March 2013
Volume 24, Issue 1

Veritas™

A newsletter of Human Resources highlights, helpful hints, suggestions and reminders to assist employers in their daily interactions with employees.

Human Resources Potpourri

The FMLA and Light Duty - Court Says No!

The U.S. Court of Appeals for the Seventh Circuit recently ruled that an employee who was granted 12 weeks of FMLA leave for surgery related to an off the job eye injury lacked an FMLA interference or retaliation claim, or an ADA reasonable accommodation claim (*James v. Hyatt Regency Chi.*, 7th Cir., 2/13/13). The employee argued that the hotel interfered with his FMLA rights when it did not promptly reinstate him to his job following a release from his "light duty" restriction. The Court's response, an employer has no duty under the FMLA to return an employee on leave from his job if that employee cannot perform the essential functions of the position. The Court noted that nothing in the Act requires employers to provide light duty for workers on FMLA leave and "there is no such thing as 'FMLA light duty'." In this case, there were a series of doctor's notes submitted by the employee to the hotel. Some of these notes stated that the employee was unable to work in any capacity, others indicated he could return to work, but with "no heavy lifting or bending" restrictions and then stated that the employee was "released to return to work on 'light duty'." In response, the Court stated, "the record indicates that [the employee's] submission of medical documentation representing that he was incapable of working kept him from returning to work."

Source: Bloomberg BNA, Daily

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NLRB Overrules 50-Year Policy

In what is becoming common practice, a (usually) divided National Labor Relations Board ruled that an employer's obligation to check off union dues continues after expiration of a collective bargaining agreement that establishes such an arrangement (*WKYC-TV Inc.*, 359 NLRB 30, 12/12/12). The Board majority stated that the Bethlehem Steel decision (1962), which established that an employer's obligation to check off dues terminates upon expiration of a contract, ". . . should be overruled . . ."

In somewhat "twisted" logic, the majority noted, under settled board law dues check off is a mandatory subject of bargaining since it is a matter related to wages, hours, and other terms and conditions of employment. However, some contractually established terms that are mandatory subjects of bargaining do not survive contract expiration, such as arbitration provisions, no-strike clauses, and management rights claims. Unlike these claims, a dues check off arrangement "does not involve the contractual surrender of any statutory or non-statutory right." Further, if Congress wanted to treat union security and dues check off clauses differently . . . "Congress knew how to do so."

Noteworthy and with more logic than the majority's opinion was a strongly worded dissent by Board Member Hayes. "Bethlehem Steel has been the law for 50 years, and Congress has never legislatively overruled it." The majority's "argument ignores the fact that for 50 years, it has been settled law that dues check off, if agreed to in the collective bargaining process, will not survive the contract." Further, "it hardly advances collective bargaining to require that some portions of negotiated agreements, *i.e.*, those favorable to the unions survive contract expiration, while others, those favorable to the employer do not."

Hayes also noted that an employer's ability to cease dues check off upon expiration of the contract has "long been recognized as a legitimate economic weapon in bargaining for a successor agreement." To strip employers of that opportunity would significantly alter the playing field that labor and management have come to know and rely on . . . the employer will be forced to act as the collection agent for dues to finance his opposition."

Query: Has the Board become "an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands." If so, the playing field has severely tilted.

When labor issues arise in your workplace, a call to experienced labor counsel is always recommended.

PTE's and the ACA

Employers, identify your part-time employees (PTE) now, in advance of Affordable Care Act's (ACA) January 1, 2014 deadline. After that date, employers that hire seasonal (work not more than 6 months) or variable-hour employees (retail, restaurant) must pay an excise tax penalty or offer them health insurance if they qualify as full-time employees (FTE). There is a "look back" period of up to 12 months which is used only for determining whether seasonal or variable-hour employees qualify as "full time" under ACA's definition of 30 hours as a full time workweek.

The employer will have an administrative period of up to 90 days to get the employee set up and enrolled in coverage. Employers, in determining whether they are applicable large employers (50 or more employees) subject to penalty, must look at the preceding calendar year (2014, look at the number of full time employees in 2013 to determine whether penalties apply). Large employers that do not offer a health plan must pay a penalty of $2,000 multiplied by the number of full time employees minus 30. Employers that do not offer a health plan must still pay a penalty if the plan is not minimally sufficient or unaffordable. Under ACA, testing must be done on a month-by-month basis. Confusing? More of the same will be coming.

Source: Bloomberg, BNA, Daily Labor Report®, November 29, 2012 and February 22, 2013.

Quotes Of The Month

- The greatest of faults, I should say, is to be conscious of none – Carlyle
- Motivation is what gets you started. Habit is what keeps you going – Unknown
- You can't build a reputation on what you are going to do – Henry Ford
- A hunch is creativity trying to tell you something – Frank Capra
- Trifles make perfection, and perfection is no trifle – Michelangelo
- Even a fool, when he holdeth his peace, is counted wise – Proverbs
- Half the lies they tell about me aren't true – Yogi Berra

Things I Have Learned

- That you shouldn't waste too much of today worrying about yesterday.
- That opportunities are never lost, someone will take the one you miss.
- That I shouldn't write anything in a letter (e-mail) that I wouldn't want printed on the front page of a newspaper.
- That everybody likes to be asked his or her opinion.
- That you shouldn't look back except to learn.
- That people are more influenced by how much I care than how much I know.
- That the more things change, the more they stay the same.

HR Potpourri

What Was He Thinking?

Despite a professor's claim that he was in a joyous mood when he interacted with a female colleague and his actions were harmless, the Indiana Supreme Court upheld his dismissal from his tenured teaching position. John Haegert v. University of Evansville (Nov. 2012). So what were the harmless actions? During the English Department's Chair interview of a prospective student and the student's parents in the department lounge, the Professor walked over to the Chairperson, called her "sweetie", and stroked his fingers under her chin and along her neck (and this was not the first incident). According to the Indiana Supreme Court, his verbal and physical conduct unreasonably interfered with the Chairperson's work, creating an offensive environment by making her uncomfortable and disrupting the work she was doing. Irrespective of his intent, the Court ruled, his conduct nearly directly mirrors the faculty manual's examples of what constitutes sexual harassment.

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Wage and Hour Compliance Checklist

Is your company in compliance with the Wage and Hour requirements of the Fair Labor Standards Act (FLSA)?

Here are a few common misconceptions:

"Salaried" employees are always "exempt" employees under the FLSA. Not necessarily. This means more than meeting the minimum weekly salary base amount of $455. Employers must also satisfy the FLSA "duties" test which deals with executive, administrative, professional, and highly compensated employees, or they will not be considered "exempt" employees.

FLSA compliance means State compliance: Maybe. When both the Federal regulations and State laws address the same wage and hour requirements, the employer must comply with the most stringent law. In Indiana, this means looking at the additional State law issues outside of the FLSA to regulate payment of wages (wage payment and claim statutes).

An employee can waive the right to minimum wage or overtime pay: Wrong! Covered employers and employees cannot negotiate a deal or enter into any agreement that would subject the employee to give up his/her minimum wage payment or payment of OT (1 1/2x) for work in excess of 40 hours per week. The "deal" would be null and void and the employer subject to liability and penalties.

An employer does not have to pay OT for unauthorized work: Wrong Again! An employer rule that overtime work will not be paid unless authorized will not preclude an employee's right to be paid for OT hours that are worked. However, the employer can discipline an employee if he or she violates the employer's policy of working overtime without the required authorization, but they still must be paid for their services.

To avoid the risk of noncompliance, an employer should periodically review its pay policies, practices and procedures to make sure they are in compliance with Local and State wage payment laws and the Federal regulations. It is that easy.

When wage and hour compliance issues arise in your workplace, a call to an experienced labor and employment attorney is recommended.

Sleeping On The Job, Termination And The Medical Diagnosis–In The Wrong Order

An employee who was diagnosed with narcolepsy after being fired for sleeping on the job was not able to show that her former employer was aware of her medical condition at the time that the decision to terminate her employment was made. Although the employee's doctor informed the employer that a medical condition might have been to blame for her inability to stay awake at work, the District Court for the Northern District of Indiana held that the information was made known to the company after it had decided to suspend the employee pending termination. (*Spurling v. C&M Fine Pack, Inc.*, N.D. Ind., 2/21/13).

In a sequence of events adverse to the employee, the Court ruled that the company did not know about the employee's medical condition at the time it made the decision to terminate her employment. It was the employee's responsibility to inform the company of her disability, to claim it was the employer's responsibility "puts the onus on the wrong party." The Court also noted, "firing someone because of the symptoms of a disability is not the same as firing someone because of a disability." The Court noted that once "the wheels had begun turning on (the employee's) dismissal", she had already been suspended pending termination. The Court also found the doctor's note too vague and uninformative to create a record of disability. Therefore, when the employer became aware of the employee's potential disability, the company was not required to halt the termination proceedings and the termination recommendation "was made without knowledge of any potential medical condition."

When ADA issues arise in your workplace, a timely call to an experienced employment attorney is recommended.

Social Philosophy or Religious Discrimination?

An interesting decision from the Southern District Federal Court in Ohio. A customer service representative for a Cincinnati hospital who refused its request that she receive a flu shot stated a plausible claim for religious discrimination based on her sincerely held beliefs as a vegan (Chenzira v. Cincinnati Children's Hosp. Med. Ctr., S.D. Ohio, 12/27/12). The Court rejected the employer's argument that vegan is "simply a social philosophy or dietary preference" noting the conclusion that vegans may be entitled to the protection of Title VII and its Ohio counterpart (Ohio Civil Rights Act) is supported by the EEOC regulations, which define "religious practices" to include "moral and ethical beliefs as to what is right and wrong" and such beliefs "are sincerely held with the strength of religious views."

Source: Bloomberg BNA, Daily Labor Report®, January 3, 2013.