



Recent Developments In Employment Law

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DEPARTMENT OF LABOR PUBLISHES PROPOSED REGULATIONS UNDER THE FLSA

On March 31, the Department of Labor published proposed regulations issued under the Fair Labor Standards Act which may revise the current regulations concerning “white collar” positions. Such positions are exempt from overtime and minimum wage requirements. The proposed regulations primarily are intended to streamline and modernize these regulations which have been essentially unchanged since 1954. In addition, there are major changes which:

- Raise the minimum salary for exempt positions to \$425 per week;
- Simplify the duties tests for white collar exemptions and eliminate the “long duties tests,” the 20% cap on the performance of non-exempt work, and the “discretion and independent judgment” requirements in the “short duties tests”;
- Allow employers to make salary deductions from exempt employees who are absent for one or more whole days because of disciplinary suspensions; and
- Provide a special exemption test for highly compensated employees (earning \$65,000 or more annually) if the employee performs non-manual work and one or more executive, administrative or professional duties.

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These proposed regulations will be subject to a 90 day comment period, which expires on June 30, 2003. Information on the proposed regulation and a chart comparing the major changes in the proposed regulations are available on the DOL website: www.dol.gov. Until the newly proposed regulations are finalized, the old, current regulations apply. When final regulations are published, we will provide a comprehensive description of their application.

HOW HEAVY IS THE HIPAA BURDEN?

While you probably heard dire warnings about the HIPAA compliance date of April 14, the requirements applicable to your health plan may not be as overwhelming as you think, especially in the short term. Small health plans — plans with receipts of less than \$5 million — have until April 14, 2004 to comply. Generally, receipts for self-insured plans are claims paid on behalf of the plan participants during the plan's last fiscal year and for fully-insured plans are premiums paid during the plan's last fiscal year.

If your health plan is fully-insured and does not create or receive protected health information (PHI), there are few regulatory burdens. Your plan will need to have written business associate agreements with entities, other than the insurer, who use or disclose individually identifiable health information on behalf of the plan. HIPAA mandates that these agreements contain certain terms to safeguard the health information. Sample agreements are available at www.hhs.gov.

If your health plan is self-insured, there are additional burdens, but they may be form over substance if the plan does not create or receive PHI. Self-insured plans must prepare and implement policies to limit access to and disclosure of PHI, designate a privacy official and train employees who have access to PHI. They must also prepare and distribute HIPAA compliant privacy notices and meet other administrative requirements.

The most weighty HIPAA requirements apply to those plans, either fully- or self-insured, that create or receive PHI. They will have to comply with all the above requirements, which take on substance as the plans must consider how it will actually safeguard the PHI they create or receive, train employees, *etc.* Nonetheless, your third party administrator, if any, may have documents available to assist you with meeting most requirements.

If a plan sponsor will receive PHI with respect to the plan (from either the plan or a third party), the plan will need to amend its plan documents to restrict the plan sponsor's use and disclosure of PHI.

Plans that are self-administered and have fewer than 50 participants are not HIPAA covered entities and do not need to comply with any of the HIPAA requirements.

FMLA WAIVER UNENFORCEABLE

A regulation issued under the Family and Medical Leave Act states that "employees cannot waive, nor may employers induce employees to waive, their rights under FMLA." 29 CFR § 825.220(d). Two recent federal district court decisions have applied the regulation according to its literal reading in refusing to enforce FMLA waivers by employees.

In *Dierlam v Wesley Jessen Corp* (ND Ill, September 23, 2002), the employee signed a separation agreement which contained a broad release of claims that specifically referenced claims under the FMLA. There was a dispute between the employer and employee, existing at the time the employee signed the separation agreement, as to whether the amount of a stay bonus should be reduced for the time spent by the employee on FMLA leave. The court concluded that the plain language of the regulation barred enforcement of the release as to

FMLA rights, ruling that the employee was entitled to the entire stay bonus.

Similarly, in *Lewis v Harper Hospital* (ED Mich, December 23, 2002), the court determined that an acknowledgement form signed by the employee at the start of her employment could not be enforced with reference to her FMLA claim. The form purported to reduce the statute of limitations for bringing any employment-related claim to six months. This could not alter, said the court, the two-year period (three years if a willful violation) under the FMLA.

While case law remains developing in this area, employers must be aware that waivers of FMLA rights, even as part of a separation agreement, will likely be construed as unenforceable.

SIXTH CIRCUIT RULES ON CRITERIA FOR ESTABLISHING OR REFUTING AGE DISCRIMINATION CLAIMS

The Sixth Circuit Court has issued a comprehensive opinion explaining its views on several key elements of establishing or refuting an age discrimination claim under federal law. *Wexler v White's Fine Furniture, Inc* (January 27, 2003).

1. Employee's qualifications – One element of establishing an individual's claim requires the individual to show that he or she is "qualified" for the job held (or sought). An employee (or applicant) is qualified if he or she presents "credible evidence" that he or she meets the "minimum *objective* criteria required" for the job, *i.e.*, education, experience and other required skills. An employer's dissatisfaction with the employee's performance is not to be considered in evaluating the employee's qualifications.

2. Same-actor inference – This allows the court to infer the *absence of discrimination* if the same person both hired and fired the employee,

especially within a short period of time. The Sixth Circuit announced that such inference is not mandatory and can be weakened by other evidence.

3. Same-group inference – This permits the court to infer that one member of a protected class is unlikely to discriminate against a fellow member of the protected class. Noting that the U.S. Supreme Court had explicitly rejected the inference in a race and sex discrimination case, the Sixth Circuit rejected the inference in this age discrimination case.

4. Business judgment defense – Legitimate business reasons for taking adverse action against an employee are not an absolute defense. Dismissal will be denied where an employee produces evidence to show that the employer's proffered reason: (a) has no basis in fact; (b) did not actually motivate the employer; or (c) is insufficient to warrant adverse action.

Thus, in *Wexler*, the Sixth Circuit reinstated the age discrimination claim of a 57 year old sales manager who was demoted, allegedly due to declining sales, by his 65 year old manager who had hired him only two years previously. The court ruled that the manager's repeated references to the sales manager's age and the manager's failure to demote the sales manager's "much younger" replacement, who experienced similarly "dismal" profits, was sufficient evidence of age discrimination to present the case to a jury.

COURT ENFORCES NO-WORK POLICY DURING LEAVE

In *Pharakhone v Nissan North America* (April 2, 2003), the federal Sixth Circuit Court of Appeals upheld an employer's enforcement of its policy prohibiting unauthorized work while on leave. The employee took leave under the FMLA related to his wife giving birth. The employee helped manage his wife's restaurant

while on the leave. The employer contacted the employee and reminded him of its policy against unauthorized work during leave pursuant to the employee handbook. The employee nevertheless continued working at the restaurant. At the completion of his leave the employee was terminated for violating company policy. He then sued, alleging that the employer interfered with the exercise of his rights under the FMLA by terminating him.

The Court found that the right to reinstatement after leave under the FMLA is not absolute. For example, an employer need not reinstate an employee who would have lost his job even if he had not taken FMLA leave. Further, an employer need not reinstate an employee if application of a uniformly applied rule against working while on leave results in the employee's discharge. Here, the employee could not demonstrate that he was discharged because he took the leave. Rather the evidence revealed only one answer: he was discharged because he violated the no-work policy.

Remember to register for Part One of our
2003 Executive Briefings Series

Economic Blues and Pink Slips

**Thursday, May 15 — 8:00 a.m. to 10:00 a.m.
at the Hotel Baronette in Novi.**

Part One will focus on workforce reductions. We will discuss how to recognize important issues and develop strategies to minimize potential liability whether you are eliminating one position or hundreds of positions. This seminar will provide practical advice on the advisability and implementation of voluntary separation programs, the use of releases and waivers that work, and the planning and implementation of involuntary reductions in force. **For more information or to register**, please contact Kristen Miller at (313) 392-1041 or kamiller@bodmanlongley.com.

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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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