



Recent Developments In Employment Law

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TAX ACT EXPANDS PENSION CONTRIBUTIONS

The Bush administration’s tax bill provides opportunities for increased pension and 401(k) contributions beginning in 2002.

The overall contribution limit for each participant in defined contribution plans is increased from \$35,000 to \$40,000. In addition, the percentage of compensation limit increases from 25% to 100%. The increase in the percentage limit will most benefit middle income employees for whom the 25% limit curtailed 401(k) contributions when the employer made contributions or provided an additional plan. Plan administration will also be simplified. The annual benefit limit in defined benefit plans is increased from \$140,000 to \$160,000.

The maximum contribution by an individual to a 401(k) plan increases from \$10,500 to \$11,000, and individuals age 50 and over may contribute an additional \$1,000.

The amount of compensation taken into account in computing contribution allocations or benefits increases from \$170,000 to \$200,000. The new compensation limit also applies to 401(k) ADP and ACP tests which will have the effect of reducing the average deferral percentages of highly compensated employees.

Employer deduction limits applicable to profit sharing and 401(k) plans increase from 15% of compensation of plan participants to 25%. In addition, employee 401(k) contributions will no longer count against the deductibility limit.

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Limits on contributions to section 457 government plans increase from \$8,500 to \$11,000 and contributions to other qualified plans no longer will count against the 457 limit.

Many of these limits continue to increase in later years. A detailed description of the changes to pension and 401(k) changes will appear in the written materials for our annual Employment Law Seminar in October.

EMPLOYERS CAN PROHIBIT CARRYING OF CONCEALED WEAPONS DURING WORK

The new concealed weapons statute, which makes it easier to obtain concealed weapons permits, has survived challenges in the courts so far and became effective on July 1, 2001. MCL 28.421, *et seq.* The statute also prohibits the carrying of concealed weapons in eight types of locations. These are: schools, day care centers, sports arenas, bars and restaurants where liquor is served, places of worship, entertainment facilities which seat at least 2,500, hospitals, and college classrooms and dormitories.

This new statute has provisions directly relevant to employers. In general, employers cannot prohibit employees from applying for or obtaining a concealed weapons license, or from carrying concealed weapons, if done in accordance with the statute. Nevertheless, the statute provides that employers can prohibit employees from carrying concealed weapons in the course of employment. MCL 28.425n(2). Therefore, employers can have "no weapons policies" for employees. Such policies can prohibit weapons from being brought onto the employer's premises, from being in vehicles in employer-provided parking lots and from being possessed by employees when they are working away from the employer's premises.

Please contact any member of our Labor and Employment Law Practice Group if you need assistance drafting or revising a personnel policy concerning weapons.

SUPREME COURT CLARIFIES BURDEN OF PROOF FOR DISMISSAL OF DISCRIMINATION CASES

In a unanimous decision, the Michigan Supreme Court clarified the burden of proof for pretrial motions for dismissal in employment discrimination cases. *Hazle v Ford Motor Co.* (July 3, 2001). To survive a summary disposition motion, an employee must provide evidence, and not mere speculation, supporting an inference that the employment decision was motivated by discrimination. The Court ruled that it is insufficient for an employee only to show that the employer chose a qualified non-minority candidate over a qualified minority candidate.

Both Ms. Hazle and the selected candidate had some, but not all, of the "desired qualifications" for the job. Ford Motor Company explained that it selected the other candidate because of certain work experiences, and this explanation was accepted by the Court as a legitimate, non-discriminatory reason. The only evidence the employee provided concerning a discriminatory motive was that the company selected a non-minority over her, a minority, and her belief that she was the better qualified candidate. The Court ruled that this subjective belief did not provide evidence from which an inference of discrimination could be made.

In addition to being a helpful summary of the burdens of proof in the pretrial setting, the *Hazle* case also reiterated that an employee "cannot simply show that the employer's decision was wrong or mistaken since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent."

Nevertheless, it is always important to have objective proof that the challenged employment action was based on legitimate business reasons, in response to a claim of discrimination.

EMPLOYER LOSES ADA CASE BECAUSE IT DID NOT CONSISTENTLY IMPLEMENT JOB ROTATION REQUIREMENT

An employer failed to avoid liability in a case filed under the ADA because it did not enforce its own policies which would have established the employee's essential job functions.

Saturn Corporation groups its employees into teams and requires them to rotate through various tasks throughout the workday. Ronald Kiphart worked in such a team. During his employment, he developed several physical impairments which limited his ability to lift and engage in repetitive motions and precluded him from performing some, but not all, of his team's tasks. Saturn did not permit employees to remain on a team unless they could perform all of the team tasks. Consequently, Saturn removed Kiphart from his team and prevented him from bidding on any jobs performed by teams.

Kiphart sued Saturn under the ADA and obtained a jury verdict in his favor. The trial court, however, vacated the jury's verdict and dismissed the case. On appeal, in *Kiphart v Saturn Corporation* (May 31, 2001), the Sixth Circuit Court of Appeals reversed the trial court and reinstated the jury's original verdict.

First, the court of appeals determined that Kiphart was "disabled" under the ADA because he was substantially limited in the major life activity of performing manual tasks.

Second, the court concluded that Kiphart was "qualified" under the ADA for a team job because he could have performed the essential functions of the job, with or without reasonable accommodation. The court rejected Saturn's contention that the ability to rotate among *all* of the team tasks was an essential job function of working at the Saturn plant because Kiphart introduced significant evidence demonstrating

that, as a practical matter, employees did not operate as envisioned under the job rotation system. For example, team members swapped tasks among themselves to satisfy personal preferences, often with the knowledge of management.

Third, the court concluded that the jury reasonably could have found that Saturn failed to provide reasonable accommodations, notwithstanding its efforts to find Kiphart temporary jobs for approximately four years. According to the court, once the jury determined that full task rotation was not an essential job function and that Kiphart was otherwise qualified, the jury reasonably could have determined that it was unreasonable of Saturn *de facto* to require only restricted employees to show that they were physically able to rotate among all tasks.

This case demonstrates the perils employers face when they do not consistently follow their own policies and procedures. It also demonstrates that employers should not assume that their policies are being followed. To avoid the problems encountered by Saturn, employers should periodically review job functions and make sure that they are being performed in the manner required by the employer. Also, before deciding whether they can reasonably accommodate an employee's disability, employers must determine the essential functions of the employee's job based on how the job is actually being performed.

FEDERAL DAMAGE CAPS DO NOT LIMIT FRONT PAY

The United States Supreme Court has ruled that front pay awards in cases under Title VII are not subject to the damage caps under federal law. *Pollard v. E.I. du Pont de Nemours & Co.* (June 4, 2001). The Civil Rights Act of 1991 established limits on the maximum amount of compensatory damages in federal discrimination cases, \$300,000 for large employers. In a

unanimous opinion, the court ruled that front pay awards, unlike back pay, are authorized in lieu of reinstatement and are properly viewed as a form of equitable relief which is not covered by the caps.

The decision has limited practical application to Michigan employers, as typically discrimination claims under federal law are joined with claims under the Michigan Civil Rights Act, which has never had damage caps.

DON'T DELAY — REGISTER TODAY FOR OUR ANNUAL EMPLOYMENT LAW UPDATE

Bodman, Longley & Dahling LLP's Employment Law Update 2001 is a must for anyone responsible for hiring, disciplining, or managing employees or enforcing employment policies and regulations. In a convenient half-day seminar, we will present **nine** important employment law topics, including:

- Winning the ADA, FMLA, Workers' Comp Triathlon
- Retaliation: The Legal Equivalent to Operatic Plots of "Vendetta!"
- A Dollar for Your Thoughts? Protecting Confidential and Proprietary Information
- Harassment Other Than Sex: The Rising Tide

We will hold our Employment Law Update on Wednesday, October 3 in Dearborn; Thursday, October 4 in East Lansing; and Friday, October 5 in St. Ignace. Please plan to arrive at 12:30 p.m. for registration and a light lunch. The seminar will last from 1:00 to 4:30 p.m. and will be followed by a networking reception.

To register, or for more information, visit our website at www.bodmanlongley.com, or call Ms. Kristen Miller at (313) 392-1041.

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We are distributing this RECENT DEVELOPMENTS IN EMPLOYMENT LAW to our clients and friends. This newsletter is intended to provide a concise overview of some recent legal developments which may affect employment practices. The matters discussed are intended to provide general information only and are not intended to provide legal advice. Specific action should be taken only after obtaining competent legal advice.

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