K&L UPDATE

Employment News

CURRENT ISSUES IN EMPLOYMENT LAW

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FMLA Regulations Continue to Cause Problems

Federal regulations implementing the Family and Medical Leave Act ("FMLA") continue to cause problems for employers. In one recent case, the failure of the employer to follow the regulations resulted in the employer unlawfully terminating an employee. In other cases, Federal courts refused to enforce the regulations. Employers need to keep up to date on these decisions in order to properly discharge their obligations under the FMLA.

The FMLA permits covered employees up to twelve weeks of unpaid leave in a twelve month period for a variety of reasons, and employers can chose one of four methods for defining the twelve-month period. However, if an employer fails to tell its employees which method it has selected, FMLA regulations permit the employee to choose whichever method is best for her.

In **Bachelder v. America West Airlines, Inc.**, a decision by the Federal Appeals Court in California, an America West employee was out of work for three weeks in 1996 after having been out of work for a considerable period of time earlier. America West determined that the employee had exhausted her full allotment of FMLA leave and relied on the employee's three weeks of absence in 1996 to support its decision to terminate her for excessive absenteeism.

Unfortunately for America West, it had never told its employees which method it was going to use to determine the twelve-month leave period. Therefore, the regulations allowed the employee to select a method that favored her. She did just that, and the method she selected resulted in the three weeks of leave being covered by the FMLA. The Court then held that she was unlawfully terminated because an employer cannot consider FMLA-covered leave when deciding if an employee has been excessively absent.

By contrast, courts recently have refused to enforce two other FMLA regulations. One regulation states that an employer can charge an employee with taking FMLA leave only if it actually notifies the employee that the leave is FMLA leave. For example, if an employee is out for eight weeks with a serious health condition and the employer neglects to tell the employee that it is FMLA leave, it can't charge the employee with eight weeks of FMLA leave. This regulation, which has been severely criticized by employers, has been declared invalid by three Federal appeals courts and will soon be reviewed by the United States Supreme Court.

Another controversial FMLA regulation states that once an employer tells an employee that she is eligible for FMLA leave, the employer cannot disclaim FMLA coverage after discovering it had made a mistake. The Federal Appeals Court in New York recently refused to enforce this regulation. The language of the FMLA defines which employees are protected by that law and the court held that the regulation has the unlawful effect of extending FMLA coverage to employees who are not covered by the language of the law.

These cases are just a few examples of the constant changes in FMLA law and illustrate the need for employers to remain informed of recent court decisions.

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Kirkpatrick & Lockhart LLP

Federal Labor Law can Apply to Non-Unionized Companies

A recent decision by the United States Court of Appeals in New York reminds us that Federal labor laws frequently apply to employees of companies which are **not** unionized.

In **NLRB v. Caval Tool Division, Chromalloy Gas Turbine Corp.**, the Second Circuit Court of Appeals held that an employer violated Federal labor law by punishing a non-unionized employee who complained at an employee meeting that managers, not production employees, were the cause of low productivity.

Caval's president held an employee meeting to express his dissatisfaction with worker productivity. He intimated that the production employees were the cause of the problem and he announced a more restrictive break policy.

Diane Baldessari, a non-unionized employee, intimated that the new policy was punishing production employees when it was managers who were responsible for high amounts of downtime and production problems. Later that afternoon, Baldessari was escorted out of work, suspended, and then placed on probationary status.

Baldessari filed an unfair labor practice charge with the National Labor Relations Board. She said that even though she wasn't a member of a union, she had a right to engage in "protected, concerted activity," which, she claimed, is what she had done. Both the NLRB and the Second Circuit agreed.

The major question in this case was whether Baldesarri was engaged in concerted activity. That is, were her objections to the new break policy made on behalf of herself and others, or just herself? The court held that it was reasonable to infer that an employee is acting on behalf of herself and fellow employees at a group meeting when she raises questions at the meeting about a change in policy that affected her fellow employees and intimates that the change is punishing the wrong employees. By her comments, Baldesseri was trying to induce her colleagues to work together against the new break rule. Hence, her activity was "concerted."

The Court also held that although Baldesseri was somewhat aggressive during the meeting, she was not so abusive that her conduct should not go protected under Federal law.

This decision teaches two lessons. First, Federal labor law applies to many non-unionized companies. Second, employees who voice objections in a reasonable way to changes in management policies may very well be engaging in protected, concerted activity within the meaning of Federal labor law, and an employer may not lawfully discipline the employee for engaging in that activity. As with many other potential discipline situations, it is best not to act reflexively but instead to consider the ramifications of different courses of action and possibly seek advice of counsel.

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Quick Quiz YES OR NO

1. **Y / N** - Every laid off employee is guaranteed at least 2 weeks severance under Mass. law.
2. **Y / N** - Employers in Massachusetts are permitted to test all employees for drug use.
3. **Y / N** - Massachusetts employer must try to make "reasonable accommodations" to employees' religious beliefs.

HENRY T. GOLDMAN, Editor

Kirkpatrick & Lockhart's Labor and Employment Group is dedicated to helping employers anticipate and cope with legal issues in a manner which contributes toward a productive work environment. Consistent with this goal, this newsletter will be published quarterly to provide information on current issues in employment law.

The Labor and Employment Group has experience in many aspects of employment law, including the myriad state and federal laws regulating employment relations, benefit issues, and labor relations. The Group also represents clients in litigation, including proceedings before administrative agencies and in state and federal courts.

This publication is for informational purposes only and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting with a lawyer.

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OUR CLIENTS ASK US

QUESTION: If I have a position that needs to be filled immediately and I don't offer it to a pregnant woman because she will have to take time off for childbirth, have I done anything illegal?

ANSWER: State and Federal law make it illegal to discriminate against a female because of her pregnancy status, so you can't refuse to hire her because she is pregnant. However, if you have a condition of employment, such as that the successful applicant must attend a training course across the country within four months of being hired, and if that condition is "reasonable" in the eyes of the MCAD or the jury, and if the pregnant applicant can't meet that condition, then you can refuse to hire her. The refusal is not because she is pregnant; it is because she can't attend the course.

An employer which has genuine business requirements, such as attending a training course across the country, should place those requirements in the position description or advertisement. If you don't do that, it will be far more difficult for you to convince the MCAD or the jury that the requirement was not an afterthought. Also, be absolutely sure that the condition is reasonable since it will be vigorously scrutinized by the MCAD.

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If you have any questions you would like addressed in this column, please let us know.

Court Clarifies Discrimination Standard

Two recent decisions by Massachusetts' highest court — **Lipchitz v. Raytheon Co.** and **Weber v. Community Teamwork, Inc.** — may indicate a shift in the way that Massachusetts courts and the Massachusetts Commission Against Discrimination will decide some discrimination claims. The court's decisions overturned judgments in favor of employees claiming discrimination, finding flaws with the lower courts' treatment of the "discriminatory intent," or state of mind, of an employer that is required for a finding of discrimination under Massachusetts law.

Under the analytical framework established by Massachusetts courts, one way an employee may succeed in a discrimination claim is to prove that the employer's stated reason for making a particular employment decision was false. The theory is that if the employer's stated reason was false, perhaps it was a pretext for an unlawful reason. Earlier cases focused more on the "pretext" aspect of the analysis, so that an employee could win if he proved that the stated reason was a pretext even if there was no other evidence of unlawful discrimination.

In these new decisions, the Supreme Judicial Court appears to be telling trial judges that they need to focus the jury's attention back to the basics of discrimination law. Juries must now be told that an employee cannot win a discrimination case unless the jury determines that the employee is in a protected class (because of the employee's gender, race, etc.); that the employer harbored a discriminatory animus against the employee because of her membership in that class; and that the discriminatory animus was "the determinative cause" of the employer's action.

While a jury can still take into consideration that the employer's stated reason was a pretext, and indeed may infer a discriminatory intent, the jury nevertheless also has to conclude that the employer's discriminatory intent was "the determinative cause" of the employer's action. In the context of discrimination claims, it is likely that these decisions will strengthen the hands of employers, although to what extent and in what ways will be debated for some time.

While these decisions may help employers, it is still permissible for a jury to make a finding of unlawful discrimination based in large measure on the jury's conclusion that the employer's reason for making an employment decision was false. Employers have long faced a difficult task in defending employment decisions that were influenced by a variety of considerations, not all of which may have been clearly documented or articulated to the employee at the time the decision was made. It is still good practice to document clearly the reasons for an adverse employment action, and to avoid giving an employee a reason that may later be shown to be false.

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Federal Court Rules on Validity of Release in Exchange for Severance

Most companies provide severance only if the employee signs a release. What happens when a employee signs the release, takes the severance, and then claims that the release is invalid and sues for more? In **Melanson v. Browning Ferris Industries et al.**, Judge Rya Zobel of the United States District Court in Boston described how a court evaluates the validity of the release.

In this case, the employee signed a release in exchange for severance. Later, she sued the employer for sexual harassment. The employer said that her release prevented her from suing. The employee said that because she was under stress when she signed the release and the company gave her very little severance, the release was invalid.

Judge Zobel held that a release is valid if the employee knows that she is giving up a benefit or right by signing the release and if she acts voluntarily by doing so. Federal courts will typically look at the following factors to decide if the release was knowing and voluntary: (1) the employee's education and sophistication, (2) the relative roles of the employer and the employee, (3) the clarity of the severance agreement, (4) the time given to the employee to consider the agreement, (5) whether the employee has outside advice, and (6) what the employee received in exchange for the release.

In this case, Judge Zobel found that the employee was intelligent and literate; she had been given at least eight weeks to consider the severance offer; the release was written clearly; at her request the employer increased its severance offer to take account of her prior part-time service with the employer; and she knew enough to contact a lawyer because she had done so earlier when she felt she was being sexually harassed.

The employee received four weeks of severance — about $1,600 — for one year of full time employment and one year of part time employment. Judge Zobel recognized that a successful award in a sexual harassment suit might have been considerably greater than $1,600, but she held that four weeks was not so small as to call into question whether the release was knowing and voluntary.

Finally, although the employee had a history of depression, Judge Zobel said that she had produced no medical evidence to show that she lacked the capacity to understand what she was doing when she signed the release.

This decision emphasizes the need to write an understandable severance letter, to give the employee a reasonable amount of time to decide whether to sign the letter, and to be sure that the employee is mentally competent. Also, keep in mind that Federal law imposes additional specific requirements for a valid release of age discrimination claims.

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Quick Quiz ANSWERS

1. **NO** - The is no minimum severance obligation in Massachusetts.
2. **NO** - Massachusetts courts allow drug testing of only a limited class of employees.
3. **YES** - But what is a reasonable accommodation is not defined by the law. M.G.L. c151B, §4(1A)

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