The Employment Brief

Updates in Labor and Employment Law to Help Your Business Succeed.

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More Bad News About Public Employee Retirement Benefits

By Eric Paltell

In the March edition of this newsletter, I wrote about a recent study from the Pew Center on the States which showed that state governments nationwide faced a $1 trillion shortfall in meeting their public employee retirement benefit obligations. Another recent study estimated that shortfall to be closer to $3 trillion. Unfortunately, taxpayers and local governments continue to be plagued with bad news in this arena, as two new studies shed more light on the magnitude of the enormous gap between public retiree benefit obligations and the money available to fund those promises.

First, an October 12, 2010, study from the Kellogg School of Management at Northwestern University and the University of Rochester showed that the nation's largest municipal pension plans are carrying a total unfunded liability of $574 billion. The study analyzed 77 pension plans in 50 major cities and counties, which cover nearly two million workers. This local governmental shortfall is separate from the trillion dollar retiree benefit deficit faced by the states.

According to the study, at least six cities -- Boston Chicago, Cincinnati, Jacksonville, St. Paul, and Philadelphia -- only have sufficient pension assets to pay for promised benefits through the year 2020. Philadelphia has only enough money to pay the benefits through 2015. Baltimore was ranked 8th worst on the list, with an expected insolvency date of 2022. The authors calculated that each household in the 50 cities and counties studied owes an average of $14,165 to current and past governmental employees for their pensions.

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Baltimore Teachers Torpedo Efforts at Real Change

By Darrell VanDeusen

If you have not yet seen the documentary "Waiting for Superman" put it on your must see list. The movie, from Davis Guggenheim (who also directed and won an Oscar for Al Gore's "An Inconvenient Truth"), takes a look at the crisis surrounding public education in the United States. Full disclosure here: I am the product of two public school teachers, both of my children enrolled in Baltimore City Public Schools, and at least one of them plans to go into teaching when he graduates from college in a couple of years. And, I am a management side labor lawyer. So perhaps I take some of what is happening in public education more personally than I should. But the rejection by the Baltimore Teacher's Union of a proposed contract that would bring about the possibility of real positive change in City schools got me thinking about the lessons to be learned here, some good and some bad.

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Ledbetter Act Does Not Extend Limitations Period for Failure to Promote Claim

By Mike Severino

In *Noel v. The Boeing Co.*, No. 08-3877 (3d Cir. 2010), the Third Circuit Court of Appeals ruled that the Lilly Ledbetter Fair Pay Act does not extend the 300 day period during which a claimant must file an administrative charge for a failure-to-promote claim.

Noel, a black Haitian national, worked for Boeing as a sheet metal assembler at its Ridely Park, Pennsylvania facility. Noel applied for, and received, one of Boeing's coveted offsite assignments. He subsequently transferred in 2002 to the Bell Helicopter facility in Amarillo, Texas. After working at the Amarillo facility for approximately seven months, two white employees were promoted, while Noel was not. Noel complained to a union representative and Boeing's labor relations representative about Boeing's failure to promote him. In March 2005, Noel filed a charge with the Equal Employment Opportunity Commission and, in June 2006, he filed a four count complaint for discrimination, disparate treatment and retaliation. Noel did not allege pay discrimination.

After a four day bench trial, the Court ruled in favor of Boeing. The Court dismissed Noel's failure to promote claim because he did not file his charge with the EEOC within the required 300 day time period. Noel only challenged this decision on appeal.

Noel argued that he was not required to file his administrative charge within 300 days of Boeing's failure to promote him, but rather, could have filed it at any time because of the Lilly Ledbetter Fair Pay Act (Act). The Act amended Title VII by establishing that a claim for a discriminatory compensation decision or other practice occurs (and thus accrues) each time wages, benefits or other compensation is paid. Noel asserted that, because he received lower pay due to Boeing's failure to promote him, the 300 day requirement started each time he received a paycheck. The Third Circuit held that the Act did not preserve Noel's failure to promote claim for two reasons. First, Noel failed to plead disparate compensation or link his failure to be promoted to lower pay. Noel continually argued that Boeing denied him a promotion while promoting white co-workers, but failed to allege pay discrimination.

The second issue was whether Boeing's failure to promote, in and of itself, constituted discrimination in compensation under the Act. The Third Circuit echoed a recent decision from the District of Columbia Court of Appeals holding that the Act does not apply to failure to promote claims. The Third Circuit explained that the Act was enacted in response to a Supreme Court decision involving pay discrimination, but not other types of employment discrimination. Furthermore, the Court reasoned that a claimant knows of an adverse employment decision – such as a failure to promote – when the decision is made. On the contrary, a claimant may not know of disparate pay until after the discriminatory action has occurred.

Finally, the Court pointed out that most employment discrimination affects pay. Permitting claimants to universally rely on the Act for all employment practices would weaken administrative remedies. Absent clear language that Congress intended the Act to cover failure to promote claims, Noel's claims were time barred.

Pushing and Shoving Among Enemies

By Pete Saucier

A pair of employees (a man and a woman) worked together in a factory. For reasons not disclosed, they developed an intense dislike for each other. Eventually, their mutual anger erupted into a shoving match that netted each a stern warning about their misbehavior. The employer cautioned them that a repeat imbroglio would be grounds for more severe discipline.

Within four months, the man was seen by supervisors intentionally crowding the woman in a narrow passage. He maneuvered into a position that forced his female nemesis to be jostled and pushed around. What is more, the run-in was caught on a surveillance camera. The employer investigated the event then gave the pushy man a one-day suspension.

The dispute was appealed to arbitration where the selected "neutral" vacated the discipline of a one day suspension because the Company produced no rule requiring courteous conduct. As a result, the arbitrator "reasoned" that the Company was wrong to administer any discipline. Instead, he berated the employer for "enforc[ing] a rule that one employee performing work is to move out of the way of an approaching employee if both are in the same crowded aisle, where such a rule has not been published to the bargaining unit . . . ."

Two lessons may be drawn from the arbitrator's decision: (1) maintaining civility in a unionized workplace often is an uphill battle; and (2) you never have enough rules to satisfy every eventuality, but with a union you have to try.

Pension Crisis

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The second piece of bad news came on October 13, 2010, when a report from the Empire Center for New York State Policy found that the State of New York has a total unfunded liability for public sector retiree health insurance of $205 billion. While New York's retiree medical tab may be one of the nation's largest, it is far from alone in having to confront this problem. In fact, a 2007 study from Credit Suisse estimates that states are facing $558 billion in unfunded retiree medical benefits liability, while local governments are facing $951 billion in unfunded retiree medical benefits -- for a total unfunded obligation of $1.5 trillion. To put the magnitude of these numbers in perspective, according to the Brookings Institution, total spending on the nine year war in Iraq, through September 2010, has been about $900 billion.

The retiree medical funding crisis stems from an accounting regulation known as GASB 45, which began taking effect in 2007 and covered all governments beginning in 2009. GASB 45 requires government employers to measure and report liabilities they assume for "OPEB" (Other Post-Employment Benefits), including retiree medical benefits. Prior to GASB 45, state and local governments did not have to show these liabilities on their books. As a result, current benefits could be paid out of the current budgets, and future obligations were simply ignored (or, perhaps more accurately stated, passed on to future taxpayers).

As a consequence of retiree medical obligations and pension shortfalls, state governments are faced with several options, all of which are undesirable, but nevertheless must be taken: (1) raise taxes to meet these obligations; (2) reduce or eliminate pension and retiree medical benefits; or (3) default on municipal bonds when they mature. Implementation of any one of these options will have dire consequences for those impacted. Moreover, it arguably is illegal under current law to reduce pension benefits of existing governmental retirees.

It appears that, after years of elected officials promising exorbitant retirement benefits to public employees, the proverbial "chickens have come home to roost." Public employees are retiring (often in their early 50's), benefits must be paid, and the money simply is not there to meet these obligations. Private sector employees, faced with a 10% unemployment rate, no guaranteed pensions, no early retirement option, and no retiree medical benefits, are unwilling to pay more taxes to bail out unfunded or underfunded retirement benefits for public sector employees. Indeed, this issue has been front and center in a number of political contests this fall, including the California gubernatorial race. While there is no clear solution on the horizon, I think it's a safe bet that the practice of promising generous pension and medical benefits to public servants who can retire in their 50's will now be viewed with the same dismay as the reckless Wall Street lending practices that precipitated the stock market crash of 2008.

Cancer in Remission is a Disability

By Randi Klein Hyatt

When the ADAAA was enacted, nearly everyone with a thought on the changes predicted, among other things, that the amendments to the ADA would result in significantly fewer ADA claims getting dismissed on summary judgment. The ADAAA does not apply retroactively, so only claims arising on or after January 1, 2009 would have the new ADAAA standards apply. Now that sufficient time has passed for such claims to make their way through the EEOC and the courts, we are starting to see the results. We knew it was coming. And we were right. Recently, a federal district court in Indiana ruled that cancer in remission was a disability under the ADAAA even though it was not presently limiting a major life activity of the employee. *Hoffman v. CareFirst of Fort Wayne, Inc.*, 1:09-CV-251 (N.D. Ind. 2010).

Mr. Hoffman was a service technician for a home medical supply company. He was diagnosed with Stage III renal cancer in November 2007. He took time off from work for surgery and recovery and returned to work in January 2008 with no work restrictions. He worked without incident and his cancer remained in remission for a year.

In January 2009, his supervisor advised that all service technicians were going to be required to work up to 70 hours of overtime per week due to a new account. Hoffman provided his supervisor a medical note restricting his work hours to 40 hours per week. The company advised Hoffman he could resign; work the overtime; or, it would honor the forty hour per week limitation, but would require Hoffman to work from an office that added up to three hours of unpaid travel time per day. Through a series of conversations with his supervisor, Hoffman believed he was terminated and stopped work the end of January 2009. He then sued for disability discrimination, arguing the company failed to offer a reasonable accommodation and terminated him because it regarded him as disabled.

The company argued that Hoffman's disability claims should be dismissed because Hoffman did not have any substantial limitation on a major life activity; his cancer was in remission during the time period in question; he did not have any work restrictions; he performed his regular job duties; and did not miss time from work.

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Baltimore Teachers

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1. *Union leadership does not always stand in the way of change*. At the national level, American Federation of Teachers president Randi Weingarten wants to be seen as a reformer and is working strategically with Secretary of Education Arne Duncan to address the very serious concerns in public education. She is no management apologist by any stretch but, to her credit, she has been heckled by union members around the country who want to maintain the status quo. In Baltimore, the proposed agreement forged by local president Marietta English and Superintendent Andres Alonzo drew support from Ms. Weingarten. One would think that this sort of support would be viewed positively by those members of the union who care about better education of our City's youth.

2. *Union membership needs to be hand fed information.* The rejection of the proposed contract by Baltimore teachers on October 14, 2010, as reported in the Baltimore Sun the following day, was largely because teachers voting "no" felt that they did not have enough information regarding the change from a seniority based system to a performance based system. Put aside the fact that we are talking about highly educated people here – most of those teachers have Master's degrees – and consider that selling "change" is always difficult. An employer, unionized or not, that wants to change longstanding practices in the workplace needs to have an effective method for getting the message across. A union needs to do the same thing.

3. *Entrenched personal interests will often trump the better choice*. Although union members, particularly in contentious negotiations, often scream about the alleged "greed" and uncaring nature of corporate America generally and the company with whom they are negotiating specifically, in their demands for higher wages, that is the pot calling the kettle black here. Other than the right to pay dues, about the only real benefit to being in a union is that members with delusions of adequacy often get to keep their jobs because of the contract's seniority provisions. An employee who does excellent work, regardless of her years on the job, rarely needs to call on a union shop steward, or has the need to file a grievance. Union shop stewards might have less to do if a contract focused on keeping the best qualified teachers on the job. Think about the added benefit to the students in the classroom.

4. *Getting out the vote is always important.* The need to get as many people as possible to vote in a union election or in contract ratification is essential. As a general rule, there is little difficulty getting those individuals who are angry to the polls (something that has already resulted in unique national races in the mid-term elections). It is often harder to convince those who say "I am sick of everyone" that their vote matters too. This was all too true in Baltimore. There are about 6,500 eligible voters in the union. But on October 13, there were only 1,540 teachers who voted against ratification, while 1,107 voted for it. Only 23% of the union voted against ratification. Where were the other 3,500 teachers who did not vote at all? This tyranny of the minority is what frequently gets an employer a union and, in this case, stood in the way of real change in public education.

Perhaps by the time you read this article, the union membership will have approved the contract on a second vote. One can only hope.

Cancer in Remission

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Under the original ADA, these arguments would have handily won the case. Not in today's world.

The district court rejected the employer's arguments because, under the ADAAA, Hoffman's renal cancer would have substantially limited a major life activity if active. The trial court also relied on the EEOC's proposed regulations implementing the ADAAA, which lists cancer as an impairment which will "consistently meet the definition of disability." The court also pointed out that the employer focused all of its legal energy arguing that Hoffman was not disabled and gave barely a second thought to explaining how it reasonably accommodated Hoffman, assuming he was entitled to reasonable accommodation. The case now goes to trial, assuming the employer does not settle.

One of the specific changes under the ADAAA is that an impairment that is episodic or in remission is still a disability if it would substantially limit a major life activity when active. While I could spend several pages arguing against the ridiculousness of this piece of the legislation, the *Hoffman* decision confirms the utter disparity that will exist between cases decided under the original ADA standard and those to come from the ADAAA. The ADAAA is nearly two years old. We can expect the slew of cases to start coming out of the courts that confirm the fortunetellers were right.

After-Hours Use of PDA's Raises Wage and Hour Issues

By Kelly Hoelzer

For many employees, the work day does not end once they leave the office. With the advent of cellular phones and PDA's such as BlackBerrys and iPhones, employees often communicate with their supervisors, coworkers, and/or clients, both before and after regular work hours. For employees who are exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA), "off-duty" use of PDAs for work purposes poses no problems, and indeed, normally can be expected to some degree by employers and clients.

It is not so simple, however, with non-exempt employees who use PDAs after normal work hours to answer emails or perform other work. Does the FLSA require an employer to compensate non-exempt employees for the time spent answering emails on a PDA outside of the regular work day? The short answer is "yes."

Under the FLSA, time spent on any work activity – including responding to emails and/or voice mails – outside of the regular work day is generally considered compensable "hours worked." The term "hours worked" generally includes: (a) all time during which an employee is required to be on duty or to be on the employer's premises or at a prescribed workplace; and (b) all time during which an employee is "suffered or permitted to work" whether or not he is required to do so. 29 C.F.R. § 778.223. If the employer knows or has reason to believe that the work is being performed, even if away from the job site or at home, the employer must count the time as hours worked. 29 C.F.R. §§ 785.11, 12. This rule is particularly troublesome for employers that issue PDAs to their employees. There is little debate regarding employer knowledge of employee usage outside regular business hours for the employer's benefit, making that activity compensable work time.

If the time an employee spends answering a few emails is so insignificant, it may be considered *de minimis* and not counted towards hours worked. The Department of Labor, however, views the *de minimis* exception narrowly, stating that even ten minutes of work is counted as compensable time. If employers do not track employee time spent on PDAs, they are allowing them to work off the clock. This practice could subject the employer to liability for overtime or straight time wages, liquidated damages, and additional penalties for violating FLSA recordkeeping regulations.

A recent case filed in federal court in Illinois highlights the potential liability for employers that do not compensate employees for after-hours use of PDAs. In *Allen v. City of Chicago*, Case No.: 1:10-cv-03183 (N.D. Ill., filed May 24, 2010), a class of Chicago Police Sergeants sued the City of Chicago for unpaid overtime under the FLSA, claiming that the City violated the FLSA by not paying them for time spent using their City-issued PDAs outside of their normal working hours. It will certainly be interesting to see how this case plays out. Regardless, the issue of off-duty PDA use may become the next big trend in FLSA litigation.

To avoid the risk of liability, employers should consider the following options:

- Establish a policy prohibiting non-exempt employees from using their personal or company-issued PDAs for work purposes outside of work hours.
- Place a limit on the amount of time non-exempt employees are allowed to use their PDAs for work purposes after hours and be sure to compensate the employees for such use.
- Permit non-exempt employees to use their PDAs for work purposes after hours only with supervisor approval, and again, with proper payment for such use.
- Make sure that non-exempt employees record all time worked (including time spent on their PDA) outside of regular work hours.

Given the ability to see the content and time emails and texts are transmitted does provide employers with an independent ability to confirm time worked. Tracking time spent on PDAs outside of work hours may seem to create administrative headaches now, but will be well worth the aggravation to avoid a costly FLSA lawsuit later.

Sixth Circuit Tackles Novel FMLA Issue

By Adam Simons

A recent decision from the Sixth Circuit Court of Appeals addressed an issue of first impression regarding Family Medical Leave Act medical certifications and the employer's ability to deny leave based on a negative certification: a medical certification that states that the employee is not eligible for FMLA leave. In *Branham v. Gannett Satellite Info. Network, Inc.*, 2010 U.S. App. LEXIS 18328 (6th Cir. Sept. 2, 2010), the court analyzed whether an employer is entitled to rely on a negative certification and deny an employee FMLA leave prior to the expiration of the fifteen-day period in which an employee must obtain a certification.

In *Branham*, a receptionist was absent for several days due to illness and her employer requested that she submit a short-term disability leave form, which doubled as its FMLA medical certification

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Sixth Circuit FMLA

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form. Two days later, a physician returned the completed certification, indicating that the receptionist did not qualify for FMLA leave and could return to work. Nonetheless, the receptionist remained absent from work for the next several days, at which point management notified her that her job was in jeopardy. The receptionist asserted that her primary care physician, and not the physician that examined her, could provide a certification that she qualified for FMLA leave. The next day, one of the managers took the negative certification and blank certification to the doctors' offices. The receptionist's physician would not complete a form because he had never examined her. The physician who had examined the receptionist confirmed the prior diagnosis and that she did not qualify for FMLA leave.

The employer terminated the receptionist, which decision was made less than fifteen days after the employer's request for the certification. Prior to the end of the fifteen-day period, however, the receptionist provided a certification stating that she was qualified for FMLA leave. She subsequently filed suit under the FMLA. The trial court granted summary judgment for the employer. The receptionist appealed and the Sixth Circuit reversed the summary judgment decision.

The Sixth Circuit recognized that the employer had raised a novel issue as an alternative basis for summary judgment: that it was entitled to rely on the negative certification in terminating the receptionist and did not have to wait the remainder of the fifteen days for her to obtain a qualifying certification. In the end, however, the Sixth Circuit did not address the issue because it held that the employer did not properly trigger the receptionist's duty to provide an FMLA certification in the first place. The court did note, however, that the FMLA does not explicitly state that an employee cannot obtain a certification that contradicts a prior negative certification.

The safest route for employers is to assume employees have the entire fifteen-day period to obtain a certification justifying FMLA leave. If an employee turns in a certification before the end of the 15-day window, but indicates another form will be submitted, the employer should not act to deprive the employee of that opportunity. *Branham* also reminds employers to ensure that they are complying with the FMLA notice and certification requirements. Employers should always ask for and provide a medical certification form when an employee requests leave for a serious health condition. More importantly, that request should be in writing (easy to prove it happened) and contain all the required warnings and caveats. Adopting the forms provided by the Department of Labor, or developing forms based on the DOL's model, is a good starting point.

EEOC Examining Use of Credit Reports

By Cliff Geiger

Considering a job applicant's credit history is a hot button issue. Earlier this year, the Equal Employment for All Act (HR 3140) was introduced in Congress. HR 3140 would make it illegal for private employers to use credit history when evaluating job applicants for most positions. Several states already have similar legislation in place, and such restrictions have been proposed in many more jurisdictions. On October 20, 2010, the EEOC stepped into the fray when it held a public meeting to hear testimony from representatives of various stakeholder groups on the use of credit histories as selection criteria in employment. whether credit history correlates to job performance, and whether using credit information in the hiring process has an adverse impact on groups protected by anti-discrimination statutes

Representatives of civil rights groups contended that employers' use of credit reports has a discriminatory impact on racial minorities, and that there is no evidence establishing that a good credit history predicts good job performance, or vice versa. Representatives of business countered that credit checks generally are used only for certain positions involving the management of financial or other sensitive information affecting consumers or other employees, and such use is consistent with what the government requires of its job applicants and contractors. The employer representatives also pointed out that the Fair Credit Reporting Act ("FCRA") already provides safeguards designed to help prevent employers from taking action based on inaccurate information.

Where does this leave employers? It is well established that racially neutral employment requirements may violate Title VII by having a disparate impact on racial minorities. Therefore, given there is some correlation between race and credit history, employers should not adopt or apply uniform credit standards to screen all job applicants. Credit reports should be considered on an individual basis, as one element of a comprehensive background check. In addition, the use of credit reports should be job-related, meaning that employers likely will not be able to justify reviewing a credit report on every job applicant. Also, employers should be familiar with and follow the requirements of the FCRA before deciding to reject an applicant based on credit report information. For those interested in more detail on this topic, the EEOC has posted speaker remarks from its October 20 meeting at http://www.eeoc.gov/eeoc/meetings/10-20-10.