

# ALR Federal *Alert*

## Route to:

- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

## From the **editor**

Enacted in 1993, the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C.A. §§ 2601 et seq., is Congress' attempt to balance the demands of the workplace with the needs of employees to take leave for eligible medical conditions and compelling family reasons. Courts have faced a number of issues arising under the FMLA. Both ALR Federal volumes 175 and 176 address aspects of the FMLA. Volume 175 contains an annotation discussing an employee's entitlement to reinstatement under the FMLA. Volume 176 will contain an annotation addressing the award of damages under the FMLA.

Barbara J. Van Arsdale, J.D.

## Highlights

### CIVIL RIGHTS

#### FMLA Reinstatement

Through the passage of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C.A. §§ 2601 et seq. Pub.L. 103-3, Title I, § 105, Feb. 5, 1993, 107 Stat. 14, enacted on February 5, 1993, Congress has tried to balance the demands of the workplace with the needs of employees to take leave for eligible serious health conditions and family reasons. On return from protected FMLA leave, an employee shall be restored to the position of employment held when the leave commenced, or to an equivalent position, under the FMLA. An employer can refuse to restore an employee to a previously held position without violating the FMLA if the employer would have terminated the employee even if he or she had not taken FMLA leave. If an employee is unable to perform an essential function of the position because of a physical or mental condition, the employee has no right to restoration



to another position under the FMLA. The FMLA, however, expressly does not require that an employer provide a returning employee any right, benefit, or position of employment other than the right, benefit, or position to which the employee would have been entitled had the

employee never taken leave. Federal court decisions that have addressed employees' entitlement to reinstatement under the FMLA, 29 U.S.C.A. §§ 2614(a), (b), are collected in this annotation. [175 ALR Fed 1](#)

### PENSIONS AND RETIREMENT FUNDS

#### Investment Service Provider as Fiduciary

Under § 3(21)(A) of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C.A. § 1002(21)(A)), a person providing administrative or investment-related services to an ERISA plan may be considered a fiduciary of the plan to the extent that the person exercises authority, control, or responsi-

bility with respect to the plan or its assets. However, a service provider is not a fiduciary where tasks of a merely ministerial nature are performed. The question of when a third-party administrator is an ERISA-fiduciary is examined in this annotation. The annotation looks at the general considerations in determining when a third-party administrator is a fiduciary, as well as whether particular individuals or entities were ERISA-fiduciaries under the circumstances presented. Check the “Related annotations” section of the annotation for additional articles covering other aspects of ERISA. [175 ALR Fed 129](#)

## CIVIL RIGHTS

### Fair Housing Act—punitive damages

The Fair Housing Act (42 U.S.C.A. §§ 3601 et seq.) is a comprehensive statutory scheme aimed at the elimination of discrimination, based upon race, color, gender, religion, or national origin, in the sale, rental, financing, and brokerage of housing. Enforcement of the Act is accomplished, for the most part, by private lawsuits that are authorized by the statute. One part of the private lawsuit enforcement mechanism, 42 U.S.C.A. § 3613(c), empowers courts to grant, among other things, punitive damages. This article focuses on the issue of punitive damages, and the standards the courts employ to determine whether punitive damages are warranted in a particular case. The Research References will direct you to relevant research and practice aids. Of particular interest are articles on “Racial Discrimination in Rental or Leasing of Real Property” which appears at [14 Am Jur Proof of Facts 2d 511](#); Racial Discrimination in Sale of Real Estate, which appears at [15 Am Jur Proof of Facts 2d 525](#), and an Am Jur Trials article on Hous-

ing Discrimination Litigation, which appears at [28 Am Jur Trials 1. 175 ALR Fed 405](#)

## TREATIES

### Consular relations

Consular notification under the Vienna Convention on Consular Relations (VCCR), 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261, generally serves to ensure that a foreign national charged with a violation of American law is visited by an official representative of that foreign national’s native country who can explain to the foreign national the rights of a criminal defendant in the United States, most notably the right to legal counsel and the right to remain silent. Foreign nationals have the burden of establishing that a violation of their consular notification rights under the VCCR caused prejudice by producing evidence that: (1) the foreign national did not know of this right; (2) the foreign national would have availed himself or herself of the right had they known of it; and (3) there was a likelihood that contact with the consul would have resulted in assistance to the foreign national. Courts have routinely held that suppression of a foreign national’s statement or dismissal of an indictment against a foreign national is not an appropriate remedy for a violation of the VCCR. Many federal courts have discussed the construction and application of the VCCR’s consular notice requirement. This annotation collects federal court decisions which have addressed the construction and application of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261, requiring that a foreign consulate be notified when one of its nationals is arrested. [175 ALR Fed 243](#)

# Coming Soon

## CIVIL RIGHTS

### FMLA Damages

The Family and Medical Leave Act, 29 U.S.C.A §§ 2601 et seq. (FMLA), was passed in 1993 to help working Americans balance the conflicting demands of work and personal life. The FMLA provides for qualifying employees to take up to twelve work weeks of unpaid leave per year for a serious health condition involving themselves, their children, or their parents, or to care for a newly born or newly adopted child, and, upon returning from such leave, to be reinstated to their former position or an equivalent position, and to any accrued employment benefits. The FMLA provides for



monetary damages including compensatory backpay and other lost compensation, interest thereon, and liquidated damages doubling the aggregate of these elements, though there is a discretionary exception from the liquidated damages award for an employer that proves that it acted in good faith and reasonably believed that it had complied with the FMLA’s requirements. This annotation examines the elements of a damages award for violation of the FMLA, and the conditions under which each may be awarded. A comprehensive listing of related annotations ties this article to other annotations regarding related aspects of the FMLA. [176 ALR Fed](#)

## FUGITIVES

### Escape or Flight

The “fugitive disentitlement doctrine,”—sometimes referred to by other designations, or not by any specific designation—was originally applied to bar court access to fugitives from justice seeking to dispute, as by appeal, the basis of their conviction or other criminal matters. In recent years the doctrine has been extended to civil cases. The doctrine is an equitable one that has been utilized by some courts to preclude the bringing of actions, disputing of judgments or motions, or other particular acts by persons alleged to be “fugitives from justice.” The doctrine’s application is not automatic, however, based on a finding that the party seeking relief is a fugitive. Instead, the doctrine’s application is discretionary and subject to particular considerations and limitations. Moreover, the doctrine’s application depends, in some instances, upon the type of civil action or proceeding involved. This annotation collects and analyzes cases dealing with the application of the fugitive disentitlement doctrine in federal civil actions. **176 ALR Fed**

## PENSIONS AND RETIREMENT FUNDS

### ADEA: Early Retirement Incentive Plans

Under a provision of the Age Discrimination in Employment Act, 29 U.S.C.A. § 623(f)(2)(B)(ii) (ADEA), an action which would otherwise discriminate against older employees in violation of the ADEA may be justified on the ground that it is done pursuant to the terms of a bona fide employee benefit plan that is a voluntary early retirement incentive plan consistent with the relevant purposes of the ADEA. This annotation collects and analyzes cases dealing with the question of when this “early retirement incentive plan”

exemption applies as a defense to age discrimination in employment claims. **176 ALR Fed**

## TERRORISM

### Sovereign Immunity—Terrorism

The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C.A. §§ 1330, 1332(a)(4), 1391(f), 1441(d), 1602-1611, which was enacted because of the uncertain state of the law regarding the amenability of foreign states to suit and the circumstances under which the defense of foreign sovereign immunity would be recognized, sets forth the general rule that foreign states are immune from the jurisdiction of both federal and state courts in the United States, subject to certain stated exceptions. A federal court lacks subject matter jurisdiction over a claim against a foreign state unless the claim falls within a FSIA exception to immunity. In 1996, the Antiterrorism and Effective Death Penalty Act amended 28 U.S.C.A. § 1607(a), in part by adding thereto new subparagraph (7), which created such an exception with respect to certain suits in which money damages are sought by or on behalf of a U.S. national against a foreign state or its agent for personal injury or death caused by certain terrorist acts committed or supported by the state, provided the state has been formally designated a sponsor of terrorism. This annotation collects and discusses federal cases in which the courts have considered the scope of the exception to foreign sovereign immunity embodied in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub.L. No. 104-132, Title II, § 221(a) (April 24, 1996), 110 Stat. 1241, codified at 28 U.S.C.A. § 1605(a)(7) which makes an exception, for state-sponsored terrorism, to the immunity of foreign states and their property under the Foreign Sovereign Immunities Act (28 U.S.C.A. §§ 1330, 1441(d), 1602 et seq.). **176 ALR Fed**

# Index

The following is a complete list, arranged alphabetically by topic, of annotations contained in the current Volume 175 or scheduled for publication in Volume 176 of ALR Federal. Some of the annotations listed may be rescheduled.



tion District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483. **176 ALR Fed**

## BANKRUPTCY

Special Commentary: Construction and Application of Absolute Priority Rule in Confirmation of Plan Under Chapter 11 of Bankruptcy Code of 1978 (11 U.S.C.A. § 1129(b)(2)). **175 ALR Fed 485**

## CIVIL RIGHTS

Employee’s Entitlement to Reinstatement Under § 104(a), (b) of Family and Medical Leave Act (29 U.S.C.A. § 2614(a), (b)). **175 ALR Fed 1**

Award of “Front Pay” Under § 7 of Age Discrimination in Employment Act of 1967 (29 U.S.C.A. § 626). **175 ALR Fed 359**

## ABSTENTION

When are Proceedings Parallel So As To Permit Federal Court Abstention Under Colorado River Water Conserva-

Award of Punitive Damages to Prevailing Plaintiffs in Actions Brought Pursuant to § 813 of Fair Housing Act (42 U.S.C.A. § 3613(e)). [175 ALR Fed 405](#)

Award of Damages Under Family and Medical Leave Act (29 U.S.C.A. §§ 2601 et seq.). [176 ALR Fed](#)

#### **CRIMINAL LAW**

Assimilation, Under Assimilative Crimes Act (18 U.S.C.A. § 13), of State Statutes Relating to Driving While Intoxicated or Under Influence of Alcohol. [175 ALR Fed 293](#)

#### **ENVIRONMENTAL LAW**

Designation of “Critical Habitat” Under Endangered Species Act. [176 ALR Fed](#)

#### **FUGITIVES**

Application of “Fugitive Disentitlement Doctrine” in Federal Civil Actions. [176 ALR Fed](#)

#### **HABEAS CORPUS**

Modern Status of “In Custody” and Live-Controversy Requirements for Asserting Federal Habeas Corpus Challenge to Custody Pursuant to State Court Judgment. [176 ALR Fed](#)

#### **IMMIGRATION**

Validity, Construction, and Application of 8 U.S.C.A. § 1401(c)-(g), Providing for American Citizenship in Certain Circumstances of Child Born Outside United States or Found Within United States and of Unknown Parentage, and Predecessor Statutes. [175 ALR Fed 67](#)

#### **LABOR AND EMPLOYMENT**

Construction and Application of Uniformed Services Employment and Reemployment Rights Act (38 U.S.C.A. §§ 4301-4333). [175 ALR Fed 437](#)

Employee’s Entitlement to Reinstatement Under § 104(a), (b) of Family and Medical Leave Act (29 U.S.C.A. § 2614(a), (b)). [175 ALR Fed 1](#)

Award of “Front Pay” Under § 7 of Age Discrimination in Employment Act of 1967 (29 U.S.C.A. § 626). [175 ALR Fed 359](#)

#### **PENSIONS AND RETIREMENT FUNDS**

When is Third-Party Administrator or Other Person or Entity Providing Administrative or Investment Services to ERISA Plan Fiduciary Under § 3(21)(A)(i) or (iii) of ERISA (29 U.S.C.A. § 1002(21)(A)(i) or (iii)). [175 ALR Fed 129](#)  
“Bona Fide Employee Benefit Plan” Exception to General Prohibition of Age Discrimination in Employment (29 U.S.C.A. § 623(f)(2)(B)) as Applied To Early Retirement Incentive Plans. [176 ALR Fed](#)

#### **PRE-EMPTION**

Pre-emption of State-Law Wrongful Discharge Claim, Not Arising from Whistleblowing, by § 541(a) of Employee Retirement Income Security Act of 1974 (29 U.S.C.A. § 1144(a)). [176 ALR Fed](#)

#### **STATUTES**

Assimilation, Under Assimilative Crimes Act (18 U.S.C.A. § 13), of State Statutes Relating to Driving While Intoxicated or Under Influence of Alcohol. [175 ALR Fed 293](#)

#### **TAXATION**

Taxpayer’s Assertion of Equitable Estoppel Against the IRS Based on Representations of IRS or Non-IRS Employees. [176 ALR Fed](#)

#### **TERRORISM**

State-Sponsored Terrorism Exception to Immunity of Foreign States and Their Property Under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. § 1605(a)(7). [176 ALR Fed](#)

#### **TREATIES**

Construction and Application of Vienna Convention on Consular Relations (VCCR), Requiring that Foreign Consulate be Notified When One of its Nationals is Arrested. [175 ALR Fed 243](#)

Have questions or need help? Please call customer support at 1-800-225-7488 or email at [alr@westgroup.com](mailto:alr@westgroup.com).



**WEST GROUP**

A THOMSON COMPANY