The Employment Brief

Updates in labor and employment law to help your business succeed

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STUDY SHOWS STATES FALLING FAR SHORT OF RETIREMENT BENEFIT PROMISES

By Eric Paltell

A study released by the Pew Center on the States on February 18, 2010 shows that state governments nationwide have promised to deliver $1 trillion more in retirement benefits than they have in their benefit funds. Significantly, the study was done based on data as of the end of fiscal 2008, before the stock market crash. The shortfall amounts to more than $8,800 for every household in the United States!

According to Pew, in fiscal year 2008, on average, state pension systems were 84% funded. That left an aggregate funding shortfall of $452 billion. Pension liabilities grew by $323 billion in just a two-year period between 2006 and 2008, exceeding asset growth by almost $87 billion in that same period.

The funding deficit for retiree medical benefits is even greater. The study showed a $587 billion total liability, with only $32 billion (barely 5% of the cost) funded of fiscal year 2008.

The retirement benefit funding deficit is the result of the relatively recent phenomenon of state and local governments promising generous retirement benefits to employees as a way to secure labor peace without incurring current year costs. As a result, in states such as California, police and firefighters can retire under a formula known as "3% at 50," meaning that they can retire at age 50 with 30 years of service, and then receive an annual pension benefit equal to 90% of their final year earnings. Additionally, these retirees receive annual cost-of-living adjustments, as well as retiree medical benefits until they become Medicare-eligible at 65. With pension actuaries showing that the average life expectancy for retirees is 81.4 years for males and 85 years for females, this means that taxpayers are footing the bill for these pensions for 30 years or more, as well as 15 years of retiree medical benefits. Put another way, public safety retirees could easily collect pension benefits for more years than they actually worked as police or firefighters!

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EMPLOYER'S ACTIONS PERMIT FEDERAL COURT LMRA LAWSUIT

By Michael Severino

The recent case of Roberto Ramirez-Lebron v. International Shipping Agency, Inc. (United States Court of Appeals for the First Circuit; no. 08-2321) reinforces the adage that questionable conduct leads to bad results.

Lebron concerns a lawsuit regarding seniority rights filed pursuant to § 301 of the Labor Management Relations Act (LMRA) by a group of workers employed by International Shipping Agency, Inc. (ISA). These workers – which the appeals court denominated "G7" – complained that they should be entitled to seniority rights over another group of workers, which the court denominated "G3." Both groups were members of the Union de Empleados de Muelles de Puerto Rico.

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Thus, the union was their designated bargaining representative, and the collective bargaining agreement established their grievance rights and procedures.

G7 filed its complaint in response to an unfavorable ruling by an arbitrator granting G3 workers seniority over G7 workers. According to the G7 complaint, ISA and the union agreed that its members would have seniority over the G3 group. Obviously unhappy with that agreement, G3 asked the union to file a grievance on its behalf pursuant to the CBA challenging G7's purported seniority rights, which it did. G7 intervened in the arbitration so that it could present its position. Since the union represented both groups of workers, it informed the arbitrator that it was not in agreement with any arrangement ISA might make with either group, and that seniority rights would need to be decided in the pending arbitration. G7's complaint further alleges that three days prior to the scheduled arbitration hearing, G3 and ISA reached a secret agreement that granted G3 workers seniority over the G7 group, and that the arbitrator incorporated this "sham" agreement into its award.

Unhappy that they had been left out of the arbitration process, G7 sued ISA. G7 alleged that ISA breached the CBA and repudiated the arbitration process, and sought to set aside the arbitration award and monetary damages.

In response, ISA asked the lower federal court to dismiss G7's claims, which it did. The lower court pointed out that G7 was not a party to the CBA or the arbitration proceeding, and that the union was G7's authorized representative. Because G7 did not allege that the union breached its duty to fairly represent G7, it did not have standing to bring its own claim. Ironically, the lower court also stated that the CBA required G7 to arbitrate its breach of contract claim.

The appeals court quickly decided the G7 workers' standing, ruling that the workers have a "uniquely personal" stake in the outcome of the lawsuit sufficient to sustain federal jurisdiction. More importantly, the appeals court examined the allegations of the G7 workers' complaint in regard to the purported actions of G3 and ISA. Employees subject to a collective bargaining agreement are typically subject to the CBA's arbitration requirements and finality provisions. Put another way, employees must exhaust the arbitration process and are usually bound by the arbitrator's decision. However, such requirements are not absolute. An employee can prosecute a LMRA claim against an employer if the circumstances have impugned the integrity of the arbitration process. One way this can happen is if the employer repudiates the grievance procedures.

The appeals court ruled that G7's factual allegations were sufficient to create an issue as to whether ISA engaged in a sham transaction and repudiated the CBA. As such, ISA cannot seek to enforce the very arbitration provision that it allegedly repudiated in seeking the dismissal of G7's LMRA complaint.

While unionized employees typically are required to arbitrate their claims as provided by the collective bargaining agreement, this is not absolute. If an employer acts to undermine the arbitration process or fails to arbitrate in good faith, employees can ask that a federal court hear their claims

HOLD ON TO YOUR HARDHATS! OSHA IS "BACK IN THE ENFORCEMENT BUSINESS!"

By Kelly Holzer

The Secretary of Labor, Hilda Solis, wants you to know there is a "new sheriff in town." Worker protection is a top priority of the Obama administration, and Solis is focused on strengthening federal enforcement of workplace safety and health. Over the past year, Solis and former Acting Assistant Secretary of Labor for Occupational Safety and Health, Jordan Barab, toured the country touting OSHA's revamped, pro-enforcement agenda. Gone are the days of conciliation and cooperation with employers. OSHA is moving from "reaction to prevention."

In October 2009 remarks, Barab promised increased enforcement and plugged OSHA's efforts to strengthen its penalty program as a way to punish violators and incentivize employers to improve safety for their workers. The agency is setting up a Severe Violator Enforcement Program to target companies that OSHA deems repeat offenders. Barab promised that OSHA will be vigilant in reviewing employer recordkeeping and intends to increase penalties for violations.

As an example of prevention efforts, in July 2009, OSHA implemented a "construction safety sweep" in Texas, bringing in inspectors from around the country. According to Barab, they conducted about 900 inspections, resulting in almost 1,500 citations and fines of almost $2 million. Last year, OSHA issued the largest fine in the agency's history for $87.4 million against BP resulting from a refinery explosion in 2005.

In a January 2010 speech to the Small Business Administration Office of Advocacy, newly confirmed Assistant Secretary of Labor of OSHA, David Michaels, reiterated the Agency's commitment to an aggressive regulatory agenda. According to Michaels, President Obama's FY 2010 budget dedicates more than $558 million to OSHA – enabling the agency to hire new employees for writing safety and health standards, investigating whistleblower complaints, and more than 100 new compliance officers. Michaels also promised aggressive enforcement of record keeping requirements.

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HONOLULU BLUE

By Pete Saucier

When Marge Schott owned the Cincinnati Reds she was fined by the Commissioner of Baseball for using a coin flip to decide a salary dispute rather than taking the matter to arbitration. Her General Manager cogently observed that arbitration is nothing but a sophisticated form of coin tossing. Sadly, that comparison often is overly generous. Every year I keep track of the top 10 noteworthy arbitration decisions, though it becomes more difficult annually to weed them down to ten. One top entry for 2009 is an arbitration decision that arose on Oahu between the Honolulu Police Department and the State of Hawaii Organization of Police Officers.

Briefly, a police officer referred to in the arbitration decision only as Officer H (no doubt to shade him from responsibility for his actions) was involved in an automobile accident. The first police officer at the scene was given information about Officer H's speed and actions that lead the officer to believe that Officer H was at fault for the accident. A responding police officer observed that Officer H had a strong odor of alcohol and also red and glassy eyes. Because of those observations, another police officer, named Ohia, administered a field sobriety test to Officer H. That test measures general coordination standards, such as a person's ability to follow an object with his eyes. Officer Ohia determined that Officer H failed all six portions of the test. In addition, Officer Ohia tested whether Officer H was able to pass the one leg stand test. Officer H failed that test, too.

After Officer H was observed to have red and glassy eyes, with the odor of alcohol, followed by which he failed a field sobriety test and the one leg stand test, another officer administered a Breathalyzer test. That test was administered in two parts, and established that Officer H's blood alcohol level was 0.163 percent, more than twice the legal limit of 0.08. The Honolulu Police Department, faced with a sworn police officer whose demeanor and conduct indicated alcohol use, along with failed field sobriety tests and the results of the Breathalyzer, decided to terminate Officer H.

Dutifully, the State of Hawaii Organization of Police Officers (SHOPO) appealed that decision through the union grievance procedure to arbitration. There, Arbitrator Martin Henner dismissed every one of the indicators that Officer H had acted inappropriately. His reasoning was as follows:

The odor of alcohol was explainable because there were some broken bottles of beer in [Officer H's] car.

The accident caused Officer H's airbag to deploy which might offer an explanation of his red and/or glassy eyes.

Because Officer H said that he had both back and neck pain, his inability to pass the one leg stand test was understandable.

Naturally, that left the field sobriety test administered by Officer Ohia, and the failed Breathalyzer to address. In order to convict an individual of the crime of driving while intoxicated, the testimony at a criminal trial in Hawaii must include evidence that the officer administering the field sobriety test had been properly trained to administer the test. Arbitrator Henner relied upon the criminal standard as a reason to ignore Officer Ohias results. The Honolulu Police Department, at the arbitration hearing concerning the termination of a police officer, a civil matter, was not aware that it was facing an Arbitrator who would impose upon them a criminal standard. Arbitrator Henner found that because the Honolulu Police Department did not present evidence that Officer Ohia was qualified to administer the field sobriety test, the test was of no value. There was no evidence presented by SHOPO, or any other suggestion that Officer Ohia was not qualified to administer the field sobriety test.

No doubt seeing the finish line for ruling in favor of Officer H, Arbitrator Henner was undaunted by the Breathalyzer results. Officer H's Breathalyzer results were taken five minutes apart, showing him at more than twice the legal limit. But Arbitrator Henner found that the test should have been administered a full fifteen minutes apart. Otherwise, Arbitrator Henner opined, how could anyone know that Officer H had not burped, coughed up, or regurgitated anything from his stomach, as that could increase his alcohol readings and invalidate the test results.

Arbitrator Henner reversed the termination of Officer H, and ordered that he receive full backpay and benefits from the time of his discharge. In addition, Officer H's disciplinary record was removed from his personnel file.

If you visit Waikiki Beach, and you meet a happy police officer with a devil-may-care attitude, don't be surprised. Send your compliments to the State of Hawaii Organization of Police Officers and Arbitrator Martin Henner.

Retirement Promises

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The Pew study showed that only a handful of states have fully funded their pension obligations as of June 30, 2008. Some states, such as Connecticut and Illinois, had funded 62% or less of the obligation. The study showed that Maryland's pension was funded at 78%, compared to the state's 101% funding level in the year 2000. Maryland has a $14.8 billion retiree medical benefit obligation, with only $119 million--less than 1% of the total obligation--funded.

The impact of these benefit obligations on state and local governments can be crippling. The size of these unfunded liabilities means that bond ratings may be in jeopardy

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(increasing the cost of borrowing), less money is available for services such as education and infrastructure repair and maintenance, and tax increases may be needed to meet governmental obligations.

As a result of the enormous funding obligations, many states have begun to enact pension system reforms. Fifteen states passed such reforms in 2009, up from 12 in 2008. The reforms range from reducing benefits to increasing the retirement age to increasing the employee contributions to the pensions. Locally, the Virginia House of Delegates has passed legislation which would reduce benefits for employees hired after July 1, 2010, and also require new hires to increase their contributions to the pension fund. The reforms are estimated to save $3 billion in the next 10 years. Maryland has yet to propose any such reform legislation.

The Pew Study is available at **http://www.pewtrusts.org/news_room_detail.aspx?id=57354.**

EMPLOYER CHECKLIST FOR 2010

By Darrell VanDeusen

We are already nearly through the first quarter of 2010. Are you doing everything you can to ensure that your organization is ahead of the curve in minimizing risk and exposure to employee claims? Now is the time to get your ducks in a row. Here is a quick checklist of some of the most common areas of potential problems:

1. *Are your employment policies up to date?* The last couple of years have seen major changes in the FMLA and ADA. A policy on social networking is a must; as are rules on phone use and texting while driving. Now is the time to update your employee handbook and other policies.

2. *Are your employees being trained in EEO rights?* Training budgets are usually among the first casualties when money gets tight, but it is essential that all of your employees – bottom to top – are trained in their rights and obligations under equal employment law. Evidence of such training comes in handy if you are defending a discrimination or harassment charge and the employee did not attempt to resolve the matter internally first. And it is just the right thing to do.

3. *Are you implementing a union avoidance strategy?* Regardless of whether EFCA gains more traction in 2010, this year promises to be one in which unions will focus on organizing in both the public and private sector. Employees often think "union" when there is a perception of unfair treatment and a lack of concern by their employer. Make sure everyone in the organization, not just your human resources team, is listening to employees and treating them with respect.

4. *Are you anticipating more changes in the law?* There are a host of additional legal changes on the horizon. At the state level, efforts are being made to expand protection of employees misclassified as independent contractors, and increase penalties under the Maryland's wage law. At the federal level, it is likely that Congress will expand coverage under Title VII and the ADEA. The DOL has indicated its intent to revise (again) the FMLA regulations. The EEOC will come out with final regulations interpreting the ADAAA in the near future.

5. *Are you confident that your wage and hour practices are correct?* Overtime cases are still a hot commodity. Trying to get by with fewer employees, some employers seeking options for non-exempt employees to work "differently" can run afoul of the FLSA and Maryland law. Working "off the clock," working from home, being "available" to answer emails at any hour, and the incorrect accounting of travel time, can all lead to claims that are both expensive and difficult to defend.

6. *Do your job descriptions represent actual duties performed?* Ok, so this is the third time "ADA" has been mentioned in this article. There is almost nothing worse than an out of date job description when trying to determine what accommodation is reasonable for an employee who needs one. If, for example, the description still refers to using a typewriter, it is almost certainly time for an update.

7. *Do your separation agreements withstand scrutiny?* Sometimes the same agreement that has been used before is pulled out time and again. Are you sure the agreement you are using to get employees to waive their rights would withstand a challenge? It is most certainly better to find out sooner, rather than later.

8. *Are your I-9 forms completed correctly?* A quick audit will determine whether you have the information that you need from your hires. Anticipate increased attention to immigration issues in the coming months, both at the state and federal level.

Hold On!

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In the past six months, OSHA has accelerated efforts to develop standards governing hazardous exposure to a number of different elements, including silica, beryllium, and food flavorings with the chemical diacetyl. The agency has issued rules for acetylene hazards, personal protective equipment consensus standards, and has changed rules applicable to fall protection during steel erection.

According to OSHA officials, however, they are "just getting warmed up." OSHA is committed to introducing new standards in a variety of other safety and health areas and is exploring other ways to strengthen enforcement. While those new standards and enforcement measures are still unfolding, all employers can be sure that OSHA is watching and waiting.

GENDER STEREOTYPING CONTINUES TO GET EMPLOYERS IN TROUBLE

By Cliff Geiger

Employers are not permitted to discriminate based on sex stereotypes. This has been the case since the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In Price Waterhouse, a female was denied partnership to a national accounting firm. The decision-makers had referred to her as "macho" and needing "a course at charm school." She was advised that to improve her chances of making partner she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." The Supreme Court concluded that these types of stereotypical attitudes, based on notions of how a woman should act, violated Title VII if they lead to an adverse employment decision.

Since Price Waterhouse, other courts have upheld a variety of claims based on sex stereotyping. Smith v. City if Salem, 378 F.3d 566 (6th Cir. 2004) dealt with a fire department lieutenant who was born as a biological male but came to identify as a female. After Smith was diagnosed with Gender Identity Disorder, and began to take on a more feminine appearance, colleagues told Smith he was not "masculine enough." The City devised a plan to terminate Smith for insubordination if he did not submit to a battery of psychological examinations, and then suspended him supposedly for violating an outdated policy. Citing Price Waterhouse, the Sixth Circuit concluded that it is impermissible to take adverse employment action based on "gender nonconforming behavior and appearance." Earlier, the Ninth Circuit had determined that Title VII prohibited harassment of a male restaurant worker who was perceived as too feminine. Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864 (9th Cir. 2001).

Chadwick v. Wellpoint, Inc., 561 F. 3d 38 (1st Cir. 2009) and Back v. Hastings On Hudson Union Free School District, 2365 F.3d 107 (2d Cir. 2004) are cases involving a different type of gender stereotype. In Chadwick, the plaintiff did not receive a promotion because she had "too much on her plate" with four young children. Similarly, the plaintiff in Back did not receive tenure because of the belief that a mother who received tenure would not remain committed to her job because she had "little ones at home." In both cases, the employer's reason for denying advancement was taken as evidence of relying on all illegal stereotyping childcare responsibilities will take priority over a woman's job.

Another case, Feinerman v. T-Mobile USA (S.D.N.Y., No. 08 Civ. 3517, 1/28/10), involved a dispute over whether it was necessary for a mother of two to attend every out-of-town conference that occurred about five times a year. Although the employer ultimately won, the plaintiff was able to establish a prima facie case of gender stereotyping based on a supervisor's alleged statement that a father who worked in the same job as the plaintiff probably would be glad to get away for an out-of-town conference.

Lewis v. Heartland Inns of America, LLC, (8th Cir., No. 08-3860, 1/21/10), provides yet another recent example. Heartland Inns operates a group of hotels, primarily in Iowa. Brenna Lewis worked for Heartland for several years before being offered a full time front desk position on the day shift at a hotel near Des Moines. Barbara Cullinan, the manager who approved hiring Lewis, did so over the phone based upon the recommendation of Lori Stifel, Lewis's supervisor.

Cullinan changed her mind after seeing Lewis. Cullinan did not believe Lewis was a "good fit" for the front desk. Stifel described Lewis as having "an Ellen DeGeneres kind of look." Lewis preferred loose fitting clothing, including men's button down shirts and slacks, avoided makeup, and wore her hair short. According to Cullinan, Lewis lacked the "Midwestern girl look," and that women working at the front desk should be "pretty." The job description for the front desk position did not mention appearance. Cullinan promptly fired Lewis for reasons that, according to the court, a reasonable fact finder could disbelieve. The court determined that Lewis had established a prima facie case of discrimination under Title VII, because requiring front desk employees to be "pretty" or have the "Midwestern girl look" were requirements that could apply only to women.

These cases demonstrate the trouble employers encounter when they assume or insist that employees match a stereotype associated with a particular group. These cases do not mean that dress codes or standards of professional appearance are unenforceable, but they demonstrate the need to exercise caution and seek legal advice when dealing with expectations that may be rooted in stereotypes of how men or women should look, act, or behave.

COURT EXTENDS RETALIATION PROTECTION TO WITNESSES NAMED IN INVESTIGATION

By Randi Klein Hyatt

The primary purpose of the anti-retaliation provisions of the federal and state employment discrimination laws makes good sense. The legislatures do not want persons who oppose a possibly unlawful employment practice, or participate in proceedings relating to uncovering a possibly unlawful employment practice, to be exposed to adverse employment actions because of the person's opposition or participation.

If a person could be fired or demoted because they, for example, filed an internal claim of harassment, or provided deposition testimony in support of a co-

worker's harassment claim, then very likely there would not be too many people coming forward with claims of discrimination or supporting the claims of others.

The basic elements of claiming retaliation are straightforward: a person engaged in protected activity within the meaning of the discrimination laws and suffered an adverse employment action because of that protected activity. The notion of retaliation becomes problematic, however, when a court issues a decision that enlarges the population of persons who are entitled to claim retaliation by giving broad meaning to "protected activity" or labels even the most trivial workplace decision an adverse employment action.

In EEOC v. Creative Networks, No. CV 05-30332-PHX-SMM (D. Az. Jan. 15, 2010), the federal district court is expanding the notion of protected activity by leaps and bounds. In this case, the EEOC filed suit on behalf of two company employees who it alleges were subjected to retaliatory discipline in violation of Title VII. The first employee (Encinas-Castro) was terminated after she filed an EEOC discrimination charge. The second employee (Allen), who had been counseled, had done nothing. That's right. She did nothing.

Encinas-Castro, however, had written Allen's name down as a witness that the EEOC should interview regarding the facts underlying Encinas-Castro's charge of discrimination. Allen did not know that Encinas-Castro had written her name down for the EEOC until after the fact. The EEOC never contacted Allen, much less interviewed her. Allen never spoke with anyone at the EEOC about anything she might have known regarding Encinas-Castro's allegations. The decision also insinuates that Allen never spoke with anyone at the company about any alleged misconduct she may have witnessed. Yet somehow, the federal district court determined that the act of Encinas-Castro writing Allen's name down as a witness was sufficient "participation" by Allen to be protected from retaliation under Title VII, even while at the same time labeling Allen as "an involuntary participant who was forced into the midst of Encinas-Castro's discrimination claim."

The court justified this finding as follows: "Having been named in an EEOC charge, Allen may have been contacted by the EEOC during their investigation and asked to provide a statement. Without the protection of Title VII, witnesses named in EEOC charges could be intimidated into not testifying or supporting a co-worker's discrimination claims. Title VII prosecutions would be chilled because witnesses would be afraid of retaliation by their employers." While this reasoning makes sense when an individual offers to be a witness, or even knows they will be named as a witness, the court failed to adequately explain why this reasoning pertains when the employee is completely unaware that she has been named a witness and never acted as a witness.

The parade of horribles is endless. If an individual identifies as a witness any person by name, that person, says this court, is protected by Title VII's anti-retaliation provision, even if they did not know their name was written, even if they did want their name to be written, and even if they actually never become a witness. While the court did reinforce repeatedly the fact that Allen was a "named" witness, it is easy to see how quickly this decision will fuel the potential plaintiff field even further (whether by zealous litigator, EEOC or judge): "All individuals that were at work on February 12, 2010;" "Anyone who received the offensive email sent by Mr. Jones on January 7, 2009;" "All employees working in Accounts Receivable under Ms. Smith;" "Any employee who entered the break room and could have seen the picture." I do not like this decision one bit.

Kollman's Corner

By Frank Kollman

The American Bar Association has published the results of a study into whether race or gender affects judicial rulings. The results of the study were sobering. Employees did significantly better (46%) when the judge was African-American than when the judge was Hispanic (19%), white (21%), or Asian-American (33%). The study also concluded that employees doubled their chances of prevailing on appeal if one or more of the judges on the appellate court panel were women.

While I realize that statistics do not necessarily prove causation, these statistics reaffirm my belief that people make judgments based on their biases and prejudices, whether they realize it or not. Two people can be presented with the same facts and reach different conclusions, based on a variety of factors, including experience.

I have a management philosophy that colors my perception of things. I tend to want to reward initiative and hard work, and I have a difficult time looking at employees as victims. Some lawyers, however, view all employees as victims or potential victims, and it is difficult for them to see why employees should be disciplined under any circumstances. When those lawyers become judges, they rarely begin with true impartiality, thinking that employers are guilty until proven otherwise. Yes, these lawyers become judges.

It is difficult for a judge who has never run a business to understand one. So, make solid employment decisions, communicate them properly, and make sure you can explain your reasoning to people who may have experience radically different than yours.