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Employment Law Letter

FALL 2009

in this issue

Labor & Employment Law Department

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Agreement On What To Do About Swine Flu? When Pigs Fly!

For the last several months, the Centers for Disease Control and the Department of Health and Human Services have been asking individuals and employers to prepare themselves and their organizations for the possibility of an outbreak of the H1N1 ("swine") flu. The CDC guidance has sent employers scrambling to consider what precautions should be taken and what changes in employer policies are necessary to react to concerns regarding the spread of the illness. Some preventative measures have caused a tussle between employers and their employees and unions.

In response to the H1N1 threat, the State of New York ordered all health care workers employed in general hospitals and certain other health care facilities to be immunized against seasonal influenza and the H1N1 virus as a condition of their employment. Those who cannot be vaccinated for medical reasons are exempt from the requirement. However, the new emergency regulation has been challenged in court by private health care workers and two unions representing public employees. They claim that the State exceeded its statutory authority in requiring vaccinations, and that the regulation violates the constitutional rights of health care workers by failing to provide due process protections and by failing to provide an exemption for those with religious beliefs that conflict with the requirement. Recently, a trial court in Albany issued a temporary restraining order preventing the State from enforcing the emergency regulation until the case is heard.

Similar challenges are popping up in other areas of the country. In Washington State, the Nurses Association recently filed a lawsuit in federal court, against a large private non-profit employer that mandates its workers to either be vaccinated against

H1N1 or wear masks at all times in all areas where patients may be present. The lawsuit requests an injunction blocking implementation of the policy until the union has an opportunity to bargain over the matter. On the other hand, the California Nurses Association is threatening to strike over what it claims is "poor H1N1 preparedness" on the part of at least some of the hospitals that employ its members. The hospitals have rebutted the claims by the Association stating that they are complying with CDC recommendations and guidelines, that they have an adequate supply of respirators/masks available, and that they have been proactive in reviewing with staff the protocols for prevention and treatment with each admission of an H1N1 patient. Some have speculated that the strike threat is an attempt to gain leverage with respect to monetary issues in the current contract negotiations.

Though there may be disagreements about how employers should prepare for the possibility of an outbreak of H1N1 in the workplace, and what they may require of their employees leading up to and during the flu season, there is consensus that employers should establish a pandemic preparedness plan. In creating such a plan, the employer should consider how it can best minimize disruption to business activities in the workplace while at the same time protecting the health and safety of employees and patrons. Such an inquiry necessarily involves determining what parts of the organization may be most affected by a possible outbreak and ensuring those areas have adequate personnel, supplies and other resources to ensure the continuity of their operations.

It is also advisable for HR departments to review leave and benefit policies and procedures to determine whether revision is appropriate and/or required due to the recommendations of the CDC, public health authorities, medical providers or others with respect to the prevention and treatment of H1N1. Employers of unionized workers must also consider whether any such proposed changes require bargaining over the impact of such changes. Furthermore, employers must determine what preventative measures are necessary and appropriate within the context of their business. Such preventative measures may include offering or requiring vaccination as permitted by law, providing hand sanitizer and personal protective equipment (such as gloves, masks, and respirators), sanitizing facilities and equipment in accordance with industry standards and CDC recommendations, educating employees about what personal steps they can take to stay healthy, and reinforcing healthy practices in the workplace. Communication by employers to employees and other stakeholders about the steps that are being taken to prevent and plan for a potential outbreak is key.

Our advice is that in the event of an actual emergency, employers must be prepared not only to be flexible in reacting to changing circumstances and legal requirements, but also to recognize the importance of continuously reevaluating and improving their pandemic preparedness plan. Stay tuned for further developments regarding the guidance of state and federal authorities and legal challenges to the preventative measures taken by employers in response to the H1N1 threat.

Why Is The State Meddling In Private Sector Labor Matters?

Industrial labor relations are generally regulated by the NLRB, which administers the National Labor Relations Act. That law governs collective bargaining and contract administration in the private sector, and attempts by state or local government entities

to interfere in those activities, for example by requiring those who do business with the government to make concessions to unions, are usually rebuffed by the courts.

Recently, however, Connecticut has initiated some unusual steps that effectively take labor's side in disputes with the management of private companies. The most visible of these is an effort by the state to become involved in a lawsuit filed by the Machinists Union in an attempt to block Pratt & Whitney from moving about 1000 jobs from East Hartford and Cheshire to facilities out of state. Attorney General Blumenthal wants to file a brief as "amicus curiae." Literally that means "friend of the court," but some feel in this case it's more like "friend of the union," since he and some other politicians, including Governor Rell, have publicly criticized Pratt's decision.

Normally such matters would be resolved by arbitration, but the Machinists Union's lawsuit is based on allegations that Pratt violated a promise to make "every reasonable effort" to avoid moving jobs out of state. That promise was set forth in a side letter rather than the collective bargaining agreement, and therefore was not subject to the contractual grievance procedure or arbitration. The union filed a similar lawsuit a decade ago and prevailed. However, in that case Pratt apparently paid only lip service to the "every reasonable effort" requirement, and this time there were extensive negotiations. The company said it could save over $50 million by relocating the work, but the union offered concessions worth only about half that amount.

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Within the past month or two, the State has taken other steps that arguably are even more intrusive. In September, the DPUC issued an order temporarily blocking the layoff of 67 employees by two gas companies. The law was to remain in effect while regulators studied whether the workforce reduction would adversely affect the level of safety and service to the public. This followed a request by Attorney General Blumenthal, addressed to the same regulators, to block a similar workforce reduction by AT&T, another publicly regulated utility. As with Pratt & Whitney, the employees affected by each of these potential layoffs were represented by a union.

Our opinion is that there may be a role for government in addressing private sector actions that directly threaten public health or safety. However, it certainly looks suspicious to see elected officials standing shoulder to shoulder with union leaders at a news conference announcing attempts to block layoffs. One wonders whether what is at issue is truly the public interest, or just plain old-fashioned politics.

Domestic Violence Victims Entitled To Job Protection

It isn't often that the courts create a new cause of action for "wrongful discharge." It only happens when a court finds that the firing of an employee violates an important public policy. The concept has its origins in a California case years ago where a Teamsters Union representative sued after being fired for refusing to lie under oath. Now a Superior Court judge has expanded the doctrine to benefit victims of domestic violence in Connecticut.

The case involved an assistant director of the Stonington Free Library who was beaten by her husband and missed some time from work due to her injuries. Shortly thereafter she was fired, allegedly because of a reorganization. However, a library board member had advised her not to talk about the assault, because it would "reflect poorly on the library," and board minutes of the meeting at which she was terminated mention not only the reorganization, but also the employee's "personal circumstances."

The librarian alleged, and the judge agreed, that her termination was contrary to the public policy favoring protection of victims of domestic violence. Although the library argued that she had statutory remedies available to her, and therefore it was unnecessary to extend the wrongful discharge doctrine to protect her, the judge found the applicable statutes to be too narrow to adequately protect the plaintiff.

Our opinion is that the library should have anticipated this outcome. There was no evidence that the plaintiff's domestic problems interfered with her job performance to any substantial degree, and her circumstances were obviously very sympathetic. Further, there have been a number of recent cases of domestic violence that have been well publicized, including an attorney who was kidnapped and held captive by her husband; she managed to escape before he burned their house down. It's no wonder the judge sided with the librarian.

Legal and Tech Developments Call for Revision of Internet Policies

Email, social networking, and other electronic communications continue to raise both practical and legal problems for employers. Some recent developments have compounded those difficulties, and the speed with which new technology evolves will likely mean more employment-related headaches, not less.

Last year we reported on the NLRB's decision in the Guard Publishing Company case. The Board said employers had the right to restrict non-business use of their email systems, and could draw distinctions that permitted some kinds of personal uses and not others, so long as they did not discriminate against communications on behalf of unions in particular. A few

Recent S&G Website Alerts

New Development: USCIS To Conduct Unannounced Site Visits on H-1B Employers, 10/09

New Labor Application System Changes H-1B Non-Immigrant Filing Process, 09/09

Form I-9 Update, 07/09

U.S. Employers Face Crackdown for Unauthorized Workers, 07/09

Supreme Court Upholds Promotional Test Despite Adverse Impact, 07/09

months ago, a federal appeals court overturned that decision, and said the employer had not drawn and enforced a clear line prohibiting solicitations on behalf of organizations.

The good news is the court didn't disturb the Board's basic premise that employers can restrict non-business use of their email systems. It also didn't disagree that employers can draw lines between some non-business uses and others. The problem was that the only non-business emails for which employees of Guard Publishing were actually disciplined were those relating to union activity.

Many employers report increasing concern about electronic leaks of company secrets or other sensitive information, either through email or social networking sites such as Facebook and Twitter. More and more companies are developing policies on this subject, and cautioning employees about how they use the company's name or company information outside the workplace. Workers are also warned that if they express controversial views on the internet, they should take care not to create the impression that they are reflecting the views of their employer.

All this has led to a dramatic increase in electronic monitoring of employee internet use. A recent survey of large employers showed one-third of them employ staff whose primary function is to monitor the content of outgoing email. That is more than double the percentage of similar responses in 2008. Even more than one-third of responses said their businesses had been affected by employee disclosure of sensitive or embarrassing information, and almost as many said they had fired workers for violating email policies.

Our advice to employers is to review and update their policies on internet use, and to state prominently and repeatedly that employees should have no expectation of privacy with respect to the use of company hardware or software. We can provide sample policies to clients and friends upon request.

Legal Briefs
and footnotes...

New Haven Sued Again:
The ink was barely dry on the landmark discrimination case (reported in our last issue), in which the U.S. Supreme Court ruled that the City of New Haven could not throw out the results of an otherwise valid promotional exam just because few minorities scored well on it, when the City was sued again. This time a black candidate who scored the highest grade on the oral portion of a promotional exam claimed that the City's decision to give the written portion of the exam more weight was discriminatory. Sometimes it seems employers get sued no matter what they do.

Rell Veto Overridden:
This summer we left out of our summary of employment legislation passed by the General Assembly in its last session a few bills that were vetoed by the governor. After we went to press, one of those vetoes was overridden. PA 09-183 sets standard wage rates for employees of private contractors who do building and property maintenance, property management, and food service work in state buildings. Under the act, such employees must receive at least the same wage rates as employees working under the union contract covering the largest number of employees doing the same type of work in Hartford County, provided that contract covers at least 500 employees.

Rowland Layoffs Still Contested:
It's been several years since Governor Rowland laid off about 2800 state workers, but a lawsuit over those layoffs is still in its early stages. The plaintiffs claim they were dismissed in retaliation for their participation in union activity, especially their union's support for

S&G Notes

Over 160 clients and friends signed up to attend our annual fall seminar on labor and employment developments on October 30th at the Downtown Hartford Marriott.

Congratulations to Shipman & Goodwin's School Law Practice Group on the launch of its website. Employment-related developments of particular interest to school districts can be found at www.ctschoollaw.com.

Rowland's opponents, in violation of Section 31-51q, Connecticut's free speech law. The state moved to dismiss the case on the grounds that a layoff does not constitute "discharge" or "discipline" prohibited by the statute. Recently the Connecticut Supreme Court said that claim involved issues of fact that could only be resolved in a trial on the merits.

Fire Wars (cont'd): Recently we reported on the running battle between New Britain Mayor Timothy Stewart, a firefighter on leave of absence, and the union that represents employees in the City's fire department. The latest chapter in the saga involves a union grievance over the Personnel Director's decision to allow the Mayor to continue to accrue union seniority, allegedly in violation of the contract. A divided arbitration panel rejected the grievance, based on a Connecticut statute allowing municipalities to grant benefits to employees during a personal leave of absence. According to the panel majority, the statute trumped the union contract.

Retirees Denied MERF COLA: Many years ago, the Town of West Hartford moved its employees out of MERF, the Municipal Employees Retirement Fund, and into a pension plan run by the Town. At the time, they promised the benefits would be not less than the "amount being paid" to employees under MERF. Several years later, MERF added a cost of living escalator, but the Town didn't. A group of retirees sued. Now a trial referee has ruled that the quoted language only guarantees the MERF benefit in effect at the time of the transfer, and not later enhancements.

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