The Employment Brief
Updates in Labor & Employment Law to Help Your Business Succeed

Inside this issue:

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DOL Issues Final FMLA Regulations
By: Darrell R. VanDeusen

On November 17, 2008 the U.S. Department of Labor (DOL) issued long awaited revisions to its 1995 regulations interpreting the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq*. There are significant changes to the regulations which, among other things, address FMLA waivers, Servicemember FMLA leave, employer and employee notice requirements, and medical certification requirements. The DOL has also revised many of the forms employers should use in implementing the FMLA in their workplaces. Employers should become familiar with these new forms and their different purposes.

Generally speaking, the changes to the regulations make things easier for employers to work with the FMLA. Some employee advocates and labor unions have expressed dismay at the changes. It is possible that the Obama administration may decide to take a second look at the regulations after the inauguration on January 20, 2009.

The regulations take effect on January 16, 2009. There are some of the highlights of the new regulations:

Ragsdale gets noticed

(§ 825.700(a)): nearly seven years after the decision, the Regulations now incorporate the holding of *Ragsdale v. Wolverine World Wide, Inc.,* 535 U.S. 81 (2002), where the Supreme Court invalidated the part of 29 C.F. R. § 825.700(a) that stated if an employee took paid or unpaid leave but the employer failed to designate the leave as "FMLA leave," the leave could not be charged against the employee's 12 week annual allotment. The Court found this penalty to be inconsistent with the statutory limit guaranteeing twelve (12) weeks of FMLA leave, and as contrary to the requirement that an employee demonstrate individual harm. This penalty now has been removed.

Serious health conditions

(§ 825.115): The final regulations clarify that if an employee takes leave for a serious health condition involving more than three consecutive calendar days of incapacity plus two visits to a health care provider, those two visits to the healthcare provider must occur within the 30 days of the period of incapacity. "Periodic visits" to a healthcare provider for chronic serious health conditions are now defined as at least two visits to a healthcare provider per year.

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Federal Legislative Horizon for 2009
By: Kelly Hoelzer

Over the past few sessions of Congress, Democrats have pursued a number of bills seeking to mandate additional benefits for employees and facilitate union organizing. Now, with a Democrat in the White House and Democratic majorities in both the House and Senate, businesses should anticipate a great deal more employment legislation coming out of Congress. Some of the laws most likely to be passed are:

Employee Free Choice Act

The "Employee Free Choice Act" is organized labor's primary legislative focus. Co-sponsored by President-elect Obama, the EFCA eliminates the employees' right to a secret ballot election when a union tries to organize the employees.

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DOL Issues Final FMLA Regulations (continued from page 1)

Employer notice obligations (§ 825.300): All notice obligations are now consolidated in one section. Employers must post notices of FMLA rights even if there are no eligible employees at the worksite. Employers must make sure all employees are provided the company's FMLA policy at the time of hire. Notices and policies may be provided to employees electronically. When an employee requests leave, the employer is required to tell the employee whether or not the employee is qualified for FMLA protected leave within five days. An employer's failure to follow the notice requirements will be interpreted as "interference" with the employee's FMLA rights.

Employee notice requirements (§ 825.301): Under the new regulations employees must follow the employer's normal call in procedure, unless there are unusual circumstances. An employee will not be deemed to have provided sufficient notice of the need for leave by calling in "sick." Where there is a dispute over employee eligibility the employer is required to discuss and document those concerns. The regulations provide that an employer may retroactively designate leave as FMLA related so long as there is no harm to the employee.

Intermittent Leave

(§ 825.203): Employees must make "reasonable efforts" in the taking of intermittent leave so as not to disrupt an employer's operation. Anticipate some litigation here as courts try to determine what efforts are "reasonable."

Medical Certification

(§ 825.305 and .307): If a medical certification is not complete, the employer must tell the employee in writing as to the deficiencies and give the employee the opportunity to correct the form. The new rule provides that an employer's representatives may contact a healthcare provider for clarification or authentication of a medical certification. The employee's supervisor MAY NEVER contact a healthcare provider, but the healthcare provider may be contacted by a human resources representative, an employer's healthcare provider; or the employer's leave administrator.

Waivers (§ 825.220): Resolving a split in the federal appellate courts, the regulations now provide that employees may voluntarily settle FMLA claims but that prospective waivers of FMLA rights are prohibited. Employers should be sure to specifically identify the waiver of FMLA rights in their severance and settlement agreements.

Servicemember Leave: Congress created active duty and caregiver leave in amendments to the FMLA in January 2008. The final regulations now put some meat on the bones of the new legal requirements. And, because DOL provided no opportunity for comment on proposed servicemember leave regulations, this is the area where litigation is most likely. The regulations make clear that the 26 weeks of caregiver leave is per servicemember and per injury. So, an employee who is unfortunate enough to have more than one family member injured in the line of duty, or have the same family member injured twice, will have the opportunity to take the 26 weeks of leave more than once.

The regulations define "exigent circumstances" for purposes of active duty leave and "next of kin" for caregiver leave. An **exigent circumstance** **(§ 825.126)** is defined as: short notice deployment; military events and related activities; childcare and school activities; financial and life arrangements; counseling; rest and recuperation; post-deployment activities; and other activities agreed to by the employer and employee. For caregiver leave, **"next of kin" (§ 825.122)** – in addition to family members specifically identified in the law (spouse, parent, son, daughter) – is defined first as a blood relative who has been granted legal custody of the servicemember, then brothers and sisters, grandparents, aunts and uncles, and first cousins. In the event that a servicemember has not designated in writing who the servicemember desires as next of kin, then all individuals at the same level may avail themselves to caregiver leave.

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Federal Legislation Horizon (continued from page 1)

In its place, the law would allow a union to gain recognition rights through a "card check" process – meaning that if the NLRB determines that a majority of employees in a bargaining unit have signed union authorization cards, the agency can certify that union as the exclusive bargaining representative of those employees without holding a secret ballot election. The law, as it was proposed in the last session of Congress, contains no safeguards to keep unions from misrepresenting to employees what they are signing or from intimidating or coercing them to sign the cards.

If the NLRB certifies the union, the employer is required to immediately bargain with the union to reach a contract. If that does not occur within 90 days, either party may request that the Federal Mediation and Conciliation Service ("FMCS") mediate the negotiations. If the parties still cannot reach an agreement 30 days after appointment of a mediator, an arbitrator will be appointed to determine the terms of the contract. The arbitrator will not be bound by any of the parties' prior negotiations when deciding the terms, and the arbitrator's determination will govern the employees' terms and conditions of employment for a minimum of two years.

The Employee Free Choice Act also carries stiff penalties for employers who violate the law. If an employer discharges or discriminates against an employee during a union organizing drive or first contract negotiations because of that employee's union activity, the employer must pay up to three times the amount of backpay or other money damages due. In addition, the law would impose civil penalties of up to $20,000 per violation against employers who willfully or repeatedly violate employees' rights during a union organizing drive or first contract negotiations.

Healthy Families Act

As head of the Senate Labor Committee, Senator Ted Kennedy (D-MA) has worked for several years to expand the unpaid leave benefits provided under the FMLA to mandating paid leave. Last session, he and Rep. Rosa DeLauro (D-CT) introduced the Healthy Families Act, which requires employers with fifteen or more employees working 20 or more calendar workweeks in the current or preceding year to provide up to seven days of paid sick leave to both full- and part-time employees. Employees may use the sick leave for the following reasons: (1) physical or mental illness of the employee; (2) a doctor's visit or medical visit or diagnosis for the employee; and (3) caring for a child, parent, or a spouse, or any other individual related by blood or affinity that is the equivalent of a family relationship. While the bill lacked enough support to pass last session, expect to see it raised again early in the Labor Committee's 2009 agenda.

Public Safety Employer-Employee Cooperation Act

The Public Safety Employer-Employee Cooperation Act requires that each state provide labor organizing rights to public safety officers and first responders. The Act grants public safety officers the right to vote on whether to have a labor union be their bargaining representative in labor-management negotiations and requires state and local governments to recognize the union for the purposes of collective bargaining regarding the terms and conditions of employment. States would be required to comply within two years of enactment, and states that fail to do so would be subject to new regulations promulgated by the Federal Labor Relations Authority.

RESPECT Act

The "Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers" – or RESPECT Act - is designed to expand the reach of organized labor to cover supervisors in the workplace. Under current law, supervisors are not covered by the NLRA and cannot be represented by unions. The RESPECT Act would revise the statutory definition of a supervisor to make some persons who are currently classified as supervisors part of the union. Most significantly, the law would require that an employee spend more than half their time performing supervisory duties to meet the legal definition of supervisor. Additionally, the law would reverse several recent NLRB decisions and provide that a person does not meet the definition of supervisor merely by assigning work to subordinates or directing the work of subordinates.

Lilly Ledbetter Fair Pay Act

The Lilly Ledbetter Fair Pay Act would overturn a 2007 Supreme Court decision requiring gender-related pay discrimination claims to be brought within 300 days of a discriminatory pay decision. The Act instead would require such claims to be brought within 300 days of receipt of any paycheck affected by the discriminatory pay decision. The effect of the Act is to eliminate the statute of limitations in pay discrimination cases and would even allow claims to be brought long after an employee has left the company if she challenges payment of retirement benefits.

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The EFCA would allow a union to gain recognition rights through a "card check" process—meaning that if the NLRB determines that a majority of employees in a bargaining unit have signed union authorization cards, the agency can certify that union as the exclusive bargaining representative of those employees without holding a secret ballot election. The law contains no safeguards to keep unions from misrepresenting to employees what they are signing or from intimidating or coercing them to sign the cards.

Federal Legislative Horizon (continued from page 3)

The Fair Pay Act would apply to salary or wages and any "other practice" that affects wages, benefits, or compensation – such as promotions, transfers, denials of overtime affecting pension benefits, etc.

Paycheck Fairness Act

A companion bill to the Lilly Ledbetter Fair Pay Act is the "Paycheck Fairness Act." This law would make compensatory and punitive damages available as remedies in Equal Pay Act cases, authorize class actions in such cases, add non-retaliation requirements, and mandate training by the OFCCP and

EEOC in wage discrimination issues.

Both the Fair Pay Act and the Paycheck Fairness Act passed the House on January 9th, and are expected to proceed to debate in the Senate.

While employers will have their hands full grappling with the new amendments to the ADA and the Department of Labor's new FMLA regulations, they should keep a watchful eye on what is happening in Congress this upcoming session. President-Elect Obama and other Democrats have promised to pursue these bills, many of which could have a significant impact on business's ability to control their workplace.

Arbitration Follies
By: Peter S. Saucier

Regular readers know that I am perpetually captivated by the inanity of some arbitration decisions. I never lack material about which to write. Anyone who wants a catalog may contact me. For this issue, however, I was moved to add a football-seasonally appropriate disability discrimination court case that caused me do a double take to make sure it was really an arbitration decision.

Fun on the Bounding Main

Teachers on ten-month assignments frequently take summer jobs for extra money. Some jobs are more alluring than others. A teacher of middle school mathematics and Spanish rented her boat and her seafaring services during the summer. The teacher was asked to take a group to an event known as the Jobbie Nooner – "a very rowdy occasion with widespread public consumption of alcohol, often to high levels of intoxication, public nudity, and public sexual activity." The teacher did not just provide delivery to the Jobbie Nooner. Instead, she dived into the fun.

The teacher's activities came to the attention of students at her school through a series of snapshots published on the internet. According to the arbitrator who would hear the case:

"One depicts the [teacher] crouching, supporting with the thumb and forefinger of her right hand the erect penis of a male figure protruding from his swim suit and placing the tip of the penis to the lips of her mouth. Another photograph indicates the [teacher] also fingering the penis and placing her mouth over the entire head of the penis. It was obvious from the background that this occurred in public and in an area of gathering onlookers."

Rumors escalated into school disruption, followed by community turmoil. The teacher sniffed that her revelry at the Jobbie Nooner was "not anybody's business," righteously defending her conduct. The principle decided to terminate the teacher's employment. Although the discharge eventually would be upheld as a proper exercise of state legislation, an arbitrator asked to review the case said that he would have reversed the termination:

"Here [sic] the [teacher] was involved in an acknowledged adult activity of a salacious nature, however it did not directly involve either the school or her capacity to teach. For this reason [sic] the arbitrator must find that the employer would not have had just cause for terminating her employment or otherwise disciplining her."

At least one point of credit is due the arbitrator for at least maintaining consistency by finding that because there was not "just cause," no discipline whatsoever was due.

Hold That Line!

Charles Weisberg, an employee of the Riverside, New Jersey, school system, complained that because of sensitivity to sound, he needs a quiet working environment. He sued his employer for not affording him perfect silence at work. During litigation, Weisberg testified that he had spent Monday, October 29, watching football on television. He added that because of his disability, there is no way he could have gone to the game. Except for one thing – Weisberg had gone to the New York Giants game that evening and the employer had videotape of him at the stadium. When the school system moved for relief from the court, Weisberg said he had "false memory syndrome" which caused him to concoct a story, then believe it. No relief was granted to the employer, because the court found that Weisberg's story was not frivolous, unreasonable, or without foundation. No word on whether Weisberg went to the Superbowl parade, or concocted a memory about it.

The Supreme Court and *14 Penn Plaza LLC v. Pyett*: Enforceability of Contractual Arbitration Provisions in Employee Discrimination Claims

By: Meg Gallucci

On December 1, 2008, the Supreme Court heard oral argument regarding the enforceability of a clause in a collective bargaining agreement waiving the union members' right to a judicial forum for their statutory discrimination claims. The case, *14 Penn Plaza LLC v. Pyett*, involves three current and former employees of Temco Service Industries who worked in an office building in New York managed by 14 Penn Plaza LLC.

All three men were over 50 years of age and worked as night watchmen until July, 2003, when they were transferred to less desirable and lower paying positions. They were the only building employees over age 50, and their replacements in the night watchman positions were much younger men. The employees were represented by the Service Employees International Union (SEIU) and covered by a multi-employer bargaining contract that included both Temco and 14 Penn Plaza.

The SEIU filed grievances on behalf of the three employees under the terms of the collective bargaining agreement, alleging wrongful transfer, denial of overtime and a promotion, and age discrimination. When the cases went to arbitration, the union dropped the wrongful transfer and discrimination claims because of a conflict of interest. The employees then filed age discrimination claims with the EEOC and sued Temco and 14 Penn Plaza in federal court under the ADEA, and state and New York City human rights laws.

Temco and 14 Penn Plaza moved to compel arbitration, arguing that the three workers agreed to arbitrate under the terms of the collective bargaining agreement. Because the union could not represent them, the employers argued that the aggrieved employees must use private attorneys, rather than union attorneys. The employers lost at the District Court level, and the Second Circuit affirmed relying on the holding in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

Alexander held that Title VII, and other statutory rights, are independent of discrimination rights determined by collective bargaining agreements. As the Court stated, "Title VII was designed to supplement rather than supplant existing laws and institutions relating to employment discrimination." The Court further held that "an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the non-discrimination clause of a collective-bargaining agreement . . . . Title VII is a statutory right independent of the arbitration process."

The *Alexander* Court considered a broad anti-discrimination clause in a collective bargaining agreement. On the other hand, the Court in *14 Penn Plaza* must focus on a provision expressly waiving an individual's rights to a judicial forum for employment discrimination claims. One interesting aspect of the *14 Penn Plaza* case that may affect the outcome is that the union declined to bring the discrimination claim because of a conflict of interest, meaning that the individual employees, not the union, would have had to invoke the arbitration clause to settle the claim. However, the contract calls for the employer and the union to split costs and assumes union intervention in defense of member claims. In this case, a procedural glitch may decide the case in favor of a separate judicial forum for individual discrimination claims apart from arbitration. A decision to uphold individual rights to sue in federal court in *14 Penn Plaza*, would spare the Court having to overrule past precedent established in *Alexander v. Gardner-Denver Company*.

Kollman's Corner

Will Card Check Cause Perpetual Campaigns Against Unionization?

By: Frank Kollman

Under current labor law, a company cannot be unionized without its consent unless the NLRB certifies that the union enjoys majority support among the employees as demonstrated by a secret ballot election. To get such an election, a union must file a petition supported by at least 30% of the employees in an appropriate employee unit. The process, from petition to election, takes several weeks, and in many cases, longer.

During the time between the filing of a petition and an election, the employer has the right and opportunity to talk to its employees about unionization: its pitfalls, the company's position, the legal ramifications of unionization, and other topics that could convince employees to vote "no." Because it is a secret ballot election, employees who change their minds can vote against unionization without fear of union reprisal. Frequently, unions lose elections where most, if not all, of the employees signed union authorization cards expressing support of the union before they heard the employer's side of the story.

If the Employee Free Choice Act passes in its current form, secret ballot elections will be replaced by card checks. That means that employees will cast their votes, in public, as they sign cards under a variety of circumstances, all of which will be favorable to the union. Big Labor has convinced the Democrats that they lose elections because employers use the time between petition and secret ballot election to terrorize employees into voting "no," not because employees are able to decide rationally whether they want a union. In fact, I suspect the argument is that employees who reject unionization are irrational for that reason alone.

If employers have any chance of convincing employees that unionization in not in their best interest under the EFCA, they must do so long before a union starts soliciting employees to sign cards. They must keep a steady stream of information going to employees and new hires explaining the company's position on unionization, and warning about the dangers of signing a union authorization card.

More important, companies must study the reasons for employee interest in unions and be vigilant that these reasons do not surface in their workplaces. Wages and benefits can generate interest in unions, but in most cases, employees seek unions out of hostility related to real and perceived employer neglect of their problems. Employers need to communicate with employees not only about unionization, but about workplace issues.

There will be a need for perpetual campaigning under the Employee Free Choice Act. At the very least, there will be a need for regular communication with employees. Otherwise, as the *Economist* predicted, the Employee Free Choice Act will allow unions to do to small employers what the UAW did to General Motors.

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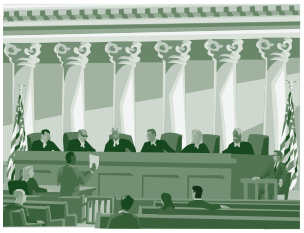

For more thoughts and comments by Frank Kollman, visit his blog at http://kollmanlaw.com/blogs

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