may be delayed or denied.

Authentication and Clarification

Using your human resource professional, health care provider, or leave administrator, you may contact the health care provider identified in the certification to ensure that he or she actually prepared the certifica tion, and to clarify handwriting or the meaning of a response.

During either of the above, be careful not to request more information than what is required to authenticate or clarify the form. Under no circumstances should the employee's direct supervisor be involved in contacting the health care provider. This task should remain exclusively with your human resource professionals or 3rd parties you retain for HR or medical assistance. The above suggestions can also be used at the recertification stage as well.

Option 2: Ask For An Additional Opinion

If you have reason to doubt the validity of an initial certification, you may ask for a second opinion. The physician providing this second opinion may be selected by the employer, but cannot be one the employer utilizes on a regular basis. The employer must cover the costs of the second opinion. If the opinion provided in the certification and the second opinion differ, you may require the employee to see a third health care provider, again at the company's expense. The third provider's opinion is binding. Although there are a number of opportunities to ask for recertification of an employee's serious health condition, you may not seek second or third opinions during the recertification.

Option 3: Ensure That All Absences Related To The Condition Are Counted

After the employee submits a certification for sporadic health-related absences, you must be certain that all absences related to the condition are counted against the employee's FMLA entitlement. However, you must ensure that these absences are *not* counted against the employee under a no-fault attendance policy[1]. Absences are typically funneled to a central dispatcher or call-in line. Your front-line supervisors must be the eyes and ears of the organization and pass along information about FMLA-covered intermittent absences to human resources. This, in turn, requires employers to train supervisors to recognize absences that may be covered by the FMLA.

Identifying FMLA absences is not simple, in part because the U.S. Labor Department and the courts have held that the employee does not have to cite to the FMLA in a request. If there is an existing certification, it is enough for the employee to notify the employer that he had a recurrence of the health condition covered by the certification.[2]

Further, you should ensure that leave increments are appropriately applied. When an employee takes FMLA leave on an intermittent basis, you must account for the leave using an increment no greater than the shortest period of time that you use to account for use of other forms of leave, provided it is not greater than 1 hour. Also, an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. Thus, if an employer accounts for the use of vacation leave in increments of 1 hour and the use of sick leave in increments of 1/2 hour, FMLA leave use must be accounted for using increments no larger than one-half hour.

Option 4: Require Employees To Follow Your Paid Leave Policy

You may require that employees use up paid leave time for their intermittent FMLA absences. In fact, all employers should include such a requirement in their

(Continued on page 5 at FMLA Abuse)

[1]A no-fault attendance policy assigns points each time an employee is absent, with corresponding levels of progressive discipline automatically imposed at certain point levels. Employers like these policies because they simplify attendance issues. These policies, however, carry, a certain degree of risk—namely in the handling of absences protected by the Family and Medical Leave Act or the Americans with Disabilities Act. If the FMLA or ADA protects an employee's absence from work, an employer would violate the statute by counting the absence as part of a no-fault attendance policy.

[2]This is also important for first-time health related absences. As a general rule, supervisors should be trained to notify human resources any time an employee is out for more than three days with an illness, particularly if the employee saw a physician during that time.

PRESERVING THE ATTORNEY-CLIENT PRIVILEGE: DOES IT INCLUDE IN-HOUSE COUNSEL?

Basics of the Attorney-Client Privilege:

The attorney-client privilege protects the confidentiality of communications between an attorney and his or her client. The communications must be made for the purpose of providing legal services and intended to be confidential. The purpose of the privilege is to allow clients to fully disclose all necessary information to their attorney who can then provide proper and complete legal advice. However, the application and retention of this privilege can be a bit more complicated in the context of in-house counsel for a corporation.

Specific Issues Regarding the Attorney-Client Privilege in the Corporate Setting:

1) ***Heightened Scrutiny*:** Although technically the privilege applies equally to both outside and in-house counsel, in reality, courts view the assertion of privilege over communications involving in-house counsel more skeptically, most likely because in-house counsel often play a number of roles at the company in addition to the role of attorney. In-house counsel frequently serves on the company's board, acts as corporate secretary, is a business negotiator, and can be a corporate officer. Because the privilege only applies to legal communications, the court seeks to ascertain which "hat" the attorney was wearing at the time of the communication – was it his or her business hat or legal hat? Accordingly, for communications with in-house counsel to be considered privileged, the corporation must be able to show that the attorney was providing legal advice at the time of the communication. For example, some courts have found that when in-house counsel is acting in a negotiating capacity, he or she is performing a business function rather than a legal function; and therefore no privilege attaches. In sum, for in-house counsel, mixing business advice with legal advice may undermine the successful use of the privilege and should be avoided or carefully delineated.

2) ***Who is the client?*** In the context of legal advice to a corporation, the corporation is the client. In-house counsel does not represent any of the officers, directors, or employees as individuals, especially if their interests are at odds with those of the corporation. For a communication with in-house counsel to be privileged, the communication must be within the scope of the employee's duties for the company. Further, to the extent in-house counsel communicates with employees who are not within a "need to know" scope of the privilege, any privilege that may attach could be waived. This is often not a problem for outside counsel, because outside counsel seek out specific employees and can filter those who should not be included in communications. But for in-house counsel, employees who are not within the scope of the privilege of the legal advice being given may be in the meeting at issue or included on an email. Therefore, it is important for in-house counsel to explain the boundaries of the privilege to corporate employees, so as to avoid having unnecessary and unprivileged conversations with them and to be careful to review the population of employees included on, for example, communications or conference calls.

3) ***Common Myth Debunked:*** Merely including in-house counsel (or for that matter any counsel) in a meeting or copying him or her on an email or memorandum does not automatically bring the correspondence within the protection of the attorney-client privilege. For example, routine business communications are not privileged just because in-house counsel is included in the group email. Again, bear in mind the key element of the privilege -- communications must be for the purposes of seeking legal advice.

Tips to Ensure Maximum Protection of Your Privileged Communications:

- In-house counsel should explicitly state in communications that they are intended to be privileged and that they are providing legal advice.
- If possible, in-house counsel should not discuss business and legal topics in the same communication or carefully delineate to protect at least the legal portion of the communication.
- Privileged communications should be marked "privileged" or "subject to the attorney-client privilege" and segregated from other business documents.
- When seeking legal advice from in-house counsel, corporate employees should clearly state in their communications that they are requesting legal advice.
- In-house counsel should be part of a legal department (rather than a business department), have an appropriate title, and refer to him or herself as "counsel" in communications when appropriate. In-house counsel should not be supervised by non-lawyers.
- Only distribute privileged information on a "need-to-know" basis within the corporation, i.e., to that group of employees who are seeking the advice or need to know the advice for the related action to be carried out.

For more information, please contact Carly Comerouski at ccomerouski@fletcher-sippel.com.

(PTC Continued from page 1) PTC-equipped track or may otherwise be required to be PTC-equipped. Let's assume Congress acts and an extension is granted. What does it mean? PTC is mandated on all main line track over which Class I's haul toxic inhalation (TIH) materials and all lines on which commuter or passenger rail runs. For Class I's and commuter and passenger rail lines, or railroads hosting commuter or passenger service, it means the pressure is off to have PTC fully installed by the end of the year. The new deadline will likely be December 31, 2018. But for tenant railroads (railroads who must traverse PTC-equipped track via trackage rights or other authority) it's not so clear. The current regulations presume to give Class II and III carriers until December 31, 2020 to comply (extended by 3 years under the compromise bill) and grant exceptions from the regulations but they also appear to give host carriers significant control over whether they will let unequipped carriers on their track.

Class II/III Exceptions
(when a non-PTC equipped locomotive may operate on PTC-operated track)

- there is no intercity or commuter passenger traffic or the non-equipped train operations are included in the PTCIP (implementation plan)
- operations are restricted to 4 or less unequipped trains/day
- the permitted move does not exceed 20 miles

49 CFR §236.1006(b)(4)

Whether Congress grants an extension or not, it is likely railroads will implement PTC in stages. The exceptions granted in the regulations are limited and it appears FRA is leaving it up to the host Class I carriers whether the tenant will be allowed to operate over PTC- equipped track with non PTC-equipped locomotives. Some tenant railroads have already been told no -- no operations on the line whether there is a trackage rights agreement or not – unless the tenant is PTC-equipped. *So what does "being equipped" entail?*

There is much more to being "PTC-equipped" than just installing the onboard PTC apparatus on your lead locomotive. And depending on your host railroad, you may find them very reluctant to help. Here's a list of just a few of the things you have to think about:

- Location of cell signals and wi-fi capability to transfer data from crews
- Type of locomotives and whether they can accommodate the equipment
- Selecting the right vendors for ETMS computer system, PTC radio kit, PTC event recorder, wayside detectors, etc.
- Securing a license agreement from Meteorcomm for 220Mhz radio and insurance
- Determine your back office system needs
- Establish interoperability with other railroads on the line
- Training plan, operations manual, initial implementation test, post-implementation testing

And if you are a tenant railroad, there may be even more hurdles you must surmount, including:

- Can you afford to equip?
- Is the host railroad going to include you in its PTCDP, PTCIP and PTCSP ?
- Will you qualify for a Class II/III exception and, if you do, will the host railroad honor an exception?
- Can you secure the insurance demanded by either Meteorcomm or the host railroad? (possible as much as $200M in liability coverage)
- Have you or will you be willing to execute an AAR PTC Interchange Agreement?
- Will you be forced to embargo traffic if you can't meet the conditions?
- Can a host carrier terminate your operating agreement if you fall within an exception and aren't equipped?

It goes without saying that an extension bill will go a long way in allowing time to work through the issues but an extension will not reduce the enormous cost involved in installing and maintaining PTC. Likewise, an extension will not preclude a host from starting up PTC earlier than the deadline on a track segment-by-track segment basis, which, for tenant railroads, means reality may set in earlier than anticipated. The ASLRRA is working diligently to advocate for the concerns of Class II and III railroads with Congress, the STB, the FRA and the AAR. Stay tuned!!!

For further information, please contact Janet Gilbert at jgilbert@fletcher-sippel.com.

(FMLA Abuse Continued from page 2)

FMLA policies in order to prevent the situation where an employee can take paid leave after their FMLA leave expires and thereby extend a leave of absence beyond the FMLA entitlement. The FMLA regulations have been clarified to provide that you may require employees to abide by your paid-time-off policies in order to be paid for FMLA leave time. For example, you may require the employee to call a certain person or a particular telephone number to notify the organization of an FMLA absence.

The FMLA, standing alone, would not allow you to request a doctor's note for every absence if there is a valid medical certification in place. But if your written paid-time-off policy calls for it, you may require a doctor's note for **paid-leave time**. (Remember, if the employee fails to provide the note, FMLA leave cannot be denied. The leave time would simply be unpaid. The prospect of paid leave provides a strong incentive to comply.)

Option 5: Follow-Up With Recertification

FMLA regulations offer several opportunities to seek recertification of the employee's stated need for FMLA leave. Unless there are changed or suspicious circumstances, these rules of thumb apply:

- employees may be asked for recertification any time they seek to extend an existing FMLA leave;
- for conditions that may require sporadic absences (as well as long-term conditions), an employer may request recertification every 30 days in connection with an absence;
- if the employee is out on a leave that has been certified to extend for more than 30 days, the employer may seek recertification at the stated interval;
- if the employee takes a solid block of leave of more than 30 days, the employer may ask for recertification if the leave extends beyond the requested leave period; and finally,
- employers may ask for a new certification at the beginning of each leave year.

As with initial certifications, the employee has 15 days to provide the recertification documentation.

Option 6: Investigate Changed Or Suspicious Circumstances

You should always keep tabs on use of FMLA leave. You may want to pay special attention to patterns of intermittent leave usage. You may seek recertification more frequently than 30 days if: a) the circumstances described by the existing certification have changed; or b) you receive information that casts doubt on the employee's stated reason for the absence or on the continuing validity of the certification.

"Changed circumstances" include a different frequency or duration of absences or increased severity or complications from the illness. In these instances, FMLA allows you to provide information to the health care provider about the employee's absence pattern and ask the provider if the absences are consistent with the health condition.

"Information that casts doubt on the employee's stated reason for the absence" may be credible information you receive (possibly from other employees) about activities the employee is engaging in while on FMLA leave that are inconsistent with the employee's health condition. For example, an employee is playing in the company softball game while on leave for knee surgery. Always attempt to independently verify information received from coworkers before taking action or requesting recertification for suspicious circumstances. Be sure the coworker is credible and doesn't have an axe to grind.

Successful FMLA administration requires employers and their counsel to plan for and skillfully respond to the unexpected. By establishing, using, and continually updating your FMLA Toolkit, employers can help reduce the headaches often associated with FMLA leave compliance.

Contact Chloé Pedersen at 312-252-1510 or cpedersen@fletcher-sippel.com for additional information or questions regarding your FMLA Toolkit and how best to manage FMLA leave.

OSHA UPDATE

Complainant's 2nd Bite May have a Shelf Life

A Review of Mullen v. Norfolk Southern Ry. Co. 2015 WL 3457493

In *Mullen*, the U.S. Dist. Ct. for the W. Dist. of Pennsylvania limited an employee's ability to seek recovery for an alleged FRSA violation before the district court. Plaintiff alleged NS wrongfully terminated his employment after he protested violations of a safety regulation and raised concerns with his supervisors while working as a trackman. Mullen filed a "whistleblower" claim with OSHA under the employee protection provisions of the Federal Railroad Safety Act ("FRSA").

After Mullen filed his complaint, the OSHA Regional Administrator conducted an investigation and issued written findings (the "Secretary's Findings"). The Secretary's Findings reported that Mullen and his supervisor disagreed about the need for a foreman to work with the gang trackman lubricating switches in the yard and Mullen refused to assume the roll when it was offered to him. The Secretary further found that Mullen raised his concerns at a safety meeting the following day during which he became argumentative and insubordinate. As a result, NS suspended and ultimately terminated him. His termination was later reduced to a 3 1/2 month suspension. According to the Secretary, there "was no evidence that Mullen's discipline was motivated in any way by his protected activity, but rather because of this disruptive behavior and insubordination."

Mullen appealed the Secretary's Findings to the Office of Administrative Law Judges ("ALJ"). During the course of discovery, the 210-day period following the filing of Mullen's complaint elapsed triggering Mullen's right to bring "an original action at law or equity for de novo review in the appropriate district court of the United States." Mullen's second bite was ripe, but he did not file his civil action at that time. Instead the parties continued discovery and ultimately participated in a 4 day hearing before the assigned ALJ. The results were not favorable to Mullen.

The ALJ issued a thorough 19 page single-spaced Decision and Order dismissing Mullen's complaint. The ALJ found NS had established, by clear and convincing evidence, that it removed Mullen from service and then imposed discipline "not because of his safety concerns but rather because of the grossly inappropriate manner in which he raised the [safety concerns]." To no one's surprise, Mullen filed a Petition for Review with the Administrative Review Board (the "ARB").

However, despite timely filing his appeal, Mullen ignored the ARB's Order to file a supporting legal brief and instead filed a Notice of Intention to File Original Action in U.S Dist. Court. Shortly thereafter, the ARB ordered the parties to show cause why the Board should not dismiss Mullen's claim and informed the parties that, should they fail to timely reply, the ARB would dismiss the claim without further notice. Mullen did not respond to the Order to Show Cause. In an attempt to preserve its rights, NS responded stating it did not object to the dismissal with prejudice of Mullen's complaint, but it reserved the right "to contend in federal district court that Mullen's claim is barred by the doctrines of claim or issue preclusion, waiver, estoppel, failure to exhaust remedies or any other applicable legal doctrine." The ARB issued a Final Decision and Order dismissing Mullen's complaint.

Mullen then filed a Complaint in the U.S. Dist. Court -- 113 days after the issuance of the Secretary's Final Decision and Order Dismissing the Complaint. In response NS challenged the district court's jurisdiction to hear the matter, raising 2 issues: (1) "whether the ARB's Order constituted a final decision under the FRSA" and (2) "whether a final decision from the Secretary, issued more than 210 days after the filing of the administrative complaint, but before the employee initiated a federal action, prevents a district court from conducting a de novo review." The District Court decided it did not have subject-matter jurisdiction, disagreeing with a sister district's opinion on the same issues.

The First Bite: The District Court found that the procedures for adjudicating a complaint under FRSA, as detailed by the DOL regulations, set forth a 3 stage process (a/k/a the "first bite"): (1) an investigation by OSHA, which issues the Secretary's Findings; (2) a hearing before and decision by an ALJ; and (3) appellate review by the ARB. At each stage, the decision and order issued can become a final, non-appealable order of the Secretary of Labor unless a party exercises his or her right to timely advance the appeal to the next level. While the ARB represents the highest level of review within the DOL, the U.S. Court of Appeals retains exclusive jurisdiction *(Continued on page 7 at OSHA Updates)*

*(OSHA Updates Continued from page 6)*to review a timely appeal from a final order of the DOL under FRSA. See 49 USCS Section 20109(d)(4); 29 CFR Section 1982.112.

The Second Bite: The Court noted that the FRSA includes a limited grant of jurisdictional authority to the federal district courts, known as the "kick-out" provision (a/k/a. the "second bite"). The District Court quoted the language of the FRSA stating that "if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee, the employee may bring an original action at law or equity for de novo review in the appropriate district court of the United States[…]".

With this language in mind, the District Court examined the first issue raised by NS and determined the ARB's Final Decision and Order was, in fact, final. There was no basis for any reinterpretation of an administrative action of the Secretary -- one that was expressly designated as a final decision - - to be something else. Thus, the District Court declined to second-guess the Secretary's designation of its own order as the Final Decision and Order.

The District Court then moved to the second issue: "whether a final decision from the Secretary, issued more than 210 days after the filing of the administrative complaint, but before the employee initiated a federal action, prevents a district court from conducting a de novo review." The District Court opined that, based upon Mullen's reading of the statute (and the view of at least one other district court), a FRSA complainant would always have the right to file a de novo action in federal court irrespective of what occurred at the administrative level so long as the Secretary did not issue a "final decision" within 210 days after the administrative complaint had been filed. Finding this to be inconsistent with the language and intent of the statute, the District Court held that Section 20109(d)(3) of Title 49 does not include an unlimited right to bring suit; rather, it states an "employee may bring an original action at law or equity for de novo review in the appropriate district court" if the Secretary "***has not*** issued a final decision within 210 days after the filing of the complaint."

In closing, the District Court warned that the "FRSA only includes a limited grant of jurisdiction to federal district courts, which must be jealously guarded." Indeed, an employee's 2nd bite at the FRSA apple becomes ripe 210-days from the filing of the complaint and is limited to the window before the Secretary's findings are final.

OTHER OSHA NEWS:

Employers are continuing to challenge *Araujo, DeFrancesco* and its progeny arguing the ARB wrongly decided these cases. In *DeFrancesco*, ARB No. 10-114 at 7, the ARB found that, because complainant's report of injury triggered the employer's review of his personnel records which then led to his suspension, his report of injury was a contributing factor to his suspension as a matter of law. However, encouraging results have been seen repeatedly out of the 8th Circuit where decisions following *DeFrancesco* have been viewed as "virtually immuniz[ing] a railroad employee from employer discipline for unsafe conduct so long as he or she reports any resulting injury and the report is the only avenue by which the employer learned of the unsafe conduct." *Kuduk* v. *BNSF Railway Co.*, 768 F.3d 786 (8th Cir. 2014). With the *Kuduk* decision, the 8th Circuit rejected both the 3rd Circuit's *Araujo* and the ARB's *DeFrancesco* "contributing factor" analysis and instead required an employee to prove intentional retaliation prompted by the employee's protected activity. Not surprisingly, the ALJ's have found a way around this. Where the case does not arise in the 8th Circuit, ALJ's have reasoned that the 8th Circuit's opinions construing the FRSA as requiring a complainant to show animus or intentional retaliation in meeting his or her burden of establishing contributing factor are simply not controlling. *See Peachy v. Wisconsin Central*, 2014-FRS-00076 (19-20).

Contact Chloé Pedersen at 312-252-1510 or cpedersen@fletcher-sippel.com for additional information.

Congrats to Chloé: On June 4th, 2015, Chloé Pedersen of Fletcher & Sippel was sworn in as a Member of the Board of Directors of the Illinois Women's Bar Association.

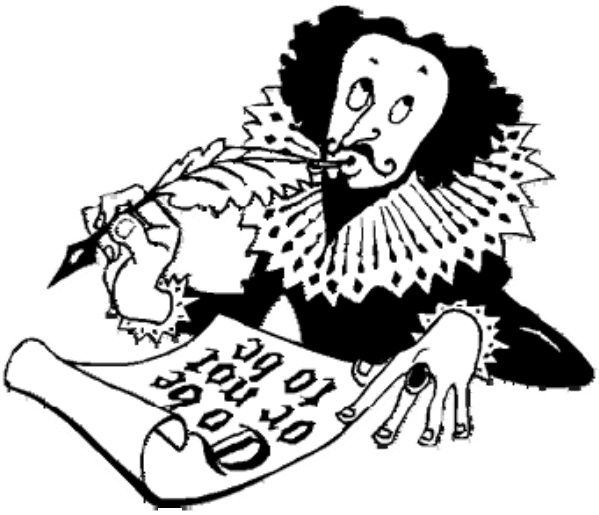
TO BE OR NOT TO BE:

Getting On & Off Moving Equipment

Over the past 25 years, the railroad industry has been up-and-down regarding whether employees should be allowed to get on and off moving equipment. For decades this was a standard practice and employees were permitted to get on and off moving equipment so long as the ground conditions were safe, the employee was properly trained and the train was going a safe speed.

For those unfamiliar with the practice, to get off moving equipment the employee rides the side of a car or locomotive, faces the equipment with both feet on the lowest step or rung and, with both hands holding on, lowers his or her trailing foot (left foot if the train is travelling left to right), angles that leg towards the direction of travel and steps down and then immediately releases his or her hands and leading foot. Similarly, to get on moving equipment the employee faces the equipment, grabs the rung with both hands and immediately lifts the trailing foot into the bottom left corner of the stair or rung. The momentum of the train helps pull the employee up on the car.

In the early 1990s some railroads revised their rules based on the belief that it was safer to ride out a movement before getting off (despite the potential for slack action) or to bring the train to a complete stop before getting on. Amongst the rank and file this was almost universally an unpopular rule change. For instance, at the BN, after the railroad had changed its rule, employees were continuing to engage in the practice so widely that BN had a "study" conducted to convince its employees it was safer to get on/off stopped equipment. That "study" has since been referred to as the "Barbre Study." Lawyers representing plaintiffs in FELA lawsuits use it to show that the practice was not safe and that the industry had notice of this fact as early as 1992. However, the study was never published in any peer-reviewed publication, by its own admission erred on the side of overestimation of forces and only estimated forces at a 70% accuracy rate.



Fast-forward to present -- railroads that banned the practice are starting to reconsider their policies. At roughly the same time some railroads were banning the practice, the scientific community began to study getting on and off of moving equipment. In August of 2011, Dr. Elaine Serina presented a paper at the Annual Meeting of the American Society of Biomechanics on the impact forces generated when getting off moving equipment. To our knowledge, this study has not been published in a peer-reviewed journal, but it was peer-reviewed before it was eligible to be presented at the Biomechanics Conference. For now, it appears to be the only peer-reviewed research on the topic.

Dr. Serina's research found that getting off equipment moving less than 5 miles-per-hour created forces similar to those experienced when walking on asphalt or ballast. For equipment going between 6-9 miles-per-hour, the forces experienced were similar to performing a jumping jack and less than the forces created when jogging on asphalt. Jogging, of course, would normally be much more repetitive than getting off moving equipment several times throughout a normal working day.

Since 2011, two Class I railroads have changed their policies and now allow employees to be trained on how to get on and off of moving equipment. In 2013, CP once again allowed the practice and NS, after conducting a biomechanical study, reintroduced the practice. NS's study is not currently available, but it is clear from its rule change that impact forces were **less** when getting off moving equipment than for getting off stopped equipment. Moreover, the forces experienced were equal to forces experienced during normal everyday activities.

For further information, please contact Steve Rynn at srynn@fletcher-sippel.com.

Transactional Tips

Most railroads have long-standing form contracts in place for routine transactions such as railcar storage, or industry track service. In most instances these contracts have been blessed by attorneys when first drafted but it's always a good idea to revisit those contracts and update the terms to reflect changes in regulations, new laws and industry trends. Below are several areas we suggest you review or add to your contracts:

What is a Venue Clause and Why Have One?

My small railroad located in Idaho has to defend a lawsuit against a shipper storing cars at my facility (in Idaho) in a New York City court?

Venue is the geographical location where a lawsuit must be filed. It applies to both federal or state court. Venue is different from choice of law. Choice of law language only covers which state's laws will apply to a dispute and has nothing to do with where the action will be litigated. So, without a venue clause, you may be litigating your case in a totally different state and one that may be a very distant state. For example, without a venue clause, a shipper located in Missouri with lawyers in New York may file a lawsuit against your railroad in New York City based on a storage contract being performed at your facility in Idaho. And, while you may object to this location and attempt to move the lawsuit to Idaho where the contract is actually being performed, there is no guarantee a court will grant such a motion, and, in any event, you will spend significant legal fees to reach that determination.

Why should you care about the venue of a lawsuit? To begin with, litigating in a foreign forum increases the costs and legal fees. Your lawyers will have travel expenses and may need to involve a local counsel licensed in the state where the lawsuit is filed. In addition, by taking the location of the lawsuit away from your region, the railroad also loses its "home court" advantage where your company is a contributor to the local economy and a local employer. This is particularly important if a jury is going to hear your case. There is no downside to including a venue clause in your contract specifying that any lawsuit will be brought in the state of your choice. If anything, you gain one more lever to pull in negotiations.

Does Your Contract Protect Against Subsequent Findings of RRB Tax Liability for Contractor's Employees?

You're saying I could be found to be the employer of a Contractor's employee, even long after our contract has expired, and I may have to pay RRB taxes for those employees?

Many railroads contract out functions that can be performed better or cheaper by someone else. To the outside world, including the RRB, these independent contractors, depending on how the work is performed and who is controlling it, can look very much like railroad employees. If the independent contractor does not pass the "smell" test as a contractor vs an employee, railroads may subsequently be held responsible for the tax liability of these "independent contractors." You may not be able to change what the outside world thinks, including the RRB, but you can make sure that the contractor takes care of his own responsibilities – through contractual indemnification requiring the contractor to indemnify the Railroad for any subsequent findings holding that the contractor's employees are in fact employees of the Railroad for purposes of RRB liability. This is a situation where the "legalese" that lawyers argue about can save you a lot of money and hassle down the line.

Does Your Contract Require Contractors to Comply with FRA Training, Qualification and Oversight Requirements?

You mean I could be fined because my contractor doesn't train its employees?

In November of 2014, FRA issued a final rule establishing minimum training standards for all safety-related railroad employees as required by the Rail Safety Improvement Act of 2008. The Rule requires each railroad *or contractor* that employs one or more safety-related railroad employees to develop and submit a training program to the FRA and to conduct periodic oversight of these employees. The Rule also contains specific training and qualification requirements for operators of roadway maintenance machines that can hoist, lower and horizontally move a suspended load. See 49 CFR Parts 214, 232, and 243. FRA has made clear that the training requirements found in 49 CFR 243.1 also apply to parties with whom the railroad contracts to perform such safety related operations, depending on the contractual obligations of that third-party and regardless of whether the work is performed on or off railroad property. To avoid railroad liability for third-party contractors' failure to comply with these new rules, specific reference to these rules and the contractor's obligation to comply with them, as well as indemnification for failure to do so, should be included in all railroad contracts with applicable third-party contractors.

For further information, please contact Audrey Brodrick at abrodrick@fletcher-sippel.com.

What to do when the FRA and NTSB both show up to investigate...

Any time you have the unfortunate experience of having a major accident involving a fatality or serious property damage, there is the real possibility that both the FRA and the NTSB will show up to conduct simultaneous investigations. In that situation, the NTSB takes priority and the FRA will become a party to the NTSB investigation. The FRA investigators will still have their own investigation to conduct and may very well not be happy about taking a back seat to the NTSB. If mishandled, this situation can turn an already highly stressful environment into the perfect storm.

So, what can you do to make things run smoothly?

The short answer is to set the ground rules up front and keep the lines of communication open. Remember, the goal of an NTSB investigation is to find out what happened in order to prevent the next accident, while the FRA is looking to see if there has been regulatory compliance. Despite these differing agendas, the agencies want the same data from you -- they just use it for different purposes.

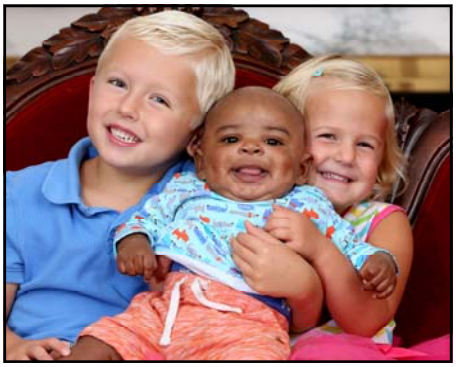
It is imperative that you establish a good working relationship with both sets of investigators. Be open about your concerns. Cooperation and inclusion should be the order of the day. Ultimately, the goal is to make sure that information, documents and witnesses are made equally available to both agencies. Whenever possible include both agencies on email or other communications.

With witnesses, there are a number of reasons why you would not want to open them up to multiple interviews, not the least of which is the danger of inadvertent but conflicting statements. You should propose that witnesses be made available for joint interviews. To the extent possible, site or equipment inspections should be handled the same way.

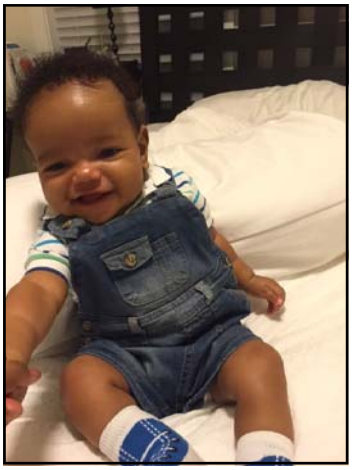
For further information, please contact Peter McLeod at pmcleod@fletcher-sippel.com.

The Fletcher & Sippel Family Grows by Three!!!

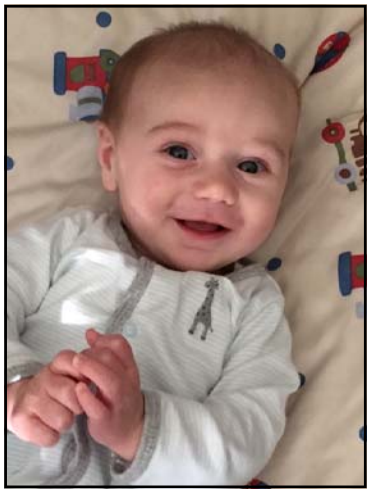
May was a busy month for the Fletcher & Sippel family and we were lucky enough to have grown by three. Below are our three new wonderful faces of Fletcher & Sippel.



Shea was welcomed home as the youngest of the Brodrick three on 5/1/15.



Sebastian Pedersen was welcomed to this world on 5/5/15.



On 5/31/15 Alex joined the Bryant family.

F&S Obtains Summary Judgement

Jim Helenhouse and Chloe Pedersen recently obtain summary Judgment in an FELA case on the grounds that there was not sufficient evidence to establish that the accident was foreseeable. The case involved an employee who alleged he slipped on an ice covered manhole. In his deposition, plaintiff testified that he could not see the ice because it was "clear." The weather records established that there had been extreme temperature changes in the 24 hours preceding the alleged incident, with a low of 11 degrees below zero. There was no evidence in the record that there had been prior complaints regarding ice on the manhole cover. The court held that under these circumstances, the accident was not foreseeable. The case is under appeal.

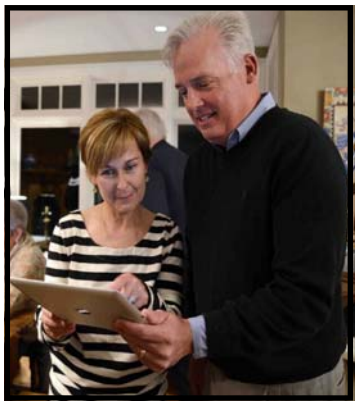
THERE'S MORE TO LIFE THAN THE LAW....

As our regular readers know, each issue we introduce you to one of our Fletcher & Sippel attorneys, not to feature their fantastic legal skills, but to let you know a little bit about their "behind the scenes" life.
***This issue we introduce you to* COLLEEN KONICEK.**

****

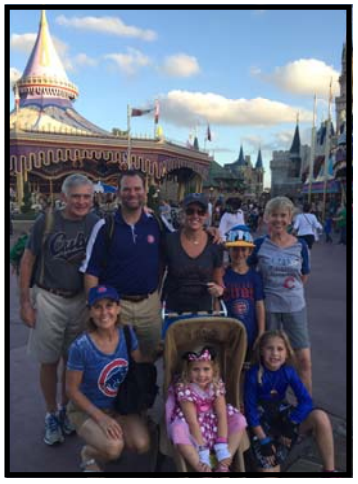
Colleen is a Partner at Fletcher & Sippel and one of its lead litigators. But if you're in the office in the morning and are waiting for her to come off the elevator, forget it…… you won't find her there!

You will meet Colleen at the stairwell as she finishes her morning jog running up 9 flights of stairs...and for all we know, it might have been her second round on those stairs! Colleen is our stand out athlete...she's completed the Boston Marathon, the Chicago Marathon, the New Orleans, San Diego, and Arizona Rock-N-Roll marathons just to name a few. She's Fletcher & Sippel's star on our annual *Race Judicata* 5K run. But a not so well known fact about Colleen is that she was a 4-year varsity starter on DePauw University's field hockey team, made the Division III All American team 3 times, and was inducted into DePauw's Athletic Hall of Fame in 2001.



And when she's not running up stairs or running in a marathon, you'll find her running for office. In 2013, Colleen made her debut into politics when she was elected by an overwhelming vote to the Barrington Hills Village Board….today the Village Board, tomorrow - who knows?

But what we most know and admire about Colleen is her love for her family. Not only is she the best thing that ever happened to her husband, Mike Hannigan, but she's devoted to mentoring her 15 nieces and nephews and sharing holidays and travel with her family, most recently traveling to Disney World with her parents, sister, brother-in-law, and 3 youngest nieces and nephew. For the past five years, Colleen and her siblings have worked together to run a community event, the Barrington Honor Ride & Run, that includes 3 bike distances and a 5K/10K run to raise funds for our nation's injured veterans through Ride 2 Recovery. She is devoted to bettering the lives of our nation's veterans and loves the opportunity to work alongside her family in effort. This is truly a family endeavor, as participants are guided through the various bike and run routes by members of the Konicek family ranging in age from 4 to 75.



Upcoming Events

October 28-30. 2015: **ASLRRA Finance & Administration and General Counsel Symposium**, Kansas City, MO. https://member.aslrra.org/aslrra/GCFA2015

November 15-17, 2015: **ASLRRA Southern Region Meeting**, Atlanta, GA https://member.aslrra.org/ASLRRA/easternregion20152

January 12-14, 2016: **Midwest Association of Rail Shippers (MARS)**, Westin Lombard Yorktown Center, Lombard, IL https://mwrailshippers.com/upcoming_meetings.asp

March 3, 2016: **Railroad Day on the Hill**, Renaissance Washington, Washington D.C. http://www.aslrra.org/meetings___seminars/

April 3-6, 2016: **ASLRRA Annual Connections Convention**, Gaylord National Harbor, National Harbor, MD (Washington D.C.) http://www.aslrra.org/meetings___seminars/

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