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The Employment Brief

Updates in labor and employment law to help your business succeed

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WHAT OBAMACARE MEANS FOR EMPLOYERS NOW

By Kelly Hoelzer

For the past year, we have all watched (in awe and perhaps dismay) as Congress wrangled over the Obama Administration's mandate to pass health care reform this year. After bitter negotiation, mud-slinging, and political machinations, the Administration got it done. On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act, and enacted on March 30, 2010, the hard-fought compromises with the Health Care and Education Reconciliation Act of 2010.

Now we have a law over 2,000 pages long that few really understand. It will take several months, even years, for HHS and other federal agencies to sort it out with regulations and guidance for benefit plans, practitioners, employers, and individuals. While government engages in this process, however, there are certain provisions of the new law of which employers should be aware as several of the mandates become effective October 1, 2010.

Most importantly, employers should know that "grandfathered" group health plans will be excluded from many of the new reforms. "Grandfathered" plans are those that were in effect on March 23, 2010. Adding new employees or dependents to an employer's group health plan will not change "grandfathered" status. It is, however, unclear whether an employer that makes small changes to its plan, such as co-pay amounts, will put its status in jeopardy. Until HHS comes out with regulations or guidance, employers may want to delay making any changes to their group health plan so that they will still be considered a "grandfathered" plan.

Certain reforms apply to all group health plans (including grandfathered plans) starting later this year:

•Plans must provide coverage for dependents up to the age of 26 (without regard to their marital or student status). The plan need not provide this dependent coverage until 2014 for those adult children who are eligible for coverage under another employer-sponsored plan.

•Plans may not impose any pre-existing condition limitations on dependents under the age of 19.

•Plans may not impose lifetime dollar caps or annual dollar caps on essential benefits.

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Supreme Court to Address FLSA Retaliation Claim Based on Oral Complaints

By Michael Severino

The Supreme Court will decide whether an employee's oral complaints to an employer constitute "protected activity" under the Fair Labor Standards Act (FLSA).

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The plaintiff, Kevin Kasten, appealed from an adverse Seventh Circuit decision which held that only written statements submitted to an employer were protected under the FLSA.

Kasten worked for Saint-Gobain Performance Plastics Corporation between 2003 and 2006. During that time, he had received several warnings from Saint-Gobain regarding improper time clocking procedures. Eventually, Saint-Gobain terminated him. Undeterred, Kasten filed suit against Saint-Gobain under the FLSA.

Kasten alleged that in late 2006 he complained verbally to his supervisors about the legality of the time clock location and that he was considering filing suit over the illegal placement of the clocks. Kasten claimed that Saint-Gobains fired him in retaliation for these complaints. Saint-Gobain disputed whether Kasten ever made these statements. The trial court granted summary judgment in favor of Saint-Gobains, and Kasten appealed to the Seventh Circuit.

On appeal, the Seventh Circuit examined two issues: (1) whether internal complaints are protected under FLSA, and (2) whether complaints must be written as opposed to merely oral. The Seventh Circuit easily answered yes to the first, holding that employee complaints to employers fall within FLSA. Notably, the Fourth Circuit (of which Maryland is part) is among the minority of courts which holds that internal complaints are not FLSA protected.

The Seventh Circuit found the second issue more challenging and delved into the meaning of "filed" within the FLSA. Kasten and the Department of Labor argued for an expansive reading, contending that it should encompass oral statements, as well as written complaints. The Seventh Circuit disagreed, and while noting that there is a split in the Circuits on the issue, concluded that the common understanding of "filing" connotes a written submission.

The issue is now before the Supreme Court. Permitting FLSA retaliation suits premised upon oral complaints raises a number of issues, the least of which are that the number of claims and the evidentiary burdens on employers will increase. Requiring a written complaint permits both parties to point to the submission as concrete evidence of a complaint and avoids the inevitable he said/she said argument that would require a jury to resolve credibility issues.

Maryland General Assembly Passes More Pro-Employee Legislation

By Eric Paltell

When the Maryland General Assembly session closed at midnight on April 13, 2010, Maryland employers found themselves saddled with several new workplace regulations. Although the Maryland business community staved off efforts to expand leave rights and limit credit checks, laws expanding overtime liability, requiring breaks for employees in retail establishments, and subjecting employers to administrative penalties for wage and hour violations were passed.

First, the good news. The Maryland Chamber of Commerce successfully opposed legislation that would have prohibited employers from using an applicant's credit report or credit history when making hiring decisions. The Chamber also successfully opposed legislation that would have expanded the Family and Medical Leave Act to require employers to provide leave to employees to care for siblings, grandparents, grandchildren, domestic partners, and children of domestic partners. Legislation mandating that employees serving jury duty be paid their normal compensation was also defeated.

Now, the bad news. The General Assembly passed legislation (SB 789; HB 1299) that requires retailers with more than 50 employees to provide a 15 minute break for employees who work between four and six consecutive hours. When employees work more than six consecutive hours, they must be provided a 30 minute break. Although the legislation excludes from coverage employees who are exempt from the overtime requirements of the FLSA, it does subject employers to administrative investigations and civil penalties, as well as civil liability in a private right of action brought by employees who were denied breaks. For large employers, this could mean class action lawsuits brought by current and former employees allegedly denied breaks. If signed by the Governor as expected, the law will take effect on March 1, 2011.

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Avoid Problems with Unpaid Interns This Summer

By Darrel VanDeusen

The economy has rebounded? Not so much. Employers confront significant challenges in controlling workplace costs every day. The student unemployment rate for summer jobs is estimated to be approximately 75% this year.

So, maybe there is a solution that solves both these problems: the unpaid student intern. The student gets a chance to try out work, and the employer gets work done at no cost. It sounds too good to be true? It often is.

Each year, employers get in big trouble by failing to follow the rules regarding unpaid student interns. This year, both state and federal authorities

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have signaled their intent to ensure employers follow the requirements related to student interns.

Wage and Hour laws treat internships as training programs. The U.S. Department of Labor (DOL) has developed six rules to evaluate whether someone is a "trainee" (and therefore can be an unpaid intern) or an employee (and therefore must be paid) for purposes of the Fair Labor Standards Act (FLSA).

Often, an unpaid student internship is a way for a student to get high school or college credit. The fact a student gets educational credit for the internship, however, while significant and helpful in the analysis, is not the end of the inquiry. A student who expects to learn computer animation while interning, for example, had best not be relegated to the mail room for the internship period.

Here are the DOL's rules:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to what would be given in a vocational school or academic educational instruction (this is where getting credit comes in handy);

2. The training is for the benefit of the trainee, not the employer (that is, it is not designed to save the employer money; getting educational credit shows this);

3. The trainee does not displace a regular employee, but works under an employee's close observation;

4. The employer that provides the training gets no immediate advantage from the activities of the trainee, and on occasion the employer's operations may actually be impeded (*e.g*, employee time spent on helping the trainee learn things takes away from the employee's main duties);

5. The trainee is not necessarily entitled to a job at the conclusion of the training period; and

6. The employer and the trainee both understand that the trainee is not entitled to wages for the time spent in training. This is best established with a written document that includes (or even comes from) the institution that will provide the student intern with the educational credit.

Trick Question: What Date is the Fourth of July?

By Pete Saucier

July 4, 2008, was a Friday [you can look it up]. No surprise to most of us, that also was Independence Day, which has been celebrated on July 4 of each calendar year since General George Washington issued a double ration of rum to the Continental Army on July 4, 1778.

WOTCO, Inc. has a collective bargaining agreement with the Ironworkers Union that provides Independence Day as a paid holiday. Employees who work on a holiday are paid double time the hourly rate, as well as a full day of holiday pay. The collective bargaining agreement also reads that Sunday holidays are celebrated on Monday, but it is otherwise silent as to moving holidays from one day to another.

In the summer of 2008, the Ironworker employees at WOTCO were regularly scheduled to work 10 hours a day, Monday through Thursday, with 8 hours of mandatory overtime on Friday. Understandably, WOTCO celebrated Independence Day (the Fourth of July) on . . . well . . . Friday, July 4 - the employees had the day off with pay. The Ironworkers Union, however, wanted the Fourth of July holiday to be celebrated on Thursday, July 3, 2008, which was their last regular work day. The Union reasoned that work on July 3, 2008, was worth double time, plus regular pay – 30 hours of pay for 10 hours work, and then Friday off. After all Friday was the Fourth of July.

Remarkably, Arbitrator Martin Henner ruled that Independence Day at WOTCO should have been on July 3, 2008, awarding the 30 hour bonanza to Ironworker employees who worked that day. Arbitrator Henner viewed his role not as applying the contract, but as doing fairness as he saw it. He reached the conclusion that Independence Day at WOTCO in 2008 was on Thursday, July 3, because, "[a]rbitration is an equitable proceeding." Equity trumped history and the calendar.

On Heels of Recess Appointments, Supreme Court Will Decide Decision-Making Authority of Two-Member NLRB

By John Bolesta

On March 27, 2010, the Obama Administration filled two of the three vacant seats on the National Labor Relations Board (NLRB or Board), bringing total membership above two for the first time since the beginning of 2008. Despite this return to normalcy, numerous litigants, aggrieved by decisions of the two-member Board, have challenged the Board's statutory authority to issue decisions and orders with only two members as of December 31, 2007. If the Supreme Court rules against the NLRB in *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted, 130 S. Ct. 488 (U.S. Nov. 2, 2009) (No. 08-1457) (arguments heard March 23, 2010), the decision could effectively vacate the five hundred ninety-five (595) decisions issued by the two-member Board since 2008.

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On December 16, 2007, when the Board had a full complement of Members, Board Chairman Robert Battista's term expired. Four days later, Board Members Wilma Liebman, Peter Schaumber, Peter Kirsanow, and Dennis Walsh, delegated to Liebman, Schaumber, and Kirsanow "as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of members Kirsanow and Walsh." The delegation of power was accomplished pursuant to Section 3(b) of the National Labor Relations Act, which provides, in pertinent part:

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise… A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board, shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence.

When the terms of members Kirsanow and Walsh expired on December 31, 2007, the Board was left with only two members. In light of the delegation, and in reliance on a 2003 Department of Justice's Office of Legal Counsel opinion, the remaining two-member Board continued to issue decisions and orders, totaling 595 by the time Becker and Pearson were appointed.

In *New Process Steel v. NLRB*, the Supreme Court granted New Process Steel's request to review the case and will decide whether the NLRB has the authority to decide cases with only two sitting members, despite statutory authority stating that "three members of the Board shall, at all times, constitute a quorum of the Board," 29 U.S.C. §153(b), and where the Board has previously delegated its full powers to a three-member group of the Board that includes the two remaining members.

The New Process Steel case presents a split among the circuit courts. The decision is consistent with decisions from the First, Second, Fourth and Tenth Circuits. The Seventh Circuit stated that Section 3(b) "gave the Board the power to delegate its authority to a group of three members," and "allowed the Board to continue to conduct business with a quorum of three members but expressly provides that two members of the Board constitutes a quorum where the Board has delegated its authority to a group of three members. The plain meaning of the statute thus supports the [Board]'s delegation procedure."

In contrast, the D.C. Circuit has held that the two active Board members do not constitute a Section 3(b) quorum and, therefore, are not authorized to issue decisions and orders. The D.C. Circuit pointed to the Congressionally imposed requirement of a three-member quorum set forth in Section 3(b), and further reasoned that the delegated authority of an agent ends at the time of the suspension of the powers of the entity bestowing authority on the agent.

At oral argument, several Supreme Court Justices focused on the prospect that the Board would be rendered effectively defunct when it dropped below three members. The Supreme Court's decision, if adverse to the Board, would potentially cripple the authority of any future two-member Board.

Obamacare

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Coverage may not be rescinded except in the case of fraud.

•For those plans that are not grandfathered, the law has several other new coverage and reporting requirements. Highlights of these reforms include, but are not limited to:

•For the first taxable year after December 31, 2010, reporting the value of employee health care coverage as a line item on an employee's W-2 form;

•Onerous non-discrimination rules (which before only applied to self-insured plans) will apply to non-grandfathered plans;

•Emergency services must be covered without prior authorization and treated as in-network coverage;

•Mandated coverage with no cost-sharing (*i.e.*, co-pays or deductibles) for specified preventive care;

•New internal and external claims and appeals processes for plan participants to enforce their rights under the law; and

•A variety of new reporting requirements to the federal government.

There are additional reforms that affect retiree health coverage. These include a new temporary federal reinsurance plan that will reimburse employers up to 80% of eligible retiree benefit claims between $15,000 and $90,000 for retirees between the ages of 55 and 64. Starting in 2013, the tax deduction for employers providing Medicare Part D subsidy for prescription drug coverage will end.

One little-known provision of Obamacare amends the Fair Labor Standards Act (FLSA) and provides whistleblower protections for those who report possible violations of the new law. Section 1558 of the Act prohibits discrimination and retaliation by employers against employees who report possible violations of the new law to the employer, the federal government or a

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state's attorney, where the employee has a reasonable belief that a violation occurred. Employees who participate in an investigation into any whistleblower claim are also protected. Employees will have 180 days from the date they suffer an adverse action as a result of their whistleblower claim to file a complaint with OSHA. If OSHA fails to issue a final order within 210 days, the employee may file a lawsuit in federal court.

Another little known provision buried in the FLSA is an amendment to Section 7 of the Fair Labor Standards Act that requires employers to provide "reasonable break time" to employees to allow them to express breast milk for nursing children. Section 4207 of the new law, "Reasonable Break Time For Nursing Mothers," requires that the break time be provided for one year after the child's birth "each time such employee has need to express the milk." The law does not specify what constitutes "reasonable" break time, nor does it indicate any limits on the number of breaks a nursing worker may take under its provisions.

Until the government provides further clarification, and to avoid the headaches of complying with many provisions of the new law, employers should contact their benefits specialists or counsel to ensure that they do not lose their status as a grandfathered plan.

Making Mountains Out of Molehills: Medication Side Effects Can Create An ADA Issue That Otherwise Does Not Exist

By Randi Klein Hyatt

In *Sulima v. Tobyhanna Army Depot*, No. 08-4684 (3d Cir. April 12, 2010), the United States Court of Appeals for the Third Circuit had opportunity to consider whether medication side effects may provide an individual with protection under the Americans with Disabilities Act (ADA).

Mr. Sulima was diagnosed as morbidly obese and with related sleep apnea. In 2005, his doctors recommended he lose weight to control his severe sleep apnea and prescribed him weight-loss medication, a laxative and an appetite suppressant. The weight-loss medication had some unpleasant side effects and Mr. Sulima would need to go to the bathroom often, and would be in the restroom for long periods at a time, often a combined total of two or more hours per workday. Over time, Mr. Sulima's supervisors grew concerned about the lengthy bathroom breaks and requested that he be transferred. After learning of the transfer request, Mr. Sulima brought in a note from his doctor advising that his medication was changed and he would no longer need extended bathroom breaks. Mr. Sulima's employer still moved forward with the transfer. Because there were no other jobs available, Mr. Sulima accepted a "voluntary layoff."

Mr. Sulima sued his employer under the ADA (because the events transpired in 2005, the ADA Amendments Act of 2008 did not apply, although the Third Circuit did indicate that its analysis and conclusion would be the same under the ADAAA). Sulima lost at the district court level and appealed. Because Mr. Sulima was claiming an impairment based on the side effects of his medication, the Third Circuit recognized that Mr. Sulima's ADA problem was different than the typical ADA claim: Mr. Sulima had health problems that required medication, but claimed his ADA impairment was based solely on the conditions resulting from the medication, and not the underlying health problems (obesity or sleep apnea) that the medications were treating.

The Third Circuit considered the case law from several other circuits (Seventh, Eighth, and Eleventh) that have previously addressed this issue and agreed that a disabling impairment caused by the side effects of prescribed medication may constitute an ADA disability even if the individual's underlying condition is not a disability. For that to happen, however, the side effects must arise from a course of treatment that is required "in the prudent judgment of the medical profession" and for which there is no available alternative that is equally effective, but without disabling side effects.

Under this legal umbrella, the Third Circuit was not persuaded Mr. Sulima was protected by the ADA, despite his medication's distressing side effects. The downfall for Mr. Sulima's claim was his inability to establish that the medications he was taking were medically necessary. In particular, Mr. Sulima's doctor discontinued the treatment after the plaintiff discussed the adverse side effects and his employer's concern that he was taking too long in the bathroom. Indeed, his doctor had testified that, as he did with Mr. Sulima, he would simply stop prescribing the medications for any patient who complained of such side effects.

The Third Circuit correctly reasoned that the concept of disability connotes an involuntary condition, and "if one can alter or remove the 'impairment' through an equally efficacious course of treatment, it should not be considered 'disabling.'" Mr. Sulima was unable to show the medication causing his gastrointestinal distress was medically necessary or that the specific drugs causing the side effects were the only effective treatments for his underlying conditions. Therefore, while the ADA theoretically could have protected Mr. Sulima, because his impairment was voluntarily inflicted, he was unable to secure cover.

Pro-Employee Legislation Passed

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The General Assembly also passed legislation (SB 694; HB 214) which amends the definition of "wage" under Maryland's Wage Payment and Collection Law to include overtime wages. The effect of this legislation is to require that terminating employees be paid all overtime wages due them in their final paycheck. The failure to do so could subject the employer to three times the unpaid overtime, plus attorneys' fees. As a result of this amendment, Maryland employees seeking to recover unpaid overtime can recover greater damages than they can under federal law, where damages are limited to twice the amount of unpaid overtime. Employers should expect that employees claiming they were misclassified as exempt from overtime will now be sued for state law violations in state court, where it is generally more difficult to get such claims dismissed. This legislation was signed by Governor O'Malley on April 13, 2010, and takes effect on October 1, 2010.

Finally, the General Assembly passed a bill (HB 404) which provides an administrative procedure for the Commissioner of Labor and Industry to pursue claims for unpaid wages on behalf of employees, so long as the amount of wages due does not exceed $3,000. This legislation, which was also signed into law by the Governor on April 13, 2010, allows employees with relatively small claims to unpaid wages to have the state pursue their claim on their behalf. Until now, the state did not pursue these claims on behalf of employees, as enforcement was limited to private lawsuits brought by employees under the Wage Payment and Collection law. The new law takes effect on October 1, 2010.

Although the Maryland business community was successful in defeating some employee friendly legislation, those bills which did pass will help solidify Maryland's reputation as a "business-unfriendly" jurisdiction.

Disability Claims Gone Wild

By Cliff Geiger

Most of our readers are seasoned Human Resources veterans who rarely get surprised by some of the decisions that courts issue in employment cases. However, two recent disability cases, one from Michigan and the other from Oregon, make you wonder what has happened to common sense.

Terry Rouse, a Michigan state police officer, was forced to retire in August 2007, following thirty years of employment. In May 2007, Rouse underwent a requalification examination to be issued a gun. A supervisor questioned Rouse's physical abilities when his knee did not go to the ground during the rifle familiarization portion of the exam. As a result of these concerns, Rouse was directed to have an independent medical exam (IME). The doctor concluded that Rouse was unfit for duty and morbidly obese. In reliance on the doctor's report, Rouse was released from duty.

All of this sounds right, but wait. In Michigan, it is illegal for an employer to discriminate based on weight. The police department argued that it was not Rouse's weight, but the doctor's opinion that Rouse was unable to perform the essential functions of his job that resulted in Rouse being relieved of his duties. However, the judge determined that because the IME report contained statements referring to Rouse's weight, and the police department relied on the IME report, a jury should decide whether weight was a determining factor in Rouse's release, even though the doctor has found Rouse unfit for duty. This cannot be what the Michigan legislature intended, can it? *Rouse v. Michigan Dep't of State Police*, 22 AD Cases 1886 (W.D. Mich. 2010).

In another surprising case, the Oregon Supreme Court ruled that an employer is not required to accommodate an employee's medical marijuana use. (*Emerald Steel Fabricators v. Bureau of Labor & Indus.*, Or., No. S056265, 4/14/10). In anticipation of having to take a drug test when hired on a permanent basis, an employee told his supervisor that he had a registry identification card under the Oregon Medical Marijuana Act, and that he used marijuana for a medical problem. Apparently, the employee, a drill press operator, smoked several times a day, but not at work. The employee's physician had recommended marijuana use by inhalation five to seven times a day. After he was fired, the employee sued for disability discrimination because the employer failed to accommodate his medical condition by allowing medical marijuana use, which is permitted by state law.

The employer took the position that the employee was dismissed for the current illegal use of drugs, which is not a protected disability under the ADA. However, Oregon law excludes medical marijuana use from the definition of "illegal use of drugs" for the purposes of the state employment discrimination laws. Nonetheless, the court found the authorization to use marijuana found in Oregon law is unenforceable, because it is preempted by the federal Controlled Substances Act. Therefore, the employee was currently engaged in the illegal use of drugs, which is not protected by state employment discrimination statutes.

These two cases reinforce the fact that litigation is an unpredictable venture that is not for the faint of heart. Perhaps more importantly, they remind us that just because an employment decision makes sense does not mean that a court will find it to be legal.