Labor & Employment Law Update

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FMLA Regulations Revised to Reflect Prior Amendments

In 2008, the FMLA was amended to provide employees with family members serving in the Armed Forces, National Guard, and Reserves with FMLA leave for reasons related to their family members' military service. In 2010, the FMLA was amended again, this time by the National Defense Authorization Act for FY 2010 (NDAA), to expand the military-related leave protections to include veterans, and to provide for qualifying exigency leave for family members in the regular Armed Forces (in addition to those in the National Guard and Reserves). The FMLA was also amended to include a special eligibility provision for airline flight crew employees.

On February 6, 2013, the U.S. Department of Labor (DOL) published new regulations that implement the federal FMLA amendments made by the NDAA and the Airline Flight Crew Technical Corrections Act. The regulations become effective on March 8, 2013.

Qualifying Exigency Leave

The new regulations add language to ensure that for purposes of exigency leave related to childcare and school activities, the military member must be the spouse, parent, or child of the employee seeking leave; however, the *child* for whom the leave is sought does not need to be the child of the employee requesting leave. For example, an employee who is the parent of a military member is eligible for leave to deal with the childcare of the military member's child (i.e., his/her grandchild).

The new regulations also expand the amount of FMLA leave an eligible employee is able to take to spend with a covered family member during rest and recuperation periods, from five (5) days to up to a maximum of fifteen (15) days, to match the military member's Rest and Recuperation leave orders.

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Save the Date

25th Annual
Labor Law Forum

April 18, 2013

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Airline Employees

The Final Rule relocates the special rules applicable only to airline flight crew employees and their employers to revised "Subpart H - Special Rules Applicable to Airline Flight Crew Employees," to provide clarity to employees and employers and to emphasize the distinction between the eligibility requirements and calculation of FMLA leave for airline flight crew employees and all other employees. Additionally, the Final Rule adopts a uniform entitlement for airline flight crew employees of 72 days of leave for one or more of the FMLA-qualifying reasons, and 156 days of military caregiver leave. The Final Rule further provides that employers must account for an airline flight crew employee's FMLA leave usage utilizing an increment no greater than one day.

FMLA Forms

Finally, the Final Rule updates the FMLA optional use forms (WH- 380, WH-381, WH-382, WH-384, and WH-385) to reflect the statutory changes, creates a new optional use form for the certification of a serious injury or illness for a veteran (WH-385-V), and removes the forms from the regulations to allow the DOL more flexibility to revise the forms ■

Kelli P. Lieurance

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EEOC v. Farmer's Pride, Inc. — Use Care In Disclosing Documents to the EEOC

EEOC v. Farmer's Pride, Inc. illustrates why employers should be cautious in producing private employee information to the U.S. Equal Employment Opportunity Commission ("EEOC") or its state counterparts. In the context of an investigation, the EEOC often seeks and may gain access to all kinds of private information only remotely related to an employee's charge of discrimination. Once the EEOC has the information, plaintiffs' attorneys may thereafter attempt to access the information and use it for their own purposes. Employers, therefore, should use care in what information they provide and may need to seek a protective order from a court to limit or protect information before producing it to the EEOC.

In *Farmer's Pride*, a male employee, Christian Ramirez, alleged that his female supervisor, Adelaida Colon, sexually harassed him and other workers. Ramirez also alleged that two male supervisors, Juan Sosa and Jose Luis, acted inappropriately toward female workers. The EEOC commenced an investigation.

The EEOC requested the personnel information for *all* employees supervised by Colon, Sosa, and Luis during their employment. Specifically, the EEOC asked for a sortable Excel spreadsheet identifying all employees, from 2008 through the present, in Farmer's Pride's deboning department. Regarding those employees, the EEOC requested each employee's name, last known address, last known telephone number, Social Security Number, hire date, starting position and department, subsequent positions and department, shift assignment for each position, and termination date, if applicable. The EEOC also requested all complaints of sexual harassment at Farmer's Pride's Fredericksburg facility since January 2008. Farmer's Pride objected that the requests were irrelevant, overly broad, unduly burdensome, and would result in privacy violations. When Farmer's Pride refused to comply with the EEOC's subpoena requiring the production of the information, the EEOC sought court enforcement.

Employers, therefore, should use care in what information they provide and may need to seek a protective order from a court to limit or protect information before producing it to the EEOC.

The United States District Court for the Eastern District of Pennsylvania noted that relevancy in the context of an EEOC investigation is not limited to what might be relevant at trial. The court also noted that the EEOC's investigation is not limited to the allegations in a charge of discrimination. According to the court, "[t]he charge merely provides the EEOC with a jurisdictional springboard to investigate whether the employer is engaged in any

discriminatory practices."

There are several implications. First, the EEOC may find facts that support additional claims of discrimination unrelated to the charge. Second, the EEOC may investigate an entire facility, rather than the department or decision maker involved. Third, the EEOC may investigate a period of time broader than the employment period of the employees involved. In light of these principles, the court ordered Farmer's Pride to comply with the EEOC's subpoena. In other words, in the context of investigating a charge of discrimination, the EEOC may gain broad access to private employee information.

Once the EEOC has the information, other interested parties may attempt to gain access to it. Title VII generally prohibits any employee of the EEOC from disclosing to the public any information obtained during an investigation. The Privacy Act of 1974 also generally protects against public disclosure of EEOC charge files. There is an exception to the general rule, however, that allows charging parties or their attorneys, to access the information. Those persons may try to use the information for an improper purpose, such as union organizing or as a fishing expedition for unrelated litigation.

In *Farmer's Pride,* for example, Farmer's Pride was also involved in unrelated wage and hour litigation, *Lugo v. Farmer's Pride, Inc.* (hereinafter *Lugo*). The court noted that Ramirez's attorney, Liz Chacko, may have had ties to the *Lugo* matter as well. Farmer's Pride submitted evidence of a general meeting attended by union representatives and Farmer's Pride employees. Chacko's assistant and the plaintiffs' attorney in the *Lugo* matter also attended the meeting. Union representatives contacted employees to attend the meeting and passed out cards at the meeting asking the workers to indicate they wanted union representation.

Given these facts, the court was concerned that if Farmer's Pride disclosed private personnel information to the EEOC, others would gain access to the information and use it for improper purposes, violating the employees' privacy interests. The court, therefore, entered a protective order prohibiting the disclosure of the private contact information of Farmer's Pride's employees to the charging party, Ramirez, and his attorney, Liz Chacko.

The *Farmer's Pride* decision provides important lessons and reminders for employers. While the EEOC has broad investigatory powers and may gain access to information that is only remotely related to a charge of discrimination, employers should take appropriate cautionary measures to protect confidential information which may include trying to negotiate with the EEOC to narrow the scope of such requests or to be allowed to produce the information in a more limited or redacted format. If necessary, an employer may need to seek protective orders to protect information, or move to quash or limit EEOC subpoenas in court, lest the information be used for improper or unrelated purposes. ■

Anthony D. Todero

PPACA Regulatory Updates

As the effective date (January 1, 2014) of significant provisions of the Patient Protection and Affordable Care Acts ("PPACA") nears, federal regulatory agencies have been hard at work issuing extensive guidance to help employers and individuals comply with the new health care laws. While the new regulations and guidance are lengthy and often complicated, this article briefly summarizes some of the more recent PPACA regulatory updates.

Agencies Issue New FAQs on Implementation of Affordable Care Act

On January 24, 2013, the Department of Labor ("DOL"), along with Health and Human Services ("HHS") and the Treasury Department (collectively, the "Agencies"), issued a new set of FAQs with the intent of clarifying several miscellaneous issues under the Affordable Care Act ("ACA"). The highlights of the FAQ are as follows:

- The Agencies have extended the March 1, 2013 deadline for applicable employers to provide employees with notices of Exchanges. Generally, the ACA provides that applicable employers must provide their employees with written notice informing them of, among other things: the existence of Exchanges; that an employee may be eligible for a premium tax credit under certain circumstances if the employee purchases coverage through an Exchange; and that if an employee purchases coverage through an Exchange, the

employee may lose the employer's contribution to health benefits. While the FAQ did not provide a specific deadline, the Agencies estimate that the new deadline will be in late summer or early fall of 2013. The DOL is considering publication of a model notice.

- In prior guidance, the Agencies stated that in order for health reimbursement arrangements ("HRA") to comply with the ACA, the HRA must be "integrated" with other employer coverage that by itself satisfies ACA requirements. Therefore, an HRA which is sponsored by an employer and used to purchase individual coverage in the market (instead of an HRA which is integrated with other coverage that, standing alone, is ACA-compliant) does not comply with the ACA. Furthermore, an HRA provided to employees who did not elect to enroll in ACA-compliant coverage offered by the employer likewise does not comply with the ACA. Lastly, any amounts credited to an HRA prior to January 1, 2014 under terms that were in effect on January 1, 2013 may be used after December 31, 2013, to reimburse an employee for medical expenses without causing the HRA to be out of compliance.

- The Agencies have clarified that in order for a fixed indemnity insurance plan to qualify for its exemption from ACA requirements, the policy must pay a fixed amount per day or per period, regardless of expenses actually incurred. Thus, the amount may not differ depending on the types of surgical procedures received, the types of drugs prescribed, etc.

In order for an employer to avoid a penalty for failure to offer employees affordable coverage, the requisite employee contribution to the premium must not be more than 9.5% of an employee's household income for a taxable year.

Proposed Regulations Provide Safe Harbor Methods for Determining Affordability of Coverage

Generally, in order for an employer to avoid a penalty for failure to offer employees affordable coverage, the requisite employee contribution to the premium must not be more than 9.5% of an employee's household income for a taxable year. On December 28, 2012, the IRS issued proposed regulations which outline three different safe harbor methods that an employer may use in determining an employee's "household income":

1. W-2 Safe Harbor. Under this method, an employee's required contribution toward the premium for self-only coverage for the employer's lowest cost coverage that satisfies the minimum value requirements must not exceed 9.5% of the employee's Form W-2 (Box 1) wages for that calendar year. Generally, this safe harbor test is performed on an employee-by-employee basis at the end of each calendar year. However, the W-2 safe harbor method may be used prospectively if adjusted throughout the year for any wage changes. Lastly, Form W-2 Box 1 wages exclude any amounts that an employee may have contributed to cafeteria plans, qualified retirement plans, etc.

2. Rate of Pay Safe Harbor. Under this method, an employee's monthly required contribution toward self-only coverage must not exceed 9.5% of the employee's computed monthly wages. To compute an hourly employee's monthly wages, an employer would multiple the hourly rate of pay for each hourly employee by 130 hours per month. For a salaried employee, the employee's monthly salary rate is used. This rate of pay safe harbor method may not be used if the employer reduced the wages of hourly or salaried employees, respectively, at any time during the year.

3. Federal Poverty Line Safe Harbor. Under this method, an employee's required contribution toward self-only coverage must not exceed 9.5% of the federal poverty line for a single individual ($11,170 in 2012 for all states except Hawaii and Alaska).

These safe harbor methods only apply for determining the affordability of coverage for an employee. These methods do not apply in determining penalties or an employee's eligibility for a premium tax credit. Employers may use one or all of the safe harbor methods for all employees or categories of employees, but

the methods must be applied on a uniform and consistent basis.

IRS Provides Some Relief from Penalty for Failure to Provide Coverage

In previous guidance, the IRS stated that where an employer offers affordable coverage to "substantially" all of its full-time employees but fails to offer coverage to a few of its full-time employees, such failure will not necessarily result in a penalty. In its proposed regulations issued on December 28, 2012, the IRS issued further guidance on the meaning of the term "substantially all." The proposed regulations adopt a 95% standard in order to address any errors in offering coverage to full-time employees. In other words, an applicable employer will be deemed to have satisfactorily offered coverage to its full-time employees for a calendar month if it offered coverage to all but 5% or less of its full-time employees in that month. Thus, for applicable large employers of less than 100 full-time employees, the employer will be deemed to have satisfactorily offered coverage to its full-time employees for a calendar month if it offered coverage to all but five (5) or fewer full-time employees in that month. Interestingly, the proposed regulations do not limit the 95% standard only to inadvertent failures to offer coverage. ■

Jeremy T. Christensen

Executive Ordered to Repay $735,000 for Breach of Agreement

A panel of the Eighth Circuit Court of Appeals recently upheld a jury verdict requiring a former Hallmark executive to repay her entire cash severance after she violated the severance agreement by using and disclosing confidential company documents. Janet Murley was Hallmark's group vice president of marketing until her position was eliminated in 2002. Murley and Hallmark signed a separation agreement under which she received a $735,000 payment plus certain benefits. In exchange, she agreed not to compete for a period of eighteen months, and also agreed not to retain any Hallmark business records and not to disclose or use any Hallmark proprietary and confidential information.

Four years later, long after her 18 month non-compete had expired, she obtained a consulting assignment with a company called Recycled Paper Greetings (RPG), during which she used and disclosed confidential Hallmark information. Three years later (now seven years after Murley's separation), Hallmark learned of the disclosures and filed suit. During discovery in the lawsuit, Hallmark also learned that in 2007, just two days before giving RPG a copy of a hard drive containing documents she used in consulting with it, Murley deleted 67 documents, including a number of Hallmark records.

The court's opinion on appeal was primarily focused on two legal issues. First, the court held that the jury verdict awarding Hallmark a refund of the entire cash severance was not improper; while it may seem harsh, it was within the jury's discretion and did not meet the legal standard of being "grossly excessive" or "glaringly unwarranted by the evidence" which would be required to overrule the jury. (The court did, however, overrule the jury's decision that Murley should also pay to Hallmark the $125,000 consulting fee she received from RPG – that would have put Hallmark in a better position than it would have been if the agreement had never been violated, which the law does not support).

Second, the court held that because there was "overwhelming" evidence of bad faith by Murley, the trial court was correct in giving an "adverse inference instruction" to the jury, i.e., instructing the jury that if they found that Murley willfully destroyed evidence, they could assume that the contents of the destroyed files would have been adverse to Murley. This gave Hallmark the benefit of the doubt with respect to all of the documents which Murley purged from her hard drive in 2007.

Although not directly addressed by the court on appeal, there are two other lessons from this case as well:

1. Confidentiality agreements can make a difference. While it might have been possible for Hallmark to sue Murley even without an agreement based on state trade secret or unfair competition laws, it is usually easier to do so based upon breach of a clear written contract. Further, as shown

in this case, a contract can help determine the measure of damages. Here, the jury concluded that since Murley violated the contract, she should give back the entire contract severance payment.

2. Confidentiality protections can last a long time. While the typical non-compete or non-solicitation agreement will have to be time-limited to survive legal challenge (typically from 12 to 24 months), this time limit does not have to apply to a company's confidential information. Proprietary rights agreements with employees, whether entered into at the onset of employment, during employment in exchange for some benefit like a promotion or bonus, or at the end as part of a severance agreement, need to be carefully written to give a company's various proprietary rights the best protection possible. ■

Jonathan R. Breuning

Other State Specific Developments:

Iowa: Iowa taxpayers will pay approximately $448,000 to settle an age discrimination lawsuit that an 81-year old doctor filed against a state home for the disabled. The doctor was fired after working eight days at the state home. The doctor claims that he was asked age-related questions during his job interview, was not provided adequate training when he was hired, and was paid thousands less than his posted pay grade. In June, a jury awarded the doctor $480,000 in lost wages, damages, and attorney fees. The state considered appealing, then decided to settle the case for less than the jury award. The state will pay the doctor $147,012 for past lost wages; $1,464 to settle an equal pay claim; $157,357 for compensatory damages for past emotional stress; and $142,422 to the doctor's attorneys.

Kansas: A former semi-nude dancer recently obtained a favorable ruling from the Kansas Supreme Court over her former employer, Club Orleans in Topeka, Kansas. The dancer argued that Club Orleans exercised so much control over her that it could not contend she was an independent contractor and deny her unemployment benefits after her tenure as a dancer ended. The Kansas Supreme Court agreed that Club Orleans exercised enough control over the dancer to create an employment relationship, writing: "Ample substantial competent evidence in the record before us … demonstrates that Milano's possessed such a right of control over the dancers at Club Orleans. Most telling, the house set various rules, and dancers' violations of those rules were punishable by fines and termination." The decision is not necessarily a novel one, but it stands as a firm reminder that businesses must carefully manage their relationships with independent contractors to avoid transforming them into employees.

Minnesota: On January 14, 2013, in *Jancik v. Subway of Buffalo*, Inc., the Minnesota Court of Appeals ruled that it was reasonable for a fast food restaurant to ban smoking on its premises "to ensure that its food is not contaminated by tobacco smells." The court's decision implies that, depending on an employer's line of business, a policy banning smoking on the premises may be reasonable and approved on this basis. The court's decision also suggests that if an employee knowingly violates her employer's reasonable "no smoking" policy, she has engaged in misconduct, which may disqualify her for unemployment benefits.

Missouri: In January, Representative Doug Funderburk introduced HB 286 in the Missouri House of Representatives, which would prohibit employers from asking current or prospective employees to provide specified information to gain access to a social networking website where such employees maintain an account or profile. "Social networking website" is defined in the bill as an internet-based service that allows individuals to construct a public or semi-public profile within the website, to create a list of other users with whom the individual shares a connection, and to view and navigate their list of connections and those made by others within the system. "Social networking website" does not include electronic mail.

Montana: This month, the Montana federal district court granted a motion to dismiss a defamation claim brought by a former employee which alleged that his former employer defamed him by statements made in an unemployment proceeding and during a workplace investigation. The employer allegedly told employees during an investigation that the employee was operating equipment dangerously, terminated him for this reason, and then reported the rationale in the unemployment hearing. Ultimately, it terminated his

employment for this reason and integrity. The court reasoned that because the statements were made during the investigation that led to termination, the alleged defamatory statements were inextricably intertwined with the discharge, and therefore, the Wrongful Discharge from Employment Act preempted it. Moreover, the court noted that the statements in the unemployment proceedings would be also be preempted because they would not have been made "but for" the discharge. Finally, the court observed that statements in an unemployment proceeding are privileged as statements made in an official proceeding.

North Dakota: A convicted sex offender brought a Section 1983 claim against a state contractor that evaluated and treated inmates and probationers in the state's care. The petitioner claimed that the contractor and its employees deprived him of his liberty by testing him in an unfair manner and mischaracterizing his statements to establish a stronger basis for his civil commitment. The court dismissed the claims against the contractor and its employees on grounds that they were engaged to perform official duties, performed those duties under color of state law, and therefore were shielded by qualified immunity.

South Dakota: The Eighth Circuit Court of Appeals upheld the district court's summary judgment decision holding that the University of South Dakota ("USD") Sanford School of Medicine lacked the capacity to be sued under state law and Federal Rule of Civil Procedure 17(b). Rule 17(b) defines when a party has the capacity to sue or be sued in federal court. The Rule provides that the capacity of an unincorporated unit of government, like the USD School of Medicine, is determined in most cases "by the law of the state where the court is located." The South Dakota legislature created USD and later its School of Medicine but did not give USD the power to sue or be sued. Instead, USD was placed under the control of the Board of Regents. Thus, only the Board of Regents has the personal capacity to sue or be sued under South Dakota law.

Wyoming: The Wyoming House and Senate have passed legislation that specifically excludes accrued vacation leave from payout on termination of employment. Accrued vacation may be forfeited upon termination of employment as long as the employer has adopted such a policy in writing and the written policies are acknowledged in writing by the employee. HB79 will now go to Governor Matt Mead for his consideration. ■

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