



CTB Project Selections Will Be Using a New Prioritization Process, House Bill 2 (HB2)

By Hessam Nabavi,
Director of Industry Services

At the recent public hearing at VDOT Northern Virginia District office, Secretary of Transportation, Mr. Aubrey Layne, talked about the Fiscal Year 2015-2020 Six Year Improvement Program (SYIP) which includes highway, road, bridge, rail, bicycle, pedestrian and public transportation projects. SYIP was adopted in June 2014 by the Commonwealth Transportation Board (CTB), and it is being revised to comply with the new prioritization process referred to as House Bill 2 (HB2) which was signed into law by Governor Terry McAuliffe earlier this year.

Prioritization is a tool that by law requires projects to be scored based on quantifiable analysis. This process will help the CTB to select projects that provide the maximum benefits to Virginia. Prioritization will also make project selection more transparent. The project scoring process is based on critical factors such as congestion mitigation, economic development, accessibility, safety and environmental quality. Ultimately prioritization will allow a project to be better compared to other projects on a statewide basis.

To implement the prioritization process, \$416 million has been de-allocated from more than 60 projects in the existing program, FY 2015 to 2020 SYIP. These



CTB board members from left to right, Helen L. Cuervo (VDOT Northern Virginia District Administrator), Jennifer Mitchell (Director, Department of Rail and Public Transportation), Charles A. Kilpatrick (Commissioner), Aubrey L. Layne, Jr. (Secretary of Transportation), Gary Garczynski, (Northern Virginia District), James W. Dyke, Jr. (At Large Urban), E. Scott Kasprowicz (At Large Urban) and Martin E. Nohe (NVTA Chairman).

projects will be scored through the prioritization process. The CTB will select projects for funding once they have been scored.

Projects that are exempt from the prioritization process include deficient pavement and bridge rehabilitation projects, Congestion Mitigation and Air Quality improvement (CMAQ) projects, revenue sharing projects, projects funded through the Northern Virginia and Hampton Roads regional funding program, and certain federal funding categories and improvements funded through secondary and urban formula funds. CTB at its discretion can have fully funded projects in the SYIP which have completed environmental review to also be exempt from the law's provisions.

CTB will work in collaboration with localities, including metropolitan planning

organization and transit and transportation authorities to set values for key factors such as reducing congestion and creating economic opportunities.

The prioritization process and how it should be administered is currently being developed, and it should be finalized by July 1, 2016. 🚚

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Over \$9,000 Raised for VRMCA PAC

With a sporting clay shoot and a golf tournament, generous sponsors and participants raised over \$9,000 after all expenses were paid. This allows the association to fund all of its priority contributions to House of Delegates campaigns.

A special thank you to the VRMCA Legislative Committee members for their work on this project. 



Event Proceeds to Benefit the VRMCA PAC

Golf Outing | October 16th



Morgan Nelson (S.B. Cox), Joe Bartley (Lehigh Cement) and Cornell Berry (Bearing Masonry) teed off with Doug Easter as one of the foursomes on October 16th at Spring Creek in Zion Crossroads.

We Would Like to Thank Our PAC Event Sponsors!

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Sporting Clays | October 23rd



A good time was had by all at the October 23rd sporting clays shoot at Old Forge Sporting Clays in Providence Forge.

How to Donate to the PAC

Donations can be made anytime throughout the year. Please make checks payable to the VRMCA PAC.

Charlottesville Member Displays Community Involvement with Mixer Trucks



By Bob Nablo,
Director of Industry Services

It is not unusual for ready-mixed producers to paint trucks with special designs celebrating notable events, anniversaries or community projects, but Allied Concrete in Charlottesville currently has a total of three trucks in service with unusual paint jobs. There are two trucks painted pink, bringing attention to October being National

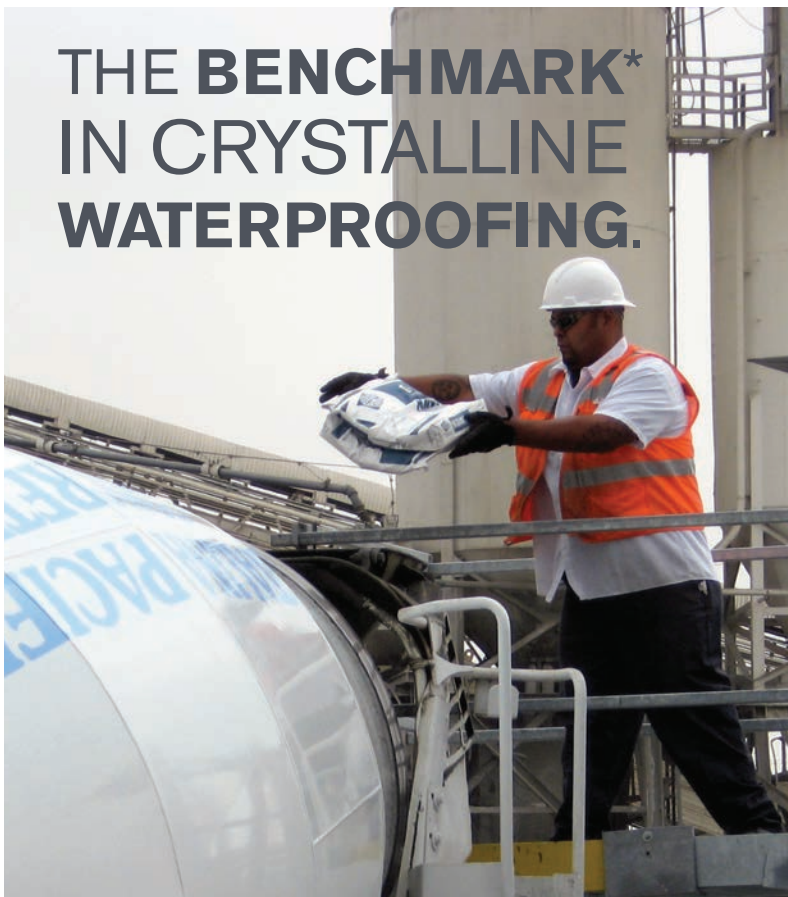
Breast Cancer Awareness Month and also showing their sponsorship of the Pink Ribbon Polo Match at King Family Vineyard. Allied also has one truck painted with the University of Virginia logo, supporting the major university in the city.

"The UVA truck doesn't have the same impact the pink trucks do," says Allied Sales Manager Rob Watkins, "but it's fun having it here in UVA country."

"Allied has long been a supporter of the Pink Ribbon Initiative." Watkins continues. "Every person has been affected by this terrible disease, or knows someone who has. We wanted to bring awareness of this disease to the community and decided to paint two trucks as our way of doing this."

Allied has been a sponsor of the Pink Ribbon Polo Match for several years. 🚚

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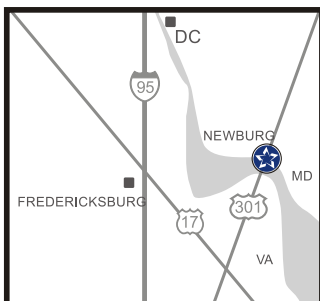
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Sea Level Rise and Local Flooding

By Ann-Germaine Danz,
Director of Industry Services

Climate change becomes more evident through increase frequency and greater intensity of storms. Locally this presents itself as water covering streets after a heavy rain, impacting traffic and overwhelming storm sewers. On a more global scale, melting of glaciers and arctic ice sheets due to increased temperatures contributes to a rise in sea levels. As the water rises it encroaches on the shoreline, converting what was once waterfront property into ocean floor. The Hampton Roads promotional council hosted Dr. Larry Atkinson, Old Dominion University’s Slover Professor of Oceanography to explain the scientific reasoning behind the changes occurring with our climate and oceans, pointing to local weather data, strategic military facilities, and challenges ahead for development in Hampton Roads.

Nuisance flooding is the term used to describe water over the road that

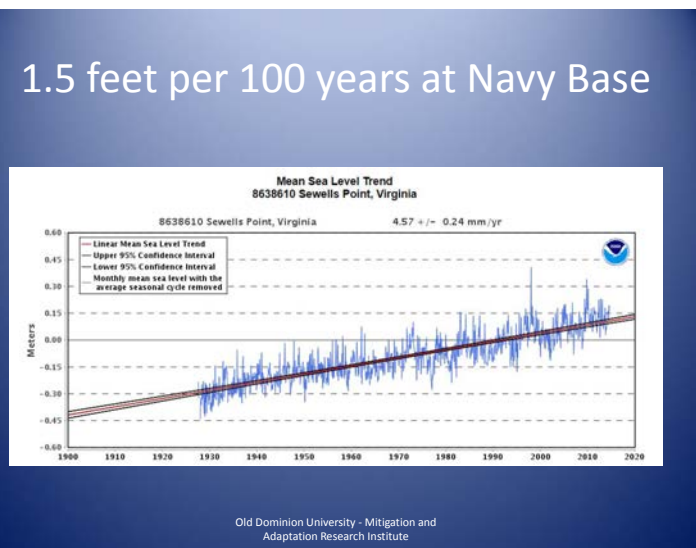
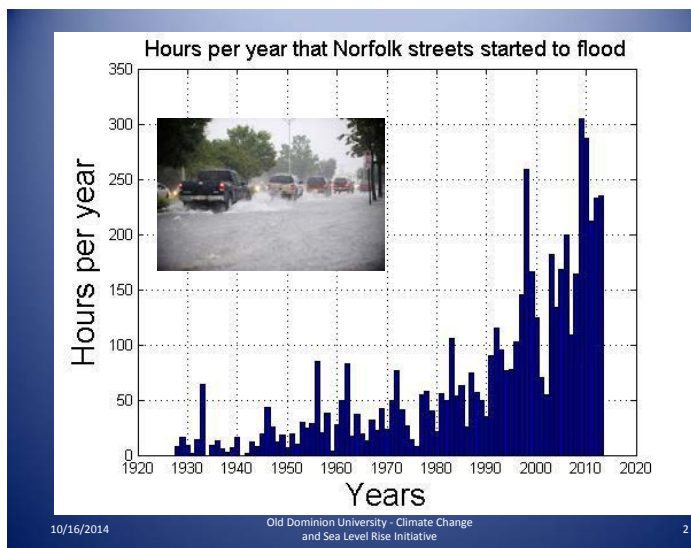
The intent is to protect insured property from flood risk and adopt a comprehensive approach at flood water preparedness.

of the country. A simple answer is that land is sinking while the water level is rising. NOAA data collected at Sewells Point at Naval Station Norfolk converts to 1.5 inches of rise over 100 years. Sea level rise intensifies local flooding that already occurs in a coastal region.

Hampton Roads is home to strategic bases for military training, outfitting, and transportation. Impacts of Hurricane Isabel in September 2003 demonstrate the vulnerability of eastern Virginia to storm water. The Midtown tunnel was overtaken by flood waters from the Elizabeth River and remained closed for a month after the storm. Dry dock 1 at what is now Newport News Shipbuilding reported record high water levels with the James River pouring in.

day off. This impacts both productivity of our major industrial companies and the financial means of the workforce. NOAA scientists have consulted with local government and military leaders on long-term planning for our coastal facilities. It was determined that most military bases cannot be moved from their current strategic geography. Coordination resulted in a special committee on the Hampton Roads Planning District Commission to address local policy and advocate for state and Federal support.

Future development in this area will need to address flooding and take measures to protect buildings from rising water. Each locality has unique flood insurance rates based on current development practices. The National

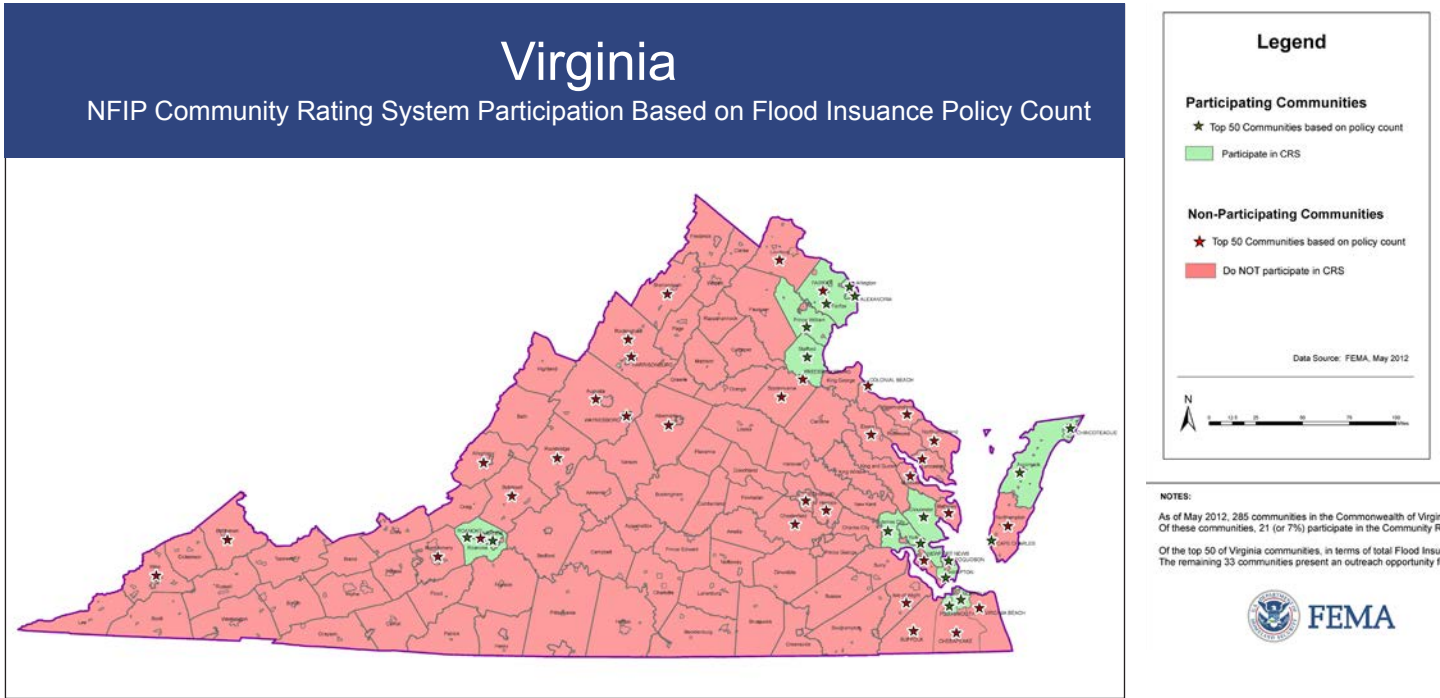


forces motorists to reroute their daily travel after a storm event. Data collected from ODU’s Seal Level Rise and Climate Change Initiative demonstrates a dramatic increase in the hours per year that streets in Norfolk are flooded.

Areas along the East Coast and Gulf Coast are impacted by sea level rise relatively higher than other areas

Streets surrounding Langley Air Force were also water covered. In the event of a major storm or even nuisance flooding due to smaller rain events, the impacts leave residents unable to get to work or report for duty. A recent rain storm in Newport News left the North Yard parking lot flooded to the point that employees were granted a voluntary

Flood Insurance Program’s voluntary Community Rating System gives credit to localities that have taken greater than the minimum steps to manage the floodplain. The intent is to protect insured property from flood risk and adopt a comprehensive approach at flood water preparedness. Activities that result in credit toward the Community Rating




System fall into four categories: public information, mapping and regulations, flood damage reduction, and warning and response. Benefits include environmental protection, reduced flood damage and increased public safety.

In addition, local improvements maintain funds within the community. The color coded map shows the cities that

participate in green and non-participants in red. Virginia Beach has not embarked on the CRS, yet has the highest number of flood insurance policies in the state.

FEMA publications conclude that growing areas see a much greater impact from flood prevention measures over areas with no pressure to develop their floodplains. According to the map 17

of the top 50 communities voluntarily enrolled in the community rating system.


Concrete products such as ICF walls and foundations perform exceedingly well in storm situations and are preferred by insurance companies. Pervious concrete pavement is another solution the concrete industry can offer to local nuisance flooding. 

VDOT Concrete Plant and Truck Inspections

On October 8, 2014 VDOT issued an updated memo on Hydraulic Cement Concrete Plant and Truck Inspections. This updates the VDOT Materials Division Manual of Instructions, Chapter IV, Section 416.01 (e). VRMCA's Technical Committee discussed the changes to memo number MD 369-14, which addresses self-certification and NRMCA certification for plants and trucks. VDOT will no longer be inspecting for nor providing plant and truck certifications. You must either be NRMCA certified or self-certified.

Documentation required varies based on the chosen plant and truck certification path. Those selecting to following National Ready Mixed Concrete Association Certification are required to complete and sign form IV-A-1. Producers choosing to self-certify are required to complete and sign forms IV-A-1 thru IV-A-6. VDOT states that documentation must be available to the District Materials Section upon request to demonstrate compliance with one of the two approval programs. Producers should have the following documents on file:

- A current List of Approved Trucks for use on VDOT projects
- VDOT HCC Plant Technician Certifications
- Approved HCC mix designs shall be kept on file
- A current Truck Inspection Report for each approved truck
- A current Hydraulic Cement Concrete Plant Inspection Report

Plant and truck monitoring will be kept at a minimum, but the District Concrete Technician may arrange to visit a plant. The following items may be requested by the Technician: review of inspection reports, visual check of drum cleanliness and blade wear, and observation of plant batching operations. It is noted that it is beneficial for an inspection to occur early before concrete is delivered to a project site. Review memo MD 369-14 for a more detailed account of changes to the Manual of Instructions. 

Tysons: Past, Present and Future

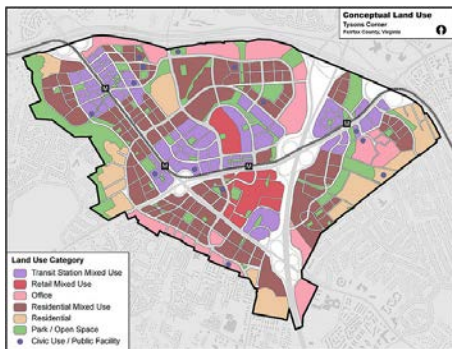
By Hessam Nabavi,
Director of Industry Services

Past: In the 1950s, Tysons was a rural area of Fairfax County, marked by the crossroads of Routes 7 and 123 and a general store. In the 1960s, the Tysons Corner Center, a large regional mall, was opened, beginning the area's transformation into a major commercial center. Later Tysons attracted a second regional mall, the Galleria at Tysons II, the county's largest concentration of hotel rooms and home to several Fortune 500 headquarters and many other major national firms. Tysons encompasses approximately 2,100 acres (including road rights-of-way) in northeastern Fairfax County, about halfway between downtown Washington, D.C. and Dulles International Airport.

Tysons grew in the 1960s and early 1970s. In September of 1975, the Board commissioned a special study and created a broad-based task force with representation from large and small businesses in the area, landowners of major undeveloped tracts, and residents of the area, as well as citizen leaders from the surrounding McLean and Vienna communities. As a result of this study, a revised Comprehensive Plan was adopted in June of 1978. Between 1989 and 1991, the county's Comprehensive Plan underwent a major review known as the Fairfax Planning Horizons process. In 1994, the Board decided to develop Tysons as the "downtown" of Fairfax County. A key feature of the 1994 Plan was the location of three Metrorail stations in Tysons. These stations were expected to serve as the catalyst to transform the area from a suburban to an urban area. Over the next ten years, county, regional, state and national officials worked to ensure that the Metrorail through Tysons would become a reality.

In May 2005 the Board established the Tysons Land Use Task Force and described its mission:





Promote more mixed use, Better facilitate transit-oriented development (TOD), Enhance pedestrian connections throughout Tysons, Increase the residential component of the density mix, Improve the functionality of Tysons, and Provide for amenities and aesthetics in Tysons, such as public spaces, public art, parks, etc.

Planning for the future of Tysons began with the Silver Line in 2005. In the next four years there were many discussions about “what Tysons should be” which resulted in a shared community plan for Tysons. Ultimately after years of studying, analysis and gathering recommendations, Tysons Land Use Task Force drafted and formulated the plan which was adopted by the Board of Supervisors on June 22, 2010.

Present: Tysons is the economic engine of Northern Virginia, and it is the 12th largest CBD in the U.S. with 49 million square feet of development which lack in parks and public facilities.

Today, this visual transformation of Tysons is becoming a reality. The Silver Line is open. Developments are being approved and construction activity is everywhere. Here are some of the new things in Tysons: In 2014, three major buildings have been delivered, The Ascent at Spring Hill (404 unit, high rise residential), Tysons Tower (526,000 sf. office) and Ovation at Park Crest (231 unit, high rise residential).

There are seven buildings currently under construction, two residential buildings with 890 units, retail expansion of the

Tysons Corner Center, Hyatt Regency hotel at Tysons Corner Center and three additional office buildings. Six additional buildings are going to begin construction within 12 months.

Future: As of now, 19 rail-related development applications have been approved and 9 additional rail-related development applications are under review. This is in addition to what is existing and under construction today. If all are built, there will be total of 93 million sf. of development in Tysons.

A vision for Tysons is a livable urban center with various transportation options. This vision focuses on urban design, pedestrian access and transportation infrastructure that is coordinated with the development. It is expected to create over 200,000 jobs and bring in an additional 100,000 residents. It is focused on 75% growth within ½ mile of the metro. By 2050, Tysons will be a sustainable, walkable urban center with a new grid of streets to break up superblocks into pedestrian scale; a place with urban standards for buildings, services, roads, infrastructure, public facilities, parks, cultural and institutional uses.

It is envisioned for Tysons to become a 24 hour urban center where people want to live, work and play. Can anyone imagine how many yards of concrete will be needed to accomplish this? 🚚

Where FMLA Administration and Practicing Medicine Collide: A Practical Lesson for Employers

Although it has been more than two decades since Congress enacted the federal Family and Medical Leave Act (FMLA), many U.S. employers continue to grapple with the intricacies of its requirements. Even if employers are savvy enough to consistently decide whether and when their employees are entitled to FMLA leave, such is only the beginning. Managing the workload in the employee's absence, managing the employee's leave time, and returning the employee to the workforce following leave consume as much (if not more) time than deciding whether the employee is entitled to leave in the first instance. Regrettably for employers, returning an employee to work can be as big a liability trap as the initial decision to grant or deny FMLA leave.

Returning an Employee to Work Can Be a Complex Issue

A recent decision from the Third Circuit Court of Appeals (the federal appeals court for New Jersey, Delaware, Pennsylvania and the Virgin Islands) illustrates how a decision that might appear to be common sense from a practical standpoint may nevertheless violate the FMLA. In this case, the court revived a former employee's FMLA claim, which she filed after her employer refused to allow her to return to her clerical position while wearing a splint on her right hand, which limited the use of that hand to her thumb and forefinger. The employee's fitness for duty certificate indicated she was released to return to work without restriction; however, her employer determined, contrary to the physician's findings and without clarifying the employee's job responsibilities with the physician, that the employee was not fit to return to full duty because she did not have "full use of all of her digits." Overruling the lower court's decision in favor of the employer, the Third Circuit held that the employer improperly substituted its medical judgment for that of the physician. Accordingly, the court



held that the employee had presented enough evidence to take her FMLA interference claim to a jury. *See Budhun v. Reading Hospital and Medical Center, 2014 WL 4211116 (3rd Cir. 2014).*

Background of the Case

The employee worked as a credentialing assistant for a medical facility. Although her job description did not identify typing as an essential job function or set a minimum word per minute expectation, typing accounted for approximately sixty percent of her job. After a non-work related fracture to her right pinky finger prevented the employee from working "full duty," her employer prompted her to take FMLA leave. Shortly thereafter, the employee's physician placed her right hand, except for her thumb and forefinger, in a splint. Although the employee told the physician that her job required typing, she explained that she felt she could sufficiently type with the five fingers on her left hand and her thumb and index finger on her right hand. Based on this representation, the physician completed a FMLA fitness-for-duty certification form stating that she could return to work with "[n]o restrictions in splint."

The employee provided the FMLA paperwork to her employer when she returned to work, and explained that

her productivity would suffer because of the splint on her right hand. Thereafter, the court found that the employer informed the employee that she "needed to perform at the 'same capacity' as she did prior to going on leave and that she should have full use of all her digits in order to be considered full duty." Most importantly, the employer wrote "[i]t seems that your physician was incorrect in stating that you could work unrestricted. If you were truly unrestricted in your abilities, you would have full use of all your digits."

Subsequently, the employee eventually exhausted her remaining FMLA leave and was later terminated. After her discharge, the employee sued and alleged, among other claims, a FMLA interference claim. The lower court ruled in favor of the employer, and the Third Circuit reversed this decision, finding the employee should be able to present her FMLA claim to a jury.

The Court's Rationale

The FMLA prohibits employers from interfering with employees' exercise of their FMLA rights and requires employers to reinstate employees to the position held or an equivalent position when they return from FMLA leave. It also protects employees from being required to take more FMLA leave than necessary.

On appeal, the employer claimed that the employee never attempted to return to work the first time she came to the worksite, because shortly after she arrived she left and sought a doctor's note requesting additional FMLA leave. However, the Third Circuit found a genuine dispute of material fact regarding whether the employee attempted to invoke her right to return to work when she presented her FMLA paperwork, which returned her to work with "[n]o restrictions in splint," and scheduled her return to work date. In doing so, the court stated that, while employers may request that an employee provide a fitness-for-duty certification before permitting an


employee to return to work, an employee's healthcare provider must merely certify that the employee is able to resume work. To require more information from the healthcare provider, such as whether the employee can perform the essential functions of her job, the employer "must provide a list of essential functions to the employee at the time that the employer notices the employee that she is eligible for FMLA leave." Because the employer never provided the employee with a list of essential job functions to present to her physician, the court found that the physician's paperwork returning her to work with "[n]o restrictions in splint" was sufficient to invoke the employee's rights despite the inconsistent nature of the physician's representation.

The court further found that the employer failed to utilize the methods provided in the FMLA's regulations for situations in which clarification might be needed before returning an employee to work based on a physician's fitness-for-duty certification. Specifically, the court noted that if an employer requires clarification of the fitness-for-duty certification, the employer can, with the employee's written prior permission, contact the employee's health care provider. The court found that, instead of following the regulations, the employer "(who is not a doctor) seemingly overruled [the employee's physician's] conclusion (albeit reached without an employer-provided list of essential job functions) by telling [the employee] that if she was 'truly unrestricted,' she 'would have full use of all of [her] digits.'" Based on those facts, the court determined that the record was sufficient to allow a reasonable jury to conclude that the employee attempted to invoke her right to return to work, and

that her employer interfered with that right when it refused her return.

The court also rejected the employer's argument that it still would have sent the employee home on the day in question because she could not perform the essential functions of her job, noting "[t]he FMLA regulations place the onus on an employee's health care provider – not her employer – to certify whether the employee is unable to perform any essential function of the job." The court further reiterated that although the employer could have provided the employee with a list of the specific functions that were essential to her job so that her physician could determine whether she could perform them, it did not and, instead, "unilaterally determined ... that [the employee] could not perform an essential function because she had use of only seven fingers."

Takeaway for Employers

Employers should ensure that their job descriptions accurately reflect the essential functions of the jobs described. Additionally, they should make sure that their FMLA leave process permits them to require fitness-for-duty certification forms that specify an employee can perform the essential functions of the job. Employers should also become familiar with the FMLA's process for clarifying confusing or inconsistent fitness-for-duty certification forms. Finally, employers should avoid substituting their opinion for that of a physician when returning an employee to work from an approved FMLA leave. 

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Article courtesy of John G. Kruchko, and Kevin B. McCoy of FordHarrison LLP.

John G. Kruchko is a Partner with the Labor & Employment Law Firm of FordHarrison, LLP in Tysons Corner, Virginia; Kevin B. McCoy is also a Partner with the Firm. An original version of this article was prepared by, Timothy L. Williams, a Partner in the Firm's Atlanta office. For more information, please contact Mr. Kruchko or Mr. McCoy at (703) 734-0554 or by e-mail at jkruchko@fordharrison.com, or kmccoy@fordharrison.com. This article is published for general information purposes, and does not constitute legal advice.

On the Horizon

Calendar of Upcoming Events

NOVEMBER 5, 2014

AIA Virginia Architecture Exchange East Convention
Greater Richmond Convention Center
Richmond, VA

NOVEMBER 6-7, 2014

VRMCA Board Retreat
The Inn at Virginia Tech

NOVEMBER 11, 2014

HRCAC Business Meeting
11:30 AM - 1:00 PM
Crazy Buffet & Grill
Chesapeake, VA

NOVEMBER 12, 2014

BRCAC Business Meeting
12:00 PM - 2:00 PM
Rowe's Family Restaurant
Staunton, VA

NOVEMBER 13, 2014

NVCAC Executive Council Meeting
11:30 AM - 2:00 PM

NOVEMBER 18, 2014

CVCAC Business Meeting
3:00 PM - 4:30 PM
American Tap Room
Richmond, VA

NOVEMBER 18-20, 2014

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White Sulphur Springs, WV

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