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WINTER 2009

## LABOR AND EMPLOYMENT OBSERVER

NEWS ON CONTEMPORARY ISSUES



### MESSAGE FROM THE CHAIR TO THE FRIENDS OF COZEN O'CONNOR:

Our Winter 2009 Labor and Employment Law Observer covers a multitude of topics of interest to in-house counsel, human resources professionals and corporate management. Many of these articles are particularly timely given the changing political climate and current difficult economic environment.

- The revised regulations to the Family and Medical Leave Act, which went into effect on January 16, 2009;
- Employment issues to consider during economic downturns;
- Preparing for the Employee Free Choice Act;
- The EEOC's new Compliance Manual section addressing religious discrimination in the workplace;
- The City of Philadelphia's new ordinance requiring unpaid leaves of absence for victims of sexual or domestic violence, which went into effect on January 5, 2009; and
- Minimizing ERISA litigation in a down economy.

You can read about these and other recent labor and employment developments in this issue of the Observer.

We welcome your inquiries on the articles in this Observer, other matters of interest to you and suggestions for future topics.

**Mark Foley**  
Chair, Labor & Employment

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## FAMILY AND MEDICAL LEAVE ACT UPDATE: WHAT YOU NEED TO KNOW ABOUT THE NEW REGULATIONS

*Debra S. Friedman*

**L**ate last year the U.S. Department of Labor ("DOL") issued new regulations under the Family and Medical Leave Act ("FMLA"). These regulations went into effect on January 16, 2009.

We initially reported significant changes in the new FMLA regulations in our November 18, 2008 email Alert! to clients and friends. In December 2008, the DOL issued a revised FMLA poster and important new forms to comply with the new regulatory standards. This article provides links to the new FMLA documents and highlights the key regulatory changes we previously reported.

### LINKS TO NEW FMLA FACT SHEET, POSTER AND FORMS

The regulations may be accessed at <http://www.dol.gov/esa/whd/fmla/finalrule.pdf>. In December 2008, the DOL issued a helpful fact sheet on the final regulations, which may be accessed at <http://www.dol.gov/esa/whd/fmla/finalrule/factsheet.pdf>.

The DOL also revised its FMLA poster and other FMLA forms. These new forms now may be accessed as follows:

- The new FMLA poster: <http://www.dol.gov/esa/whd/fmla/finalrule/FMLAPoster.pdf>.
- Certification of Health Care Provider for Employee's Serious Health Condition (Form WH-380E): <http://www.dol.gov/esa/whd/forms/WH-380-E.pdf>.
- Certification of Health Care Provider for Family Member's Serious Health Condition (Form WH-380F): <http://www.dol.gov/esa/whd/forms/WH-380-F.pdf>.
- Notice of Eligibility and Rights & Responsibilities (Form WH-381): <http://www.dol.gov/esa/whd/fmla/finalrule/WH381.pdf>.
- Designation Notice to Employees of FMLA Leave (Form WH-382): <http://www.dol.gov/esa/whd/forms/WH-382.pdf>.

- Certification of Qualifying Exigency for Military Family Leave (Form WH-384): <http://www.dol.gov/esa/whd/forms/WH-384.pdf>.
- Certification for Serious Injury or Illness of Covered Servicemember—for Military Family Leave (Form WH-385): <http://www.dol.gov/esa/whd/forms/WH-385.pdf>.

### ACTIONS FOR EMPLOYERS TO TAKE

The new regulations require employer action. First steps include:

- Reviewing and revising written FMLA posters, policies and forms to ensure compliance with the new regulations;
- Addressing new employer options for applying certain workplace rules to employees requesting or currently on FMLA leave; and
- Training Human Resource personnel and front line managers on how to identify, respond to and track all types of FMLA leave in accordance with the new regulations.

### KEY CHANGES AND CLARIFICATIONS TO THE FMLA

This article analyzes 15 of the new FMLA regulations' most significant developments:

#### 1. Employee Eligibility

##### a. Counting 12 months of service

Employees who have worked with an employer for 12 months and for at least 1,250 hours in the last 12 months are eligible for FMLA protection. The old regulations, which remain in effect through January 15, 2009, stated that an employee's 12 months of employment need not be consecutive. However, the old regulations did not put a limit on how far back in time an employer needed to go to determine if an employee worked a total of 12 months for the employer.

The new regulations state that employment periods prior to a break in service of seven (7) years or more need not be counted in determining eligibility, except in two situations: (a) where a written agreement, including a collective bargaining agreement, exists concerning the employer's intent to rehire the employee after the break in service; or (b) where the

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break in service is due to fulfillment of a National Guard or military service obligation.

**b. Interplay of USERRA and the FMLA**

The old regulations did not discuss the interplay of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") and the FMLA. The new regulations explicitly state that time spent performing military service must be counted in determining whether the employee has been employed for at least 12 months by the employer.

**c. Employee eligibility occurring while employee is on leave**

The new regulations clarify that an employee who first becomes eligible for FMLA protection while on a non-FMLA leave may acquire protection during the employee's leave. Specifically, any portion of the leave taken for an FMLA-qualifying reason *after* the employee meets the eligibility requirements would be counted as FMLA protected leave.

*"The new regulations explicitly state that time spent performing military service must be counted in determining whether the employee has been employed for at least 12 months by the employer."*

**2. Definition of a Serious Health Condition**

The new regulations retain the six individual definitions of serious health condition. However, the DOL made some clarifications.

For instance, one form of "serious health condition" under the FMLA involves an incapacity of more than three consecutive calendar days and either (a) two or more treatments by a health care provider or (b) one treatment by a healthcare provider which results in a regimen of continuing treatment under the supervision

of the health care provider. The new regulations clarify that (1) the period of incapacity must be "more than three, consecutive, full calendar days;" (2) treatments by a health care provider require an "in-person visit to a health care provider;" (3) treatments "two or more times" must be within the first 30 days of incapacity, absent extenuating circumstances; (4) the first treatment visit must take place within seven days of the first day of incapacity; and (5) any determinations of whether additional treatment visits or regimens of continuing treatment are necessary shall be made by the health care provider, not the employee.

Another form of "serious health condition" under the FMLA involves periods of incapacity or treatment due to a chronic serious health condition. The old regulations required "periodic visits" for treatment by a health care provider, but did not define "periodic visits." Now the regulations state that "periodic visits" means visits at least twice a year.

**3. Changes in Notification Procedures**

**a. Employee's notice to his/her employer of the need for FMLA leave**

Under the old regulations, an employee had up to two business days after an absence to provide notice to his/her employer of a need for FMLA leave. The new regulations clarify that when an employee first becomes aware of a need for FMLA leave less than 30 days in advance, "it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day."

The new regulations also state that an employer now may require employees to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For instance, employees may be required to follow an employer's normal call-in procedures and/or contact a specific individual to request leave.

**b. Employer's notice to employees designating FMLA leave**

Under the old regulations, employers generally had

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two (2) business days after learning of the employee's FMLA-qualifying condition to notify the employee that his/her leave would be designated as FMLA leave. The new regulations give employers five (5) business days to provide notice of their intention to grant FMLA leave after the employer learns of the employee's FMLA-qualifying condition, absent extenuating circumstances.

## 4. Medical Certifications

The old regulations only permitted physicians representing the employer to seek clarification and/or authentication of medical certifications. The new regulations permit an employer to contact an employee's health care provider directly for clarification and authentication of medical certifications (other than those related to military leaves) once certain conditions have been met. First, the employer must specify in writing what information is lacking from the medical certification and provide the employee with seven calendar days to cure the deficiencies and/or authorize the employer to contact the employee's health care provider. Second, if the employer has the necessary authorization, the new regulations specify that the employer's contact must be a health care provider, human resource professional, leave administrator or a management official, and cannot be an employee's direct supervisor.

Employers generally continue to be prohibited from requesting additional information from an employee's health care provider. However, the new regulations provide that if an employee's serious health condition may also be a disability under the Americans with Disabilities Act ("ADA"), that the FMLA "does not prevent the employer from following the procedures for requesting medical information under the ADA" and that any information received may be used in determining an employee's entitlement to FMLA leave.

## 5. Definition of Health Care Provider

Under the old regulations, physician assistants were not explicitly mentioned in the definition of health care provider, although they generally fell under the provision of "any other person determined by the Secretary to be capable of providing health care services." The new regulations clarify that physician assistants fall within the definition of health care provider.

## 6. Substitution of Paid Leave

Under the old regulations, employers were prohibited from imposing any limits on the substitution of paid vacation or personal leave for unpaid-FMLA leave. The new regulations state that an employee's ability to substitute accrued paid leave for unpaid FMLA leave is determined by the terms and conditions of the employers' normal leave policy. This change increases employer flexibility by allowing more consistent application of workplace policies.

For instance, if an employer requires employees to provide two days' notice of the need for paid personal time off, such notice requirements may be applied to the substitution of accrued, paid personal time off for unpaid FMLA leave. Similarly, if an employer requires paid sick leave to be used in full day increments, and the employee requests FMLA leave for a shorter duration of time but wants to substitute paid sick leave, the employee must take the larger increment of leave required under the paid leave policy unless the employer chooses to waive the requirement.

## 7. Intermittent Leave

The old regulations stated that employees on intermittent FMLA leave must make an attempt to schedule treatments so as not to disrupt an employer's operations. The new regulations clarify that an employee must make a "reasonable effort" to schedule treatment so as not to disrupt unduly the employer's operations.

The new regulations also clarify that employers are not required to account for FMLA leave in increments smaller than one hour just because their payroll systems are capable of tracking smaller time increments. Rather, an employer may choose to account for FMLA leave in any increment not to exceed one hour so long as it matches the smallest increment used by the employer to track any other type of leave. For instance, if an employer accounts for sick leave in 30-minute increments and vacation time in one-hour increments, FMLA leave must be accounted for in 30-minute increments.

Significantly, employers still may not charge FMLA leave for any period of time during which an employee performs work. For example, if an employee needs FMLA leave 45 minutes before the end of the employee's shift, but the employer tracks all time off in increments



of one hour, the employee only can be charged 45 minutes of FMLA leave. Accordingly, employers must be cautious in how they account for FMLA leave.

## 8. Fitness-for-Duty Certifications

The old regulations generally limited fitness-for-duty certifications to a simple statement of an employee's ability to return to work. The new regulations permit employers to require employees returning from FMLA leave to provide fitness-for-duty certifications that address an employee's ability to perform the essential functions of the employee's job. In order to take advantage of this new provision, employers must have a uniformly applied policy that requires all similarly situated employees who take leaves of absence for such conditions to provide a fitness-for-duty certification, and the certification must be limited to the health condition that caused the need for FMLA leave. Moreover, the employer must provide the employee with a list of essential job functions at the same time the employer provides designation of FMLA leave to the employee.

Employers also may require fitness-for-duty certifications up to once every 30 days if an employee used intermittent or reduced schedule leave during that period and if the employer has reasonable safety concerns about the employee's ability to perform his or her job duties based on the serious health condition for which the employee took FMLA leave. "Reasonable safety concerns" means a reasonable belief of a significant risk of harm to the individual employee or others. Specifically, the employer should consider the nature and severity of the potential harm and the likelihood that the potential harm will occur.

As under the old regulations, employees must bear the cost of obtaining any fitness-for-duty certifications. Employers, as before, may not require second or third opinions on such certifications. An employer's health care provider, human resource professional, leave administrator or a management official may, however, contact an employee's health care provider for clarification of a fitness-for-duty certification so long as it does not delay an employee's return to work.

## 9. Light Duty

The new regulations and comments preceding them clarify that time spent performing a light duty assign-

ment does not count as FMLA leave. Moreover, employees who are entitled to FMLA leave are not required to accept light duty assignments while recovering from a serious health condition if they do not so choose. The new regulations also clarify that when an employee on FMLA leave decides to accept a light duty assignment, the employee does not waive his or her rights of restoration to the same position that the employee held when his/her FMLA leave commenced, but that the employee's right to restoration ceases at the end of the applicable 12-month FMLA leave year.

## 10. Perfect Attendance Awards

The old regulations prohibited employers from denying perfect attendance awards to employees as a result of an absence due to FMLA leave. The new regulations permit employers to deny certain bonuses or payments to employees who took FMLA leave if such bonuses or other payments are "based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave." Significantly, however, FMLA and similar, non-FMLA leave must be treated the same for purposes of determining such bonuses or other payments.

## 11. Definition of Qualified Exigency for Military FMLA Leave

President Bush signed the National Defense Authorization Act ("NDAA") into law on January 28, 2008. The NDAA includes provisions expanding the FMLA to provide enhanced leave provisions for families of U.S. military personnel. One type of leave under the NDAA provides eligible employees up to 12 weeks of unpaid leave in a 12-month period for a "qualifying exigency" arising out of the fact that the employee's spouse, child or parent is on active duty or has been notified of an impending call or order to active duty. Because the DOL had not previously defined "qualified exigency," the agency did not require employers to grant such leave until final regulations defining the term become effective.

The final FMLA regulations define "qualifying exigency" as follows: (1) short-notice deployment, which is defined as a call or order to active duty in seven or less calendar days prior to the date of deployment; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6)

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rest and recuperation; (7) post-deployment activities; and (8) additional activities, which is a catch-all provision covering events arising out of the military member's active duty or call to active duty, provided the employer and employee agree such leave qualifies as an exigency and both agree as to the timing and duration of such leave. Accordingly, employers must grant leave meeting this definition as of January 16, 2009, although the DOL encourages employers not to wait until the regulations go into effect.

## 12. Joint Employers

The old regulations did not address joint employers in the specific context of Professional Employer Organizations ("PEOs"), which are organizations that generally contract with clients to perform administrative functions such as payroll and benefits. The new regulations address how to treat PEOs. Specifically, the DOL recognized that not all PEOs will be joint employers, stating that a determination turns on the "economic realities" of the situation. Accordingly, the new regulations state that PEOs that merely perform administrative functions for the employer are not joint employers with the employer. However, if the PEO has the right to hire, fire, assign or direct and control its client's employees, or benefits from the work that its client's employees perform, the PEO may be considered a joint employer, depending upon the facts and circumstances.

## 13. Overtime

The old regulations did not address whether failure to work mandatory overtime counted as FMLA leave. The new regulations explicitly state that where an employee normally would be required to perform overtime work, but cannot do so due to an FMLA-qualifying condition, the employee may be charged FMLA leave for the overtime hours not worked. While the DOL states that this is not a change in policy, it is the first time that the policy is in the regulations, as opposed to the preamble.

## 14. Waiver of Potential and Actual FMLA Claims

The old regulations stated that employees could not waive their FMLA rights and made no distinction between prospective rights and past employer conduct. The new regulations clarify that employees may settle or release FMLA claims based on past employer conduct without the DOL or court approval. Employees still may not waive their prospective FMLA rights.

## 15. New FMLA Forms

The new regulations also contain FMLA prototype forms, which employers may use to comply with their FMLA obligations. Links to the forms are set forth at the beginning of this article.

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## PREPARING FOR THE EMPLOYEE FREE CHOICE ACT: WHAT EMPLOYERS SHOULD BE DOING IN ADVANCE OF NEW LABOR-FRIENDLY LEGISLATION

*Jeffrey L. Braff and Andrew J. Rolfe*

Organized labor spent a reported \$450 million in the last election cycle supporting the candidacy of President Barack Obama and other candidates viewed as friendly to unions. In an interview published in the Wall Street Journal weekend edition on December 6, 2008, titled "Let's Share the Wealth," Andrew Stern, President of the Service Employees International Union, made clear that he

intends to "hold [Mr. Obama] accountable" for promises made on the campaign trail. Atop that list of promises is the speedy passage of the Employee Free Choice Act ("EFCA"), which Mr. Stern and other labor leaders say they will press to have passed in the first hundred days of the Obama Administration. While opposition to EFCA has been mounting, and passage of the legislation is not necessarily guaranteed, there are steps employers should be taking now to prepare for the dramatic changes EFCA would make to enable unions to more easily organize workers.

First, a brief overview of the changes EFCA would make to existing law. The principal change, and the one that has garnered the most attention to date, is that EFCA would replace the current system of secret ballot elections supervised by the



National Labor Relations Board (“NLRB”) with a card-check system. Under EFCA, the NLRB would be required to certify a union as the exclusive representative of a group of employees if the union presents signed authorization cards from a majority of employees in an appropriate bargaining unit. (How and when challenges to the appropriateness of the unit are to be resolved is a detail not addressed by EFCA.) Indeed, as currently drafted, EFCA **prohibits** the Board from conducting an election if it is presented with authorization cards from a majority of employees in a particular unit. Of equal, if not greater importance, EFCA also calls for binding arbitration, under rules to be developed by the Federal Mediation and Conciliation Service to resolve first contracts that do not settle within 120 days. An EFCA arbitration panel will have authority to impose a first contract that lasts for two (2) years. Finally, EFCA provides for enhanced penalties for unfair labor practices committed during union organizing drives and first contract negotiations, including liquidated damages of two (2) times any amount awarded as back pay, and civil penalties of up to \$20,000.

So what can employers do to prepare for EFCA? Number one – don’t take passage of EFCA for granted. While EFCA easily passed the House, it failed to garner enough support to ward off a Republican filibuster in the Senate. Since then, opposition to EFCA has been mounting amid greater publicity. Even former Democratic presidential candidate and stalwart friend of Organized Labor, George McGovern, took a stand against EFCA in an August editorial calling the card check procedure for certifying unions “a disturbing and undemocratic overreach not in the interest of either management or labor.” More recently, the U.S. Chamber of Commerce published a series of three white papers exposing the fallacies underlying labor’s arguments in favor of EFCA, titled “Responding to Union Rhetoric: The Reality of the American Workplace.” (<http://www.uschamber.com/publications/reports/unionrhetoric>) Employers can, and should, support the efforts of the Chamber of Commerce and other industry groups to oppose EFCA. Moreover, employers should voice their opposition to EFCA to elected representatives in the states where they do business, either directly or through industry organizations.

If EFCA does become law, it will not necessarily require every employer to be in a perpetual state of “campaigning” against an organizing drive that might be happening without their knowledge. However, there are steps employers should take

*“...there are steps employers should take in advance to ensure their readiness to address union activity.”*

in advance to ensure their readiness to address union activity. In particular, employers need to review and assess the adequacy of existing policies that may impact organizing activity, including no-solicitation rules, and rules governing access to employer facilities and use of employer equipment and property, including phones, computers, and e-mail systems. In addition, employers should evaluate how best to educate their employees about the drawbacks of unionization. At a minimum, employers should begin the process of educating employees, both supervisors and the rank and file, about the significance of authorization cards, and the legal consequences of signing one. More generally, supervisors need to be reminded to treat employees fairly and with respect. Supervisors also need to be taught how to spot organizing activity, and what they lawfully are permitted to do in response.

The bottom line is that there is still time for employers to make their opposition to EFCA known and to work for the defeat of this poorly-named and potentially damaging legislation. Even if it passes, employers are not powerless to address the increased organizing activity that will come in EFCA’s wake. **For more detailed information on what employers can do to prepare for EFCA, Cozen O’Connor’s Labor and Employment Department is conducting a Breakfast Briefing on January 27, 2009 in Philadelphia. To view the invitation go to [http://www.cozen.com/cozendocs/out-going/invites/2009/Labor/Labor\\_EFCA.html](http://www.cozen.com/cozendocs/out-going/invites/2009/Labor/Labor_EFCA.html).**

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## TOP 5 POTENTIAL HAZARDS WITH ECONOMY-DRIVEN DECISIONS

*Michael C. Schmidt*

**O** Times are tough. The weakened economy has spared few industries, causing companies big and small to re-examine their personnel needs and make tough decisions regarding those positions that no longer may be necessary. Debunking the myth that corporate giants are immune to these crossroads, the nation's second largest bank, Citigroup, recently announced that it would lay off 75,000 employees globally this year alone.

Tough times require businesses to strengthen their resolve to avoid the legal tsunami that can also result from the economy-driven decisions that are made. This article sets forth best practices for ensuring that your company minimizes its potential exposure in 5 primary areas.

### 1. THE TRADE SECRET AND UNFAIR COMPETITION DILEMMA

An economic downturn increases the likelihood that senior-level employees will leave your company either involuntarily or voluntarily. Among the critical issues involved with such departures is the fear that a former employee might disclose your company's trade secrets to the outside world or unfairly compete. Businesses must, therefore, consider whether to seek the enforcement of non-compete and non-disclosure agreements, or, alternatively, whether to request that employees who remain with the company sign such agreements. On the flip side, in the event your company chooses to hire an individual who has recently left another company, you should proactively determine whether the new hire is

*"Businesses must...consider whether to seek the enforcement of non-compete and non-disclosure agreements, or, alternatively, whether to request that employees who remain with the company sign such agreements."*

subject to any restrictive covenants with his or her former employer, and perhaps ask the new hire to certify in writing that no restrictions exist. That way, your company can minimize potential exposure by avoiding the knowledge or intent that must be shown to support a tortious interference claim by the former employer.

It is well established in many states like New York that restraints on an employee's ability to compete remains disfavored except in certain circumstances when enforcement would prevent unfair competition. In fact, an even smaller group of states, California being at the forefront, have legislatively banned virtually all types of restrictive covenants. Nevertheless, in those jurisdictions where a restriction on an employee's ability to compete or solicit is governed by a "reasonableness" test, the restriction must be reasonable in geographic and temporal scope, must be necessary to protect the company's legitimate interests, and cannot be unreasonably burdensome to the employee being restrained.

Before determining whether to bind an employee to a restrictive covenant, or to seek the enforcement of an already-existing agreement, your company should: First, understand that you generally cannot enforce restrictive covenants against an employee who has been involuntarily terminated without cause. Second, make sure that all trade secret and otherwise proprietary information is treated as such internally. You will not persuade a court to protect valuable information unless you demonstrate that the information was, in fact, considered to be valuable and that the company limited access to the information accordingly.

Third, tailor any restrictive covenant to the particular position of the employee to be bound, demonstrating that a business need exists which justifies restrictions being placed on that particular position, rather than that a boilerplate agreement was used for clerical and senior executives alike. Fourth, include time and geographic restrictions that are reasonable and necessary to your business and industry, and the specific needs of your company, in order to avoid the perception or reality that you are overreaching and simply acting in a punitive manner. Fifth, consider "safeguards" such as additional severance to be paid during the restriction period. While businesses are often loathe to pay anything to former employees, doing so here may prevent the employee from successfully claiming an inability to earn a living while subject to the restrictive covenant.

## 2. THE MEDICAL LEAVE DILEMMA

The stress caused by the troubled economy may lead to an increase in the number of employees whose productivity diminishes and who may seek a leave of absence. While workplace stress and anxiety may not be a protected condition alone, stress can manifest itself in other conditions that are protected under the various laws that govern leave-related issues. Additionally, increased stress coupled with the significant time spent in the office in a particular day or week, could provide inappropriate outlets in the form of harassment or violence in the workplace. Recognizing the potential for stress-related conditions in this economic setting, and determining whether certain legal obligations are met, is critical.

Businesses are advised to engage experienced counsel to help navigate the interplay among the relevant laws. On the federal side, the primary sources for leave-related obligations are the FMLA and the ADA. Many states also have their own version of these statutes, as well as workers compensation and unemployment insurance programs that must be considered. Indeed, Congress' recent amendments to the ADA and newly-published Department of Labor regulations interpreting the FMLA will expand the number of employees that might have the right to take a medical leave.

Therefore, your company should: First, understand the nature of its obligations under these laws, and particularly the expansive definitions of "serious health condition" and "disability." Do not dismiss an employee's statements about a particular condition simply because of prejudice or an unsubstantiated belief that the condition is not a "real condition." Second, maintain and regularly communicate policies that set forth the employee's rights and obligations with respect to employment leave. Third, engage in a dialogue with an employee who expresses a need for an accommodation due to a condition. Many problems can be avoided if the employer and employee communicate from the first instance about expectations, needs, and the potential for mutually acceptable solutions. Fourth, document the history of discussions with the employee, and any accommodations that are requested or offered.

## 3. THE MASS LAYOFF DILEMMA

With the recent news of companies laying off tens of thousands of their workforce at a time, large scale terminations and even facility closings will continue to trigger certain

*“...large scale terminations and even facility closings will continue to trigger certain notice obligations.”*

notice obligations. The federal Worker Adjustment and Retraining Notification Act, known as "WARN", requires that 60-days notice of a mass layoff or plant closing be given in certain circumstances. The federal WARN Act applies to companies that employ 100 or more full-time employees, and generally requires that 60-days notice be provided of a mass layoff or plant closing, particularly when 50 full-time employees lose their positions and constitute at least 33% of the workforce at a single site.

States such as California, Illinois and New Jersey have adopted their own version of WARN, and New York joined that growing number of jurisdictions when it adopted its own version of WARN that governs the events requiring private employers to provide notice and the amount of notice that must be given. The New York legislation takes effect in February 2009, and is more expansive than the federal WARN. For example, the New York WARN Act applies to employers with 50 or more full-time employees, or 50 or more employees (including part-time employees) whose hours total at least 2,000 hours per week, whereas the federal Act applies to those employing 100 or more employees. In addition, while the federal Act requires 60-days advance written notice to employees in covered situations, the New York WARN Act now requires 90-days advance written notice of a triggering event. Finally, the events that will in fact trigger the required advance notice is broader under the New York WARN Act, as New York law has reduced the thresholds for triggering plant closings and mass layoffs, and has added a requirement that notice be given for "relocations" that involve the removal of all or substantially all of an employer's industrial or commercial operations.

Therefore, companies that are considering a large reduction-in-force, the closing of a particular facility, or even certain types of relocations, should: First, determine whether the planned event requires compliance with federal or state notification laws, including whether any recognized exceptions insulate the company from the notice requirements. Second, ensure that the reasons for the planned event are well docu-

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mented, particularly from a timing standpoint, and that all covered employees, whether temporary or permanent, part-time or full-time, receive the proper notification.

## 4. THE INDIVIDUAL LAYOFF DILEMMA.

Where economic troubles may not warrant mass layoffs and full operational shut downs, the prospect of terminations on a smaller scale still remains. Without triggering the federal and state WARN obligations, businesses are still best advised to consider whether the termination of even one individual could lead to potential exposure.

Statutes such as Title VII of the Civil Rights Act, the Equal Pay Act, the Age Discrimination in Employment Act, the Uniformed Services Employment and Reemployment Act, and various other federal and state laws, proscribe discrimination against individuals of a protected class. Federal and state law also provides redress for individuals who claim retaliation as a result of a company's decision affecting employment up to and including termination. The termination of a particular individual, and even the elimination of a particular position, may be unavoidable in these economic times.

*“...your company should take certain steps when determining to terminate an individual’s employment, particularly if that termination is part of a larger company-wide plan.”*

However, your company should take certain steps when determining to terminate an individual's employment, particularly if that termination is part of a larger company-wide plan: First, perform an impact analysis to determine whether the individual termination(s) impact a particular protected group more negatively, documenting the reasons that certain individuals, positions, or departments have been chosen for elimination. Second, comply with all COBRA-related requirements, and determine any state law obligations relating to the timing of final paychecks, payment of accrued but unused sick or vacation time, and whether any company documents or other property must be returned. Third, consider offering severance or other post-termination benefits to terminated individuals in exchange for a full release of potential claims, to the extent permitted under applicable law. Any severance program must be evenly-applied, and

must provide benefits beyond that to which the terminated individual would otherwise be entitled.

## 5. THE EXPANDED WORKPLACE BOUNDARY DILEMMA.

Occasionally, businesses will look to cut costs and reduce work schedules through measures other than individual or mass layoffs. For example, companies may offer telecommuting and Blackberries as options to employees who no longer have to commute to the traditional “office” for a nine-to-five workday. However, with the decision to permit the performance of work outside the four walls of the workplace, and the explosion of technological advances that keep us all connected 24/7, comes significant concerns as well.

One area of concern is with the potential for misclassifying company employees and failing to pay the required overtime premium for hours worked in excess of 40 hours per week. For example, the hours worked by an employee working from home or traveling with the benefit of a Blackberry or similar PDA, can no longer be monitored from a company standpoint, leaving the company susceptible to claims (legitimate or illegitimate) that the employee performed work in a given workweek for which he or she is entitled to overtime pay. In addition, courts have recently refused to excuse a company's failure to pay for overtime work even in the face of evidence that the overtime was not authorized by the company in the first place. While your company may discipline an employee for violating company policy relating to unauthorized overtime, an employee must nevertheless be paid for all work performed for the benefit of the company.

Your company cannot ignore the strict requirements pertaining to employee wages and hours. To that end, there are certain pro-active steps that can be taken to minimize the potential exposure in any future administrative audit or lawsuit: First, create a well-defined overtime policy that is distributed and communicated effectively to your employees. It is not enough simply to create a policy in a handbook; it is critical that your policy be communicated through regular trainings or meetings with employees, and distribution of the policy with an employee's written acknowledgement of the policy. Second, say what you mean and mean what you say. If your company maintains a strict policy that employees cannot work after hours, then you should not create a “wink-wink” culture where employees feel as if they are expected to “check in” at all hours through their home computers or Blackberries, and are frowned upon for not immediately responding to an e-mail sent at 10:00 p.m.



Third, verify that the appropriate classifications are made and that the appropriate records are maintained supporting the proper wage classifications for employees. Internal audits should be conducted by job classification, with a focus on the day-to-day job duties that are actually performed, rather than on indiscriminate job titles or out of date job descriptions. Finally, consider instituting a supplemental documentation procedure for non-exempt employees, so that your company can better account for the number of hours an employee later claims he or she worked.

There also are practices that your company should consider before it provides Blackberry-like devices to the entire workforce: First, consider giving out Blackberries or similar devices only to those employees that are exempt. That way, there generally will be less concern about when the employees are using the device and whether they are "working" for a greater number of hours than desired. Second, you should have a clear and specific policy that states that employees are not required or permitted to use the Blackberry outside normal working hours, and that the employee may be required to return the device if it is determined that the employee is

using it contrary to the policy. The company may want to consider monitoring, not the content of employee e-mail, but the amount of usage during certain hours. While it is an exercise in towing the line between the morale that might be lost by the perception of "big brother" and the business need inherent in any monitoring, your company should at the very least create a policy and practice that reflects thought having been given to the conduct of the workplace and the challenges that are being faced.

Times are tough. However, your company has the ability to control many of the decisions it makes and the legal consequences of those decisions, even in a difficult economy. By identifying the issues that may arise, and proactively analyzing and creating a plan to confront those issues, your company can ultimately survive this climate and realize continued growth and prosperity in the future.

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## RELIGIOUS DISCRIMINATION IN THE WORKPLACE: ADHERING TO THE EEOC'S COMPLIANCE MANUAL TO AVOID ADVERSE DETERMINATIONS

*Tiffani L. McDonough*

With over 22 major religions in the U.S., the American workplace has become increasingly diverse. According to the U.S. Equal Employment Opportunity Commission (EEOC), a record 2,800 charges of religious discrimination were filed in 2007, up 13 percent from the prior year (2006) and more than double the number of charges filed in the last fifteen years. In response, on July 22, 2008, the EEOC issued a new Compliance Manual Section ("Manual") addressing workplace discrimination on the basis of religion under Title VII of the Civil Rights Act of 1964. Although this section does not set new law, it incorporates recent developments in case law. Employers should pay particular attention to the Manual because it is used by EEOC staff when investigating religious discrimination charges.

Unsurprisingly, employers that fail to comply with the Manual's standards will likely face adverse determinations.

The Manual focuses on five major topics: coverage issues, disparate treatment, harassment, reasonable accommodation, and related forms of discrimination. The Manual addresses what constitutes "religion" within the meaning of Title VII; disparate treatment based on religion; the requirement to reasonably accommodate religious beliefs and practices; religion-based harassment; and retaliation. The Manual also provides guidance on the sometimes complex workplace issues involved in balancing employees' rights regarding religious expression with employers' need to maintain efficient, productive workplaces. In addition, the EEOC issued two summary documents: *Questions and Answers: Religious Discrimination in the Workplace* and *Best Practices for Eradicating Religious Discrimination in the Workplace*. All three documents are available on the agency's web site at [www.eeoc.gov](http://www.eeoc.gov).

### BEST PRACTICES

Within the new guidelines, the EEOC has a list of "best practices" for employers to adopt in order to avoid workplace religious

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discrimination. The Best Practices document addresses disparate treatment, religious harassment, and accommodation.

One of the most practical suggestions is to "allow religious expression among employees to the same extent that [employers] allow other types of personal expression that are not harassing or disruptive." The EEOC also suggests that "employers should encourage managers to intervene proactively and discuss with subordinates whether particular religious expression is welcome if the manager believes the expression might be construed as harassing to a reasonable person." The caveat employers should be aware of with this suggestion is the amount of training management has received with respect to religious discrimination. Thus, employers should direct managers with less training in this area to involve human resources rather than personally intervene with the employee.

The EEOC recommends the following best practices in the area of reasonable accommodation:

- Employers should inform employees that they will make reasonable efforts to accommodate the employees' religious practices.
- Employers should train managers and supervisors on how to recognize religious accommodation requests from employees.
- Employers should consider developing internal procedures for processing religious accommodation requests.
- Employers should individually assess each request and avoid assumptions or stereotypes about what constitutes a religious belief or practice or what type of accommodation is appropriate.
- Employers and employees should confer fully and promptly to the extent needed to share any necessary information about the employee's religious needs and the available accommodation options.
- An employer is not required to provide an employee's preferred accommodation if there is more than one effective alternative to choose from. An employer should, however, consider the employee's proposed method of accommodation, and if it is denied, explain to the employee why his proposed accommodation is not being granted.
- Managers and supervisors should be trained to consider alternative available accommodations if the particular accommodation requested would pose an undue hardship.

- When faced with a request for a religious accommodation which cannot be promptly implemented, an employer should consider offering alternative methods of accommodation on a temporary basis, while a permanent accommodation is being explored. In this situation, an employer should also keep the employee apprised of the status of the employer's efforts to implement a permanent accommodation.

## REASONABLE ACCOMMODATION

According to the EEOC, "religion typically concerns ultimate ideas about life, purpose, and death" Courts apply a much more liberal test for "religious belief," however, asking only whether an individual's beliefs "occupy the same place in the life of the individual as an orthodox belief in God holds in the life of [one who practices a monotheistic religion]." Consequently, a set of beliefs and practices is a religion if the beliefs and practices are sincerely held and religious in an individual's own scheme of things. Thus, the purported religion does not necessarily have to speak to "ultimate ideas." As a practical matter, although an employer may consider a set of beliefs and practices unusual, the employer should never assume that the beliefs and practices are not religious.

*"although an employer may consider a set of beliefs and practices unusual, the employer should never assume that the beliefs and practices are not religious."*

The EEOC states that an employer must provide a reasonable accommodation for any employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless doing so would pose an undue hardship. Undue hardship is anything that poses "more than a de minimis" cost or burden to the employer. An employer needs to show real evidence of either direct monetary costs or other burden on its business, such as lowered productivity, decreased workplace safety, or infringement of the rights of other employees.

Significantly, the EEOC poses the question, "[w]hat are common methods of religious accommodation in the workplace?" The EEOC offers various suggestions including scheduling changes, voluntary substitutes, and shift swaps.

For example, the EEOC suggests that employers adopt policies allowing alternative work schedules and/or a certain number of “floating” holidays for each employee that will allow employees to meet their religious obligations. The EEOC also advises that it may be necessary to remove tasks from employees or move them to other positions, but it notes that there may be many factors (*i.e.*, lack of replacement workers, lack of other available positions, and the application of a collective bargaining agreement or seniority system) that could contribute to a finding that removing tasks or changing positions would present an undue hardship.

The EEOC cautions that the undue hardship standard may be more difficult to meet in the area of appearance. For example, dress and grooming standards are an area in which the EEOC expects employers to be liberal in their provision of accommodations. The EEOC cautions employers not to rely on “image” as an undue hardship.

The EEOC also advises that employee requests to use employer facilities for prayer and other practices during the

work day must be accommodated unless the use would pose an undue hardship. Notably, if employers allow employees to use facilities for non-work-related, non-religious activities, they would not have much of a basis to deny use of the same facilities for non-work-related, religious activities.

## CONCLUSION

The EEOC’s Manual is designed to be a practical resource for employers on Title VII’s prohibition against religious discrimination. Although guidance in the Manual does not change EEOC policy, it is a comprehensive document outlining recent Title VII case law and the EEOC’s views regarding religious discrimination issues. Because unique and challenging situations can arise with respect to religion in the workplace, employers need to understand their obligations to accommodate individual religious beliefs and their duty not to engage in harassment based on religion.

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## MINIMIZING EMPLOYEE BENEFITS LITIGATION IN A DOWN ECONOMY

by Jonathan R. Cavalier

Perhaps it is no surprise that traditional employment litigation tends to rise during periods when the economy falters. However, employers are often unprepared for the resulting surge in benefits litigation under the Employee Retirement Income Security Act (“ERISA”) which typically follows an economic downturn. As employers tighten their economic purse strings, often seeking to reduce expensive employee benefits or to cut headcounts, decision-makers should be aware of several pitfalls that may result in potentially damaging lawsuits action at a time when the company can ill-afford the expense. Several of these potentially dangerous areas are detailed below along with suggested tactics that employers can use to minimize the likelihood and costs of employee benefits litigation.

### REDUCTIONS IN CURRENT BENEFITS

The practice of providing pension benefits to its employees is often one of a company’s larger expenses, making such

benefits an attractive target for cost-saving cuts in tough economic times. As a threshold matter, ERISA prohibits employers from reducing benefits that have already accrued or vested in the employee. Thus, before making any cuts in benefits, the first step is to carefully examine the plan documents and the summary plan description so as to determine whether the benefits marked for termination have already accrued – or whether the benefits could be reasonably interpreted as having accrued under the plan.

Employers can more readily make cuts where the Plan includes provisions preserving the right to amend certain benefits at any time. For example, if the Plan confers discretion to the employer to cap or modify certain medical benefits at will, the employer can likely limit its exposure, even where the benefits had been vaguely described as “unlimited” or “for life.” However, where the Plan contains specific language promising a benefit at a specified amount or for a particular duration, a court would likely interpret the promised benefit as having accrued and therefore subject to ERISA’s anti-cutback rule, which would prohibit a plan from eliminating or reducing the benefit. In many cases involving the cutback of a benefit, the core dispute will center around whether the language in

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the Plan is sufficient to prevent a terminated benefit from vesting. Thus, it is important to consider not only what the employer intended the language to mean, but what meaning the language will be given by an ostensibly-neutral court. Simply knowing which benefits have vested and which may be subject to discretionary cuts can help both in avoiding and defending lawsuits, and in providing ways to reduce short- and long-term expenses.

## 401(K) PLANS

As the current recession has deepened and the stock market continues to decline, many employees have seen the value of their 401(k) plans decrease significantly. Since 401(k) plans represent the primary retirement investment vehicle for most workers, those most harmed by the devaluing of their retirement assets are often looking for someone on whom they can place the blame. The target of their anger is often the fiduciary of their underperforming retirement plan, and the result is often litigation.

Unfortunately for employers, the Supreme Court recently made it much easier for individual employees to bring these suits based on underperforming 401(k) plans. In *LaRue v. DeWolff, Boberg & Associates*, 128 S. Ct. 1020 (2008), the plaintiff was a former employee and 401(k) participant who instructed his former employer to make certain changes to his retirement investments in his individual account of the employer's

*"Unfortunately for employers, the Supreme Court recently made it much easier for individual employees to bring...suits based on underperforming 401(k) plans."*

defined contribution plan. The employer failed to make the changes, allegedly costing the employee \$150,000 in value, and the employee sued under Section 502(a)(3) of ERISA claiming that the employer breached its fiduciary duty to him. Though courts had previously held that suits under 502(a)(3) could only be brought by a class on behalf of the plan as a whole, the Supreme Court held that ERISA authorizes suits by individual participants for fiduciary breaches that impair the value of plan assets in a participant's individual account.

Whether the potential plaintiff is an individual or a class, ERISA authorizes suits against plan fiduciaries for failing to act "prudently" in evaluating and selecting investment options for the plan. Theoretically, fiduciaries can fulfill their responsibilities by following objective procedural requirements, but a beneficiary who has recently lost a large chunk of his retirement investment is likely to question even the most reasonable decisions based purely on the result, and hindsight is 20-20, especially in the eyes of a litigious plaintiff. Clearly, whether a plan fiduciary has selected "imprudent" investments for the plan is a question subject to many interpretations, but successfully defending litigation involving such questions can often be time consuming and expensive. Further, even when the plan is sued only by an individual rather than a class, it will risk setting a dangerous precedent to be followed by its many other employees, which can lead to a lack of leverage in negotiations and make settlement even with a single plaintiff potentially cost-prohibitive.

Avoiding suits by employees over depleted 401(k)s can be difficult, but there are several steps plan fiduciaries can take to minimize risk. Most importantly, fiduciaries should avoid investing in the employer's own stock if possible. Doing so not only creates a perceived conflict of interest in the event that the stock drops in value, but will also result in the fiduciary being charged with the responsibility to ensure that the stock has not been overvalued by the company. Plan fiduciaries should ensure that proper procedures for investing the plan assets are followed, and should make every effort to diversify the plan's investments as broadly as possible to avoid abrupt losses and violent swings. Finally, employers (and, in particular, their board of directors) should exercise caution in appointing and monitoring the fiduciary selected to manage the plan's investments, as failing to do so can provide a basis for a lawsuit against the company, even where the plan is administered by a third-party.

## ERISA-GOVERNED SEVERANCE PLANS

As mass-layoffs and plant closings continue to occur, many lawsuits will be filed over severance packages offered to terminated employees of all levels. To minimize the resources consumed in litigating these battles, and to perhaps avoid litigation all together, employers should consider setting up severance plans governed by ERISA.

Though structuring a severance plan to be covered by ERISA-based severance plan creates an additional administrative expense, the many benefits and protections offered to employers under ERISA often outweigh this cost for many employers. For example, when a severance plan is covered by ERISA, potential plaintiffs are not entitled to a jury trial and cannot recover punitive or emotional damages. If the plan provides for administrative review of claims, employers can also force potential plaintiffs to exhaust administrative remedies before filing suit. ERISA also contains a broad preemptive clause, which is usually sufficient to limit a plaintiff's action only to the recovery of a disputed benefit. Perhaps most importantly, ERISA gives employers a means to remove actions from state court and access to the wide array of precedent already developed under federal law.

In most cases, an employer can control whether ERISA will govern their severance plan. For example, a simple severance payment made in a single lump sum to one or more terminated employees without administrative eligibility determinations will not be covered by ERISA. At the same time, a plan that provides ongoing retirement benefits to large numbers of former employees will almost certainly be covered. In between the two, there are many options. According to the Supreme Court, the key factor that will trigger ERISA cov-

erage is the existence of an "ongoing administrative scheme." While subsequent case law has developed many factors that may be considered within this context on a case-by-case basis, there are several steps an employer can take to ensure that its severance plan is covered, including drafting a plan document and summary plan description listing eligibility requirements, filing the appropriate government reports, and adhering to ERISA's notice and disclosure requirements.

Regardless of whether an employer seeks to have its severance plan covered by ERISA, it must take precautions when developing its severance arrangements (including employment contracts and individual severance agreements) to ensure that its desired legal framework will govern potential claims by unhappy employees.

Employers seeking methods for reducing costs by avoiding some of the pitfalls listed above or by leveraging the benefits of ERISA coverage should consult with counsel, which can assist in finding a cost-effective strategy for managing all types of employee benefits.

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## REMINDER: NEW PHILADELPHIA ORDINANCE REQUIRES UNPAID LEAVE FOR ABUSE VICTIMS

*Emily Simpson-Miller*

Employers in Philadelphia now must grant unpaid leave to employees who are victims of sexual or domestic violence, or who have a family or household member who is a victim of such violence. Under a new ordinance, which took effect in Philadelphia on January 5, 2009, employees are entitled to unpaid leave to seek medical or psychological attention, obtain services from a victim services organization, relocate or take other precautionary measures, or seek legal assistance. Employers with 50 or more employees for each working day over the 20 weeks preceding the request must grant up to eight workweeks of leave during any 12-

month period. Employers with less than 50 employees for each working day during the 33 weeks preceding the request must grant up to four workweeks of leave. Employees are required to certify to the employer that the employee (or a family or household member) is a victim of domestic or sexual violence, and that he or she is requesting leave for one of the purposes noted above. Employers must keep this information "in the strictest confidence." An employer may not interfere with the employee's right to this leave, nor retaliate against the employee for taking it. A copy of the ordinance is available at [http://www.phila.gov/humanrelations/pdfs/Domestic\\_or\\_Sexual\\_V1.pdf](http://www.phila.gov/humanrelations/pdfs/Domestic_or_Sexual_V1.pdf).

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