Employment Law Letter

Winter 2009

Welcome to 2009! A Checklist of Labor and Employment Law Changes

Everyone has heard that Connecticut's minimum wage went up to $8.00 per hour on January 1. But are you familiar with the new federal FMLA regulations effective January 16? How about the new I-9 rules that apply starting on February 2? In case you have trouble keeping up with all these developments, here's a brief summary of the most significant changes HR professionals should be aware of.

FMLA: The federal Department of Labor has issued its final rules amending the Family and Medical Leave Act (FMLA) regulations These new regulations address both new military family member leave entitlements, and also updates to the 15 year old original FMLA regulations, as well as DOL forms for medical certifications and employee notices of rights and obligations under the FMLA. The amended regulations, which became effective on January 16, look to improve communication between employees seeking FMLA leave and their employers, and also provide employers new tools for administering FMLA leave.

In addition to the military leave amendments, including eight categories of "qualifying exigency leave" related to active duty status or call to active duty, the regulations revise the definition of "serious health condition" to require employees to see their health care providers within set time periods. They revise employers' notice obligations for the designation of leave, and revamp the medical certification and fitness for return to duty processes. As noted, they also introduce a new set of DOL medical certification forms, including separate forms for certification of an employee's own serious health condition and the employee's family members' conditions. In addition, based on a U.S. Supreme Court

IN SUMMARY:

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ruling a few years ago, the regulations now provide for limited retroactive designation of FMLA leave.

Just before press time, the Connecticut Department of Labor issued a statement saying that some of the new federal rules were in conflict with existing Connecticut regulations, which may complicate compliance efforts for employers covered by both state and federal FMLA leave.

ADA: Amendments to the Americans with Disabilities Act signed into law by President Bush last fall took effect on January 1. They will undoubtedly increase the number of employees covered by the law, because they require the determination of whether someone has a disability to be made without regard to "mitigating measures" such as medication or corrective lenses. Those with "episodic impairments" or conditions that are in remission will also be covered. Additionally, it will be easier for an employee to show that he or she is "regarded as" disabled.

Overall, the amendments seem to call for a broader application of the protections available under the ADA, and commentators expect more employers to err on the side of providing more accommodation to employees with physical limitations in order to avoid being accused of providing too little. Meanwhile, the EEOC is working on regulations offering guidance on how the new provisions will be interpreted and applied, but it is anyone's guess as to how long that process will take.

I-9 FORM: On December 17, the U.S. Citizenship and Immigration Services issued new rules concerning the employment eligibility verification process, which became effective after 45 days, on February 2. As of that date, employers are required to use a new I-9 form, which provides that all documents used during the verification process must be unexpired. There have also been minor changes to the list of acceptable documents for verification purposes.

Detailed information about the FMLA and ADA changes is available on our firm's website. The revised I-9 form for use by the public can be downloaded from www.uscis.gov.

New Haven Discrimination Case To Be Heard by U.S. Supreme Court

Only a very small fraction of the cases decided by lower courts ever get to the highest court in the land. That is one of the reasons why a job bias complaint filed by a group of white and Hispanic firefighters in New Haven is getting some attention on the national level. The plaintiffs claim that the results of the promotional exams they took for lieutenant and captain positions were thrown out by the City simply because whites and Hispanics attained higher scores than African-American candidates. They argue there is no evidence that the

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test was in any way biased against any ethnic group, but rather it simply failed to produce the number of black officers that the City wanted to promote.

The trial court dismissed their complaint, stating that the City was only trying to fulfill its obligations under Title VII of the Civil Rights Act. The plaintiffs appealed, and the Second Circuit Court of Appeals in New York reached the same conclusion, by a split decision. One dissenting judge made a point of saying he thought the case was "worthy of review" by the U.S. Supreme Court. Apparently the justices agreed, because early in January they agreed to hear the case.

The exams in question date back to 2003, when there were eight lieutenant vacancies and seven captain vacancies. Although approximately 20-25% of the applicants were black, none of them scored high enough on the exams to qualify for one of the positions. The civil service commission, on a tie vote, failed to certify the results, so the positions have remained vacant.

The plaintiffs argue that minorities are entitled to equal opportunity, not equal results. They assert the City is in effect practicing intentional race discrimination, which is unacceptable regardless of whether minority or non-minority employees are the victims of it. They point out that this is not a case where there is an established history of discrimination. In some such situations the courts have sanctioned race-conscious decisions to right past wrongs.

Our opinion is that this case presented the City with a classic "damned if you do, damned if you don't" choice. It is unfortunate that the resulting paralysis has disadvantaged all the interested parties, including the fire department and the residents it serves, for the better part of a decade.

Despite What You've Heard, Employers Can Require Medical Exams

Many companies have become gun-shy about looking into their employees' illnesses and injuries, for fear of allegations of invasion of personal privacy. They have also assumed that they have no choice but to accept vague and general statements by their workers' physicians, such as "John Jones is under my care." While there are reasons to be cautious about going too far in the investigation of employee health conditions, employers have a lot more leeway than some of them may think.

An Appellate Court decision involving a New Haven employee illustrates the point. After her workload increased following the consolidation of some of the company's facilities, she became "stressed out," and missed almost two weeks of work, phoning co-workers to say she was sick. Her doctor faxed a note to the employer saying she had a "medical condition," and would not be able to return to work for another ten days or so. The company scheduled a "fitness for duty" exam the day before she was scheduled to return to work, but she failed to show up. The employee was terminated for insubordination, and she filed suit alleging a violation of the ADA as well as a breach of contract and violation of the duty of good faith and fair dealing.

The trial judge found, and the Appellate Court agreed, that the employer's request was justified because it was "job-related and consistent with business necessity," as required by the ADA. The vagueness of the doctor's note and the failure of the employee to respond to telephone inquiries from the company's personnel department contributed to the employer's need to determine whether it was safe for the employee to return to work, and whether the plaintiff's condition put co-workers at risk. The judges noted that the company's employee handbook clearly set forth the right to require a physical exam to verify an employee's claim of inability to work, or to address questions raised by managers about an employee's ability to perform the required functions of his/her job. Therefore, the employee's contract claim failed.

Despite today's emphasis on privacy generally and medical confidentiality in particular, employer rights to verify employee medical conditions are in some respects expanding. For example, certain portions of the new federal FMLA regulations are responsive to employer concerns about documenting justification for leave. These include the right to request more detailed medical information about an employee's serious health condition, the right to require recertification periodically, and provision for more time to request medical information. These rules apply even if the employee is on employer-provided paid leave while the FMLA allowance is being used.

Our advice to employers is not to be paralyzed by concerns about an employee's medical privacy. While those concerns are legitimate and must be accommodated, in many cases an employer's need for information necessary to make an informed business decision will trump employee privacy interests. The only sensible approach is a case-by-case determination, with the advice of counsel when appropriate.

Employers Struggle to Adjust to New Economic Realities

Only a few months ago, it seemed like the Connecticut economy was in decent shape. The housing bubble hadn't affected us nearly as much as some other parts of the country, Connecticut hadn't been badly hurt by the subprime mortgage crisis, our unemployment rate wasn't as high as the national average, and it seemed we could weather the "rough patch" that experts predicted.

But that was then, and this is now. Most indicators have dropped farther and faster than anyone can remember, and any hope that those of us in the land of steady habits could escape relatively unscathed has been dashed. So what are Connecticut employers doing about it? Here's a sampling of what our clients are considering or have implemented.

ERIP: Some companies have found that work-force reductions can be accomplished through early retirement incentive plans. Workers close to retirement are offered severance, assistance with health insurance, pension enhancements or other incentives to leave early. If they accept, the employer may be able to retain younger workers with a longer term value to the organization, while avoiding the age discrimination implications associated with an involuntary reduction in force. Obviously, however, it's difficult to cut costs if the "incentive" element of an ERIP approaches the cost of

keeping the participants employed during the economic downturn.

RIF: If a voluntary program doesn't produce the desired results, it may be necessary to consider an involuntary reduction in force. For unionized employers, the process is generally spelled out in the applicable collective bargaining agreement, and almost invariably seniority determines who goes and who stays. In a non-union environment, the employer has more flexibility, but the criteria used in making decisions must be objective, in order to avoid claims of age discrimination or other illegal motivation. It's well worth the cost to sit down with an employment lawyer or other experienced advisor to discuss the risk factors and possible approaches to addressing them. Obviously, given the often devastating impact on the workforce and the morale of those who remain, the process has to be managed with care and sensitivity.

Furloughs: In order to avoid losing good quality workers, some employers have resorted to rolling layoffs, workweek reductions, mandatory no-pay days and similar techniques to spread the pain. One problem, of course, is that the result of any of these approaches is to reduce take-home pay, and some employees will look for other jobs where they don't have to deal with pay cuts. Often those most likely to leave are also the most valuable workers, so the outcome is counter-productive. It is also important to be careful about work and pay reductions for salaried employees. For example, a four day workweek coupled with a 20% reduction in weekly pay may be seen by the Labor Department as prorating pay on an hourly basis, which would threaten the exempt status of the affected employees.

Concession bargaining: For those employers living with collective bargaining agreements, the only relief may be through a voluntary agreement by the union to negotiate a reduction in pay and benefits. The State of Connecticut and many local governments are proposing such negotiations for the first time since the Weicker administration. The questions for employers in these situations include the following: Are you willing to disclose the details of your current financial situation to the union in order to justify your position? What will you have to agree to in return for a reduction in pay and/or benefits? Will there be a permanent cost savings or just a temporary delay that will mean a bigger increase later on? And of course, who knows how long this situation will last, and therefore what the appropriate terms of a concession package should be? One thing is certain, employers won't need to explain to unions or their members the seriousness of the economic conditions that have led to the request for relief from the terms of contracts negotiated in better times.

Our advice is for employers to consider all these options and more, including cutbacks in benefits such as employer contributions to 401(k) plans. There's no "one size fits all" solution. In some cases, just being more deliberate and more selective in hiring decisions, and being more aggressive about weeding out marginal performers and people with attendance, attitude or conduct issues, may be enough to make a significant difference.

What Has To Be Bargained And What Doesn't . . .

The State Board of Labor Relations has issued a series of interesting decisions over the past few months,

shedding light on what kinds of issues affecting unionized employees are subject to management decision-making without prior negotiations, and what kinds are not. While these cases all involve public employees, their logic may be equally applicable to private sector groups.

It's not unusual for municipal employee bargaining to continue long after the old contract expires, and the new contract's effective date is often made retroactive to the expiration of the old one. What about employees who have left in the interim? The Town of Hamden refused to discuss the matter, and the Labor Board ruled it had every right to do so, because retirees and other ex-employees are no longer represented by the union. Departed employees therefore received no benefit from the retroactivity of any negotiated increases.

Firefighters in Groton objected to a memo issued by the chief prohibiting personal computers (except those provided and supported by the City) in any firehouse, even during the downtime that inevitably occurs during a 24-hour shift. In ruling against the City, the Labor Board was influenced by the fact that there was a past practice of firefighters using PCs for years, and the City must have been aware of it. They also noted that a PC is now a regular part of daily living for most people.

Another fire department, this one an autonomous volunteer company in Stamford, was found guilty of a prohibited practice for refusing to bargain over the installation of several surveillance cameras in and around the firehouse. Ironically, the Labor Board found no violation of the duty to bargain with respect to the cameras installed in the kitchen and lounge areas, because such installations were prohibited under state law and therefore an illegal subject of bargaining. However, the decision said cameras could not be installed in other locations without bargaining.

The SBLR also found a violation when the City of New Britain attempted to impose a "performance audit" system which was tantamount to an evaluation process. The Labor Board has consistently taken the position that an employer can unilaterally implement methods of monitoring compliance with existing rules, but performance appraisals that can lead to positive or negative consequences for the employee must be negotiated.

Our advice to employers with unionized employees is to anticipate issues like this by negotiating strong management rights language that allows management to act unilaterally in areas not specifically regulated by the contract. Certainly things like conducting performance appraisals, implementing security systems, and establishing reasonable rules and procedures for discipline and safety purposes are prime candidates for such provisions.

LEGAL BRIEFS
. . . *and footnotes*

Misclassification Cases Continue: In our last issue we discussed the risks associated with wrongly classifying employees as independent contractors, and treating non-exempt employees as if they were exempt for overtime purposes. Two more recent cases illustrate the point. In one, a federal district court judge in Connecticut approved a class action overtime claim by a group of "tournament directors" employed by the American Contract Bridge League, demonstrating that the overtime exemption issue can rear its head in almost any corner of the economy. The other development was a ruling by a referee regarding damages from a California court decision in favor of FedEx drivers wrongly classified as independent contractors instead of

employees. The referee set a tentative price tag of $9.1 million.

CHRO Filing Deadline Clarified: The Connecticut Supreme Court has established a different rule for the filing of discrimination complaints with the state's CHRO than the rule that applies to similar complaints filed with federal EEOC. The federal rule is that when an employee is fired and feels the termination was discriminatory, the limitation period for filing with the EEOC starts running when the employee is informed of the dismissal. Our Supreme Court ruled, however, that the 180-day time limit for filing a similar complaint with the CHRO starts running on the date the dismissal takes effect. A majority of other states that have addressed the same issue have similarly departed from the federal rule.

Phone Call Not a Contract: As we have reported more than once over the years, an employment contract can be created as a result of oral conversations, and a formal document is not required. However, a store manager recently failed to convince a Superior Court judge in Connecticut that a binding contract for continued employment was created in a telephone conversation with her boss. When he proposed that she manage a newly constructed store, she asked how long he expected the assignment to last, and he replied, "Let's go for two years." The judge found this did not create a contract, in part because the employee handbook gave the company "the right to terminate your employment at any time, with or without advance notice and with or without cause."

EAP May Disclose Threats: In a victory for common sense, the federal appeals court with jurisdiction over Connecticut has affirmed a Connecticut district court decision exonerating an EAP provider from liability to a postal employee who made threats against his supervisors during a counseling session. The employee sued the postal service for wrongful discharge and the EAP for tortious interference with his employment relationship. The judges relied on a Connecticut statute that permits social workers to disclose communications in the event of "imminent physical injury."

UAW Negotiating at Foxwoods: We have previously reported on the hotly contested unionization effort at Foxwoods Resort Casino. While the Pequot Indian Tribe continues to contest NLRB jurisdiction over a tribal enterprise, it has quietly agreed to sit down with the UAW to negotiate a contract under tribal law. Although such bargaining is in many respects comparable to what goes on under federal law, one big difference is that instead of the right to strike, the parties can invoke binding arbitration by a mutually acceptable neutral if no agreement is reached after five months. The tribe also has its own process for addressing safety issues and unfair labor practices, among other issues usually overseen by federal agencies.

Whither Domestic Partner Coverage? Last year the Connecticut Supreme Court legalized same sex marriage in Connecticut, and a series of opinions last fall by Attorney General Richard Blumenthal essentially recognized the same rights for those in same sex marriages as are enjoyed by spouses in a traditional marriage, except of course for joint filing status under federal income tax laws. So what about all those employers who have been offering health insurance coverage for same-sex domestic partners? Will they still provide coverage even though marriage is now an option? A little-known provision of the interest arbitration award several years ago that provided insurance coverage for same sex domestic partners of state employees stated that if same sex marriage became legal in Connecticut, domestic partner coverage would end one year later.

Citigroup Bonus Plans Are Not "Wages": A class of former employees of Citigroup sued the company, claiming that a bonus program under which some of their earnings were withheld and invested in restricted stock of Citigroup violated Connecticut's law prohibiting withholding of wages (other than for taxes or insurance premiums) without the written consent of the employee "on a form approved by the labor commissioner." However, our Supreme Court ruled that the bonus payments were not wages, because they were discretionary based on factors other than the individual efforts of the individual employee. Even if they were wages, the employees signed authorizations that were clear and unambiguous. Finally, the court said, the fact that the authorizations were not on a form approved by the labor commissioner did not give rise to a private cause of action.

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