KOLLMAN & SAUCIER, P.A. SPRING 2012

THE EMPLOYMENT BRIEF

HELPING YOUR BUSINESS THRIVE

IN THIS ISSUE

KOLLMAN & SAUCIER, P.A.
The Business Law Building
1823 York Road
Timonium, Maryland 21093
410.727.4300
KOLLMANLAW.COM

The Spring 2012 issue of *The Employment Brief* is the second issue to publish since we revamped the newsletter's format. The vast majority of feedback we received on our inaugural Winter 2012 issue was positive, which means either that readers liked it or are too polite to tell us that they have added it to their "Junk Mail" list. I am hoping it is the former.

As we continue to update the way we communicate with our clients and firm friends, we have also created a Facebook page (www.facebook.com/KollmanLaw) and a Twitter feed (@KollmanLaw). In a world where news stories become stale in less than 24 hours, we realized that we needed to find a way to communicate with you more often than bi-monthly or quarterly newsletters. At the same time, we do not want to clutter your email inboxes with updates on legal developments that may be of little or no interest to you. Our solution is to give you an option: if you wish to receive regular updates on employment law developments several times a week, please "like" us on Facebook or follow us on Twitter. We promise you will not see us posting pictures of what we are making for dinner or tweeting that we are standing in line at the bank. Rather, you will see comments on – and links to – labor and employment law related news about which we think employers should know.

NLRB ISSUES MORE GUIDANCE ON SOCIAL MEDIA POLICIES

By Eric Paltell

As we reported in the September/October edition of *The Employment Brief*, in August of last year, the National Labor Relations Board (NLRB) issued guidance on the legality of workplace social media policies under the National Labor Relations Act (NLRA). On January 25, 2012, the Board published a second *General Counsel's Report* on the subject, further establishing the NLRB as the self-proclaimed arbiter of social media guidelines in the workplace.

To understand why the NLRB has been so active in this arena, it helps to have a brief overview of Section 7 of the NLRA, which provides employees with the right to engage in "protected concerted activity." This right extends to all employees, even in a non-union setting. To be protected, the activity must be engaged in with or on behalf of other employees, and must seek to improve terms and conditions of employment. Historically, the NLRB has interpreted Section 7 to prohibit employers from disciplining employees who gather around the proverbial water cooler in the workplace to complain about terms and conditions of employment. Now, as a smartphone-equipped workforce voices those water cooler complaints on Facebook, Twitter, blogs, and other social media sites, employers are challenged with finding proper ways to regulate such statements in cyberspace.

The NLRB has taken the position that an employer violates Section 8(a)(1) of the NLRA through maintenance of a work rule if the rule "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Layfayette Park Hotel*, 326 NLRB 824 (1998). The Board uses a two-step inquiry to determine if a work rule would have such an effect. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). First, a rule is clearly unlawful if it explicitly restricts Section 7 protected activities. If the rule does not explicitly restrict protected activities, it will only violate Section 8(a)(1) upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

"The NLRB rejected the use of blanket employer disclaimers as an effort to rescue otherwise overly broad social media policies."

In the General Counsel's latest memoranda, the NLRB summarizes fourteen (14) cases which "present emerging issues in the context of social media." For

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example, the Board found unlawful an employer policy which prohibited "inappropriate discussions" about the company, management, and/or co-workers because "inappropriate discussions" could include criticism of the employer's labor policies, treatment of employees, or terms and conditions of employment. Similarly, the General Counsel found a policy prohibiting "making disparaging comments about the company through any media, including on-line blogs [and] other electronic media" to be unlawful because it may discourage employees from making comments about being treated unfairly or complaining about their pay. On the other hand, a policy which prohibited the use of social media to "post or display comments about co-workers or supervisors or the employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the employer's workplace policy against discrimination, harassment, or hostility on account of [protected characteristics]" was found to be lawful because it would not be reasonably understood to restrict legal concerted activity.

One of the areas of greatest concern to employers is the need to protect against unauthorized disclosure of confidential information and trade secrets. According to the General Counsel's guidance, a confidentiality policy is illegal if it would impinge upon an employee's ability to discuss wages and conditions with others inside or outside the organization. For example, a policy is illegal if it prohibits employees from "disclosing or communicating . . . confidential, sensitive or nonpublic information concerning the company on or through company property to anyone outside the company without prior approval of senior management or the law department." The General Counsel, however, approved a policy that "prohibited employees from using or disclosing confidential and/or proprietary information, including personal health information about customers or patients," as well as "embargoed information" such as launch and release dates and pending reorganizations. The General Counsel approved this language because the employer was in the pharmaceutical business and the policy contained references to customers, patients, and health information so that employees would reasonably understand that the rule was intended to protect privacy interests of the employer's customers and not to restrict communications protected by Section 7.

Finally, the NLRB rejected the use of blanket employer disclaimers as an effort to rescue otherwise overly broad social media policies. Specifically, the Board found the following disclaimer insufficient to save an otherwise overboard rule: "the policy will not be interpreted or applied so as to interfere with the employee rights to self organize, form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from engaging in such activities." According to the General Counsel, the disclaimer was insufficient because employees may not know what it means, and therefore could be deterred from making permissible postings. The end result is that an employer cannot try to simplify a social media policy with a generic disclaimer; instead, the employer must make the effort to specifically enumerate the universe of prohibited postings and then hope it passes muster with the NLRB.

WORKER ENTITLED TO FMLA PROTECTION EVEN THOUGH NOT FMLA ELIGIBLE

By Michael Severino

An employee is not eligible for leave pursuant to the Family and Medical Leave Act of 1993 (FMLA) until the employee works at least twelve months and 1,250 hours during the previous twelve month period. What has not always been clear, however, is how an employer responds to an employee who has not worked the requisite 1,250 hours and/or 12 months, but notifies the employer that he or she intends to take FMLA leave *after* becoming eligible. Is that employee protected by the FMLA even though he or she is not yet eligible to take leave? Is the simple act of requesting the leave in advance of eligibility sufficient to invoke the protections of the FMLA? The Circuit Court of Appeals for the Eleventh Circuit recently answered "yes" to these questions, thereby opening up the FMLA playing field to a wider group of plaintiffs. *Pereda v. Brookdale Senior Living Communities, Inc.*, No. 10-14723 (11th Cir. Jan. 10, 2012).

Kathryn Pereda began her employment with Brookdale in October 2008. In June 2009, she advised Brookdale that she was pregnant and intended to take FMLA leave after the birth of her child, which was expected in late November 2009. At the time Pereda advised Brookdale of her intent to take leave, she had not worked for 12 months and, thus, was not yet eligible for FMLA leave. Further, she was not entitled to FMLA leave at that time because she had yet to have a triggering event under the FMLA (although she would have been eligible for leave in November 2009 when she expected to give birth). Pereda was fired in September 2009.

Pereda filed a lawsuit alleging FMLA interference and retaliation. The trial court dismissed Pereda's complaint, reasoning that her employer could not have interfered with any FMLA right because Pereda was not eligible for FMLA leave when she requested it and because the triggering event (the birth of her child) had not yet occurred. Furthermore, because Pereda was not eligible for FMLA, she could not have engaged in a protected activity and, thus, Brookdale could not have retaliated against her.

The Eleventh Circuit reversed the district court and held that the FMLA did, in fact, grant to Pereda pre-eligibility rights in relation to post-eligibility leave. The Eleventh Circuit looked first to the FMLA provision that requires an employee (and noted that the statute did not state an *eligible* employee) to give an employer 30 days' notice of intent to take leave. The Eleventh Circuit recognized the paradox of requiring an employee to provide notice of at least 30 days before the triggering event (in this case childbirth) but not providing that same employee protection for doing so because the triggering event has not yet occurred. The Court stated that "[a]s the statute requires advance notice, logic mandates that the FMLA be read to allow a cause of action for employees who, like

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Pereda, in goodwill exceed the notice requirement."

The Eleventh Circuit also recognized the public policy implications and raised the scenario where an employer could get away with terminating an employee once the employer had reason to believe the employee would need FMLA leave (obviously, for example, with a pregnant worker). An interpretation of the FMLA that requires the worker to be both entitled and eligible for leave would lead to the inequitable result of permitting an employer to terminate the employee once the employee gave the required FMLA notice. Because Pereda engaged in protected activity when she requested the leave, even though she was not then eligible, she was entitled to pursue her claim for FMLA retaliation, as well as interference with her FMLA rights.

ECONOMIC REALITIES, NOT LABELS, GOVERN PROPER WORKER CLASSIFICATION

By Cliff Geiger

Making the distinction between an employee and an independent contractor continues to be tricky for many businesses. Getting it right is important because of the many different consequences that flow from the classification. Employment relationships come with minimum wage and overtime requirements, employer contributions for unemployment benefits, social security, and workers' compensation insurance, and compliance with laws regarding income tax withholding, employee benefits and employment discrimination. Independent contractor relationships do not.

Unfortunately, the government does not make it easy for an employer to make the classification task accurately. Various government agencies apply different tests to determine whether someone is an employee or an independent contractor, and the results may be inconsistent. For example, someone who is an independent contractor for income tax withholding purposes under the IRS's common law test still may be entitled to unemployment benefits under Maryland law. In *DOL v. Fox*, 346 Md. 484 (1997), the Court of Appeals of Maryland held that the IRS's common law approach to determining the employer-employee relationship was irrelevant, and "the Maryland unemployment insurance definition of covered employment is broader than that of the common law." *Id.* at 498.

Most recently, in *Calle v. Or*, No. 11-0716 (D. Md. Jan. 18, 2012), the United States District Court for Maryland had the opportunity to discuss the differences between employees and independent contractors in the context of coverage under the Fair Labor Standards Act (FLSA) and the Maryland Wage and Hour Law (MWHL). The complaint alleged that each morning the defendant met the plaintiff at a specified bus stop, drove him to a work site, and instructed him to install windows, doors, or siding. The plaintiff also asserted the defendant supervised the work to ensure it was sufficient quality. The plaintiff brought his own tool belt to work, but the defendant provided all large tools and the scaffolding necessary for the plaintiff to complete the assignments. The plaintiff worked between ten and twelve hours each day, resulting in approximately sixty-six hours per week between January 2008 and March 2011. The plaintiff was paid on a weekly basis using a daily fixed rate. After the defendant ended the work relationship, the plaintiff sued, claiming the defendant had violated the FLSA and MWHL by refusing to pay overtime for hours worked in excess of forty per week.

The defendant moved for summary judgment, arguing that the plaintiff was not his employee, but an independent contractor. Essentially, the defendant's position was that the parties acted as though the plaintiff was an independent contractor and treated him that way for tax purposes by issuing him an IRS Form 1099. The trial court, however, quickly noted that the label given to the relationship is not dispositive of the proper classification, and commented that the defendant "fails to recognize that the concept of employment under the FLSA and MWHL is broader than the common law definition of employment and even broader than several other federal employment-related statutes, such as the Internal Revenue Code."

Rather than focus on the labels used by the parties, the trial court analyzed the "economic realities" of the working relationship, which incorporates a six-factor test to determine whether the worker is an employee for purposes of the FLSA and MWHL. These factors are: (1) the degree of the alleged employer's control over the worker; (2) the worker's opportunity to realize profit or loss; (3) the worker's investment in equipment or material; (4) the degree of skill the work requires; (5) the permanence of the working relationship; and (6) the degree to which the work is an integral part of the alleged employer's regular business. The point of this analysis is to determine whether the worker is economically dependent on the person or entity for which he is providing a service, or if the worker really is in business for him or herself.

Using the economic realities analysis, the trial court found that five of the six factors indicated that the plaintiff was the defendant's employee: the defendant exercised control by setting the work schedule, directing the plaintiff to specific work sites, and providing instructions regarding the work to be performed each day. The plaintiff had no opportunity to realize additional profit or loss because the schedule was set by the defendant, who paid the plaintiff a fixed amount for each day worked. The plaintiff's use of his own tool belt did not demonstrate a significant investment in equipment or show that he was in business for himself. The plaintiff worked exclusively for the defendant for more than three years, and the work he performed was integral to the defendant's business. The only factor that weighed in favor of independent contractor status was the degree of skill required to perform construction work, but that was hardly enough to convince the court that the worker was an independent contractor.

This issue of proper classification will continue to cause problems for businesses. A good place to start in making the assessment is the economic realities. Independent contractors really need to be in business for themselves, which business is usually different from the business of the person for whom they are performing work.

DOL ISSUES GUIDANCE ON AFFORDABLE CARE ACT PROVISIONS

By Bernadette Hunton

On February 9, 2012, the Department of Labor (DOL) issued a technical release document that provides responses to Frequently Asked Questions (FAQs) about the Patient Protection and Affordable Care Act's (PPACA) automatic enrollment, employer shared responsibility, and 90-day limitation on waiting periods provisions. The document also highlights various approaches under consideration for future regulations.

Automatic Enrollment

The PPACA amends Section 18A of the Fair Labor Standards Act (FLSA) to require those employers with more than 200 full-time employees to automatically enroll new full-time employees in an employer's healthcare plan, and to continue the enrollment of employees already enrolled. On December 22, 2010, the DOL issued FAQs regarding this section, explaining that employers are not required to comply with the automatic enrollment mandate until the DOL develops regulations on this section. According to the most recent FAQs, rulemaking will not be completed by 2014, as previously predicted. It remains the DOL's position that until guidance is issued, employers are not required to comply with FLSA section 18A.

Employer Shared Responsibility

The employer shared responsibility provisions, contained in Section 490H of the Internal Revenue Code (IRC), provide that employers who have 50 or more full-time equivalent employees must either offer affordable health coverage to those employees or pay a penalty. Full-time employees are defined as those who work on average at least 30 hours per week. The Treasury Department and IRS have requested and received comments on interpreting and applying this section. Specifically, input was requested on a proposed "safe harbor" provision that would assist employers in determining whether a healthcare plan qualifies as affordable. The most recent FAQs state that the Treasury Department and IRS intend to issue regulations permitting employers to use employee W-2s as a safe harbor for determining the affordability of coverage.

The guidance document further states that the Treasury and IRS intend to issue regulations that would permit large employers to use a look-back/stability period safe harbor to determine which employees qualify as full-time. Such guidance would provide that:

- At least for the first three months following an employee's date of hire, an employer will not be subject to the employer responsibility payment for failure to offer coverage during that three-month period.

- If an employee works full-time during the first three months of employment, but the hours worked are reasonably viewed as not representative of the hours the employee will be expected to work on an annual basis, the plan is permitted an additional three-month period to determine an employee's status, and the employer will not be subject to the employer responsibility payment for failure to offer coverage during that six-month period.

- An approach will be permitted where the period of time an employer will have to decide whether a new hire is a full-time employee will depend on whether: (a) at the time of hire, the employee is reasonably expected to work an average of 30 or more hours per week annually, and (b) the employee's first three months of employment are reasonably viewed as indicative of the average number of hours an employee will work on an annual basis.

90-Day Limitation on Waiting Periods

The Public Health Service Act (PHS) section 2708, as added by the PPACA, prohibits a health care plan which begins on or before January 1, 2014, from imposing a waiting period of more than 90 days. While PHS defines a waiting period as a period that must pass before an individual is eligible to be covered for benefits under the plan, under prior regulations, a waiting period was defined as a period that must pass before coverage for an employee or dependent who is otherwise eligible to enroll in a plan can become effective. The agencies recognize that some ambiguity exists as to the 90-day waiting period, and the release document explains that they intend to retain the definition applicable to prior regulations. The FAQs also reiterate that PPACA does not penalize small employers for failing to offer coverage, nor does it penalize large employers for limiting coverage to full-time employees.

Upcoming guidance is expected to address other terms under a healthcare plan that will likely be permissible, so long as a condition is not designed to avoid compliance with the 90-day waiting period. Such terms would include full-time status, a bona fide job category, or receipt of a license. Additionally, future guidance is expected regarding situations where, under the terms of a plan, employees (or certain classes of employees) are eligible for coverage once they complete a specified cumulative number of hours of service within a defined period (such as 12 months). Such conditions will not be treated as designed to avoid compliance with the 90-day waiting period, so long as the required cumulative hours of service do not exceed those specified in the guidance.

EMPLOYER MAY BE LIABLE FOR FIRING EMPLOYEE AFTER INTERNAL COMPLAINT OF FLSA VIOLATIONS

By Kelly C. Lovett

Beyond the wage and hour obligations put in place by the Fair Labor Standards Act (FLSA), the statute also prohibits employers from retaliating against employees who assert their rights under the law. Specifically, Section 215(a)(3) of the Act makes it unlawful for employers to "discharge or in any manner discriminate against an employee because

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such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding." 29 U.S.C. § 215(a)(3). Like most provisions of the FLSA, courts have wrestled with the application of this anti-retaliation clause to determine what kind of employee complaint is sufficient to trigger statutory protection.

In *Minor v. Bostwick Laboratories, Inc.*, No. 10-1258 (4th Cir. Jan. 27, 2012), the Fourth Circuit, for the first time, considered the question of whether an employee's internal complaint to management – as opposed to a complaint filed with a government agency or in a court – fell within the scope of the FLSA's anti-retaliation provision. Answering "yes," the court held that intra-company complaints *may* constitute protected activity under the FLSA.

Kathy Minor worked for Bostwick as a medical technologist. On May 6, 2008, Minor and other coworkers met with Bostwick's COO to report Minor's belief that their supervisor routinely altered employee timesheets to delete overtime hours they had worked. The COO stated that he would look into the allegations. A few days later, however, Minor was fired, allegedly because of conflict with her supervisors and reports by her coworkers that Minor, and not the supervisor, was the problem.

On June 1, 2009, Minor sued Bostwick in federal court (U.S. District Court for the Eastern District of Virginia), alleging that the company violated the FLSA's anti-retaliation clause by firing her for reporting her supervisor's alteration of timesheets. In response, Bostwick moved to dismiss her complaint, arguing that Minor's internal complaint was not legally protected activity under the FLSA. The district court agreed with Bostwick and dismissed Minor's complaint, holding that the plain language of the FLSA's anti-retaliation provision did not protect employees from retaliation for making intra-company complaints. *See Minor v. Bostwick Labs., Inc.*, 654 F. Supp. 2d 433 (E.D. Va. 2009).

On appeal, the Fourth Circuit considered whether the plain language of Section 215(a)(3)'s prohibition against retaliating against an employee who "has filed any complaint" includes intra-company complaints. For guidance, the Fourth Circuit considered the Supreme Court's recent decision in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1330 (2011), which held that an employee's oral complaints to his employer were protected activity under the FLSA. As in *Kasten*, the Fourth Circuit held the statute's wording "filed any complaint" to be ambiguous as to whether an intra-company complaint, like Minor's, is protected activity.

The Fourth Circuit then took into account various "functional considerations." In particular, the court held that the remedial purpose of the FLSA required interpretation of the anti-retaliation provision to cover intra-company complaints. Noting the Supreme Court's mandate that the FLSA not be interpreted in a "narrow, grudging manner," the Fourth Circuit concluded that an interpretation limiting the FLSA's retaliation protection to only formal administrative or judicial complaints would discourage employees from using workplace grievance procedures to protect their rights. In its holding, the court followed the other circuits addressing the issue and the DOL's position that intra-company complaints fall within the meaning of the FLSA's anti-retaliation clause.

The Fourth Circuit cautioned, however, that not every "instance of an employee 'letting off steam' to his employer constitutes protected activity" under the FLSA. To clarify, the Fourth Circuit noted that employers must have "fair notice" that an employee's grievance is protected activity and followed the test set forth in *Kasten* – that is, whether an employee's complaint to his or her employer is "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection." Concluding that Minor's comments to Bostwick met that test, the court reversed the decision of the trial court.

It remains to be seen what kind of employee gripe will be viewed as just "letting off steam," as opposed to one that is a valid assertion of rights under the FLSA. While an employee complaint about wanting to make more money is probably considered unprotected activity, a grievance about altered timesheets or the alleged failure to be paid for overtime work will undoubtedly be protected.

NEW RECORDKEEPING REQUIREMENTS FOR GINA EFFECTIVE APRIL 3, 2012

By Adam T. Simons

On February 3, 2012, the Equal Employment Opportunity Commission (EEOC) issued final record-keeping regulations for the Genetic Information Nondiscrimination Act (GINA) which take effect on April 3, 2012. Those requirements extend the existing record-keeping requirements that employers already have under Title VII and the Americans with Disabilities Act to GINA.

The Genetic Information Nondiscrimination Act

Enacted in 2008, GINA is designed to prevent discrimination on the basis of genetic information in employment and health insurance. Title I of the Act focuses on health insurance issues, and is administered by several federal departments. Title II prohibits employers from using genetic information in employment decision-making and is administered by the EEOC.

Title II of the Act applies to employers with at least fifteen employees, employment agencies, labor unions, joint-labor management training programs, and federal sector employees. It makes it illegal for employers and other covered entities to discriminate against employees or applicants because of genetic information. Genetic information includes, but is not limited to, genetic tests of the individual or family members, diseases or disorders of the individual's family members, and family medical history.

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Employers are prohibited from using, requesting, or disclosing this material.

Confidentiality of Genetic Information

The confidentiality requirements of GINA require employers to take particular steps to keep confidential an employee's or applicant's genetic information in their possession. This goes beyond a duty not to disclose. Indeed, the employer must take active steps to keep the information confidential, including keeping the information in a separate file. Until now, however, there was no record-keeping requirement for employers as there is with other anti-discrimination statutes. The new regulations now impose such a requirement.

EEOC Proposed Record-Keeping Requirements

These regulations first appeared in June 2011, when the EEOC proposed regulations to "extend its existing recordkeeping requirements under Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA) to entities covered by Title II" of GINA. The EEOC publicized the proposed regulations and sought comments on or before August 1, 2011.

The EEOC received one comment, from an association of state credit unions, who supported the proposed change. As a result, this past February, the EEOC adopted the proposed regulation without change. Accordingly, any records related to GINA covered materials must be retained for the period of time specified in the Title VII and ADA regulations. In most instances, however, an employer's own record-keeping policy is going to be more stringent and longer than that required by the regulations.

Preservation of Records by Employers

The regulations require that personnel or employment records made or kept by an employer, such as application forms and other records having to do with terms and conditions of employees (e.g., wages, demotions, promotion, and the like), must be preserved for at least one year from the date of the making of the record or the personnel action involved. Therefore, if you fire someone, you must also keep all records for a period of one year from the termination.

If, after terminating an individual, he or she brings an EEOC charge, then all documents relevant to the charge must be preserved until after the time for the individual to file suit expires, or in the event a lawsuit is filed, when the case is finally resolved. Once that period has expired, the obligation to keep the records also ceases. The records that must be kept include, but are not limited to, "personnel or employment records [of the employee] . . . and other employees holding positions similar to that held or sought by the aggrieved person and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected." Therefore, all records related to that individual, and similarly situated individuals, should be preserved.

Preservation of Records by State and Local Governments

The record-keeping requirements for state and local governments differ. The same records must be kept, but the length of time the records must be maintained is longer. State and local governments must keep the records for a minimum of two years.

The regulations specifically exempt any "state or local educational institutions or school districts or school systems" from the two year requirement. Consequently, institutions such as community colleges and other state schools are not bound by the two year requirement, but will be bound by the one year requirement.

Practical Effect

These regulations should have little effect on employers' operations because employers should already have in place record-retention policies. The various employment statutes at the federal and state level have different record retention policies, ranging from one to six years. In particular, employers should maintain working files on active employees throughout each individual's employment and for up to three years thereafter. All files should be maintained in a secure location. These regulations simply require that, to the extent any of those records relate to genetic information, they now also are to be retained.

DOL PROPOSES RULEMAKING ON SERVICEMEMBER FMLA AND MORE

By Darrell VanDeusen

On January 31, 2012, the Department of Labor (DOL) released proposed changes to the agency's Family and Medical Leave Act (FMLA) regulations. This Notice of Proposed Rulemaking (NPRM), a necessary precursor to any regulatory change, seeks comments from interested parties by April 16, 2012. The last time the DOL issued FMLA regulations was in 2008. This NPRM will seek to incorporate changes made to the FMLA since that time.

SERVICEMEMBER LEAVE

Definition of Active Duty [§ 825.126(a)]: The DOL proposal replaces the existing definition of "active duty" with two new definitions: "covered active duty" for the Regular Armed Forces and "covered active duty" for the Reserves. The DOL suggests this change will reflect the fact "there are limitations on the types of active duty that can give rise to qualifying exigency leave."

Exigency Leave for Childcare and School Activities [§ 825.126(a)(3)]: The 2008 regulations state that eligible employees may take qualifying exigency leave to arrange childcare or attend certain school activities for a military member's son or daughter. The DOL's proposal places limits on this leave:

(1) the military member must be the spouse, son, daughter, or parent of the employee requesting leave; and (2) the child must be "the military member's biological, adopted, or foster child, stepchild, legal ward, or child for whom the military member stands in *loco parentis*, who is either

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under age 18 or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence."

Exigency Leave for Rest and Recuperation [§ 825.126(a)(6)]: The 2008 regulations permit eligible employees to take up to five days of leave to spend time with a military member on rest and recuperation leave during a period of deployment. The DOL's proposal expands this to fifteen (15) days, but it cannot exceed the actual amount of time granted to the military member. An employer may request a copy of the military member's rest and recuperation leave orders or other relevant military documentation to support the need for leave.

"The last time the DOL issued FMLA regulations was in 2008. This NPRM will seek to incorporate changes made to the FMLA since that time."

Certification Provisions for Caregiver Leave [§ 825.310]: The 2008 regulations restrict the types of healthcare providers authorized to certify a serious injury or illness for military caregiver leave. These individuals must be affiliated with the Department of Defense (DOD) as either a part of the Veteran's Administration (VA) or DOD-TRICARE. The DOL's proposal eliminates this distinction and permits any healthcare provider authorized under Section 825.125 of the regulations to certify a serious health condition as capable of certifying a serious injury or illness under the caregiver provision.

The DOL's proposal would modify Section 825.310(d) to provide that second and third opinions are *not* permitted when the certification has been completed by one of the types of DOD/VA authorized healthcare providers identified in Section 825.310(a)(1)-(4), but that second and third opinions are permitted when the certification has been completed by a healthcare provider that is not one of the types identified in Section 825.310(a)(1)-(4).

Definition of Covered Veteran for Caregiver Leave [§ 825.127(b)]: The 2008 regulations do not define "covered servicemember" with regard to veterans. The DOL proposal would define "covered veteran" as someone discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for a covered veteran. Thus, a veteran will be a "covered veteran" if he or she was a member of the Armed Forces in the five-year period immediately before the date the requested leave would begin.

Definition of Serious Injury or Illness [§ 825.127(c)]: The DOL's proposal provides that a serious injury or illness that existed before the beginning of the military member's active duty and that was aggravated by serving in the line of duty while on active duty will include: (1) conditions that were noted at the time of entrance into active service; and (2) conditions that the military was unaware of at the time of entrance into active service but that are later determined to have existed at that time.

AIRLINE FLIGHT CREW EMPLOYEE ELIGIBILITY

The amendment to the FMLA for flight crew eligibility provides that, after December 21, 2009, an employee meets the hours of service requirement if she has worked, or has been paid for, not less than 60% of the applicable total monthly guarantee and has worked or been paid for not less than 504 hours (not including personal commute time or time spent on vacation, medical, or sick leave) during the previous 12 months. The DOL's proposal -- a new section 825.205(d) -- would bring the regulations current with the legal requirements.

ADDITIONAL CHANGES TO FMLA REGULATIONS

Increments of Intermittent FMLA Leave [§ 825.205]: Section 825.205 (a) of the 2008 regulations defines the minimum time increment that can be used for FMLA intermittent or reduced schedule leave as an increment no greater than the shortest period of time that the employer uses to account for other forms of leave, provided that it is not greater than one hour. The NPRM stresses that an employee's entitlement should not be reduced beyond the actual leave taken. The proposed change would add language to paragraph (a)(1) that provides an employer may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for leave.

Recordkeeping Requirements [§ 825.300]: The proposal would add a sentence to Section 825.300 stressing that employers have an obligation to comply with the confidentiality requirements of GINA. GINA permits genetic information, including family medical history, obtained by the employer in FMLA records and documents to be disclosed consistent with the requirements of the FMLA.

CONCLUSION

The FMLA will continue to be one of the best intended, yet most difficult, statutes to administer for the foreseeable future. In addition to these proposed changes, courts are coming out with new interpretations of the scope of the FMLA on a regular basis. When faced with anything other than basic FMLA use by an employee, an employer should be sure that the decision-making is based on the most current developments under the law.

DISABLED WORKER NOT ENTITLED TO AUTOMATIC REASSIGNMENT UNDER THE ADA

By Randi Klein Hyatt

Dealing a blow to the Equal Employment Opportunity Commission (EEOC) and handing employers a victory, at least for now, the Seventh Circuit Court of Appeals has ruled that the Americans with Disabilities Act (ADA) does not require an employer to automatically reassign an

(continued on next page)

employee who loses his current job because of a disability to another vacant job he or she is qualified to perform. In *EEOC v. United Airlines, Inc.*, No. 11-1774 (7th Cir. Mar. 7, 2012), the EEOC filed an ADA lawsuit against the airline, challenging its reasonable accommodation guidelines. The guidelines provide that transfer to an equivalent or lower-level vacant job for which the employee is qualified may be a reasonable accommodation for an employee unable to perform his or her current position due to a disability, but the reassignment process is competitive – meaning that the disabled employee would not automatically receive the vacancy if a better-qualified candidate applies. The policy does give some preference to employees needing accommodation, including priority consideration over similarly qualified applicants, but United retains the right to select the best qualified applicant for the job.

The EEOC claimed the competitive transfer policy violated the ADA because the statute requires an employer to reassign a disabled worker to a vacant job for which he is qualified, without consideration of other qualified candidates. Indeed, the EEOC argued that the ADA requires an employer to reassign the disabled worker over the more qualified nondisabled candidate, as a reasonable accommodation, so long as the disabled employee is "at least minimally qualified" for the job and the employer is unable to establish any undue hardship from the selection of the disabled employee.

In support of this position, the EEOC maintained that the Seventh Circuit precedent of *EEOC v. Humiston-Keeling*, 227 F.3d 1024 (7th Cir. 2000), which had held an employer's competitive transfer policy did not violate the ADA, was no longer valid because of the Supreme Court decision in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). In *Barnett*, the Supreme Court considered reassignment under the ADA in the context of a seniority system. Barnett, a cargo handler, had injured his back and invoked seniority to switch to a mailroom position. Shortly thereafter, two more senior employees bid on the mailroom job. Barnett argued he was entitled to the position, regardless of the seniority of the other applicants, because he was a qualified individual with a disability and the reasonable accommodation was required by the ADA. The Supreme Court held that a case-by-case analysis was necessary, and that in Barnett's case, although it would be a reasonable accommodation to transfer him to the mailroom, violating the established seniority system in place would pose an undue hardship on the employer. As a result, reassignment was not required by the ADA.

Despite the EEOC's argument, the Seventh Circuit determined that the *Humiston-Keeling* case was still valid law and had been followed by several Seventh Circuit panels after *Barnett* was decided. As such, the court affirmed the validity of United's competitive transfer policy. The appellate court did, however, strongly suggest an *en banc* review of the case, which, if granted, would mean the entire set of judges sitting on the Seventh Circuit Court of Appeals would reconsider and rule on the issue, rather than the three-judge panel deciding the instant matter. Only a full panel of judges can overrule circuit precedent.

Moreover, *en banc* review may be appropriate because the Tenth and District of Columbia Circuits have both held that the ADA requires automatic reassignment of disabled employees to vacant positions for which they are qualified, without regard to whether better qualified candidates are available. The Eighth Circuit, however, has sided with the Seventh Circuit on the issue, holding that a competitive process is permissible under the ADA.

For now, the Seventh Circuit continues to recognize that an employer is not required to provide a qualified disabled employee assignment to a vacant position if a better-qualified candidate applies. That position will undoubtedly be reconsidered by the full panel of judges, and very well may be decided by the Supreme Court.

KOLLMAN & SAUCIER, P.A. ATTORNEYS

Frank Kollman	**Pete Saucier**	**Darrell VanDeusen**	**Cliff Geiger**
fkollman@kollmanlaw.com	sauce23@kollmanlaw.com	dvand@kollmanlaw.com	cgeiger@kollmanlaw.com
Anthony Palaigos	**Eric Paltell**	**Sarah Longson**	**Randi Klein Hyatt**
apalaigos@kollmanlaw.com	epaltell@kollmanlaw.com	slongson@kollmanlaw.com	rhyatt@kollmanlaw.com
Kelly Lovett	**Michael Severino**	**Adam Simons**	**Bernadette Hunton**
klovett@kollmanlaw.com	mseverino@kollmanlaw.com	asimons@kollmanlaw.com	bhunton@kollmanlaw.com

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