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Labor & Employment Practice Group

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Disability Benefits a Trap for Unwary Employers

Often employers, especially state and local government entities that negotiate contracts with unions, agree to provide benefits to employees who become disabled, but don't pay enough attention to the details. Some recent examples that have been in the news illustrate just how costly such mistakes can be.

A Newtown police officer who suffered from PTSD after the Sandy Hook shootings applied for and was granted benefits under the town's disability insurance policy. The trouble was that the applicable collective bargaining agreement said, "Employees shall be eligible for Long Term Disability benefits for the length of their disablement up to their normal retirement date," but the disability insurance policy the town bought only provided benefits for mental illness for twenty-four months.

The issue ended up in arbitration, with the town arguing they shouldn't be obligated to self-insure for the additional cost of providing benefits up to normal retirement, which it estimated to be over $380,000. The majority of the arbitration panel disagreed, saying the "plain language" of the union contract supported the officer's claim. Obviously, someone should have looked at the insurance policy more carefully, to be sure it conformed to what employees had been promised.

Many disability insurance policies provide more generous benefits for the first few years than they do for the longer term. For example, some policies say benefits are payable for a limited period if an employee is unable to perform the duties of his or her own occupation, but are only payable thereafter if the employee is unable to engage in any gainful employment. The latter standard is closer to what Social Security provides.

The same distinction is sometimes drawn in pension systems that provide disability benefits, and a good example of that is Connecticut's state employee pension plan. If a worker is disabled from performing his or her own job, there is supposed to be a medical review after two years to see whether there is "suitable and comparable" employment the worker can do. A recent whistleblower complaint alerted state auditors to the fact that the state had not been conducting these examinations for some time, allegedly because of disputes over how the term "suitable and comparable" should be interpreted.

According to recent reports, the state and its unions have negotiated a fix for this problem, but nobody has publicly disclosed the terms. Given the generous level of state employee benefits, adoption of a more rigorous standard would be fiscally prudent

but seems unlikely.

Our opinion is that this problem should have been addressed long ago. If there was a dispute over the standard to be applied in medical reviews, the state should have applied whatever standard it believed was appropriate and let the unions challenge it. Who knows how much money from the already underfunded state employee pension plan has been wasted because of this issue, or how much more would have been wasted if it were not for the whistleblower?

Union "Prisoner" Shirts Prohibited by AT&T

A few years ago, when AT&T was negotiating a new contract with its unions in Connecticut, the workers started wearing T-shirts with "Inmate #" on the front and "Prisoner of AT$T" on the back, with vertical stripes suggesting the bars of a jail, as a way of putting pressure on the company. AT&T responded by prohibiting the wearing of such shirts by employees who interacted with customers, and issued one-day suspensions to workers who violated that order.

The union ran to the NLRB, alleging an unfair labor practice. A majority of the Board ruled that the order violated the employees' right to wear union apparel at work. They said that customers would not confuse the shirts with real prison uniforms. Not surprisingly, AT&T disagreed with the decision, and went to court.

A federal appeals court has now overturned the NLRB decision, stating that the issue was not whether customers might think they were dealing with convicts, but whether AT&T reasonably believed the shirts might hurt its public image. In a rebuke to today's notoriously pro-labor NLRB, the court said that common sense "sometimes matters," and that the company's action was a reasonable effort to protect its reputation.

The court rejected the Board's reasoning that the company had not disciplined employees who wore other unprofessional apparel, such as shirts that said "Support your local hookers" (with an image of a fishing lure), or "If I want your opinion, I'll take the tape off your mouth." Those messages did not directly disparage the company. Further, the court said allowing one or two unprofessional shirts didn't require an employer to allow any and all unprofessional attire.

Our opinion is that the NLRB's decision made no sense, and we applaud AT&T's action in going to court, even though its negotiations with the union were successfully resolved. If it hadn't done so, or hadn't prevailed, unions everywhere might have adopted similar tactics.

Educator Salary Cap Reinterpreted by Attorney General

The state's pension plan that covers public school teachers and administrators, including superintendents, allows retired professionals to remain employed by local boards of education, provided they do not receive a salary greater than 45% of the maximum salary for the position in question. Presumably the intent is to assure that their salary plus their pension does not produce a lot more income than they would receive if they hadn't retired.

However, many educators have negotiated deals that comply with the salary cap, but include other benefits that push the value of their contract considerably higher. Some superintendents who are approaching retirement age have applied for a pension, but have continued working in their same position with a reduced salary plus deferred income that effectively restores their cut in pay. The Administrator for the Teachers' Retirement Board ("TRB") has long considered such an arrangement to be acceptable under TRB rules, until recently.

In response to an inquiry from the TRB Administrator, Attorney General George Jepsen has ruled that for purposes of applying

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the 45% cap, the term "salary" includes the value of any fringe benefits the educator may receive. His opinion states that the obvious intent of the legislature was to limit the total compensation of an educator reemployed during retirement, and to permit other forms of payment to exceed the salary cap "would result in no limit at all."

Some local school officials still feel there is an ambiguity in the statute, and that the appropriate fix would be for the legislature to clarify it. The General Assembly might also address the question of what to do about existing arrangements under which local school districts are contractually bound to provide benefits to educators who, according to the Attorney General's opinion, are not entitled to them.

Our opinion is that the legislature never considered this issue, and if it had, it might have used a word like "compensation" rather than "salary" in defining the earnings cap for retirees. Since the wording of the statute is what led to this problem, it seems logical that the legislature should clarify the wording in order to accurately reflect its intent.

How to Guarantee You'll Be Sued

The front page story in a recent edition of the Connecticut Law Tribune, with the headline "Firing Line," provides a textbook example of how to make so many bad HR decisions that you're sure to get sued, not once but multiple times. The facts, as reported by the Law Tribune, would provide the basis for an issue-spotting law school exam.

Several members of the same family (the father, two daughters and a son-in law) worked for many years for Fairfield Caterers, an entity jointly owned by two business men. The father was responsible for sales for wedding venues. When he was 70 years old, the owners allegedly decided that young brides could not relate well to someone of his age. They told his two daughters it was time for him to retire.

When that didn't happen, they fired him, on his 71st birthday. He of course filed a complaint with the CHRO. Allegedly, the owners pressured the daughters to get their father to withdraw his complaint, but he didn't. They then hired an investigator, presumably to get some "dirt" on the family. They discovered that the father had accepted payments from vendors, which the owners called kickbacks and he called tips, and that one of the daughters (Kelli) had done the same thing, so they fired her as well, even though she was pregnant at the time.

Her husband, who had worked for the business since before the two were married, told the owners that what they had done was illegal. He was promptly demoted, and claimed they made his life so miserable that he quit. After the other daughter (Holly) protested the treatment of her father and sister, she too was fired. Holly brought a lawsuit, which is still pending. Her father's case has been settled on undisclosed terms, but presumably it involved some substantial payment, since the facts seemed egregious.

The focus of the Law Tribune story was on the resolution of Kelli's case. After a lengthy jury trial, Kelli was awarded almost $300,000 in back pay, and then in addition, almost $250,000 for attorney fees and costs. The total of over half a million dollars was to be split between the two owners.

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Our advice to employers is that if they don't have sophisticated HR staff in house, they should consult with counsel before firing people. Some sound legal advice might have saved Fairfield Caterers a lot of money in the long run. As an example, a lawyer likely would have recommended a retirement incentive, which could have accomplished the desired result at a fraction of the cost.

Legal Briefs
and Footnotes

Orchestra Players Can't Unionize: In 2005, the Connecticut State Board of Labor Relations ruled that musicians who played for the Waterbury Symphony Orchestra could not unionize, because their employment relationship was too tenuous. The same issue was presented to the SBLR this year, with the same result. Although musicians are required to comply with certain symphony rules, most of them play in less than half of any given season's performances, and someone who works every concert earns less than $2000. The majority of the Board concluded this was insufficient to meet the "economic realities" test for employee status.

No Retro Pay for Ex-Employee: If an employee resigns while his union contract is being renegotiated, and the contract is later settled with a pay increase that is retroactive to a date before his resignation, is he entitled to the additional compensation? A Canton police officer demanded four months' worth of a retroactive pay increase under just those circumstances. A divided arbitration panel rejected his claim, because he was not an employee at the time the increase was negotiated. This dispute could have been avoided if the contract had been worded so that the increase only applied to those who were employed as of a specific date.

Punitive Damages Revisited: We have reported before on the split of court authority on the question of whether punitive damages are allowed under Connecticut's Fair Employment Practices Act. Superior Court decisions have gone both ways. Now an Appellate Court has ruled that FEPA does not provide for punitive damages. Since it does allow recovery of litigation costs, which most courts use as a basis for computing punitive damages when such damages are available, granting punitive damages as well would effectively allow double recovery. It's a safe bet that this issue will end up before the Connecticut Supreme Court.

Commuting Injuries Compensable: Unlike most employees, municipal police officers are covered by workers compensation if they are injured on their way to or from work. But what if an officer has his kids in the car, so he can drop them off at day care on the way to work? A New Haven cop was injured in an accident on his morning commute, but the City contested workers compensation because he had children in the car. An Appellate Court ruled that he was not disqualified from benefits, because the day care facility was only slightly out of his way, and in any event, he had not yet deviated from his commuting route when the accident occurred.

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October 1st, 8th, and 29th
8:00 AM - 10:00 AM
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