IMA UPDATE

Volume 15 Issue 3 | IMA Management Group Inc. | March 2010

Court Awards Employer $4.5 Million in Fees Against EEOC in Harassment Suit

The Equal Employment Opportunity Commission has been ordered to pay approximately $4.5 million of a defendant's attorneys' fees and expenses because, in the judge's opinion, the agency's actions in pursuing the multi-victim sexual harassment lawsuit were "unreasonable, contrary to the procedure outlined by Title VII and imposed an unnecessary burden upon [the defendant] and the court." *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR (N.D. Iowa Feb. 9, 2010).

The EEOC's Chicago District Office sought relief for 270 women who the agency alleged were subjected to a hostile work environment by their employer, a trucking company. As pre-trial discovery progressed, the district court granted a series of motions that reduced the number of women remaining eligible for relief to 67. Chief Judge Linda Reade then barred relief even for the 67 and dismissed the lawsuit. She found the agency did not, prior to the filing its lawsuit, investigate specific allegations or attempt to conciliate relief for any of the 67 women. The EEOC has appealed the dismissal of the lawsuit to the Eighth Circuit Court of Appeals.

In ruling on the employer's motion for attorneys' fees and expenses, Judge Reade determined that the EEOC's lawsuit met the standard of being "frivolous, unreasonable or without foundation" to warrant granting the employer's motion. According to the Judge, the agency pursued a strategy of "'sue first, ask questions later,'" which she found to be "anathema to Congressional intent." The EEOC argued its actions were not unreasonable because the court's dismissal was "unexpected." This was a "red herring" in an attempt to avoid attorneys' fees by arguing the merits of the sexual harassment claims, the court ruled.

The EEOC's appeal of the dismissal of its lawsuit likely will affect EEOC pattern-and-practice investigations and lawsuits. In these cases, the EEOC frequently identifies alleged victims as the litigation unfolds. If the dismissal is upheld, the agency may decide to identify all alleged victims during its investigation and conciliate meaningfully on each and every alleged victim prior to filing a lawsuit. This likely would bring more protracted EEOC investigations. However, such a change also would provide employers with concrete information on which to make early settlement assessments. The EEOC's brief supporting its appeal is due to be filed April 2, 2010.

Jackson Lewis advises clients on EEOC pattern-and-practice investigations and defends employers facing lawsuits brought by the EEOC.

Jackson Lewis 2/24/10

Update from the President

On April 1, 2010, the United States Citizenship and Immigration Services (USCIS) will begin accepting new H-1B visa applications for employment that will begin on October 1, 2010. The H-1B visa is a popular choice for companies planning to hire a foreign worker to fill a “professional” or “specialty occupation” position requiring a minimum of a bachelor’s degree or the equivalent.

There are 65,000 H-1B visas available each year in addition to 20,000 H-1B visas reserved for holders of U.S. master’s degrees or higher. Although USCIS reached the quota in the first week of filing in previous years, the quota this past year was not filled until December 2009. However, the H-1B visa numbers may be filled more quickly this year as the economy starts to recover.

Consequently, an April 1 target date for filing H-1B petitions will increase your chances of obtaining one of the H-1B visa numbers. To meet a target filing date of April 1, we recommend that you start the application process now.

Unlike previous years, there is no longer the possibility of one-day approval from the U.S. Department of Labor (DOL) for Labor Condition Applications—which are required in order to file the H-1B petition with USCIS. The DOL is generally taking seven days to process Labor Condition Applications, and we expect this processing time to increase as employers prepare to fi le H-1B petitions.

Possible candidates for H-1B visas include current employees or potential new hires now working in student (F-1 or J-1) status whose employment authorization will expire before October 2011.

We encourage you to contact us with any questions, needs or suggestions you may have.

Thank you for your membership.

Larry Donnelly

National Position Evaluation Plan

A Measure of Value

NPEP is a Point Factor Evaluation System. It evaluates each position according to 11 established criteria that can be applied to any position in any organization. As a result, your salary structure is Objective, Equitable, and Non-discriminatory. It will help you to use your salary dollars more efficiently, organize your Wage & Salary system, improve employee morale and have a system that is defensible against discrimination claims.

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OFCCP's New Method for Calculating Settlements Leads to Sharp Drop in Awards

Employers should not get the wrong impression from a sharp drop in settlement awards secured by the Office of Federal Contract Compliance Programs (OFCCP) in fiscal year 2009.

The $9.3 million recovered by the OFCCP in the first year of the Obama administration is significantly less than the record-setting $67.5 million collected by the agency in fiscal 2008, the last full year of the Bush administration. However, the drop reflects a change in the agency's calculation of settlement awards, not any dip in the agency's enforcement efforts, according to a fiscal 2011 document.

On page 20 of the OFCCP's 28-page budget, the OFCCP disclosed its low settlement award figure for fiscal 2009 and indicated that it no longer would include annualized salaries when calculating its financial settlements—a far cry from the Jan. 5, 2009, Employment Standards Administration (ESA) news release at the end of the Bush administration, which had stated that the agency's settlements were going "higher and higher" and setting a "record annual number of financial remedies for more American workers than ever before."

In a Feb. 25, 2010, interview, Harold Busch, executive director for the Center for Corporate Equality in Washington, D.C., described the change as a "good" and "honest" decision, saying that including annualized salaries in settlement awards inflates damage awards.

The national director of the OFCCP's division of program operations in the Clinton administration and the acting deputy assistant secretary of the OFCCP at the beginning of the Bush administration, Busch noted that early in the Clinton administration, the OFCCP responded to criticism of the inclusion of annualized salaries in settlement awards by no longer including them in the total figure.

The Bush administration subsequently resumed the inclusion of annualized salaries in settlement award figures.

Jeffrey Norris, president of the Equal Employment Advisory Council, told *SHRM Online* that he did not think there was anything necessarily invalid about including annualized salaries in the total settlement award figures, saying that the inclusion of annualized salaries in settlement awards has been a common practice at the agency almost since its inception in 1978. . . .

Report Calls for More Transparency

More transparency is exactly what is needed at the OFCCP, according to a February 2010 Center for Corporate Equality **report** on OFCCP enforcement statistics in fiscal 2008.

The report stated that several important details are missing from OFCCP's annual enforcement reports, such as:

- On what basis contractors discriminated against covered individuals, and what types of personnel practices were involved.
- Which industries had the most settlements.
- Whether individuals covered by settlements held low- or high-level jobs.

The Center for Corporate Equality report sought answers for these and other questions in the report, which analyzed 70 conciliation agreements and three consent decrees from fiscal 2008.

The center found that nearly all of the settlements—more than 95 percent—involved allegations of systemic discrimination in hiring.

Contractors in the food service industry were most likely to be involved in OFCCP settlements. Food service industry contractors represented 27 percent of settlements, the report found, while manufacturing contractors were involved in 18 percent of settlements. Contractors from the health care, banking and shipping industries accounted for 7 percent, 7 percent and 8 percent of the settlements, respectively.

Eric Dunleavy, a senior consultant at the Center for Corporate Equality, told *SHRM Online* on Feb. 24 that the higher number of settlements in the food and manufacturing industries is "consistent with what we saw in [fiscal] 2007." He said it makes intuitive sense as well, since these industries recruit many entry-level jobs. It is easier to find statistical disparities against protected groups when the pool of applicants is larger, he remarked.

Dunleavy was surprised, however, that there were no compensation cases. That is likely to soon change. In its budget, the OFCCP said that it "will prioritize wage discrimination cases, promotion and entry-level based discrimination." It added that it will increase the percentage of compliance evaluations that resolve compensation discrimination, saying that for this measurement, fiscal 2010 "will serve as a baseline year as OFCCP continues to review and refine its compensation discrim-ination investigative procedures."

Renewed Commitment

The OFCCP also will focus more on veterans and disability issues. It critiqued the Bush administration's enforcement approach, describing its enforcement strategy as putting too much empha-

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20 Ways Your Independent Contractor Might Be An Employee

Last month, the IRS began its first comprehensive audit of employment tax issues in over 25 years. The IRS will audit 6000 companies in total over the next three years. The main issues to be examined in these audits are worker classification, executive compensation and taxable fringe benefits. Because worker classification will garner more scrutiny than any other issue in these audits, this alert focuses solely on worker classification and the factors involved in making an accurate determination.

Generally, the IRS favors classifying workers as employees. When workers are classified as independent contractors, the company does not pay employment taxes or withhold income taxes. Instead, the workers pay the full amount of employment taxes and pay income taxes usually through estimated payments. Moreover, as independent contractors, workers are not entitled to unemployment, retirement and health benefits offered through the hiring company or many of the protections afforded to employees through the various federal acts which protect employees. As such, misclassification has a profound effect on the ability of the IRS to collect all taxes that should have been paid, and it denies workers the ability to participate in employee benefit plans and receive legal protections to which they may otherwise be entitled.

The IRS will only allow independent contractor classifications when the company hiring the contractors can show it lacks the necessary control over the workers that would indicate an employer-employee relationship. However, before analyzing control, any worker classification analysis should begin with these two threshold questions:

- Does the hiring company pay its regular employees to perform essentially the same duties as the subject worker who is treated as an independent contractor?
- Has that worker previously been paid by the company as an employee to perform essentially the same task?

If the answer to either of these questions is yes, the worker in question very probably is an employee for classification purposes.

Beyond these threshold questions, the IRS considers the following 20 factors to determine whether the company hiring the worker actually has control over the worker:

- **Instructions.** A worker who is required to comply with another person's instructions regarding when, where and how to perform the work is ordinarily an employee.
- **Training.** Training a worker indicates that the company wants the services performed in a particular method or manner, which also indicates control.
- **Integration.** Integration of the worker's services into the company's core business operations generally shows that the worker is subject to direction and control.
- **Services Rendered Personally.** If the worker must personally perform services for the company, this will indicate control by the company. Alternatively, if the worker is free to engage others to perform the service for the company (i.e., subcontractors), a lack of control by the company is indicated.
- **Hiring, Supervising and Paying Assistants.** Similar to #4 above, if the worker is unable to hire, supervise and pay assistants to perform services for the company, control by the company is indicated. However, a lack of control is indicated when the worker is able to hire his or her own assistants and pay them from the worker's own funds.
- **Continuing Relationship.** A lengthy and continuing relationship between the worker and the company indicates that an employment relationship exists.
- **Set Hours of Work.** If the worker works certain hours set by the company, employment status is indicated. If the company does not control the hours of the worker, independent contractor status is indicated.
- **Full Time Required.** If the worker must devote substantially full time to the company's business, control is indicated.
- **Work Performed on Employer's Premises.** If the work is performed on the company's premises, the company is considered to have control over the worker, especially if the work could be done elsewhere. Control is also indicated when the company has the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.
- **Order or Sequence Set.** If a worker must perform services in the order or sequence as determined by the company, the worker is generally subject to an employer's control. However, if the worker chooses his or her own method for completing a job, a lack of control exists.
- **Oral or Written Reports.** A requirement that a worker submit regular or written reports is an indicator of control.
- **Payment by Hour, Week, Month.** Hourly, weekly or monthly payments generally point to an employment relationship. On the other hand, payments based on

a contract or for completing a particular job or task will generally indicate an independent contractor relationship.

- **Payment of Business and/or Traveling Expenses.** If the company ordinarily pays the worker's business and traveling expenses, the worker is ordinarily an employee.
- **Furnishing of Tools and Materials.** If the company furnishes significant tools, materials and other equipment, an employment relationship is indicated.
- **Significant Investment.** If the worker does not invest in his or her own facilities, control is indicated because the worker depends on the company for such facilities.
- **Realization of Profit or Loss.** A worker who cannot realize a profit beyond an ordinary salary or suffer a loss is generally considered to be an employee.
- **Working for More Than One Firm at a Time.** If the worker cannot perform services for more than one company at a time, the company generally controls the worker. However, a lack of control is indicated when the worker is able to perform services for multiple companies at the same time.
- **Making Service Available to General Public.** If a worker is not free to advertise his or her services to the general public on a regular basis, control is indicated. Workers who advertise their services are generally considered independent contractors.
- **Right to Discharge.** The right of the company to discharge a worker without breaching a contract indicates an employment relationship as control is exercised through the threat of dismissal.
- **Right to Terminate.** If, at any time without incurring liability, the worker has the right to end his or her relationship with the company, an employment relationship is indicated.

See Rev. Rul. 87-41. See also IRS Form SS-8. None of these factors are singularly determinative. Instead, all factors should be considered to make an accurate determination.

It is important to note that the various state revenue and labor departments are also concerned with worker misclassification and have been increasing enforcement at varying speeds. The worker classification analysis used by many states will differ substantially from the 20 factor test utilized by the IRS, resulting in different classifications based on the same facts. As such, a state may classify a worker as an independent contractor while the IRS may classify the same worker as an employee.

Baker Donelson, March 9, 2010

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sis on Executive Order 11246—an approach that “resulted in a decline of enforcement of other OFCCP laws and program areas, mainly affirmative action.”

The agency promised it would renew its “commitment to strengthening affirmative action, combating discrimination against veterans and individuals with disabilities, as well as continuing to resolve systemic discrimination cases.”

Systemic cases will not be the be-all, end-all, though. The OFCCP said it “will investigate all discriminatory practices, not just systemic cases, and enforce affirmative action plans to ensure that federal contractors are committed to advancing equal employment opportunity and are proactive in developing opportunities for minorities, women, individuals with disabilities and veterans.”

Allen Smith, J.D., SHRM, 2/26/10

Handbook/Policy Reviews - A Labor Law Necessity

In the whirlwind surrounding the Employee Free Choice Act (EFCA), it might be easy to ignore the basic need to ascertain that employee handbooks and policy manuals pass National Labor Relations Board (NLRB) muster in the event of union organizing or concerted activity. Nevertheless, the changing of the guard at the NLRB under the Obama Administration makes this basic exercise even more important.

Clear statements of employer policies and expectations are an essential building block of positive employee relations. In general, as long as an employer enforces its rules and policies uniformly, the NLRB will find no fault. Where the rules and policies are interpreted to infringe on employees' Section 7 rights under the National Labor Relations Act (NLRA), however, well-intentioned employers have found themselves in violation of the law.

The following is a checklist of some of the provisions in employee handbooks or employer policy manuals which should be reviewed carefully for legal compliance under the NLRA.

Technology Usage (Email)

In *Register-Guard*, a hotly contested 3-2 decision, the NLRB approved a company policy prohibiting employees' use of the company's computers for "non-job-related solicitations." The NLRB upheld the employer's property rights and further ruled that it is not unlawful to permit personal communications while banning non-business solicitation.

The policy language approved by the Board majority stated: "Communications systems are not to be used to solicit or proselytize for commercial ventures, religions or political causes, outside organizations, or other non-job-related solicitations. Nothing in this rule is intended to prevent communications concerning wages, hours and working conditions and is not intended to prohibit any communications allowed by law." While that is currently the controlling law, it is highly likely that the new Obama NLRB will reverse this decision. The new Chairman of the Board, Wilma Liebman, authored the stinging dissent.

Prohibitions From Disclosing Wages And Working Conditions

This prohibition is sometimes found in "confidentiality" sections of handbooks and policy manuals. Properly-defined confidential business information (*i.e.*, cost figures, trade secrets and customer lists) can be protected from disclosure. Confidential information should be defined, however, with sufficient specificity to be clear that "wages," "wage rates" and "other terms and conditions of employment" are not included.

Prohibition Of Pins Or Decals

Wearing union insignia is considered a Section 7 right. Most rules which attempt to restrict pins or decals are invalid on their face. There are limited circumstances where uniformly enforced "no jewelry" rules designed to avoid product contamination may apply to union pins. There are also limited circumstances where a policy mandates wearing a company uniform and employees are in constant contact with customers, that the NLRB has considered it lawful to prevent union insignia or other buttons and pins. The minor exceptions are based on special business circumstances (*e.g.*, sales floor in retail settings or immediate patient care area in a hospital) and uniformity of enforcement.

Generalized Prohibition Against "False, Vicious Or Profane Statements" Or "Abrasive Or Insulting Language"

The NLRB believes that the type of generally described prohibition above inhibits legitimate employee protests protected by Section 7. The problem is not the intent of these types of rules; it is that their ill-defined breadth covers legitimate protests as well as conduct that is not legally protected. Some suggestions to "tighten" the language might be "maliciously false statements," "sexually explicit or pornographic comments" or "sexually, racially or otherwise harassing comments." Another approach is to include a disclaimer stating that "none of these rules is intended or will be applied in a manner to limit employee complaints or discourse which is protected by law."

Prohibitions Against "Fraternizing On Or Off Duty"

This type of rule is subject to an over-broad interpretation which could restrict employees from engaging in concerted activity. If the intent of the rule is to prohibit romantic relationships and/or nepotism, the language should be sharpened to specify what is actually prohibited.

Requirement That Complaints Be Presented Internally Or Follow A Designated Chain Of Command

Employees have the right, under Section 7, to complain to each other or to an outsider, like a union organizer. There is nothing wrong with a policy or rule which suggests the normal channel for pursuing a complaint. It is the prohibition against making the complaint in a different way which is unlawful.

Rules, Policies Or Statements To Report To A Supervisor "If Anyone Puts You Under Pressure To Support A Union Or Sign A Union Card"

The NLRB interprets these types of comments as "soliciting employees to report on the union activities of others." It is permissible to advise employees that the company will put a stop to "unlawful" conduct of which it is aware.

Rules Or Policies Prohibiting "Disruption Of Any Kind During Working Hours Or On Company Property"

The NLRB would consider this rule unlawful because it prohibits protected concerted activity. Bans on destruction of company property are permissible.

The Combination Of An "Anti-Union" Position Statement And A Requirement That Employees Comply With All Company Policies

It is a stretch, but the NLRB believes that employees would interpret the combination to mean that employees must comply with the "anti-union" position statement and forego rights to engage in union activity.

Bulletin Board Policies That Require "Company Approval" Before Any Employee Posting

Essentially, the NLRB believes that every employer would discriminate against any union-related employee posting. Solutions include prohibiting all employee postings or specifying what limited postings might be allowed (e.g., employee "swap and sell" notices in a prescribed format).

More To Come

Two of the most sensitive employer rules or policies are no solicitation/no distribution rules and no access rules (for off-duty employees). These two rules will be addressed in detail in an upcoming issue of The Employment Law Authority.

Conclusion

Why is a close legal review of employee handbooks and policies warranted? In some cases, the mere existence of an unlawful policy (even if it is never enforced) can be considered objectionable conduct, resulting in a rerun of an election in which employees rejected a union. In other instances, innocent application of a rule which the NLRB concludes violates NLRA Section 7 rights can lead to an award of back pay and reinstatement. That has always been an undesirable result. With the triple back pay and $20,000 fine per violation provisions in the proposed EFCA, it is a result no employer wants to face.

J. Hamilton Stewart, III, Ogletree Deakins (Greenville) 12/28/2009

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Jackson Lewis Testifies on Paycheck Fairness

Jackson Lewis Partner Jane McFetridge presented a compelling case to the U.S. Senate Committee on Health, Education, Labor and Pensions that proposed pay equity legislation could further harm employers already reeling from the ongoing economic crisis. Ms. McFetridge, Managing Partner of the firm's Chicago office, was one of six witnesses to offer testimony during the Committee's March 11th hearing on the pending Paycheck Fairness Act (S. 182), a measure that would fundamentally change the Equal Pay Act of 1963 ("EPA"), exposing employers to far greater liability than they face now.

Current Law: EPA

The EPA currently prohibits employers from paying a female employee less than a male employee for "substantially equal" work. The law does not require any showing of discriminatory intent, and a defendant will be liable for such a pay differential unless it can demonstrate that the discrepancy results from:

1. a seniority system;
2. a merit system;
3. a system which measures earnings by quantity or quality of production; or
4. any factor other than sex.

Successful plaintiffs may recover back pay, front pay (if unlawful retaliation is proven), prejudgment interest, attorneys' fees and costs.

Difficulties for Employers under Paycheck Fairness Act

The Paycheck Fairness Act would make it much more difficult for employers to mount an affirmative defense in EPA cases, while exposing businesses to unlimited compensatory and punitive damages and loosening the procedural requirements for class action litigation under the long-standing law.

In her testimony, Ms. McFetridge stressed that our existing laws, including the EPA and Title VII of the Civil Rights Act of 1964 ("Title VII"), provide robust protection against gender-based pay discrimination. She also emphasized that the employer community is already committed to ensuring gender pay parity. As evidence, Ms. McFetridge noted that in 2009, the EEOC found "reasonable cause" in only 4.6 percent of the EPA charges and 5 percent of the Title VII sex discrimination charges it received. This statistic, Ms. McFetridge said, demonstrates that the "vast majority of employees who file charges do not have valid claims."

Specifically addressing the Paycheck Fairness Act's unlimited compensatory and punitive damages provision, Ms. McFetridge explained in her written testimony that, for Title VII purposes, Congress purposely imposed damages caps that vary depending on the employer's size. Without a statutory damages cap, Ms. McFetridge told the Committee, "[t]he pending legislation… has the potential to cripple companies, particularly smaller businesses." She continued, "In the midst of this financial crisis, we should be encouraging small businesses to expand, not making it more difficult for them to operate and survive."

Another major problem with the Paycheck Fairness Act, Ms. McFetridge explained, is that it would replace the EPA's "any factor other than sex" defense with a much more demanding requirement. The employer would have to show the difference in pay was based on a "bona fide factor other than sex" that is "job related" and "consistent with business necessity." Further, the "business necessity" defense would be unavailable if a plaintiff demonstrates that "an alternative employment practice exists" that would serve the same business purpose.

"It will take years of costly litigation to sort out what is meant by these new affirmative defenses," Ms. McFetridge warned. "In the meantime, employers are left with little guidance as to how to conduct their business under this paradigm…. As a practical matter, there is simply no way an employer will be able to demonstrate that each and every pay determination it makes is consistent with business necessity."

Other problems with the proposed law, such as its opt-out class action procedure and expansion of the meaning of "establishment" for EPA purposes, are detailed in Ms. McFetridge's written testimony.

The Paycheck Fairness Act currently has 38 co-sponsors in the Senate. The House of Representatives passed an essentially identical bill along with the Lilly Ledbetter Fair Pay Act in January 2009 (H.R. 12).

Other Proposals in Congress

In addition to the Paycheck Fairness Act, the Fair Pay Act (H.R. 2151/S. 904) has been introduced in both the House and Senate. The Fair Pay Act, which is premised on the rejected "comparable worth" theory, among other things, would expand the EPA to cover race and national origin pay disparity claims and broaden the EPA's requirement that the plaintiff show different pay for equal work and instead require only "equivalent" work.

We will continue to monitor and keep you apprised of the latest developments with respect to both the Paycheck Fairness Act and the Fair Pay Act.

Jackson Lewis 3/15/2010

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Volume 15 Issue 2 | IMA Management Group Inc. | February 2010

Plaintiff in Supreme Court Retaliation Case Wins $1.5 Million

One year after the U.S. Supreme Court handed a judicial lifeline to Vicky Crawford, a Nashville schools employee who claimed she was fired in retaliation for remarks about her boss in a sexual harassment investigation, a jury awarded her $1.5 million in compensatory damages, back pay and future lost wages.

After a five-day trial, a jury in the U.S. District Court for the Middle District of Tennessee ruled Jan. 25, 2010, that the Metropolitan Government of Nashville and Davidson County (Metro) had illegally fired Crawford, a payroll coordinator who had worked for the school system for 30 years before she was terminated.

Although Crawford never filed her own sexual harassment complaint, she had been a willing participant in an internal investigation into the alleged sexual harassment of the organization's employee relations director in 2002. She told investigators, who were looking into allegations made by others, that the supervisor repeatedly asked to see her breasts and once grabbed her head and pulled it to his crotch. The official was never disciplined for his alleged behavior, but Crawford and two other employees who also said they were harassed soon came under investigation on other grounds and were fired.

In Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee , 129 S. Ct. 846 (2009), the Supreme Court had unanimously reversed two earlier pro-management decisions that limited coverage under the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964 to employees who complain on their own or are interviewed as part of a formal investigation. The lower courts had ruled for management on the grounds that since Crawford never filed a formal complaint, she didn't have anti-retaliation protections.

The Supreme Court ruled that Crawford's testimony fit within the "opposition" clause in Title VII's anti-retaliation provision.

"Nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same word when asked a question," Justice David Souter said for the court. Later he wrote, "If it were clear that an employee who reported discrimination in answering an employer's questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others."

After the 2009 Supreme Court ruling, Crawford's claim advanced to trial. Crawford has been unable to get a job since 2003, has lost her house and has no car, her attorney, Ann Steiner, said.

Rita Zeidner HR Magazine, 2/3/2010

IMA Updates

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Update from the President

Later this month or in early March, the IRS will begin examining Forms 941 filed for the 2008 calendar year. The examinations are part of a study by the National Research Program (NRP) within the IRS Office of Research, Analysis & Statistics to measure reporting and payment compliance for employment taxes.

NRP is working to close an employment tax gap estimated at $15 billion. These examinations will be detailed, and will provide the IRS with information about how taxpayers are treating employment-related tax matters. According to IRS officials, the goal of the NRP study and examinations is to compile trending information in five categories: worker classification, fringe benefits, executive compensation, backup withholding, and Forms 1099. But any employment tax issue that presents itself will be examined. IRS agents are being instructed to conduct worker classification determinations even in situations where it appears that all workers are employees.

The IRS has selected the 1,500 - 2,000 taxpayers it is going to examine. Taxpayers will know they have been selected for one of these audits if they receive a letter stating they are subject to a "compliance research examination," or if they receive a letter that states "3850-B."

The IRS and the courts are taking employment tax matters very seriously.

Beginning February 1, employers must post a summary of the total number of job-related injuries and illnesses that occurred last year. Employers are required to post only the Summary (OSHA Form 300A)-not the OSHA 300 Log -from Feb.1 to Apr. 30, 2009.

We encourage you to contact us with any questions, needs or suggestions you may have.

Thank you for your membership.

Larry Donnelly

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New Mental Health Parity Regulations Answer Some Open Questions

Three federal agencies have recently issued regulations interpreting the requirements of the new federal law known as the Wellstone Act. The regulations help employers understand their legally permissible options in offering mental health and substance abuse benefits on a going forward basis.

Background

The Mental Health Parity Act (MHPA) has been in place since 1996. The MHPA prohibits any annual and lifetime limits under employer group health plans which are more restrictive for mental health benefits than for other medical/surgical benefits. That law was expanded under the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (Wellstone Act). The Wellstone Act further restricts the ability of an employer group health plan to differentiate between mental health and medical/surgical benefits. For example, under the Wellstone Act, health plans can no longer impose any type of financial restriction including deductibles, copays, coinsurance and treatment limits on a less favorable basis for mental health benefits than for medical/surgical benefits. Further, the Wellstone Act expands its restrictions to apply to substance abuse benefits, as well as mental health benefits.

Effective Date The Wellstone Act began to apply as of the first day of the first plan year beginning after October 3, 2009 (i.e., January 1, 2010 for calendar year plans). HHS was required to issue regulations last fall interpreting the Wellstone Act. However, HHS indicated that it needed more time to consider the high volume of comments received. As a result, the regulations were published on February 2, 2010. The regulations will not apply until plan years beginning on or after July 1, 2010 (i.e., January 1, 2011 for calendar year plans). Plans maintained pursuant to a collective bargaining agreement ratified before the Wellstone Act was enacted have a delayed effective date – until the first day of the first plan year beginning on or after the later of the date on which the collective bargaining agreement terminates (without regard to extensions) or July 1, 2010. For the current year, employers are required to make a good faith effort to comply with the Wellstone Act absent the regulatory guidance.

Highlights Here are some highlights of the new regulations:

- **No Separate But Equal Deductible**. Some employee benefit practitioners believed that under the Wellstone Act, employer group health plans could potentially require separate but equal deductibles for mental health/substance abuse treatment vs. medical/surgical treatment. The new regulations prohibit such a practice.
- **Financial Requirements and Quantitative Treatment Limits.** Parity is required with respect to financial requirements and quantitative treatment limitations. In applying this rule, the new regulations identify six separate classifications: inpatient in-network benefits, inpatient out-of-network benefits, outpatient in-network benefits, outpatient out-of-network benefits, emergency care and prescription drugs. A plan may not apply a financial requirement or a treatment limit to mental health/substance abuse benefits in any of the six classes which is more restrictive than the "predominant" financial requirement or treatment limit applied to "substantially all" medical/surgical benefits in the same class. For this purpose, "predominant" means more than one-half and "substantially all" means at least two-thirds.
- **Nonquantitative Treatment Limits**. The regs also require parity with respect to nonquantitative treatment limits such as medical management, standards to admit a provider to a network, formulary design, and step therapy. For example, an employee assistance program (EAP) cannot serve as a gatekeeper, restricting or directing mental health care, unless a similar form of medical management is applied to medical/surgical benefits. Further, employers cannot require employees to exhaust EAP benefits before they can access mental health care if a similar requirement does not exist for accessing medical care.
- **Exemptions** As with the MPHA, small group health plans provided by employers with an average of no more than 50 employees on business days during the prior calendar year are exempt from the law. Further, while the MPHA also included a cost-based exemption where the employer can prove that compliance with the law will significantly increase its health plan costs, that exemption is much more restrictive under the Wellstone Act. The Wellstone Act increases the cost threshold, requires actuarial certification and revises the notice requirement. Further, the cost-based exemption may only be claimed for alternating plan years. Additional guidance will be issued in the near future regarding the cost-based exemption.

Employers should review their current mental health / substance abuse benefit provisions to determine whether they comply with the new regulations and plan to make any necessary adjustments.

Miller Johnson, February 10, 2010

Understanding Reasonable Accommodation

To help prevent discrimination against employees with disabilities, both the federal Americans with Disabilities Act and the California Fair Employment and Housing Act require employers to provide an employee with a disability "reasonable accommodation." This term means a modification or adjustment to the workplace that enables the employee to perform the essential functions (i.e., the primary duties) of the job.

Finding a reasonable accommodation can be a simple process. Sometimes, though, it involves working together with the employee who needs it, through an interactive dialogue. The employer must provide an effective and necessary accommodation, unless doing so would be an undue hardship—that is, extremely difficult and costly.

A recent California case reminds employers the duty to provide a reasonable accommodation is ongoing. The employer also is responsible for ensuring reasonable accommodations are implemented correctly and consistently over time.

A.M. v. Albertsons, LLC The California Court of Appeal in A.M. V. Albertsons, LLC, examined the adequacy of a reasonable accommodation when, on one occasion, the accommodation failed. A.M. worked at the grocery store Albertsons, both at the meat and deli counter and as a checker. In January 2003, she took a medical leave to receive cancer treatment. As a side effect from the treatment, A.M. had a very dry mouth. To counteract this, she needed to drink large quantities of water, which caused her to need to urinate frequently.

When A.M. returned to work at Albertsons in January 2004, she told her managers she needed to be able to keep water with her at all times, and to use the restroom frequently. The managers said this was not a problem, and she just needed to say something when she needed to use the restroom. From January 2004 until February 2005, this accommodation worked fine.

One evening in February 2005, A.M. was working at the check stand. Only two other employees were working at the time: a courtesy clerk who was not qualified to work as a checker, and Kellie Sampson, who was in charge of store operations when no senior managers were in the store. There was no evidence Albertsons previously told Sampson about A.M.'s condition or her need for an accommodation.

Albertsons did not allow employees to leave the check stand at the front of the store unattended, so A.M. could not go the restroom unless Sampson was there to relieve her. At about 8:00 p.m., A.M. saw Sampson and said she needed to take a break. She did not mention that she needed to use the restroom. A delivery truck was arriving, so Sampson asked A.M. to wait, and A.M. agreed to do so.

Sometime later, A.M. called Sampson on the store intercom and told her she needed to go to the restroom. Sampson was unloading merchandise and told A.M. she had to wait. About seven to ten minutes later, A.M. called Sampson on the intercom again, and Sampson repeated that she was busy and could not relieve A.M. A.M. told Sampson she was going to go the restroom. Sampson did not give A.M. permission to leave the check stand, and hung up the phone.

A.M. did not go to the restroom. She was unable to control herself and urinated while at the check stand. Eventually, she left the store, extremely upset. Over the next few months, A.M. suffered from depression and was withdrawn. She attempted to return to work at Albertsons in May 2005, but the store was unable to offer her a schedule that allowed her to attend therapy meetings, a condition of her return.

Later, when A.M.'s doctor released her to return to work, he conditioned it on her attending classes twice per week and working a day shift, when more employees were working and it was easier for A.M. to go to the restroom. Although initially she had trouble getting the shifts she needed to accommodate these restrictions, at the time of the trial, A.M. was back at work and Albertsons provided restroom breaks when she needed them.

A.M. filed a lawsuit against Albertsons, claiming the company did not provide her with a reasonable accommodation for her disability when it failed to give her a restroom break in February 2005, and did not engage in the interactive process when she attempted to return to work in May 2005. After a trial, a jury awarded A.M. $200,000, agreeing that Albertsons failed to accommodate her.

The Duty to Engage in the Interactive Process Albertsons unsuccessfully argued A.M. failed to participate in the "interactive process" by not notifying Sampson of her disability and the existing accommodation. The court explained the duty to engage in the interactive process and the duty to provide a reasonable accommodation are separate. The purpose of the interactive process is to determine what reasonable accommodation the employee needs. Once the employee and employer have established this, the employer must provide the accommodation. The employee does not have an ongoing duty to keep communicating with the employer; so, A.M. was not required to tell Sampson about the accommodation. In other words, the employer and employee share an obligation to find an accommodation. But once they do, the employer has the obligation to implement it.

The Duty to Provide a Reasonable Accommodation A.M. claimed that in failing to accommodate her on the one occasion when she was not able to take a restroom break, Albertsons did not meet its obligation to provide a reasonable accommodation. Albertsons responded that this single incident, after a longer period of successful accommodation, was not significant enough to entitle A.M. to recovery.

The Court of Appeal agreed with A.M. It took a rigid approach to reasonable accommodation, specifically stating that "a single failure to make reasonable accommodation can have tragic consequences." So, Albertsons's single error, after over a year of sufficient performance, was enough to sustain a jury award. In the court's view, Albertsons's had a duty not only to provide a reasonable accommodation, but to continue to provide it without fail.

The reasonable accommodation in this case is "the ability to use the restroom frequently during a shift." On the day in question, A.M. was denied that privilege because of the staffing in the store. A.M. therefore was "denied" the accommodation, albeit on one day. As a result, Albertsons was liable for damages. The extraordinary damages in this case for one missed rest room break were due to A.M.'s profound emotional distress and her pre-injury condition.

Employer Tips The court held Albertsons to a very high standard that may leave employers wondering how to ensure a reasonable accommodation is carried out perfectly, every time. Fortunately, the decision provides some clues about steps employers can take to stay on the right side of the law. In particular, employers should keep the following principles in mind:

Involve the right people in the interactive process. Albertsons had a five-step procedure for providing reasonable accommodation to an employee with a disability, a process that may have worked if the company had properly implemented it. But the process relied on Albertsons's human resources managers, not the store's managers, meeting with the employee to discuss the accommodation. Had the store's managers known human resources needed to be involved and contacted them to discuss A.M.'s situation, Albertsons may have been better able to manage the process from the start, with employees specifically trained and knowledgeable about the process.

Ensure those who need to know about the accommodation do. In addition to Sampson, other store employees who were sometimes left in charge of the store testified they did not know about A.M.'s need for an accommodation. Had those individuals been aware of the need and the accommodation, they may have been better able to provide it. At the same time, providing information about a needed accommodation does not mean releasing private medical information, or telling people who do not need to know. Additionally, supervisors must be trained to keep confidential information about accommodations and to prevent discrimination and retaliation against employees with disabilities.

Establish open communication. A.M. chose not to tell Sampson the reason she needed a break. She did not have to do so. Perhaps if she had a different avenue to make her concerns known, this situation would not have happened. For example, if she had a designated person or persons to call in case she was not given her accommodation, she might have been more comfortable to complain before things got out of hand. Employers also can improve open communication with simple steps like periodically checking in with the affected employee to ensure an accommodation is working and reiterating the organization's commitment to a long-term, sustainable solution.

Make sure the accommodation makes sense. An accommodation needs to meet legal standards, but it must also be practical. Also, the employer need not provide the employee's choice of accommodation. Although A.M.'s accommodation worked for over a year, scheduling A.M. to work when relief options were made failure more likely. Even if Sampson had been aware of A.M.'s need for an accommodation, competing duties made it difficult for her to respond quickly. The later requested accommodation—having A.M. work the day shift, when more employees who could relieve A.M. were in the store—may have been the more practical solution from the start.

Ask for input. While the Albertsons case makes clear that the ultimate responsibility for providing a reasonable accommodation rests with the employer, employers should still tell employees that that they want regular feedback and input. In policies, meetings, and follow up communications, employers should remind employees that they expect them to speak up right away if an accommodation is not working.

Immediately address inadvertent errors. Employers may be able to avoid lawsuits by addressing inadvertent wrongs when they happen. It is unclear from the opinion whether Albertsons took affirmative steps to address the failure of the accommodation. The court suggested Albertsons was not immediately responsive to A.M.'s need to work the day shift after the incident. Had Albertsons responded sensitively to A.M.'s plight, she might not have been as motivated to seek legal action in the first place.

Conclusion

There is no denying that A.M. v. Albertsons complicates the legal landscape for employers seeking to provide employees with disabilities with the accommodations to which they are entitled. However, by adopting and carefully and consistently following a few important guidelines, a careful employer may be able to avoid a legal minefield when it is time to provide—and maintain—a reasonable accommodation.

By Jennifer Brown Shaw and Alayna Schroeder, Shaw Valenza LLP

DOL Interprets FLSA Exemptions More Narrowly

Employers can expect to see the U.S. Department of Labor (DOL) take much narrower positions on the Fair Labor Standards Act's (FLSA) administrative and outside sales exemptions, Gregory Jacob, an attorney with Winston & Strawn in Washington, D.C., and the former solicitor of labor for the DOL during the Bush administration, said at a Jan. 26, 2010, firm webcast.

Already the DOL has opined in a friend-of-the-court brief filed with the 2nd U.S. Circuit Court of Appeals in wage and hour litigation against Novartis Pharmaceutical Corp. that pharmaceutical sales representatives do not fit within either the administrative or outside sales exemptions, he remarked.

DOL's Influence in Wage and Hour Cases

Even though DOL efforts account for less than 10 percent of total wage and hour enforcement, the DOL can have a tremendous influence on exemption issues, Jacob explained.

Courts must defer to DOL positions articulated in the department's briefs, even if the positions appear there for the first time, unless the department's positions are arbitrary and capricious, he emphasized. So, it's important, he said, for organizations to pay attention to the DOL's pronouncement in its briefs and, once a wage and hour administrator is confirmed, the backlog of wage and hour opinion letters awaiting the new administrator's signature. The nomination of Lorelei Boylan for the administrator position has, he noted, been withdrawn.

In its *Novartis* brief, the DOL opined that pharmaceutical sales reps are nonexempt because they were not outside sales employees when no goods or services actually were sold. While the representatives worked with very little supervision, specific instructions were provided for each aspect of the job, so the DOL argued there wasn't the requisite independent judgment in matters of significance needed to qualify for the administrative exemption.

The facts are bad for Novartis to defend its classification of the pharmaceutical sales representatives as exempt in this case, according to Jacob. He said that the reps had a list of doctors who they are to visit each day and did not have the discretion to visit other doctors, although they did have discretion to select the order of their visits, the manner in which to approach the doctor based on the doctor's personality and how best to deliver the company's "core message" for a particular drug given the time limits of a visit. Jacob characterized this fact pattern as "less favorable" than with most pharmaceutical sales representatives.

But the DOL is taking a stance that will make it "harder for most people to qualify" for the administrative exemption in this brief, and Jacob expects the DOL to continue to narrow its interpretation of the exemption going forward. Consequently, he said, this is a good time for companies to examine employees who it has identified as falling within the administrative exemption to see if they still qualify even as the DOL tightens the exemption.

DOL Staffing Up

The department has shifted its emphasis away from compliance assistance and is staffing up to increase enforcement, Jacob added.

The Wage and Hour Division has a 28 percent increase in its 2010 budget for 1,558 full-time employees versus 1,283 in 2009, he noted. The Office of Federal Contract Compliance Programs has increased its full-time staff almost 26 percent to 740 in 2010, an increase from 585 full-time employees in 2009, and is placing much more emphasis on compensation discrimination, Jacob said.

The Occupational Safety and Health Administration's (OSHA) budget has increased by a smaller percentage—11 percent—with 1,693 employees in 2010, up from 1,557 in 2009. However, Jacob said that the number of regulation writers with OSHA has risen 32 percent in the 2010 budget from 78 to 103. So, he said, employers should expect more OSHA rulemaking.

The Employee Benefits Security Administration (EBSA) has gotten a 6 percent increase in full-time employees for 2010, he said, from 835 in 2009 to 905 in 2010. Jacob highlighted a 28 percent budget increase in EBSA's budget for executive leadership and program administration and said this could translate into a "more politicized" agency.

Jacob cautioned employers that this is "not a great time to ask for opinions" from the DOL, which he predicted would not often be sympathetic to business interests. Before seeking out DOL opinions, he said, employers should consider carefully whether they might be taking "the opportunity to say something [to the DOL] that ultimately would come back to haunt you."

Allen Smith, J.D., SHRM 1/28/2010

Employer's Discriminatory and Overbroad Restrictions on Union Activity Violate NLRA, Court Rules

Showing deference to the National Labor Relations Board, the federal appeals court in Chicago has upheld the Board's determination that a company violated the National Labor Relations Act by restricting union organizing activity at the workplace. *Loparex LLC v. NLRB*, Nos. 09-2187, 09-2289 (7th Cir. Dec. 31, 2009). The Court also agreed that the company's shift leaders were not statutory supervisors under the NLRA. Accordingly, the Court granted the Board's order for the company to cease its unfair labor practices and to take affirmative steps to remedy its past violations. The Seventh Circuit has jurisdiction over Illinois, Indiana, and Wisconsin.

The company owns and operates a manufacturing plant in Wisconsin with approximately 200 employees. When a handful of them began to try to unionize the workforce, the company instituted a number of restrictions on activity in the workplace. These included:

- requiring approval from the company before posting any material on company bulletin boards,
- telling union advocates they violated company policy in distributing pro-union flyers in the company parking lot, and
- telling union advocates that passing out Teamster union buttons in the plant and leaving buttons near a time clock violated company policy.

Additionally, the company discouraged employees from talking about the union during working hours, and told shift leaders they were supervisors under the NLRA, prohibited from participating in union activities.

The union filed unfair labor practice charges against the company in response to its policies and the Board found the company violated the NLRA by:

- promulgating its bulletin board policy because of anti-union animus,
- announcing unlawfully broad constraints on employee communications relating to unionization, and
- treating shift leaders as though they were supervisors under the Act.

Bulletin Board Policy

On review, the Court first noted the NLRA offers employees broad protection from employers' attempts to interfere with, restrain, or coerce employees in the exercise of their rights to organize. This, however, "does not give employees an unfettered right to use a company's bulletin boards to stir up interest in unionization." Therefore, "the critical question is whether the employer is discriminating against union messages, or if it has a neutral policy of permitting only certain kinds of postings (for example, those related directly to work rules)." Even if a new policy is facially neutral and not applied discriminatorily, an employer may violate the NLRA if the policy is motivated by "its hostility toward pro-union activity" (i.e., anti-union animus). Further, the Board is entitled to rely upon circumstantial evidence.

The Court determined that the Board had made a prima facie showing that anti-union animus was a substantial or motivating factor in the employer's new requirement that anything posted on company bulletin boards be pre-approved. As the company did not present any evidence to overcome this showing, the new bulletin board policy violated the NLRA.

Distribution of Union Flyers and Buttons

The Court said the NLRA recognizes that employees' organizing activities may substantially interfere with employers' property rights and interests in maintaining productivity and discipline. While an employer is entitled to limit or ban union solicitation in the workplace during work time, it may not prohibit all solicitation in a company parking lot, the Court ruled. Accordingly, the Court held the company engaged in an unfair labor practice in barring employees from placing union flyers under the windshield wipers of cars parked in the company parking lot.

Additionally, the Court held that the company's policy against union buttons was overbroad under the NLRA. A company manager had warned employees, "I don't want to catch you passing buttons out, Okay, I don't want to see them laying around …. You can pass them out when you're outside, on your own time, but when you're here working, you, you, need to be working." The company sought to characterize the warning as "an anti-clutter order." The Court did not agree, finding this overbroad and operates in a way that discriminates against union organizers — employees could have believed they were barred from soliciting near the time clock, a non-work area, during non-working hours.

Shift Leaders as Supervisors

Finally, the Court determined that the company engaged in an unfair labor practice by telling shift leaders that they were NLRA statutory supervisors and were forbidden to engage in pro-union activity. Shift leaders did not have the authority to transfer, assign, responsibly direct, or to effectively recommend rewards for workers, as required under the Act, the Court found. They worked under a team manager and would receive a priority sheet at the beginning of each shift that listed the jobs for each machine in order of importance and when those jobs are due. Based on the priority sheet, shift leaders directed crew members which machine to operate during the shift. Machine assignments were random or based on the need to finish a job. Shift leaders did not take into account the relative skills of their crew members. They also operated machinery. Therefore, the Court determined shift leaders were not NLRA supervisors and cannot be prohibited from engaging in pro-union activity.

Jackson Lewis 1/7/2010

Failure to Pay Over Payroll Taxes Could Land You in Jail - The Sequel

Once again, the IRS has successfully secured the conviction of a business owner who willfully failed to pay over payroll taxes withheld from his employees. In *Crabbe v. United States*, No. 08-1393, 2010 U.S. App. LEXIS 1931 (10th Cir. Jan. 28, 2010), the U.S. Court of Appeals for the 10th Circuit affirmed the conviction and 37-month sentence of the business owner.

Payroll taxes withheld from employee paychecks are the property of the U.S. government, and are held in trust by employers until such time as they are deposited with the government. If a business fails to deposit payroll taxes, the IRS will seek to recoup them from any "responsible person" of the employer, including officers, directors, owners, or bookkeepers with signature authority over a bank account. The personal liability of such individuals can be substantial, and can include criminal liability under § 7202 of the Internal Revenue Code for "willful" failures to "collect, account for, and pay over" payroll taxes.

In the past, criminal prosecutions under § 7202 were fairly rare, and the IRS was content to seek civil penalties against violators. However, in 2008, the IRS secured the conviction and 30-month sentence of a business owner who failed to pay over a portion of the payroll taxes he collected from his employees to the IRS, because he claimed he needed to money to meet the operating expenses of his business. *See United States v. Easterday*, 539 F.3d 1176 (9th Cir. 2008) and "Failure to Pay Over Payroll Taxes Could Land You in Jail." As the conviction in *Crabbe* makes clear, the IRS' use of its prosecutorial powers in *Easterday* for such violations was no fluke, and business owners need to ensure they are properly remitting payroll taxes to the government.

In *Crabbe*, the business owner was the vice president of a business that provided nursing services to healthcare facilities. He had no defined duties and was not responsible for the day-to-day management of the company. The business operated by contracting with nurses willing to provide short-term services, and matching them with facilities that had contracted with the business for such services. In doing so, the nurses signed contracts with the business that stated they were employees of the business, that the business was responsible for withholding all applicable payroll taxes, and that it would issue them W-2s for their wages.

In 1999, Crabbe learned that his partner had failed to pay over payroll taxes to the government. He convinced the president to retain a tax attorney who advised the business to stay up to date with its payroll tax obligations and resolve its deficiencies as best it could. For a short time thereafter, the company regularly paid over its payroll taxes, but by the end of 1999, it had fallen behind again.

In 2000, Crabbe unilaterally opened a bank account on his own through which he intended to pay the company's taxes. In 2001, Crabbe convinced the president to allow him to prepare the company's delinquent quarterly payroll tax returns that spanned from the first quarter of 1999 to the first quarter of 2001. Crabbe filed them himself, after using the company's payroll software to prepare the delinquent returns (*i.e.*, Forms 990). On each of these forms, Crabbe only counted and paid over the taxes withheld for the business' corporate employees, and did not include any of its nurses in the payroll tax deposits made to the government.

In October 2002, Crabbe was informed that he had failed to file returns for the company's nurses from whom the company had withheld federal taxes, and that he had misrepresented the number of employees on some of the returns he had filed. Although he asked how to remedy these misrepresentations, and another employee began preparing correct and complete returns, Crabbe took no further action at that time.

In 2003, the IRS became aware of the issue, and by 2004, it had opened a criminal investigation into the company and its officers. In August 2004, after being informed of the criminal investigation, Crabbe remedied his previously deficient filings by completing new tax returns and paying over all the payroll taxes withheld from his staff. Nonetheless, Crabbe was convicted of 30 violations of the federal tax laws and received a 37-month prison sentence.

On appeal, the 10th Circuit affirmed Crabbe's conviction. The court rejected, among other things, Crabbe's claim that the nurses were independent contractors and not employees, noting specifically that the business had the power to control the method and manner in which they worked, had contracted with the nurses to pay them wages, withheld payroll taxes, and issued W-2s.

The court further held that Crabbe was a "responsible person" pursuant to § 7202 because he was a corporate officer, had the authority to distribute funds, had a large ownership interest in the company, and had fired at least one employee in the past. Most importantly, however, the court held that Crabbe's violations of the tax laws were willful, despite his efforts to remedy the company's deficiencies, because he was aware of his duties, intentionally failed to pay over the payroll taxes withheld from the nursing staff, and failed to fully remedy the problems until he was already the subject of a criminal investigation.

Crabbe and *Easterday* underscore the importance of paying over payroll taxes owed to the government. Moreover, they show that remedying past violations may not be adequate to avoid criminal prosecution. Thus, employers, and more specifically their principals, must be sure to completely pay over their collected payroll taxes in a timely fashion or face prosecution.

McGuireWoods News 2/4/2010

IMA UPDATE

Volume 15 Issue 1 IMA Management Group Inc. January 2010

DOL Publishes Model COBRA Notices, Other Compliance Resources

As we previously published in our December 21, 2009 Legal Alert, on December 19, President Obama signed into law the Department of Defense Appropriations Act of 2010 (the "2010 DOD Act") extending the 65% COBRA subsidy that had been previously enacted under the American Recovery and Reinvestment Act of 2009 (the "ARRA"). Under the ARRA, eligibility for the 9-month subsidy was scheduled to end December 31, 2009. The 2010 DOD Act made several important modifications to the ARRA, including: (1) extending eligibility for the subsidy to individuals who are terminated through February 28, 2010 ("assistance eligible individuals" or "AEI"s); (2) lengthening the maximum duration of the subsidy from 9 to 15 months; and (3) adding new notification requirements. The 2010 DOD Act also clarified that eligibility for the subsidy depends upon termination date – not the date on which the AEI would otherwise be eligible for COBRA coverage.

On January 13, 2010, the Department of Labor's website reflected model notices to help employers and plan administrators comply with the 2010 DOD Act's new notification requirements. The model notices may be found on the DOL's website at http://www.dol.gov/ebsa/COBRAmodelnotice.html. There are three updated model notices.

First, plans must provide an updated General Notice to all qualified beneficiaries – not just AEIs – who experience a qualifying event at any time through February 28, 2010. The model notice includes updated information on the premium reduction as well as information required in a COBRA election notice.

The updated General Notice must be provided to those who have not yet been given an election notice, **regardless of the type of qualifying event**. (Individuals who experience an involuntary termination of employment after December 19, 2009 (the date of the 2010 DOD Act) must receive the updated General Notice within the normal COBRA notice deadlines.)

Second, there is a Premium Assistance Extension Notice that must be provided in several situations. Individuals who were AEIs on October 31, 2009 and are still receiving the subsidy under the ARRA (*i.e.*, have not exhausted 9 months of premium reduction assistance), and individuals who experienced a termination of employment after October 31, 2009 and lost their health coverage, must be provided a Premium Assistance Extension Notice (unless they were already provided a timely updated General Notice). In addition, AEIs who began receiving the premium subsidy on March 1, 2009 but exhausted it after 9 months and then dropped COBRA coverage must be notified that they may be eligible to retroactively elect COBRA and pay reduced premiums for retroactive coverage; to do so, however, they must pay 35% of their premium costs within 30 days after the Premium Assistance Extension Notice is provided. Finally, individuals who began receiving the premium subsidy on March 1, 2009, exhausted it after 9 months, but continued unsubsidized COBRA coverage must be provided the Premium Assistance Extension Notice within the first 60 days following the

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Update from the President

The U.S. Department of Labor recently released its Semiannual Regulatory Agenda, in which the agency announced its regulatory agenda and priorities for the upcoming year. The sessions are scheduled as follows:

January 12, 2010 – 2:00-3:00 EST: "Affirmative Action & Nondiscrimination Obligations of Contractors and Subcontractors; Evaluation of Recruitment and Placement Results under Section 503 of the Rehabilitation Act." According to the Regulatory Agenda, the OFCCP will focus on strengthening these requirements by requiring federal contractors and subcontractors "to conduct more substantive analyses and fully monitor their recruitment and placement efforts on behalf of individuals with disabilities." The OFCCP plans to publish an Advance Notice of Proposed Rulemaking for this regulation in December 2010.

January 14, 2010 – 2:00-3:00 EST: "Affirmative Action & Nondiscrimination Obligations of Contractors and Subcontractors; Evaluation of Recruitment and Placement Results under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA)." According to the Regulatory Agenda, this revision would "require that federal contractors and subcontractors conduct more substantive analyses of recruitment and placement actions taken under VEVRAA and would require the use of numerical targets to measure the effectiveness of affirmative action efforts." The projected publication date for the Notice of Proposed Rulemaking for this regulation is December 2010.

January 20, 2010 – 2:00-3:00 EST: "Construction Contractor Affirmative Action Requirements." . . .

Registration information for these sessions is available on the OFCCP's web site at: http://www.dol.gov/ofccp/web_listening_series.htm.

We encourage you to contact us with any questions, needs or suggestions you may have.

Thank you for your membership.

Larry Donnelly

National Position Evaluation Plan
A Measure of Value

NPEP is a Point Factor Evaluation System. It evaluates each position according to 11 established criteria that can be applied to any position in any organization. As a result, your salary structure is Objective, Equitable, and Non-discriminatory. It will help you to use your salary dollars more efficiently, organize your Wage & Salary system, improve employee morale and have a system that is defensible against discrimination claims.

Affirmative Action Plan Preparation

Are your AAP's up to date and ready in the event of an audit?

Do you know that a well written plan may exclude you from an in-house audit?

Changes have been made to the regulations that give an OFCCP investigator options on how to proceed with a contractor. As a result, fewer companies are having full audits and many more companies are being audited. Being prepared, will reduce the chances of your organization going through a complete audit.

Contact IMA for information on the above services

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end of their 9 months of subsidized coverage (the period following expiration of the 9-month subsidy but during which the individual continues to be an AEI under the 2010 DOD Act is referred to as the "transition period").

Third, there is a model updated Alternative Notice that insurance issuers who provide group health insurance coverage must send to those persons who became eligible for continuation coverage under state law. Continuation coverage requirements vary among states and issuers should modify this model Alternative Notice as necessary. Issuers may also find the model Premium Assistance Extension Notice or the updated model General Notice appropriate for use in certain situations.

The DOL's Employee Benefits Security Administration has also released a Fact Sheet (available at http://www.dol.gov/ebsa/newsroom/fscobrapremiumreduction.html) and some initial Official Guidance that summarizes the provisions of the 2010 DOD Act. The Official Guidance (http://www.dol.gov/ebsa/faqs/faq-cobra-premiumreductionEE.html), consisting of 15 questions and answers, provides answers to many of the commonly asked questions about the subsidy extension.

The Bottom Line:

Employers should act quickly to take the following next steps:

- Identify all qualified beneficiaries who experienced a qualifying event at any time from September 1, 2008 through February 28, 2010 regardless of the type of qualifying event. Determine if those persons have been provided a COBRA election notice and a general notice about the subsidy.
- Identify those individuals who must be provided a Premium Assistance Extension Notice, including individuals who are entitled to notice of their right to elect COBRA retroactively and individuals who are or were in a "transition period."
- Tailor the COBRA Model Notices to meet the administrative procedures and other requirements of the group health plan. Keep in mind that because continuation coverage requirements vary among states, the Updated Alternative Notice should be modified as necessary to conform to the applicable State law.
- Review severance policy for COBRA implications.
- Update employee handbooks and/or other company policies concerning COBRA to provide notice of the subsidy extension.
- Reach out to third-party administrators to make sure that group health plans reflect the COBRA subsidy extension accurately.
- Determine whether any updates to plan documents are necessary.

Lindsay O'Brien, Ford & Harrison, 1/14/2010

IRS Response to Question on Date to Claim Credit for COBRA Assistance Coverage

Q. If, in 2010, an employer receives payment of an assistance eligible individual's 35% share of the COBRA premium for 2009 coverage, does question FP-15 permit the credit for the related 65% premium subsidy to be claimed for a quarter in 2009?

A. No. If an employer receives an assistance eligible individual's 35% share of the COBRA premium in 2010, the employer may claim the credit for the related premium subsidy on Form 941 for either the quarter in 2010 in which it receives the individual's 35% premium payment or a later quarter in 2010, but not for a quarter in 2009, regardless of the fact that the premium is for coverage during 2009. In all cases, however, if an employer chooses to reduce its payroll tax deposits during the quarter based on the receipt of the individual's 35% premium payment, the employer must claim the credit for the related subsidy amount on Form 941 for the quarter during which its payroll tax deposits were reduced. In addition, of course, an employer may only claim credit for the subsidy amount once.

The Year In Labor & Employment Law, from A to Z

A - The **American Recovery and Reinvestment Act**, or **ARRA**, was a comprehensive piece of legislation designed to stimulate the economy during our "Great Recession." For employers, the most significant aspect of the new law involved the continuation of health care coverage through COBRA for those involuntarily terminated since September 1, 2008, with employees paying 35% of their premiums and employers on the hook for the remaining 65%. Although set to expire on December 31, 2009, Congress is considering extending the benefit and raising the employer contribution to 75%. Stay tuned for developments in the early part of 2010.

B - President **Barack Obama** wasted no time making federal appointments that will impact labor and employment law for years to come. He selected Rep. Hilda Solis, a long-time advocate of progressive labor policies, as the head of the Department of Labor. The President also selected Judge Sonia Sotomayor as a Justice for the U.S. Supreme Court, providing relative youth and a shot of liberal energy to an aging and conservative Court. He also nominated candidates for over 30 federal judgeships in district and appellate courts across the country, with close to 100 vacancies that need to be filled, and an additional 22 vacancies to open up in 2010. These appointments will no doubt lead to more worker-friendly decisions from federal courts for years to come.

C - After President Obama was elected, most predicted that **"card check"** legislation was not far behind. The Employee Free Choice Act (EFCA) was the crown jewel of Big Labor's legislative agenda. Fortunately for employers, partisan bickering and a faltering economy has distracted Congress and EFCA remains in a holding pattern as we end 2009. Employers shouldn't celebrate yet – EFCA will no doubt reemerge in 2010, although many predict that a watered-down version will now pass (perhaps involving "quickie elections").

D -Several states passed laws prohibiting cell phone use or texting while driving in 2009, believing that these **driving distractions** unnecessarily cause accidents. Seven states and the District of Columbia now ban hand-held cell phone usage while driving, while text messaging is now banned for drivers in 19 states. It's a good bet that these numbers will increase in 2010.

E, F - The **EEOC** had a busy year in 2009, proposing new regulations for the Americans with Disabilities Act (ADA) that promise to expand the reach of the law even further. It hopes to finalize the new rules by January 2010. Another federal agency, the Department of Labor, published new **FMLA** regulations that went into effect this year, leading to an ever-increasing administrative burden on employers. In 2010, we expect to see proponents of paid family leave continue to push for California-style FMLA benefits.

G - Employers will need to familiarize themselves with yet another acronym this year: **GINA**, or the Genetic Information Nondiscrimination Act, which went into effect in November and prohibits employers from acquiring or using genetic information about its employees. And employers need to add yet another poster to the crowded bulletin board in the break room, this time about employees' genetic privacy rights.

H - Health care reform will continue to be the main focus for Congress into 2010, with most analysts predicting some form of legislation passing by the end of 2009 or early in 2010. It will likely lead to big changes to the way that Americans are insured, and most likely will impact employers. Some versions of proposed legislation include requirements that employers provide health insurance to all employees, others would create a tax on employer-sponsored high-end insurance plans. This will no doubt be a hot topic in the coming year.

I - Another area of law that had a roller coaster 2009 is **immigration –** after several years of waiting for the social security no-match rule to take effect, the Obama administration dropped the initiative altogether in September. Instead, the federal government has decided to step up audits and raids as a means to control illegal immigration in the workplace. The other big news was the requirement that all federal contractors use E-Verify, the online employment eligibility verification system.

J, K - When **Johnny (and Jane) came marching home** in 2009, what should his (or her) employer have done? The federal government expanded the leave rights of military servicemembers and their families this past year by implementing new regulations that provide qualifying exigency leave and additional leave for those needing to care for injured military personnel. Most recently, in October 2009, Congress created somewhat of a **knotty situation** for employers by enacting additional changes to the leave provisions, further expanding the circumstances under which employees may take both qualifying exigency and military caregiver leave, and producing a thicket of confusing and complicated requirements.

L, M, N - Besides EFCA, there are plenty of other **labor initiatives** that could emerge from Congress this year: the expansion of FMLA, the Working Families Flexibility Act (the "Union of One" bill that would allow non-unionized employees to file grievances against employers), the Employment Non-Discrimination Act (ENDA) (expanding Title VII protections based on sexual orientation), the RESPECT Act (allowing managers to be part of a union), and the Patriot Employer Act (offering tax breaks to those companies that agree to union neutrality). Many predict there will be a scramble to push through many of these and other bills before the **midterm elections**, where some are already predicting a 1994-like reversal of fortunes for the GOP, which could stall out many Democratic initiatives.

Meanwhile, as the **NLRB** is reconstituted under President Obama's direction, the agency seems poised to administratively accomplish many labor-friendly goals that might be more appropriate for lawmakers, stepping into the void left by a distracted Congress. Expect to see a very active year on the labor front in 2010.

O - One of the more active and aggressive government agencies in 2009 was **OSHA**, and it figures to remain busy in 2010. The agency has announced that it will step up enforcement actions in the coming months, and also expects to issue new safety standards for almost all areas of industry. The new administration has placed workplace safety on its priority list. That means you should do the same.

P - Employers across the country were actively addressing **pandemic preparations** for much of the past 6 months, and will continue to remain on high alert in 2010. Although the H1N1 scare did not cripple the workforce as some predicted, it did force all employers to reassess their approach to possible mass absenteeism.

Q - For years, most employers only saw **QWERTY** keyboards as a tool to help accomplish work. In 2009, employers began to realize that the computer could be both a beneficial resource and a source of problems with the rise of social networking websites such as MySpace, Facebook and Twitter. Catching up to the evolving legal landscape, employers began to determine when these websites could be mined for background information on applicants and employees, and reacted when they realized that some employees were inappropriately blogging about company matters. If you don't have an effective social media policy in your handbook, you're not ready for 2010.

R - 2009 also saw the **reemergence of the sexual harassment claim**. When a celebrity like David Letterman is in the news for inappropriate workplace behavior, you can almost certainly predict a resulting spike in such claims across the country. The last year saw an increase in the number of lawsuits and discrimination charges alleging sexual harassment, with "textual harassment" (harassment by text message) being just the latest chapter in this sordid area of law.

S, T, U - The **Supreme Court** had an interesting year, only issuing a few decisions of any import in the area of labor and employment law. The most notable was the *Ricci v. DeStefano* reverse discrimination case involving Connecticut firefighters, which was a mixed bag for employers. One of the gains employers achieved before the Court – increasing the burden on age discrimination plaintiffs (*Gross v. FBL Financial*) – may soon be overturned by Congress in a manner similar to another recent case.

Lawmakers **turned the tables** on employers by taking a victory from last year's term and passing a law reversing the victory, allowing pay discrimination claims to be resurrected well past the statute of limitations (the Lilly Ledbetter Act). We may also see arbitration victories of the recent past reversed by the Arbitration Fairness Act, which would curtail the use of these alternative agreements. The **upcoming docket** for the Supreme Court includes several traditional labor cases, arbitration cases, and a case dealing with the timeliness of Title VII claims.

V - The EEOC's semiannual regulatory agenda was released in early December, and it offers a **veritable cornucopia** of ambitious new priorities to track in 2010. In this era of layoffs, the agency is increasingly focused on age discrimination claims and intends to issue revised guidance in this area starting in February. It also plans on finalizing ADA regulations in the first quarter of the year, and finalizing new GINA regulations by midyear.

W - As always, **wage and hour issues** impacted millions of employers, especially as some companies tried to cut corners and got burned by FLSA claims. Some employers tried to shave costs by transforming employees into independent contractors without realizing the disastrous legal consequences of doing so incorrectly, while others tried to squeeze off-the-clock work out of their employees.

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X - After a few years of slow growth, 2009 witnessed the **xplosion** [sorry, "x" is tough] of new lawsuits filed against employers. No doubt the slumping economy and increased layoffs led to additional claims, as did the availability of new laws and the expansion of existing ones. Almost all signs point to this trend continuing in 2010, especially as job growth remains stagnant and out-of-work individuals seek rewards through litigation.

Y, Z - We've reached the end of the **year**, and perhaps one of the best things about 2009 is that it's over and we can all start fresh in 2010. Things can't get worse for companies, can they? We look forward to **zealously** tracking labor and employment developments in 2010 and will continue to provide practical solutions to your employment dilemmas.

Fisher & Phillips LLP, January 2010

IMA Updates

Have you been receiving our "IMA Updates" by email. If not be sure to email (imamg@verizon.net) us your email address and we will put you on our *IMA Update* list

Retaliation Claims Now Tied with Race Discrimination as Most Common Charge with EEOC

Retaliation moved up to a tie with race discrimination as the most common type of charge filed with the U.S. Equal Employment Opportunity Commission (EEOC), according to statistics released by the EEOC on Jan. 6, 2010.

For years, race discrimination claims have led all other types of claims filed with the agency, but in fiscal year (FY) 2009, 36 percent of the 93,277 workplace discrimination charges filed with the federal agency nationwide alleged discrimination based on retaliation and 36 percent alleged race discrimination. Multiple types of discrimination may be alleged in a single charge filing, the EEOC noted.

The FY 2009 data show that job bias charges alleging discrimination based on disability, religion and/or national origin hit record highs. The number of charges alleging age-based discrimination reached the second-highest level ever.

The total number of charges filed with the agency in FY 2009 was the second highest for any fiscal year. More charges were filed with the agency in 2008, when a record 95,402 charges were filed.

Multiple Factors Explain Rise

The near-historic level of total discrimination charge filings may be attributable to multiple factors, including greater public accessibility to the EEOC, economic conditions, increased diversity, demographic shifts in the labor force, greater employee awareness of their rights under the law, and changes to the agency's intake practices that cut down on the steps needed for an individual to file a charge, the EEOC stated.

In addition, many management attorneys have predicted the U.S. Supreme Court's receptivity to retaliation claims, most notably in *Burlington Northern v. White* (548 U.S. 53 (2006)), will lead to more retaliation charges.

Millions Recovered in EEOC Resolutions

The EEOC resolved 85,980 private-sector charges in FY 2009. In FY 2009, the commission resolved more charges than ever alleging unlawful harassment as well as allegations under Title VII of the Civil Rights Act. In FY 2009, the EEOC recovered a record high of $294 million through administrative enforcement and mediation.

Through its combined enforcement, mediation and litigation programs, the EEOC recovered more than $376 million in monetary relief (e.g., court decrees and settlements requiring employers to change discriminatory policies or practices) in FY 2009, which ended Sept. 30, 2009.

The EEOC's enforcement and litigation statistics are posted on the agency's web site at

http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm.

Allen Smith, J.D., SHRM 1/6/10

New Penalty for Failing to Report Payments to Medicare Beneficiaries

On January 1, 2010, a failure to comply with a new requirement for reporting to Medicare payments to Medicare-eligible individuals for resolution of claims involving medical expenses could cost the payor $1,000 per day in penalties for noncompliance.

Background

Medicare is a government-funded health insurance program primarily for individuals age 65 or older. However, Medicare is not intended to be the primary insurance coverage for such individuals where there are other funds available to pay for the medical treatment (*i.e.*, Medicare is a "secondary payer").

In response to increasing costs and funding concerns for Medicare, Congress passed the "Medicare, Medicaid and SCHIP Extension Act of 2007" (MMSEA) which President George W. Bush signed into law on December 29, 2007. *See* 42 U.S.C. § 1395y(b). The purpose of the Act is to enable Medicare to determine when its beneficiaries have received payment or reimbursement for medical expenses which Medicare could recoup.

What Is Required?

Section 1395y(b)(7) of the Act requires a "Responsible Reporting Entity" (RRE) to register with the Centers for Medicare and Medicaid Services (CMS) Coordination of Benefits Contractor (COBC) and electronically file certain information on third-party claims that involve payments to Medicare-eligible claimants. This information includes identifying information about the individual (including his or her social security number) and the amount paid to the individual to resolve all or part of a claim for medical expenses. The payment is referred to as the Total Payment Obligation to Claimant (TPOC).

An RRE can be any entity that is self-insured for all or part of a particular claim involving medical expenses. Where the claimant is a Medicare beneficiary and either (i) the claimant has made a claim for medical expenses or (ii) the claim results in a settlement, judgment, award or other payment to the Medicare beneficiary that resolves claims for medical expenses, the RRE must make a report on the payment to the COBC.

Why Is This Important for Employers?

The problem is this: any employer that is self-insured for all or part of any claim for medical expenses (*i.e.*, personal injury claims, which can include claims for discrimination or harassment) can be an RRE and thus subject to the reporting requirement. Why is this important? Effective January 1, 2010, an RRE that fails to properly report to the COBC a covered payment to a Medicare-eligible claimant will be subject to a civil penalty of $1,000 for each day it fails to report the payment.

Group health plan insurers and third-party administrators of self-funded group health plans were required to begin providing information to CMS on certain individuals entitled to Medicare benefits in 2008. However, there are situations in which employers may also qualify as RREs. On and after January 1, 2010, where an employer is fully or partially (*e.g.*, a deductible) self-insured for tort or employment claims potentially involving personal injuries to a Medicare-eligible claimant, payments by the employer to such a claimant must be reported to the COBC.

What Should Employers Do?

- Employers should consult with their insurance carriers and the attorneys handling their insured liability claims to ensure that preparations have been made to report information on TPOC payments made on or after January 1, 2010.
- Employers should examine their claims history and determine if any claims or demands could be made against their company for personal injury, including claims for harassment or discrimination, for which the company would be self-insured for all or part of a claim. This includes deductibles on Employment Practices Liability Insurance (EPLI) policies.

  If "yes," the employer should register with the COBC to begin the process of filing claim information.

  If "no," the employer should stay on alert for such claims, and consider registering with the COBC in case it is obligated to report a covered payment in the future.
- For claims pending against a company for which the company may be required to make a payment to the claimant, the company should determine if the individual making a claim is a Medicare beneficiary. (Note: as an individual's Medicare status can change during the course of litigation, such an inquiry should be made at the beginning of the litigation and at the time of a final payment to the claimant, at a minimum. Inquiries about a claimant's Medicare status can be made (i) to the claimant, and (ii) through the COBC by entities registered to report TPOC payments.
- When a Medicare-eligible claimant has made a claim for personal injury/medical expenses at any time during a dispute, or when a payment is made to such a claimant settling a claim for medicals or any personal injury, the payment should be reported promptly to the COBC.

Additional Information

The COBC website is located at http://www.section111.cms.hhs.gov/. The CMS User Guide for MMSEA reporting can be http://www.cms.hhs.gov/MandatoryInsRep/Downloads/NGHPUserGuide2ndRev082009.pdf.

Ogletree Deakins 12/30/2009

NY WARN Act Emergency Rule Extended

On December 15, 2009, the New York Department of Labor (NYDOL) extended the lifespan of its Emergency Rulemaking concerning the New York WARN Act through February 12, 2010. As addressed in prior eAuthorities, the NY WARN Act differs from the federal WARN Act in many key respects, such as requiring 90 rather than 60 days notice, applying to employers with 50 rather than 100 employees, and covering certain job losses of 25 or more employees, rather than 50 or more employees. We have been advised by the NYDOL that a final Rulemaking concerning the NY WARN Act is expected in the coming months.

Ogletree Deakins, 1/14/2010

New Jersey - Reminder – Employers With 10 or More Employees Must Provide Annual CEPA Notice

As the New Year is upon us, we remind New Jersey employers with 10 or more employees of their obligation to **annually** distribute to their New Jersey employees, via written or electronic means, the required notice http://lwd.state.nj.us/labor/forms_pdfs/lwdhome/CEPA270.1.pdf under the Conscientious Employee Protection Act (CEPA) in both English and Spanish. The notice must be completed with the appropriate contact information prior to distribution to employees and posting in the workplace.

Ogletree Deakins, 1/14/2010

New Jersey - Weekly Unemployment, Temporary Disability and Family Leave Insurance Benefits Increased for 2010

The maximum weekly payment for temporary disability and family leave insurance benefits for 2010 has been increased from $546 per week to $561 per week, pursuant to regulations promulgated by the New Jersey Department of Labor (NJDOL) on December 21, 2009. Likewise, the maximum 2010 weekly unemployment benefit has been increased from $584 per week to $600 per week. These 2010 rates represent a 2.7 percent increase over the 2009 rates and were intended to track the upward trend of wages in the state's economy, thus preserving the real purchasing power of the benefits. The regulations also raised the amount of earnings required in 2010 to establish a “base week” for an individual’s claim for State Plan temporary disability and family leave insurance benefits, as well as for unemployment purposes.

Ogletree Deakins, 1/14/2010