

Winter 2009

Employment Law Update

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New FMLA Regulations Now in Effect

On November 17, 2008, the Department of Labor released new Family and Medical Leave Act (FMLA) regulations. This is the first major overhaul of FMLA – which allows qualified employees to take up to 12 weeks of medical leave annually – in more than a decade. These regulations went into effect on January 16, 2009 and may have an impact on employers of the estimated 7 million employees who take FMLA leave annually. Highlights from the new regulations include:

- Employers now have five days (up from two) to give notice of FMLA leave rights;
- There are now two different certification forms, depending on whether the employee or a family member has a “serious health condition;”
- Employees must follow company policies with regard to providing FMLA notice, such as giving notice in accord with normal attendance rules, absent unusual circumstances;
- Only certain individuals can contact an employee’s health care providers for medical certification: health care providers, leave administrators, HR professionals, and management officials, *not direct supervisors*;
- Vacation and sick leave may be treated the same for purposes of using accrued, paid time off as a substitute for unpaid FMLA leave;
- Light-duty assignments don’t count toward FMLA leave;
- Employees and their employers may settle FMLA claims without prior government or court approval;
- Employers may be liable if a failure to provide FMLA notice causes actual harm to an employee.

These regulations also implement new family military leave entitlements. A “spouse, son, daughter, parent or next of kin” of covered service members may now take up to 26 work weeks off to care for a service member who has a serious illness or injury incurred in the line of duty. The regulations also define circumstances when a family member of members of the National Guard or Reservists called to duty may take all or part of his/her regular allotment of 12 weeks of FMLA leave due to a “qualifying exigency.”

The complete regulations can be found at: <http://www.dol.gov/esa/whd/fmla/finalrule.htm>.

Practical Pointer

Asking an employee for medical information related to FMLA leave can be tricky. We recommend using the new form provided by the Department of Labor (DOL), which can be found and completed online at: <http://www.dol.gov/esa/whd/forms/WH-380-E.pdf>. Also, a new Notice of FMLA Rights form can be found at: <http://www.dol.gov/esa/whd/fmla/finalrule/WH381.pdf>. Finally, the new FMLA poster, which is required under the new regulations, can be found at: <http://www.dol.gov/esa/whd/fmla/finalrule/FMLAPoster.pdf>.

Not Worried About Unions? Maybe You Should Be!

Passage of the Employee Free Choice Act of 2009 (“EFCA”) is just around the corner. This legislation creates the potential for a radical expansion in union activity, and makes unionization much easier. President Barack Obama was an original sponsor of the legislation and made support for EFCA an element of his presidential campaign. With strengthened Democratic representation in the Senate and House, and strong support from the White House, look for passage early this year.

The EFCA will create a new method for unions to gain representation and bargaining rights for workers. Currently, most union campaigns center around obtaining sufficient “check cards” from workers to force a secret-ballot election on whether the workforce wants to unionize. While an election can be required if as few as 30% of the workers sign the cards, in practice unions tend to seek elections only where a solid majority of the workforce has signed. However, under EFCA a union can obtain representation and bargaining rights in a facility simply by having a majority of workers sign cards: no election needed! Since there is no limit on the number of times a union organizer can attempt to convince an employee to sign, many observers contend that the EFCA scheme will make unionization much more widespread. As soon as fifty-percent-plus-one employees sign cards, the employer will have to deal with a union.

In years past, once a union was recognized, an employer was required to engage in good faith bargaining with the union; if the bargaining failed, the employer could impose terms of employment – at the risk, of course, of a strike. Under EFCA, once a union is “in,” employers and unions are still required to bargain in good faith towards a first contract, but the process will be very different if bargaining does not produce a contract quickly. An impasse in negotiations will trigger mandatory mediation and, after that, mandatory and binding arbitration to determine the terms of the first contract.

House Majority Leader Steny Hoyer (D-Md.) predicts that the bill will pass by “early Spring” at the latest.

Practical Pointer

Employers who discover that they have been targeted for a unionization campaign remain free to make presentations to their workers, during working hours, about the benefits of a union-free workplace. Since the EFCA allows proceeding without an election, the “no meetings 24 hours before an election” rule does not limit employer initiative in this area. (Remember, though, that all of the standard constraints on unfair labor practices remain fully in force: employers may not promise or threaten workers, or even interrogate them as to their position on the union.) If EFCA is enacted, employers in susceptible industries should consider a regular program of educating employees on why a union is not needed or wanted in your workplace.

Employers Forced to Layoff Employees Face Legal Risks

As the economy falters, many employers are forced to layoff employees or restructure their workforces. This has led to an increase in legal claims filed on behalf of employees who feel they were discriminated against, or otherwise wrongfully discharged. On November 18, K&C Employment Law Team member Bob Barry presented a workshop on avoiding legal risks of layoffs and restructuring as part of the first showing of the 25th Annual Employment Law Update. Bob emphasized the need for advance planning to reduce those risks.

While generally only employers with over 100 employees need to worry about the 60-day advance notice required by the Worker Adjustment and Retraining Notification (WARN) Act, most employers face other risks, such as discrimination or wrongful discharge claims. For that reason, Bob recommended that employers rely on well-documented business reasons in choosing employees to be laid off. He also pointed out that while severance packages are not required, they can be used to obtain releases from employees, and thus avoid any legal risks. Employers should also be well aware of any obligations to pay employees accrued leave, and they should consistently apply written policies regarding obligations to terminated employees.

E-Verify System Soon to be Required for Government Contractors

E-Verify is a free, internet-based system that allows all enrolled employers, and not just federal contractors, to confirm the employment eligibility of new hires within seconds. Due to a legal challenge by business groups, the scheduled effective date of required use of the E-Verify System has been delayed until May 21, 2009. At that time, use of the system is likely to become mandatory for certain federal contractors.

Early success of the system led the government to impose E-Verify as a mandatory requirement for federal contractors with prime contracts lasting at least 120 days and worth at least \$100,000, and on subcontractors with contracts worth at least \$3,000 flowing from covered primes. Companies that are awarded contracts subsequent to May 21 will have 30 days after award to enroll in the E-Verify System and will then have 90 additional days to begin e-verifying. Once in use, contractors will be required to "e-verify" the status of all persons hired since 1986 if designated to support a covered contract. New hires assigned to a covered contract must be e-verified within three business days as employers generally have done when using the I-9. Civil money penalties apply for covered contractors who fail to comply.

Although private employers are not required to use the E-Verify System, many use it to double-check their employment verification efforts. Contractors and other employers may obtain more information through the Homeland Security website at www.dhs.gov/E-Verify, or by "Googling" "e-verify getting started."

FYI

All employers should also be aware that a new I-9 form is pending. U.S. Citizenship and Immigration Services (USCIS) recently delayed implementation of the new form from February 2, 2009 until April 3, 2009. The prospective new form can be viewed at: http://www.uscis.gov/files/form/I-9_IFR_02-02-09.pdf.

2009 On the Job: Supervisory Training Clinic

The On the Job: Supervisory Training Clinic is back. This clinic is designed to provide focused training for supervisors. Our 2009 Clinic series features two topics: Workplace Harassment and Dealing with the ADA in a Changing Environment. These topics will be presented on a variety of dates to allow attendees to choose the most convenient time and place. The first clinic will be held on February 18, 2009, at the Norfolk offices of Kaufman & Canoles. For further information, please contact Kerry Martinolich at (757) 624-3158 or visit www.kaufmanandcanoles.com.

This program has been approved for 2.5 credit hours toward PHR and SPHR recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI homepage at www.hrci.org.

25th Annual Employment Law Update

How Sweet It Is . . .

On March 19th, the K&C Employment Law Team will host the second showing of the 25th Employment Law Update: How Sweet It Is . . . at the Greater Richmond Convention Center. In celebration of our silver anniversary, this one-day seminar will feature new information and materials on our most popular topics to be presented by some of our best-received speakers.

Attendees will select their choice of several of our most popular educational workshops. Topics include: Effective Interviewing and Hiring; Wage-Hour Compliance; Legal Risks in Layoffs and Restructuring; Handling Unemployment Claims; and more. The day will also feature three chances to take a "Turn for Treasure" along with special guest speakers who should both educate and entertain attendees.

For more information, visit our website at www.kaufmanandcanoles.com or contact Kerry Martinolich at (804) 771-5722 in Richmond or (757) 624-3232 in Hampton Roads.

This program has been approved for 6 credit hours toward PHR and SPHR recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI homepage at www.hrci.org.



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Visit us on the web at www.kaufmanandcanoles.com
for timely updates or to register for our seminars.

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