KOLLMAN & SAUCIER P.A. SEPTEMBER/OCTOBER 2009

# The Employment Brief

*Updates in labor and employment law to help your business succeed.*

## CONTENTS



Kollman & Saucier P.A.
The Business Law Building
1823 York Road
Timonium, Maryland 21093
P. 410-727-4300
F. 410-727-4391

To be added to our mailing list or if you have any commments or questions, please email us at lmaffei@kollmanlaw.com

## Federal Judge Rules Furloughs Unconstitutional

By Cliff Geiger

On August 18, 2009, U.S. District Judge Alexander Williams ruled that Prince George's County, Maryland (the "County") violated the Contracts Clause of the U. S. Constitution when it furloughed 5,900 employees covered by collective bargaining agreements ("CBA's"). *Fraternal Order of Police vs. Prince George's County, MD. No. AW-08-2455.* Judge Williams found that while furloughing these employees was permitted by the Prince George's County Code's Personnel Law (the "Personnel Law"), the furloughs were unconstitutional because they were not "reasonable and necessary" to serve an important public interest. Judge Williams wrote, "Here, although the County suggests to the Court that it faced dire circumstances and had no other reasonable alternatives, the record suggests otherwise and the County's actions resemble trappings of doing that which is politically expedient."

A little background is helpful to understand the dispute. In January 2008, the County's Spending and Affordability Committee ("SAC") reviewed revenue projections for FY 2009, which began July 1, 2008. The SAC issued a report projecting an $80.1 million general fund deficit for FY 2009 and warning that the deficit could grow larger if the housing market did not recover. Overall, the SAC characterized the County's revenue picture as "dim" and recommended a $2.626 billion cap on general fund appropriations for FY 2009. On March 14, 2008, the County Executive submitted a Proposed Operating Budget ("POB") to the County Council totaling just over $2.67 billion, which was $44.4 million more than the SAC's recommendation.

In May 2008, the County made a presentation to bond rating agencies in New York. County officials explained the many fiscal challenges it faced as well as the potential for further deterioration based on the economy. However, the County explained it would keep its budget in balance and was willing to take strong action to reduce expenditures. The presentation went well, and the County received its first ever AAA bond rating. The County attributed the AAA rating to strong financial management, a readiness to reduce expenditures, and its ability to maintain reserves.

(continued on page 7)

### United States Department of Labor Dismisses Sarbanes-Oxley Complaint

By Michael Severino

In *Patrick J. Godfrey v. Union Pacific Railroad Company* (ARB Case No. 08-088, July 30, 2009), the U.S. Department of Labor Administrative Review Board upheld an Administrative Law Judge's dismissal of Patrick Godfrey's complaint alleging that his termination by Union Pacific violated the whistleblower protections of the Sarbanes-Oxley Act of 2002. The Board ruled that Godfrey failed to "specifically and definitively" allege conduct that came within Sarbanes-Oxley.

(continued on next page)

Union Pacific employed Godfrey as a manager at its Kansas City, Missouri locomotive facility. In that capacity, Union Pacific permitted Godfrey to use a company Visa card for work related purchases. However, such use was not unfettered - Union Pacific required a written contract for any purchase that exceeded $5,000 in one year and prohibited employees from "parceling" transactions so as to avoid the contract restriction.

In January 2007, Union Pacific began investigating the unauthorized use of its Visa cards. In the course of its investigation, Union Pacific discovered that Godfrey had parceled transactions and misused an identification badge. Union Pacific subsequently terminated Godfrey for these violations.

Unhappy with his termination, Godfrey filed a complaint with the Department of Labor's Occupational Safety and Health Administration alleging that his discharge violated the whistleblower protections of Sarbanes-Oxley. OSHA dismissed his complaint, as did an Administrative Law Judge. Godfrey appealed to the DOL's Administrative Review Board.

The Board began its analysis by examining the scope of the whistleblower protections afforded by Sarbanes-Oxley and the evidence required to sustain Godfrey's complaint. Sarbanes-Oxley protects an employee when he or she provides information to a covered employer, federal agency or Congress relating to conduct that the employee reasonably believes constitutes a violation of federal law relating to certain fraud or Securities and Exchange Commission regulations. To prevail on his claim, Godfrey must prove that (a) he engaged in conduct that Sarbanes-Oxley protects, (b) Union Pacific knew of such protected activity, (c) he suffered an unfavorable personnel action, and (d) the protected activity was a contributing factor in the unfavorable action.

Examining the facts proffered by Godfrey in response to Union Pacific's motion for summary judgment, the Board noted that Godfrey's and his wife's complaints related to perceived discrimination and sexual harassment were unrelated to Sarbanes-Oxley liability. The Board also noted that Godfrey's complaints to Union Pacific that a co-worker parceled accounts failed to "definitively and specifically" relate to the fraud statutes or SEC rules, and were merely speculative. As a result, the Board ruled that Godfrey failed to allege facts that could support his claim that he engaged in Sarbanes-Oxley protected activity.

Sarbanes-Oxley requires more than speculation. A complainant seeking whistleblower protection under the Act must allege specific facts that support a reasonable belief that a company violated Sarbanes-Oxley. An employee cannot simply invoke its protections to nullify a justified termination.

## Healthcare Reform Reality For Employers- A Straightforward Application of the Proposed Healthcare Legislation

By John Bolesta

On July 15, 2009, the Senate Health, Education, Labor, and Pension (HELP) Committee voted to approve the Affordable Health Choices Act (AHCA). One day later, House Democratic leaders introduced House Bill 3200, titled America's Affordable Health Choice Act of 2009 (AAHCA). Both of these bills are the product of President Obama's healthcare reform agenda, which was generally outlined in the Administration's campaign documents. The objectives behind both pieces of legislation and the Obama plan have sparked an emotional nationwide debate, and considering the staggering length of the proposed legislation (the House bill alone is 1,018 pages, and the Kennedy Bill in the Senate is 615 pages long), most of the debate has been marked by confusion over the actual provisions in the proposals. While a complete analysis of all aspects of the proposed bills are beyond the scope of this article, a candid review of the key sections will bring most readers to an inescapable series of conclusions-that competition will not increase but rather decrease, that much of the burden of paying for healthcare reform will fall to small and midsized businesses, which eventually will trickle down to employees and consumers, and that retention of a person's current private insurance will likely be made impossible by the highly prescriptive federal standards that will be imposed on private insurance plans.

Proponents of the reform movement typically cite the ever increasing costs of medical premiums as evidence of the necessity for increased competition in the health-insurance marketplace. Admittedly, most employers face substantial premium increases each year. Employers, the argument goes, would avoid year-over-year increases in medical insurance premiums by embracing the supposed competition that comes with the "public option," which is figured prominently in both pieces of legislation. This public option would be the result of the creation of a national healthcare exchange (or "gateway" under the Kennedy-Dodd bill in the Senate), which is sometimes described as a nationwide pool of health insurance providers that would facilitate access to coverage for individuals and employers."

(continued on page 4)

## What The FTC's New "Red Flag Rules" Mean For Your Business

By Kelly Hoelzer

In late 2007, the Federal Trade Commission ("FTC") issued "Red Flag Rules" – a set of regulations requiring certain businesses and organizations to implement written Identity Theft Prevention programs designed to detect the warning signs of consumer identity theft in their

(continued on next page)

daily operations and to take affirmative steps to prevent such theft and mitigate any resulting damage. *See* Fighting Fraud with the Red Flags Rule, www.ftc.gov/redflagsrule. The FTC initially established a November 1, 2008, compliance deadline, which has been pushed back multiple times – most recently to November 1, 2009.

The Red Flag Rules apply to financial institutions, credit companies, and similar businesses. As is common with many government mandates, however, the Red Flag Rules cover many more industries than one would expect. The regulations apply to any business that falls within the broad definition of a "creditor" dealing with "covered accounts." The FTC defines a "creditor" as any entity that extends credit, grants loans, or makes credit decisions. "Creditor" also includes any business that regularly defers payments for goods or services, or provides goods or services, and bills customers at a later date. The FTC specifically recognizes that under its definition, utility companies, health care providers, and a variety of other industries can be considered creditors.

To be covered under the Red Flag Rules, creditors also must handle "covered accounts." The regulations define "covered accounts" as (i) consumer accounts offered to customers primarily for personal, family, or household purposes that involve or are designed to permit multiple payments or transactions; or (ii) any other account that a creditor offers or maintains for which there is a reasonably foreseeable risk to customers from identity theft, including financial, operational, compliance, reputation, or litigation risks. *Id.* Again, the definition of "covered accounts" is broad and could include any "account" maintained for a customer or client where they are permitted to pay over time. At least the FTC has clarified that simply accepting credit card payments from customers does not mean that the business is a creditor with covered accounts, as those terms are defined by the Red Flag Rules.
For covered businesses, the Red Flag Rules establish the following requirements for identity theft programs:

1. Identify the kinds of red flags that are relevant to the type of business. Consider the types of accounts the business offers or maintains, the methods used to open those accounts, how customers may access those accounts, and any past history of customer identity theft.

2. Explain the process for detecting red flags. Businesses should implement reasonable measures to verify identities, which can be as simple as requesting identification either through name, address, and ID number, or by looking at a driver's license or passport.

3. Describe any procedures in place to respond to red flags to prevent and mitigate identity theft. The Red Flag Rules offer guidelines on the types of responses, such as:

- monitoring an account for evidence of identity theft

- contacting the customer

-changing passwords or account codes

-closing an existing customer account

- not trying to collect on the account

- notifying law enforcement.

4. Show how the plan will stay current. The FTC anticipates that identity thieves will always be on the lookout for new ways to steal consumer data. The regulations require that businesses should keep abreast of new technology and how it may lead to additional red flags for identity theft.

Businesses and organizations of all types should take a moment to determine whether they are covered under the broad sweep of the Red Flag Rules. While the regulations have no criminal penalties, covered entities are subject to financial penalties for failing to develop and maintain an Identity Theft Prevention program.

## Reintroduction of SAVE Act Would Require Employment Verification of Aliens

By Andreas Lundstedt

The Secure America Through Verification and Enforcement Act (H.R. 3308) was recently reintroduced. On July 23, Representative Heath Shuler (D-N.C.) and Senator Mark Pryor (D-Ark.), together with nearly a hundred House members and one Senator, introduced the so-called SAVE Act. The 2009 version is virtually identical to the 2007 bill, and is intended to curb illegal immigration. Supporters of the bill, represented by both parties, say the Act would take a significant step toward true immigration reform by using fencing and technology to tighten and secure borders, introducing stricter verification standards on employers, and by enhancing current interior enforcement.

To start, the legislation would force an employer to use a Homeland Security Department verification system to ensure that their employees are authorized to work in the United States. The bill would gradually require use of E-Verify. The federal government, federal contractors, and employers with more than 250 employees would have to comply with the requirements one year after the date of enactment, but smaller businesses would phase in over four years. In addition, there would be increased monitoring of compliance by E-Verify users to ensure that employers are utilizing the system properly.

E-Verify (previously called Basic Pilot) is an online system operated jointly by the Department of Homeland Security and the Social Security Administration, and it permits employers to check whether a new employee is authorized to work in the U.S. by entering their names and other biographic information

(continued on next page)

into an online program. The information is then checked against the Social Security Administration and U.S. Citizenship and Immigration Services databases. If the checks reveal that a worker is not authorized to work and the worker does not resolve the discrepancy, the employer must terminate the worker.

The new bill is not without controversy. E-Verify proponents say it is a fast and accurate way to determine whether new employees are authorized to work. Critics, on the other hand, say the system can result in the termination of lawful employees due to errors within government databases. As a result, states have lined up on both sides of the controversy. For example, Illinois passed a bill in 2007 restricting the use of the program because it was deemed unreliable. Arizona and California, however, have already approved measures making use of the system mandatory.

Regardless of what side of the immigration debate people fall on, most will agree that we face a serious problem with illegal immigration and that our current system is in need of overhaul. The SAVE Act appears to be a step in the right direction and if it gets passed, it will hopefully prove to be a helpful resource to employers. More than 141,000 employers are already enrolled in the program, with over 7 million queries run through the system in fiscal year 2009 (as of August 8, 2009), and perhaps in anticipation of the proposed legislation, thousands more are being added weekly.

## Healthcare Reality for Employers

(continued from page 2)

While the structure and function of the national healthcare exchanges being championed by Congressional proponents of both the House and Senate bills differs, both would create a platform for a government-run public health plan that, using Medicare-style administrative pricing, would compete against the current slate of private health insurance plans. This competition, according to proponents, would result in lowering premiums for employers and corresponding lower costs for consumers.

Opponents of the reform bills cite a host of concerns, ranging from increased deficits to "death panels" resulting from proposals to encourage counseling for families who are facing expensive end-of-life treatment. In order to help separate the wheat from the chaff, a closer inspection of the actual language of the proposals is (unfortunately) necessary. To that end, a cursory review of one of the proposals, House bill (H.R. 3200), reveals (and in some cases muddies) the general healthcare landscape should the legislation pass in its current form.

A. *To Whom Does The Bill Apply?*

The proposed bill sets up a scheme whereby a politically appointed "Health Choices Commissioner" ensures "the provision of quality healthcare and financial security" (Section 122) by establishing the minimum services to be covered under all private health plans. In sum, any private insurer wishing to enroll participants would have to offer an "essential benefits package" regardless of the class of individuals sought to be insured. Speaking of "essential benefits," the Health Choices Commissioner will see to it that all approved health plans contract with "essential community providers."

In Section 205, titled "Outreach and Enrollment of Exchange-Eligible Individuals and Employers in Exchange-Participating Health Benefits Plan ("EHBP")," subsection (b)(3) requires that all individuals who have not elected to enroll in an EHBP and who are already enrolled in Medicaid are automatically enrolled in an EHBP. If you are an employee of a company and are enrolled in a healthcare plan through your employer, your healthcare plan would have to meet the prescriptive requirements of Section 122, a requirement that leads to the auto-enrollment of employees under Section 312. If a person is not on Medicaid, and is not automatically enrolled in an employer-based plan, and chooses to not enroll in a government approved plan, that person (depending on income levels) will be assessed a tax penalty equaling 2.5%. (see Section 401). In other words, everyone falls within the purview of this legislation, whether you want to or not.

B. *Will The Bill Eliminate Freedom To Choose Or Retain Private Insurance?*

In short, no. There is no provision that states that an individual cannot retain their current insurance coverage or that an employer must drop any of the private insurance plans it may offer to its employees. BUT… the proposed legislation fosters an environment whereby private insurance will likely be unsustainable. First, large employers who self insure that is, those large enough to build their own risk pools and pay benefits directly-will be unable to offer uniform plans across state lines unless approved by the Health Choices Commissioner. This invokes the "acceptable standards" and "essential benefits" requirements for all health plans as set by the Commissioner. Because it is likely that the "minimum benefits" required will only increase (necessarily driving up premiums to employers), many employers will simply cease offering health benefits to employees, despite the fact that medical benefits packages designed by these employers allow them to recruit and retain workers in a competitive labor market. Second, the "public option" established through Section 221 under the House plan would offer the same benefits required by law for private health plans, but would costs consumers (and employers) approximately 25% less in premiums than private plans. This, of course, is due to the fact that the public plan would not provide either profit margins or broker commissions, would be based on Medicare payment rates, and many Americans would receive subsidies

(continued on next page)

to assist with premiums for enrollees in qualified plans. Because the Health Choices Commissioner is charged with setting the premiums for the public plan (Section 222) while retaining the ability under Section 203 to specify (each year) the health benefits and benefit levels for private health plans that participate in the national exchange, it is no stretch to see why private insurers will have a difficult time keeping pace with the public option. While the freedom to choose remains, the actual choices will likley dwindle.

C. *Who Will Pay For The Newly Insured 41 Million People ?*

An obvious objective of the proposed legislation is to decrease the number of uninsured Americans. The Congressional Budget Office (CBO) estimates that through the expansion of Medicaid and public subsidies (through enrollment in the public option or an EHBP), 41 million previously uninsured Americans will now have health coverage. This is on top of the 90 million Medicare and Medicaid already serve. The CBO estimates that the House version would increase the federal deficit by $239 billion over the first ten years, and that number is largely dependent on the revenues generated from the new tax surcharges set forth in the bill. Someone has to pay for it, so why not employers who, for whatever reason, choose to not offer an insurance plan to their employees that meets the government's newly beefed up "minimum coverage" requirement? Section 313 of the House bill, titled "Employer Contributions In Lieu Of Coverage" states that for all businesses whose payrolls exceed $400,000:

"A contribution is made in accordance with this section with respect to an employee if such contribution is equal to an amount equal to 8 percent of the average wages paid by the employer during the period of enrollment (determined by taking into account all employees of the employer and in such manner as the Commissioner provides, including rules providing for the appropriate aggregation of related employers)."

There is a sliding scale for those smaller businesses whose payrolls fall below $400,000, with the percentages ranging from 6% (for payrolls between $350,000 to $400,000) to 2% (for payrolls that do not exceed $250,000). Moreover, when the House Ways and Means Committee got a hold of the bill, Chairman Charlie Rangel (D-NY) added a graduated surtax on the top two income tax rates to offset the increased costs of launching the national healthcare plan. The surtax is 1 percent for joint filers earning over $350,000, 1.5% for joint filers earning over $500,000, and 5.4% for joint filers with over $1 million in adjusted gross income. The Joint Tax Committee estimates that this surtax will raise $543.9 billion over the next ten years. The rates could increase to 2% and 3% for those making between $350,000 to $1 million annually if the promised savings have not materialized. These people will now face a tax rate of 52%, higher than many top earners in other countries that have government run health insurance. According to the Treasury Department, 72% of small business income is subject to these new rates.

While the current version of the House and Senate bills will certainly face amendments and may not even pass, the above key provisions have been touted as central components to the majority party's plan. Although still in draft form, the current healthcare reform proposals clearly establish that employers will be footing the bill.

## Workplace Policies Should Carry Names

By Pete Saucier

Long ago, Frank Kollman opined that every workplace could begin with one workplace policy – Use Common Sense. Then, every violator who forces the employer to implement a rule should have his/her name attached to the rule. In that ideal world, Scheurer Hospital might have the Gascho Anti-Nepotism policy.

Mary Ann Gascho is a nurse who worked at Scheurer Hospital, and who also happened to be married to Dwight Gascho, the President and Chief Executive Officer of the Hospital. Apparently, Dwight likes to keep his professional and personal life in the same sphere – he developed a romantic relationship with Theresa Rabideau, a Vice President of the Hospital. [Perhaps you see where this is going.] Naturally, Mary Ann was fired and signed a release in exchange for a year's pay and benefits, following which she had second thoughts, and found a dutiful plaintiff lawyer. The battle was on in court. The Hospital has prevailed so far, but there is an adage about how one should act where one eats that leaps immediately to mind.

Meanwhile, Gallaudet College might deploy the Kimmel Watch-Your-Punctuation policy. Karen Kimmel, a former dean of Gallaudet College alleges that she was terminated for not being deaf enough to continue her job. Kimmel is not fully deaf, as a result of which, she contends, she was harassed and eventually discharged from employment. Dean Kimmel contends that Gallaudet maintains a Deaf Culture with capitalization of the word "deaf" as an indicator of the attitude that led to her professional demise.

As Kurt Vonnegut famously wrote, "And so it goes."

## The Developing Law of Estoppel Theories in FMLA Cases

By Darrell VanDeusen

The FMLA protects employees who meet its eligibility requirements by providing job security for 12 weeks when the employee is absent from work due to her own serious health condition or that of a family member, or for the birth, adoption, or placement in foster care of a child in the employee's household. In January 2008 the law was expanded to provide for two types of Servicemember FMLA leave: "active duty" leave and "caregiver" leave.

But what about the employee who is not eligible for FMLA leave? Are there circumstances in which an employer can nevertheless be required to provide FMLA protection to an unqualified employee? The Department of Labor's 1995 regulations sought to invoke this sort of protection, but most courts rejected that position as beyond the scope of Congressional intent. The 2009 regulations deleted this language. Nevertheless, the efforts to invoke an estoppel theory has not abated. For the most part, the focus is on the use of equitable estoppel.

A recent decision from the Sixth Circuit has added to FMLA estoppel jurisprudence. In *Dobrowski v. Jay Dee Contractors, Inc.,* 2009 U.S. App. Lexis 14946 (6th Cir. 2009) the court considered the appropriate burden of proof for plaintiffs raising a FMLA equitable estoppel claim, with the court accepting the standard articulated by the Supreme Court in *Heckler v. Community Health Servs.,* 467 U.S. 51, 59, 1984 U.S. Lexis 87 (1984).

There are important differences between promissory and equitable estoppel, which is sometimes lost in a general "estoppel" analysis:

Promissory estoppel is based in contract principles, and steps in where a promise lacks the elements of a binding contract but has induced detrimental reliance on the part of the promisee. Sometimes the facts of a given case raise a threshold question of whether the promise created an enforceable contract in the first place. The Restatement (Second) of Contracts § 90(1) provides that: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise." Typically recognized as a state law remedy, promissory estoppel provides protection separate from the FMLA; it is an affirmative cause of action.

Equitable estoppel, on the other hand, operates defensively to bar the assertion of a claim or defense. Although virtually all courts explain that an individual must be an "eligible employee" to be entitled to FMLA leave, a growing number of courts have opined that otherwise ineligible employees may obtain FMLA protection through the principles of common law equitable estoppel. These cases most often come up when an employer has assured an employee of FMLA protected leave, but later recants when it discovers it has fewer than 50 employees in a 75 mile radius, or that the employee had worked fewer than 1,250 hours in the past twelve months.

Dobrowski was hired by Jay Dee as a mechanical engineer in September 2003, and assigned to a joint-venture project for the Detroit Municipal Government to rehabilitate sludge thickeners at the Detroit Wastewater Treatment Plant. His primary responsibility was evaluating, coordinating, and processing shut-down requests from sub-contractors, which required portions of the wastewater plant to be turned off for completion of the tasks. Jay Dee did not have 50 employees within a 75 mile radius of where Dobrowski worked, but that fact apparently was lost on all involved until much later in the story.

Dobrowski was diagnosed with epilepsy as a child. Even though he took regular medication and underwent various treatments to control his disease, Dobrowski continued to have seizures as an adult. After consulting his physician, Dobrowski decided to explore additional treatment options, ultimately settling on a surgical option. Dobrowski was told he'd get FMLA leave, and went off for his surgery, but was fired when he asked to return to work. Dobrowski's FMLA claim was rejected by the district court, because the company didn't meet the 50/75 requirement, and his estoppel argument also failed. On appeal, the Sixth Circuit noted that − in certain circumstances − equitable estoppel applies to employer statements regarding an employee's FMLA eligibility, preventing the employer from raising non-eligibility as a defense. But, the court observed, "our precedents do not make clear precisely which situations merit the application of equitable estoppel. We have cited two different equitable estoppel rules in FMLA cases."

The court discussed the Circuit's development of the estoppel analysis: "When we first recognized equitable estoppel in an FMLA case, we collected decisions from other courts of appeals to support the proposition that "under the right circumstances, an employer may be equitably estopped from challenging an employee's entitlement to [FMLA] leave." As to the standard, the court relied on the Supreme Court's decision in *Heckler,* where the Court, commenting that the core principles of the doctrine are "tolerably clear," and adopted the Restatement of Torts statement of the rule.

The *Heckler* Court noted that "the party claiming the estoppel must have relied on its adversary's conduct in such a manner as to change his position for the worse, and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading."

(continued on next page)

This version of the rule, said the court, "does not require the party asserting the estoppel to show that the other party was aware of the 'true facts' or that the other party intended for the statement to be relied upon -- '[t]he rule . . . is operative although the one making the representation believes that his statement is true . . . .'"

This difference "is not without consequence. For instance, it appears likely that Jay Dee was not intentionally or recklessly misleading Dobrowski. It simply was mistaken as to how many employees it had near the wastewater plant. Indeed, the district court . . . based its estoppel decision in part on the fact that a mistake is not sufficient to invoke equitable estoppel."

The better approach, said the court, is to follow the requirements for equitable estoppel endorsed in *Heckler*. This has been the view of most of the circuit courts to consider equitable estoppel in the FMLA context. The holding: to prevail on his equitable estoppel argument, Dobrowski needed only to meet the requirements for equitable estoppel adopted by the Supreme Court in Heckler and discussed in the Restatement (Second) of Torts § 894. "He need not show that his employer either was aware of the true facts or intended for the statement to be relied on. Instead, Dobrowski need show only (1) a definite misrepresentation as to a material fact, (2) a reasonable reliance on the misrepresentation, and (3) a resulting detriment to the party reasonably relying on the misrepresentation."

Even under this standard, however, Dobrowski could not survive summary judgment. To be sure, said the court, Jay Dee's actions amounted to a definite misrepresentation of Dobrowski's eligibility. He applied for leave on an FMLA form and received written notice from his company that his leave was "pursuant to the Family and Medical Leave Act" and that he was an "eligible employee" even though he was, in fact, not covered by the Act. But on the record before the court, Dobrowski could not show that he detrimentally relied on this misstatement of eligibility. There was no evidence to show that he changed his position in reliance on the belief that his leave would be FMLA-protected.

While most courts that have considered the issue have recognized the possible use of estoppel in FMLA cases, the actual application of estoppel in an employee's favor is unusual. Still, each case on the issue provides excellent guidance for employers and employees.

First, employers need to make sure that their FMLA policies accurately reflect the requirements of the Act. Second, communications with employees on leave should likewise completely and accurately explain the circumstances under which eligibility is determined, and provide some explanation that FMLA protection is not available to ineligible employees. Third, employers should review their handbooks. Many states have held that a disclaimer of contractual intent in an employee handbook will defeat employee claims of reasonable reliance on the handbook's provisions. Fourth, employers need to be extremely careful to avoid mistakes in making promises to employees that they do not intend to make. If an employer does not intend to be more generous than the FMLA provides, it should say so from the start.

These cases also provide good guidance for employees. It is always worthwhile to look beyond the statutory claims available in employment cases and consider state common law claims. If an employer makes a promise, the employer may be legally required to fulfill it, without regard to statutory requirements. Employees should make sure that they get promises of leave in writing and, if leave is later denied, document to the employer how the employee relied upon the promise of leave and job protection.

## Furloughs Ruled Unconstitutional

(continued from page 1)

The County Council approved the POB without substantive change. At approximately the same time, the County Council approved CBA's with police and firefighter unions covering the two year period from July 1, 2007 through June 30, 2009. In March 2008, the County Council had approved CBA's with several local AFSCME Unions.

After the County Council enacted the FY 2009 budget, revenues were "reprojected." The new projections were "dramatically worse than what was in the proposed budget." To cover part of the $48 million newly projected shortfall, the County requested that the unions give up their merit step increases or cost-of-living adjustments for FY 2009. The unions refused, taking the position that the County had more than enough money in its reserves to cover the pay increases in the CBA's. The Unions also identified other budget items that could be reduced or eliminated in lieu of cutting the pay increases.

In September 2008 the County again revised its revenue estimates. This time a budget deficit of $57 million was projected, but the County also projected $65 million in undesignated reserves, approximately $50 million more than previously thought. The County Executive shared the new revenue projections with the Unions and advised that it in order to balance the FY 2009 budget it was necessary to implement a furlough plan as a less drastic alternative to layoffs. On September 16, 2008, the County Council approved the Employee Furlough Plan ("EFP"). The EFP reduced the work hours of all covered employees by 80 hours during FY 2009, effectively reducing salary expenditures by a total of $20 million. This translated into an annual pay cut of 3.85%. The Unions filed suit, alleging two violations of the County Personnel

(continued on next page)

Law as well as a violation of the Contract Clause of the U.S. Constitution.

Section 16-233 (e) of the County Personnel Law provides:

"All collective bargaining agreements shall be adopted and approved by legislative acts of the County Council referencing the collective bargaining agreement and date of execution by the County Executive. Upon adoption of the legislative act by the County Council, any provision in the applicable agreement contrary to the provisions of this subtitle shall have the effect of amending any such provision and enacting the provision into law applicable to that collective bargaining unit."

The Unions argued that once their CBA's were approved by the County Council, the County could not implement an EFP because a furlough would be contrary to the provisions of the CBA's. The Court rejected the Unions' argument, finding that nothing in the CBA's precluded the County from furloughing employees. The Court took note of the fact that, between July 1991 and June 1995, the police and firefighter CBA's had prohibited furloughs, but this language was removed from the CBA's after 1995.

The Personnel Law also includes Section 16-229, which permits the County Executive to implement employee furloughs when he determines such action is required to address a revenue shortfall. The Unions argued that the EFP was not "required" under Section 16-229 of the County Personnel Law because the County had reserve funds and there were other budget items that could be reduced or cut. The County contended, and the Court agreed, that Section 16-229 gives the County Executive a wide degree of discretion. In the absence of bad faith or unreasonableness, the County Executive had the authority and discretion to determine whether compensation levels for County employees are required to be reduced.

Despite ruling that the County did not violate the Personnel Law, the Court ruled in favor of the Unions on their Constitutional claims. The Contract Clause of the U.S. Constitution states, "No State shall … pass any … Law impairing the Obligation of Contracts." The purpose of the Clause is to prevent a unit of government from enacting legislation to alter, relax, or unilaterally modify contractual obligations. The Contract Clause, however, is not an absolute bar to the modification of a government's own financial obligations. Governments retain power to safeguard the welfare of their citizens, but this power is limited. When enacting legislation that constitutes a substantial impairment of its own contracts, the government must demonstrate that the legislation is reasonable and necessary to serve an important public purpose.

The Court's Contract Clause analysis consisted of a three part inquiry. First, did the legislation impair a contract? Second, did the impairment constitute a substantial impairment of the contractual relationship? Third, is the impairment nonetheless permissible as a legitimate exercise of the government's sovereign power? The Court relied heavily on the Fourth Circuit's decision in *Baltimore Teachers Union v. Mayor & City Council of Baltimore,* 6 F.3d 1012 (4th Cir. 1993), a case in which the City of Baltimore enacted a salary reduction plan (including furloughs), in the middle of its fiscal year, in response to budget cuts imposed by the State of Maryland. Ultimately, the Fourth Circuit determined that while the furloughs substantially impaired CBA's with Baltimore City's teachers and police, the impairment was permitted because it was necessary and reasonable to serve an important public purpose.

The Court distinguished the actions of Prince George's County from those of Baltimore City in the *Baltimore Teachers Union* case. Although the County contended the EFP was reasonable and necessary because it was facing an enormous deficit and it was required to balance its budget, the Court disagreed. In *Baltimore Teachers Union,* the budget cuts were large and unforeseen, the City had already laid off some employees, there was an impending breakdown of government, and the furloughs were stopped at the first opportunity. None of these circumstances existed in the County. Furthermore, there was no suggestion that the City, unlike the County, had $97 million in basically unrestricted reserves to draw upon.

In the Court's view the County saw (or should have seen) the budget shortfall coming and had a number of alternatives to deal with the situation other than furloughs, including passing a budget that heeded the SAC's recommendations in the first instance. The Court said it could not allow the County to make a decision to maintain its reserves and fund certain projects rather than abide by the CBA's.

The County has already filed an appeal of Judge Williams' decision, as well as Motion to Stay the Court's Order pending resolution of the appeal. The outcome on appeal may hinge on the fact that the County has a law that specifically permits furloughs. In other words, this does not seem to be a case where the County passed a law after the fact to allow it to enact furloughs that would otherwise be proscribed by the CBA's. Rather, it s is a case where the County already had a law in place – Section 16-299 of the Personnel Law – that permits the County Executive to furlough employees in his discretion. Therefore, we believe that the United States Court of Appeals may see the issue very differently than Judge Williams.

# Kollman's Corner

## by frank kollman


The Occupational Safety and Health Act of 1970, which created OSHA, is not designed to foster safety. Rather than creating incentives to have a safe workplace, funding programs to improve safety, or putting pressure on employees to work more safely, the Occupational Safety and Health Act is an adversarial program directed against employers. The program is enforced with fines and stop work orders, and most citations are issued after the fact, frequently as the result of an accident. Following the accident inspection, OSHA inspectors go back to their libraries to conduct exhaustive research to see what esoteric safety regulation can be cited. How can "after the fact" citations foster safety?

An honest OSHA official will tell you that the agency is actually in the "compliance business," not the "safety business." OSHA conducts inspections not to determine if the workplace is safe, but to determine if the employer is in compliance with the thousands of safety regulations that have been adopted over the past 39 years. Does a guardrail really become unsafe if it is 37, rather than 36, inches high? OSHA also gives employees a free ride in the process. I have never seen an employee fined for violating a safety regulation. In fact, employee misconduct is not a defense to an OSHA citation unless the employer can show that it effectively enforces its safety regulations through discipline. The Catch-22 is that OSHA sometimes argues that if an employee violates a safety rule, the discipline cannot be all that effective. You can't win for losing.

The country's safety laws need an overhaul, not more vigorous enforcement of the current safety regulations, some of which are over 60 years old (OSHA adopted a bunch of old regulations when it first got started, many of which are still on the books). Inspectors need to exercise judgment and common sense, not blind obedience to regulations that have little to do with safety and health.

Yet, the Secretary of Labor has announced a program of increased enforcement and the hiring of hundreds of new inspectors. These inspectors will be trained, not on how to make workplaces safer, but how to discover violations of OSHA standards, how to prepare worksheets for computation of fines, and how to win cases before the Occupational Safety and Health Review Commission. The really sharp inspectors will eventually leave the agency, setting up consulting businesses to tell employers how to avoid OSHA fines and citations. Where in all this is the genuine devotion to safety?

Most employers in my experience are more committed to safety than government officials. None of them want to see employees injured or killed. In fact, the employers are generally more committed to safety than their employees, many of whom view OSHA regulations as a ridiculous hindrance on their ability to do their jobs. Education of those employees, not OSHA fines and confrontation, is what is needed.

Of course, in this political climate, employers are the villains. Those in power will only try to make the nation's safety laws more punitive, all at the expense of true safety. Too bad.