The Employment Brief

March/April 2009 Updates in Labor and Employment Law to Help Your Business Succeed

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STIMULUS LEGISLATION HITS THE WORKPLACE

By Eric Paltell

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 ("AARA"). The legislation contains several provisions that impact the workplace, including changes in COBRA, unemployment benefits, executive compensation, and visas.

COBRA. The stimulus package's biggest impact on the workplace is a provision that provides eligible workers with a 65% subsidy towards their COBRA premiums for a nine-month period. To be eligible, an employee must have been involuntarily terminated between September 1, 2008 and December 31, 2009, with an annual income of less than $125,000 (single) or 250,000 (couple). The subsidy extends to COBRA premiums for both individual and family coverage. The subsidy takes affect for premiums covering March 1, 2009 and beyond.
(*See* **Stimulus Plan** *page 4*)

Title VII Retaliation Claims Expanded by Supreme Court

By Darrell R. VanDeusen

Retaliation has been on the mind of the Supreme Court a lot lately. It all started about three years ago, in *Burlington N. & Santa Fe Ry. v. White*, when the Court adopted the "materially adverse" standard for determining whether actions taken against an employee can be considered retaliatory. Last term, the Court considered and expanded the scope of coverage for retaliation under two federal anti-discrimination laws. In *Gomez-Perez v. Potter*, the Court held that the Age Discrimination in Employment Act (ADEA)

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provides a cause of action for retaliation for employees of the federal government, even though retaliation is not referred to in the law. The same day, in *CBOCS West, Inc. v. Humphries*, the Court held that Section 1981 provides a cause of action for retaliation even though, again, retaliation is not mentioned in the statute.

It came as no great surprise, then, when in late January the Court held in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, that an employee who made allegations of inappropriate conduct by a supervisor during a company investigation of that supervisor, and who was later discharged, stated a retaliation claim. The employee did not initiate or instigate a complaint of harassment; her participation was limited to an interview during the internal investigation.

(*See* **Retaliation**, *page 4*)

Changes to I-9 Process Put on Hold

By Clifford B. Geiger

As most readers of this newsletter know, employers must complete a Form I-9 for all newly hired employees to verify their identity and authorization to work in the United States. On December 17, 2008, the Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS) published an interim final rule that would have required employers to begin using a new version of Form I-9 beginning February 2, 2009. However, on January 30, 2009, USCIS announced that the implementation of the interim final rule would be delayed until April 3, 2009. USCIS also reopened the public comment period, which now ends March 4, 2009. Presumably, the delay was in response to a memorandum from President Obama's Chief of Staff, who requested that all executive departments extend for 60 days the effective date of regulations that have been published in the Federal Register but have not yet taken effect. This will allow the new President and his staff an opportunity to review regulations issued during the waning days of the Bush administration.

The biggest change under the new interim final rule is that employers may no longer accept expired documents for proof of identity and authority to work. Under current regulations, U.S. Passports and List B documents (such as drivers' licenses) are acceptable even if expired. USCIS believes that eliminating the use of expired documents will improve the integrity of the employment verification process so that individuals who are not authorized to work do not improperly obtain employment in the United States. In other words, USCIS is attempting to reduce the incidence of fraud and document tampering that appears to occur with completing the Form I-9, and it believes that expired documents are more prone to fraudulent use than unexpired ones. Documents that do not include an expiration date, such as Social Security cards, are considered unexpired.

(*See* **I-9 Changes** *page 5*)

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Pro-Labor Agenda Gets Boost from Obama Administration

By Kelly C. Hoelzer

Just a few weeks after he took office, President Obama has already taken steps to advance the interests of organized labor. Between January 30 and February 6, 2009, Obama signed four Executive Orders that, in the interest of promoting "economy and efficiency in Government procurement," ease the way for labor unions to expand their presence on government services and construction contracts.

A brief description of each Executive Order follows:

Notification of Employee Rights Under Federal Labor Laws. This Executive Order mandates that under all federal contracts, contractors and subcontractors must post a notice informing workers of their rights to organize and to designate representatives of their own choosing to negotiate the terms and conditions of employment. According to the Order, contractors whose employees are informed of their rights to unionize will increase "workers' productivity" and facilitate the "efficient and economical completion" of federal contracts.

Economy in Government Contracting. Pursuant to this Executive Order, federal contractors are prohibited from receiving reimbursement for any costs associated with their efforts to persuade employees to refrain from exercising their right to organize or collectively bargain. Unallowable costs include such things as: preparing and distributing materials, hiring or consulting legal counsel or consultants; holding meetings (including employee wages for the time spent in the meetings); and planning or conducting activities by managers, supervisors, or union representatives.

No Displacement of Qualified Workers Under Service Contracts. According to this Executive Order, when a new contractor takes over a service contract from another company to provide the same service, the government's interests in "economy and efficiency" are best served by a "carryover workforce" to reduce potential disruption of services during the transition. The Order specifically requires most federal services contracts (with some limited exceptions) to contain a clause mandating that successor contractors on a federal project offer employment to the non-managerial employees of a predecessor contractor and give those individuals the right of first refusal in positions for which they are qualified. The employees have ten days to respond to the offer, and no employment openings are permitted until after providing the "carryover" employees the right of first refusal.

Use of Project Labor Agreements for Federal Construction Contracts. Under this Order, federal agencies awarding large-scale construction contracts (worth $25 million or more) are encouraged to require the use of project labor agreements. In particular, agencies may mandate that contractors and subcontractors on such a project agree to negotiate or become a party to a project labor agreement with one or more unions. The Order also directs the

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Director of OMB and the Secretary of Labor to report as to whether broader use of project labor agreements on construction projects would promote their "economical, efficient, and timely completion." Look for expansion of this Executive Order in six months or so after the recommendations are issued.

Federal contractors should become familiar with these directives. They go into effect immediately, and penalties for violations are steep – resulting in loss of the contract or debarment, among other things.

Stimulus Plan

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The special COBRA Subsidy will be administered by the Treasurer Department. Employers or health plans that administer COBRA benefits can receive a credit against payroll taxes for the cost of the subsidy. The subsidy terminates once the employee receives new employer sponsored healthcare coverage.

Unemployment Comp. The stimulus bill extends the time period for which workers are able to collect unemployment benefits. Specifically, the law extends the expiration date of the recently enacted Unemployment Compensation Act of 2008 from March 31, 2009 until December 31, 2009. Additionally, an increase of $25.00 per weekly benefit will be available to all individuals receiving regular unemployment benefits, extended benefits, or emergency unemployment benefits.

Executive Comp. The stimulus package limits compensation for the highest paid individuals at institutions receiving money under the Troubled Asset Relief Program ("TARP"). The limitations, which apply only to employees who are required to register with the Securities and Exchange Commission, limits the size of any bonus to no more than a third of the employee's total annual compensation. The legislation also limits golden parachutes to the departing executives, as well as excessive expenditures on items such as entertainment, use of corporate jets, and office renovations. The law also requires that TARP recipients hold an annual shareholders vote to review executive compensation.

Visas. The stimulus legislation prohibits organizations that are receiving TARP money from obtaining H1-B visas for two years unless they have taken good faith steps to recruit U.S. workers for the job in which the H1-B visa is sought. Additionally, recipients of TARP money must offer the job to an equally or better qualified U.S. worker who has applied for the position.

Retaliation

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Vicki Crawford had worked for Metropolitan Government (Metro) for over 30 years. In 2002, the Assistant Director of Human Resources began investigating allegations of sexual harassment by Metro's Employee Relations Director, Gene Hughes. As part of the investigation, Crawford was interviewed, and she told the Assistant Director of Human Resources that

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she believed Hughes had sexually harassed her and other employees.

A few months later Metro fired Crawford and two other employees who had alleged harassment by Hughes during the investigation. Metro claimed that Crawford had mishandled public funds, and was fired for that reason. The Sixth Circuit held that Crawford's statements in the interview about someone else's allegations of harassment did not constitute protected activity. The Supreme Court reversed that decision, holding that Crawford's conduct fell squarely within the "opposition clause" of Section 704(a) of Title VII. That clause makes it an unlawful employment practice to retaliate against an employee who either "opposes" an employer's discriminatory practice, or "participates" in proceedings to enforce rights under Title VII.

The Court used a dictionary definition of "oppose," finding it to mean, "to be hostile or adverse, as in opinion." Writing for a unanimous Court, Justice David Souter stated that: "[t] he statement Crawford says she gave to [HR representative] Frazier is thus covered by the opposition clause, as an ostensibly disapproving account of sexually obnoxious behavior toward her by a fellow employee, an answer she says antagonized her employer to the point of sacking her on a false pretense."

Where does this leave the practitioner in addressing potential retaliation claims? For any employer who has tried to avoid making employment decisions based on irrelevant considerations, there should be little difference. As with any other circumstance in which an employee has engaged in unquestionably protected activity, this fact does not and should not preclude legitimate discipline. If an internal investigation reveals (or if subsequent to the investigation it is discovered) that an employee who has provided information may also have violated work rules, an employer may engage in legitimate discipline -- the protected activity does not insulate an employee from the results of her own bad behavior.

An employer, of course, needs to get its "ducks in a row" first. As with any employment decision, the facts are critical. In *Crawford,* it seemed somewhat suspicious that the three employees who related alleged bad acts by Hughes were almost immediately investigated and terminated. And, according to Crawford, she was later vindicated of any wrongdoing.
But where an employer can establish that an employee has actually broken the rules, and the investigation into the allegations was conducted in a manner identical to any other investigation, regardless of the alleged protected activity, the employer should generally prevail on a retaliation claim. Moreover, most courts also require that in order for an employee to be protected under the opposition clause, any opposition must be made in good faith.

I-9 Changes

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The new interim final rule changes the documents that may be accepted by employers for Form I-9 purposes. Several documents have been added to List

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A. These are: (1) the U.S. Passport Card; (2) a foreign passport with a specially-marked machine-readable visa with a pre-printed, temporary I-551 notation (which indicates legal permanent residence status); and (3) a passport from the Federated States of Micronesia or the Republic of the Marshall Islands if accompanied by a Form I-94 demonstrating valid status pursuant to the Compact of Free Association with the United States. Other documents have been removed from List A. These documents include the Temporary Resident Card and some older versions of the Employment Authorization Card. These documents are no longer issued by USCIS and all such cards in circulation have expired.

The new Form I-9 can be found at the USCIS website (www.uscis.gov/i-9). Given the delay in implementation of the new regulations, the new form is for use only on or after April 3, 2009. Until April 3, 2009, employers must continue to use the June 2007 version of Form I-9. The requirements for verifying employment eligibility may change again before April 3, 2009, so please continue to check back with us for the latest developments.

Multivitamins, Skepticism, Vaccines, and Supervisor Training

By Frank Kollman

I recommend supervisor training in every one of my seminars. I believe that an untrained supervisor is an accident waiting to happen. If he or she does not know what the law requires, or does not know how to relate to employees in a positive way, the employer will certainly have legal problems in the future, or employees seeking unionization in an atmosphere of workplace hostility. It makes sense to me, though I have no scientific evidence to back me up.

I have been reading recently that taking a daily multivitamin may be a complete waste of time. Taking such a vitamin has always made sense to me because (1) we need vitamins, and (2) we don't always get those vitamins in our diet. Taking a pill made sense to me, just like supervisor training. Scientific research, however, is making me skeptical of vitamins.

I am sure most of you (especially if you watch Oprah or the Today Show) are familiar with the vaccine controversy. Several celebrity advocates claim vaccines cause autism, despite overwhelming evidence that they do not. As a result, the incidences of dangerous childhood diseases are on the rise because parents are not immunizing their children. People would rather listen to Jennie McCarthy than qualified scientists and doctors, apparently because Jennie McCarthy makes sense to them.

So, while I am not yet ready to change my view of supervisor training, I am ready to look at it with a more critical eye. Training is generally a good idea, though a person can use what he or she learned in a bad way. Training can also give a person false confidence. Sometimes, it is better for a supervisor to be cautious, and other times it is better for a supervisor

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to be decisive. Training can be an excuse for a supervisor to reject commonsense.

Then again, much of labor and employment law is counterintuitive. By that, I mean that commonsense has been legislated out of the equation. Who would guess that it is against the law to tell a nonsupervisory employee he cannot discuss his raise with other employees who might become jealous or greedy? It is under the National Labor Relations Act. According to recent newspaper articles, the recent crash of a jet in Buffalo may have been the result of the pilot lacking training on a condition where the plane is programmed to act in a way that seems counterintuitive. When it did, the pilot fought it, and the result was catastrophic.

Supervisors can cause real harm. I believe there is scientific evidence to back that up. So, until someone can show me that supervisor training causes more harm than good, I will continue to recommend it. I would appreciate anyone, however, with a contrary view. Skepticism is good for the soul.

Employment Law – It Just Keeps Giving

By Peter S. Saucier

It is amazing what you see in the field of employment law, as these two situations reveal:

The Village of Hempstead, New York, determined that if it was going to pay an employee to stay home sick from work, she should stay home sick. Dawn Borum, a police detective collecting benefits for not working, considered the policy discriminatory. She wanted to go to church while she collected pay for being home sick, which she could not do under the policy during the time that she was supposed to be home sick and unable to work. Borum claimed that the policy violated her religious freedom, and discriminated against her on the basis of race and sex. The religion component was dismissed for procedural reasons, but Borum is permitted to pursue her race and sex claims against Hempstead.

Earlier this month, a group of officials with UNITE HERE filed a lawsuit in New York to try splitting the union into two units. Union officials describe the complaint as a product of a civil war within UNITE HERE. According to the Complaint, "There are broad and irreconcilable differences" within the leadership ranks of the union. That follows closely upon a legal action against the US Airline Pilots Association filed by pilots who are convinced the union failed to represent them responsibly. The lawsuit came after the pilots already had been forced to arbitration with the union to try to resolve differences in 2006. The USAPA lost a motion to dismiss and the case is moving forward. Ah, brotherly love!

As the late Kurt Vonnegut often said, "and so it goes."