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L&E Newsletter

A publication of the Labor and Employment Law Section
of the New York State Bar Association

A Message from the Chair

I recently was asked to speak at an ABA meeting on civility and professionalism in the practice of labor and employment law. As I prepared my remarks, our Section was prominent in my mind, for it is an extraordinary gathering of professionals who, in their practices and as contributing members of the Section, exemplify the ideals of civility and professionalism. Our members represent every labor and employment viewpoint and every corner of this geographically diverse state, and yet they form a group that works together, for the greater good of the profession, in harmony, with hearty collegiality, and with mutual respect.

Within the broader profession, however, concern abounds that such collegiality and mutual respect are waning and that attorneys may be straying from the courtesy and integrity that should mark our work and conduct. It is essential, therefore, that we seize opportunities to promote and exemplify behavior that is consistent with the dignity of our profession. We must instill these values in our newer attorneys, as they begin to shape and develop their professional styles and values. One way to enhance the likelihood that the next generation of labor and employment lawyers will be appropriately attuned to the need for civility in practice is to encourage their involvement in bar association activities such as those offered by our Section. Coming together as a group with a shared specialization builds mutual respect and enhances civility, even as we deal with the disparate interests and perspectives of our specific practices.

Inside

Our Executive Committee is working to ensure that Section opportunities remain readily available to newer attorneys. We are doing this through our expanded attention to membership services, under the guidance of William Frumkin, Chair of the Membership Committee, and our District Representatives, all of whom serve on the Membership Committee. In addition, our newly formed Committee on Diversity and Leadership Development, co-chaired by Allegra Fishel and Lou DiLorenzo, will examine ways to ensure that our Section provides ample opportunities for involvement within the Section. We invite our members to contact Bill, Allegra, and Lou with ideas and suggestions for the means by which we may encourage newer attorneys to become involved in the Section's functions and leadership.

I am happy to report that one of our outreach efforts, the recent invitation to members to express interest in committee memberships, resulted in an overwhelming response. We are delighted by the willingness of so many members to join in the important work of the Section. Accordingly, we have expanded the membership of most committees to accommodate the varied interests and enthusiasm that were expressed.

At this writing, final preparations are underway for the Annual Meeting, which will be held on January 29. Most of the Section's committees will meet at that time and will progress with the important tasks that are at the heart of our Section's responsibilities. An example of such activity is seen in the work of the Labor Relations and Procedure Committee, co-chaired by Peter Conrad and Donald Oliver. Thanks to their efforts, the Committee at its January 29th meeting will host the Regional Directors of all three New York Regions of the National Labor Relations Board. This presents an important opportunity for our members to obtain up-to-the-minute information about NLRB activities and to interact with the NLRB officials whose work is so important to our practices.

The Annual Meeting is drawing a record attendance, and we hope that among the registrants will be many new attorneys whose professional development will be enhanced by involvement with this extraordinary group. Please make plans to attend future Section events, and encourage your colleagues and associates to join us. The Fall Meeting will be October 1–3, 2004, at the Otesaga in Cooperstown, and next year's Annual Meeting will take place on January 28, 2005, in New York City. Also, please mark your calendars now for our 30th Anniversary Meeting, to be held October 21–25, 2005, in beautiful Longboat Key, Florida. See you there!

Jacquelin F. Drucker

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L&E Newsletter Index

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To search, click "Find" (binoculars icon) on the Adobe tool bar, and type in search word or phrase. Click "Find Again" (binoculars with arrow icon) to continue search.

From the Editor

I was thinking recently about the old saying that history is written by the winners. That started me thinking about whether insight could be gleaned from looking at the cases the U.S. Supreme Court has chosen not to hear. They seemed to me to be like Sherlock Holmes' dog that didn't bark, so I asked Dan Dashman to look at the labor and employment cases that were denied *cert* recently and to write about the most interesting.

In this edition, we also have articles about recent rulings on remedies at PERB, by Paul Bamberger; the FACT Act and prior consent, by Susan Corcoran; ERISA guidelines, by Stephen Ehlers and David Wise; FMLA regulations, by Kenneth Stein, David Safon and Lisa Brauner; and the return of Frank Flaherty's *Labor Matters* column. Our thanks to all the authors.

I always appreciate getting feedback about the *Newsletter.* Recently, a Section member told me she thought the issues were getting to be too large, with too many articles to read. In fact, she said, it no longer resembled a newsletter. I have been giving her comments some thought and looking at how this publication has changed in the past three years. I am opening it up to all of you for comments and feedback. Would you like the *Newsletter* to have fewer articles in each edition? Should the focus change? Should there be different kinds of articles and features? Please let me know what you think.

The Supreme Court recently agreed to hear a case that should answer a question about an employer's affirmative defenses under *Ellerth* and *Faragher.*[1] In those two 1998 cases, the Court held that an employer is vicariously liable under Title VII for sexual harassment by a supervisor if there is a tangible employment action against the targeted employee.[2] Where there is no tangible employment action, the employer may assert as an affirmative defense: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[3]

In the case now before the Court, *Suders v. Easton*,[4] the Third Circuit found the employer was barred from asserting it took reasonable steps to prevent the violative conduct because the evidence was sufficient to conclude that the plaintiff had been constructively discharged.[5] The question before the Court is whether constructive discharge caused by a supervisor's sexual harassment is a tangible employment action that precludes the *Ellerth/Faragher* affirmative defenses.

Nancy Suders was hired by the Pennsylvania State Police as a communications operator. She alleged she had been sexually harassed by three supervisors, as well as discriminated against on the basis of her age and political affiliation. Suders had taken a computer skills test as part of her application for a job at a different location and had not been informed of the results. She found the test results lying in a half-open drawer in the women's locker room, she said, and removed them. Two days after she complained to an EEO officer about the violative conduct, Suders said, officers accused her of theft of her exam results, arrested and interrogated her and released her only after she gave them a letter of resignation she had previously prepared.

The District Court granted summary judgment to the employer, but the Third Circuit reversed and allowed Suders to proceed under Title VII. The Circuit court said Suders raised genuine issues of material fact on her claim of a sexually hostile work environment. Unlike the lower court, the Third Circuit found the employer was not entitled to assert the affirmative defense and that there were issues of fact justifying a trial on the merits. Furthermore, it found it was unclear whether the employer exercised reasonable care to prevent or correct the alleged sexual harassment.

The Third Circuit noted that the court below did not consider Suders' claim of constructive discharge, which it said was apparent from her complaint; nor, it said, did it consider whether a claim of constructive discharge would obviate use of the affirmative defense. The court noted that it had previously adopted an objective standard in constructive discharge cases.[6]

The employer petitioned the Supreme Court for *certiorari,* claiming that Suders was aware of its policy against sexual harassment but did not report the details of the alleged harassment during her first contact with an EEO officer; nor, it claims, did she call the EEO officer again until two days before she resigned, two months later.[7] The state argued that lower courts are divided in their views of the *Ellerth/Faragher* affirmative defense in constructive discharge cases and asked the Supreme Court to resolve the conflict by setting forth a uniform and predictable standard.

Suders argued that a constructive discharge must be considered a tangible employment action "because forcing someone to quit their job is far more egregious than the 'significant change in employment status' described in *Ellerth*." Allowing employers to use the affirmative defense in constructive discharge cases, Suders asserted, "will almost certainly always result in a dismissal of the plaintiff's cause" or force employees to "continue enduring unendurable harassment" to be able to bring a claim.[8]

And now for something completely different: *Theroux v. Reilly*, a recent case in the New York State Court of Appeals.[9] General Municipal Law § 207-c provides that a police officer or other covered municipal employee be paid the regular salary or wages if injured or taken ill "in the performance of his duties" or "as a result of the performance of his duties."[10] These payments continue until the disability has ceased, or the disabled employee is granted a disability retirement. The payments stop if the employee either performs, or refuses to perform, light-duty work.[11]

The question in *Theroux* was whether the statute required a "heightened-risk standard," that is, whether these benefits were available to municipal employees only if they took on the higher risks of law enforcement. The Court found that the legislative intent was that all covered municipal employees be eligible, whether or not they were law enforcement personnel.

Citing three recent cases,[12] the Court found that the Appellate Division had "upheld the municipality's denial of section 207-c benefits to municipal employees based on erroneous application of a 'heightened risk' standard to determine eligibility."[13] This created a "heightened risk" standard under which only employees performing actual law enforcement work would be eligible for those benefits, and which the Court of Appeals has now rejected in *Theroux*. It held, further, that "in order to be eligible for section 207-c benefits, a covered municipal employee need only prove a 'direct causal relationship between job duties and the resulting illness or injury.' The word 'duties' in section 207-c encompasses the full range of a covered employee's job duties."[14]

Janet McEneaney

Endnotes

1. *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. Boca Raton*, 524 U.S. 775 (1998).
2. The Court defined a tangible employment action as "a significant change in employment status," often, but not always, resulting in economic injury. *Ellerth*, 524 U.S. at 761–62; *see also Faragher,* 524 U.S. at 808.
3. *Ellerth*, 524 U.S. at 765; *see also Faragher*, 524 U.S. at 807.
4. 325 F.3d 432 (3d Cir. 2003).
5. *Pennsylvania State Police v. Suders*, U.S. No. 03-95, *cert. granted*, Dec. 1, 2003, 2003 WL 22428573.
6. The Third Circuit has also rejected the "'aggravating circumstances' requirement often imposed by other Courts of Appeals. *Aman*, 85 F.3d at 1084 (citing *Levendos*, 860 F.2d at 1232). Therefore, in *Aman*, we held that '[t]he fact that [plaintiff] had been subject to continuous discrimination during her employment could support a conclusion that she simply had had enough. No other precipitating facts were legally required.'" 85 F.3d at 1084.
7. 2003 WL 22428573.
8. *Id.*
9. 2003 WL 22844403 (N.Y. Dec. 2, 2003), 2003 N.Y. Slip Op. 18983.
10. "In 1980, the Legislature amended section 207-c to add sheriffs, undersheriffs and sheriff's department corrections officers to the list of covered employees. In 1985, 1990, 1991, 1993, 1996 (twice) and 1997, the Legislature extended section 207-c to additional classes of municipal employees; specifically, detective investigators in the district attorney's office (L 1985, ch 696), Erie County corrections officers (L 1990, ch 885), Long Island Railroad police officers (L 1991, ch 628), certain investigators in the office of a county's district attorney (L 1993, ch 565), Nassau County advanced ambulance technicians (L 1996, ch 476), certain Nassau County fire inspectors and fire marshals (L 1996, ch 621) and Nassau County probation officers (L 1997, ch 675)." *Id*. at n.1.
11. The municipality is liable for medical treatment resulting from the covered injury or illness. These payments continue after retirement, if applicable.
12. *In re Belcerak v. County of Nassau*, 274 A.D.2d 580 (2d Dep't 2000); *Council of the City of New York v. Giuliani*, 93 N.Y.2d 60 (1999); *In re White v. County of Cortland*, 97 N.Y.2d 336 (2002). For a discussion of *Balcerak*, see Richard K. Zuckerman, *General Municipal Law § 207-c Eligibility: What's Changed Since* Balcerak, NYSBA L&E Newsletter, vol. 26, no. 3 at 4 (Fall/Winter 2001).
13. *Theroux*, 2003 WL22844403, at *4.
14. *Id.* at *3.

Happy Anniversary! After Ten Years, Employers Continue to Struggle with FMLA Regulations

By Kenneth D. Stein, David M. Safon and Lisa M. Brauner

Ten years ago, on August 5, 1993,[1] the Family and Medical Leave Act (FMLA, or the "Act") was enacted "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity."[2] Despite an entire decade for testing and refinement, many of the U.S. Department of Labor (DOL) regulations still befuddle and bewilder employers.[3] To some employers, the regulations have become more, not less, difficult to comprehend and comply with over time.[4]

Such confusion has been the source of much litigation. Indeed, during the period from August 5, 1993 through July 31, 2003, the validity of 13 of DOL's regulations for FMLA implementation had been challenged in 68 court decisions.[5] In *Ragsdale v. Wolverine World Wide, Inc.*,[6] the Supreme Court struck down a portion of an existing DOL regulation on the grounds it was inconsistent with congressional intent.[7] From the time *Ragsdale* was decided through the first half of 2003, there were ten FMLA decisions, seven of which challenged the validity of six of DOL's regulations.[8] In addition, from 1996 through 2002, approximately six congressional hearings documented numerous implementation problems with FMLA regulations.[9]

In the midst of all this—changes in implementation, as well as efforts to make changes in the future—employers still must comply with the law. It is critical for employers to understand what has been decided to date, and how to deal with the open issues.

Requirements of the Act

The FMLA entitles an eligible employee to take an unpaid leave of absence of up to 12 weeks in a 12-month period for (1) the birth of a son or daughter, and to care for that child; (2) adoption or foster care placement of a son or daughter; (3) the care of a spouse, son, daughter or parent, if such person has a "serious health condition"; and (4) one's own "serious health condition."[10] The covered employer[11] must continue group health coverage during the leave and restore the employee returning from leave to the same or an equivalent job.[12] To qualify under the FMLA, an employee must have worked for the employer[13] for 1,250 hours during the preceding 12 months.[14]

Problem Areas

A. Overview

According to a Society for Human Resource Management (SHRM) 2003 FMLA Survey, 54% of human resource professionals reported granting FMLA requests they did not believe were legitimate because of DOL's regulations and the interpretations of such regulations, and 35% were aware of employee complaints in the prior 12-month period due to a co-worker's questionable use of FMLA leave.[15] Much litigation has resulted from confusion over the DOL's regulations implementing the FMLA.[16] Ultimately, in 2002, the Supreme Court ruled on its first FMLA case, *Ragsdale v. Wolverine Worldwide, Inc.*, in which it invalidated, at least in part, a DOL regulation prohibiting an employer's retroactive designation of leave as FMLA leave.[17] Some of the cases leading up to *Ragsdale* are instructive.

B. Some of the Cases Leading Up to the Supreme Court's *Ragsdale* Decision

1. *Fulham v. HSBC Bank USA*[18]

In *Fulham v. HSBC Bank USA*, the plaintiff argued his employer had the obligation to designate his short-term disability leave as FMLA leave but failed to do so.[19] The employer argued the DOL regulations were invalid insofar as they expanded the rights conferred on employees by extending the FMLA's 12-week period. The District Court agreed, and held the DOL regulations at issue regarding notice and designation were invalid insofar as they purported to require an employer to provide more than 12 weeks of leave time.[20] In particular, the court noted the regulations, creating an entitlement to an additional 12 weeks of leave whenever an employer failed to notify an employee the leave was FMLA leave, were "directly inconsistent with the plain language of the FMLA, which makes clear that eligible employees are entitled to a total of 12 weeks of leave."[21]

2. *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*[22]

In *Sarno*, the plaintiff had been seriously injured and placed on FMLA leave, yet he was discharged when, after 12 weeks on unpaid FMLA leave, he was still unable to return to work.[23] The Second Circuit affirmed the grant of

summary judgment to the employer on the FMLA claim, concluding that, because the employee's condition rendered him unable to return to work after 12 weeks, the exercise of his FMLA substantive rights was unaffected by any lack of notice.[24] The court also determined there was no private right under the FMLA or its implementing regulation, section 825.700(a), that would permit an employee to enforce the terms of a company's employee benefit program.[25]

3. *McGregor v. Autozone, Inc.*[26]

In *McGregor*, the plaintiff brought an FMLA action contending she was entitled to 13 weeks of paid disability leave and then 12 weeks of unpaid FMLA leave because her employer failed to notify her that the two leaves would run concurrently.[27] She then contended she was entitled to restoration to her prior position or an equivalent one after a 15-week absence.[28] The District Court held she was not entitled to the relief sought because the regulation requiring notification of concurrent leaves was invalid. The Eleventh Circuit affirmed, finding the employer exercised its statutory right under the FMLA when it required the employee to substitute her accrued paid leave for her 12-week FMLA leave and she was absent for more than the 12-week allowable period of time under the FMLA.[29]

In so holding, the court reasoned the regulation requiring specific and prospective notice of FMLA designation contained requirements that were inconsistent with and greater and broader than those permitted by statute.[30] The Sixth Circuit, by contrast, found the identical regulation valid, reasoning that because the FMLA is silent as to the notice required by an employer before designating paid leave as FMLA leave, the regulation constitutes a reasonable interpretation of the FMLA.[31]

C. The Supreme Court's *Ragsdale* Decision

In *Ragsdale*, the plaintiff, who had been diagnosed with Hodgkin's disease, requested medical leave from her employer.[32] The company granted her 30 weeks of medical leave under its policy, which was more generous than what the FMLA allows, but failed to notify her of her leave eligibility under the FMLA or her right to have leave designated as FMLA leave.[33] After she exhausted her FMLA leave, however, and was unable to return to work, Wolverine denied her requests for additional leave or permission to work part-time and terminated her employment.[34] Thereafter, she brought an FMLA action against Wolverine, asserting that DOL regulation 29 C.F.R. § 825.700(a) required her employer to grant her request for 12 weeks additional leave after she exhausted her 30 weeks of medical leave because it had failed to give her prospective notice that the 30-week leave would count against her FMLA entitlement, even if she would not have behaved any differently had she received timely and proper notice.[35] The district court granted the employer's motion for summary judgment, and the Eighth Circuit affirmed.

The Supreme Court affirmed summary judgment for Wolverine, holding the particular DOL regulation contradicted and undermined the statutory language and intent of Congress in enacting the FMLA.[36] Specifically, a portion of the regulation was contrary to the statutory requirement that an employee prove impairment of his/her FMLA rights and resulting prejudice to obtain relief under the Act.[37] Instead, the regulation created an irrefutable presumption that failure to prospectively designate leave as FMLA-qualifying impaired the employee's FMLA rights and entitled the employee to an additional 12 weeks of leave.[38] Additionally, the automatic penalty imposed by the regulation was not related to any harm suffered by the employee and therefore, was contrary to the statute's remedial purpose.[39]

The Court rejected DOL's contention that the regulation was justified by administrative convenience.[40] The Court noted Congress had selected a remedy requiring a retrospective, case-by-case analysis of the impairment of statutory rights and resulting harm asserted by an employee before she could obtain relief under the FMLA, and DOL was not authorized to contravene Congress' decision.[41]

Finally, the regulation punished employers who provided more generous benefits than those required by the FMLA by denying any credit for leave taken before the notice.[42] The Court noted the regulation appeared in a section addressing employers who provide more generous benefits,[43] and would likely discourage employers from continuing those benefits.[44] This result conflicted directly with Congress' instruction the FMLA not be construed "to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under [the FMLA]."[45] Finally, the Court concluded the "categorical" penalty imposed by the DOL regulation was "disproportionate and inconsistent" with the FMLA's remedial scheme, as evidenced by the fact the FMLA requires nothing more than general notice to employees through posting and imposes just up to a $100 fine for failure to provide general notice.[46]

The *Ragsdale* decision was important in a number of respects. It helped clarify that the failure of an employer to provide timely notice of the FMLA designation does not necessarily prohibit the employer from later designating time already taken as FMLA leave. The penalty, in other words, does *not* have to be the granting of an additional 12 weeks of leave after the date an employer has given notice that the leave is FMLA-qualifying. (Nevertheless, an employer is not relieved from its obligation to designate leave, where appropriate, as FMLA-qualifying and its failure to make the designation, under certain situations,

where the employee can prove harm as a result of such failure, may entitle the employee to additional leave.)

The decision, however, also was important in that, for the first time, the Supreme Court addressed a case under the FMLA and took issue with the DOL's interpretation of the Act and its requirements.[47] It gave employers reason to question other DOL regulations under the FMLA, spawning much litigation to date and into the future.

D. Other DOL Regulation Challenged: *Kosakow v. New Rochelle Radiology Associates, P.C.*[48] and *Woodford v. Community Action of Greene County*[49]

The regulations described above dealing with advance notice and designation of FMLA leave are among the top three most-challenged DOL regulations interpreting the FMLA.[50] The third most-challenged DOL regulation, which has been the subject of 19 reported decisions questioning its validity, prohibits employers from later challenging an employee's FMLA eligibility where, upon request for FMLA leave, an employer fails to timely notify an employee that he or she is ineligible.[51]

In 2001, the Second Circuit in both *Kosakow* and *Woodford* ruled this regulation was invalid to the extent it attempted to change or broaden the statutory definition of an eligible employee to include those who have not worked for the same employer for at least 12 months and/or who have not worked at least 1,250 hours for that employer within the immediately preceding twelve months.[52] Similarly, in *Dormeyer v. Comerica Bank-Illinois,*[53] the Seventh Circuit found this regulation invalid on the grounds it attempts to change the FMLA's plain language, clearly identifying an eligible employee as one who has worked for the same employer at least 1,250 hours in the preceding 12-month period.[54]

E. "Serious Health Condition"

One of the FMLA's more troublesome areas to navigate is the determination of whether an employee's own medical condition, for which leave is being requested, constitutes a "serious health condition." The Act itself defines a serious health condition as "an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice or residential medical care facility; or (B) continuing treatment by a health care provider."[55] The regulations elaborate, providing that a "serious health condition" means an injury, illness, impairment or condition that results in "[a] period of incapacity (*i.e.*, inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days . . ." that involves: 1) treatment two or more times by a health care provider, or 2) treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.[56]

The Congressional Committee's report seems to indicate that Congress' intent was to cover long-term, not short-term, conditions. In particular, it noted:

> The term "serious health condition" is not intended to cover short-term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies. Conditions or medical procedures that would not normally be covered by the legislation include minor illnesses which last only a few days and surgical procedures which typically do not involve hospitalization and require only a brief recovery period . . .[57]

Examples of serious health conditions cited in the legislative history include: heart attacks, heart conditions requiring bypass or valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, etc.[58]

Nevertheless, the regulatory definition and broad interpretation have stretched the term to include, at times, the cold, the flu, and non-migraine headaches.[59] In an opinion letter issued in December 1996, DOL stated:

> [If], an individual with the flu is incapacitated for more than three consecutive calendar days and receives continuing treatment, e.g., a visit to a health care provider followed by a regimen of care such as prescription drugs like antibiotics, the individual has a qualifying "serious health condition" for purposes of FMLA. . . . Accordingly, our letter to you of April 7, 1995, which stated that conditions meeting the regulatory criteria specified in section 825.114(a)(2)(i) would not "convert minor illnesses . . . into serious health conditions in the ordinary case (absent complications)," is an incorrect construction of the regulations and must, therefore, be withdrawn.[60]

F. The "Key Employee" Exception

The FMLA requires an employer to restore an employee returning from a covered leave to his or her position at the commencement of the leave or to an equivalent position with equivalent benefits, pay and other terms and conditions of employment.[61] Under certain circumstances, a covered employer may deny restoration to a "key employee."[62] As the only stated exception in the statute, this provision is important to employers seeking to cope with lengthy absences of employees in "key" positions.[63]

Unfortunately, however, the regulations and case law to date appear to make this exception unavailable except in very narrow circumstances.

To take advantage of the "key employee" exception, employers must make certain a number of factors are present.[64] First and foremost, the employee at issue must be "a salaried[65] [FMLA-]eligible employee who is among the highest paid [ten] percent of the employees employed by the employer within 75 miles of the employee's worksite."[66] This, of course, may knock employees, otherwise thought of as "key" to the business, out of contention. In a hospital, for example, where physicians and other medical personnel employed by the institution may make high salaries, "key" administrative employees, while critical to the business, simply may not qualify for the exemption.

In addition, even where the salary factor is met, the employer must be able to show that denial of restoration to the prior position (rather than the employee's absence) will cause "substantial and grievous economic injury" to the employer.[67] Thus, rather than require an employer to examine the potential cost to its business of *granting* a leave of absence to an employee whose presence is critical to the operations, the FMLA instead requires that an employer determine whether the employee's *reinstatement* will cause "substantial and grievous economic injury" to its operations.[68]

The regulations offer little guidance in making this determination. They provide, in pertinent part:

> A precise test cannot be set for the level of hardship or injury to the employer which must be sustained. If the reinstatement of a "key employee" threatens the economic viability of the firm that would constitute "substantial and grievous economic injury." A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute "substantial and grievous economic injury.[69]

There is no "compelling business interest" or "undue hardship" defense under the statute but, as the applicable FMLA regulation itself notes, the standard for proving "substantial and grievous economic injury" is nonetheless more stringent than the "undue hardship" defense under the ADA, as it includes "substantial long-term injury."[70]

Proposed Legislation

There is proposed legislation that would revise the meaning of a "serious health condition" under the FMLA to: (1) *exclude* from coverage a short-term illness, injury, impairment, or condition for which treatment and recovery are very brief; and (2) include a list of examples of types of illnesses, injuries, impairments, and physical or mental conditions to be covered under the FMLA. [71] It would also require employees to: (1) request leave be designated as FMLA leave; (2) provide a written application within five working days of providing notice to the employer for foreseeable leave; and (3) with respect to unforeseeable leave, provide, at a minimum, oral notification of the need for the leave not later than the date the leave commences, unless the employee is physically or mentally incapable of providing notice or submitting the application.[72] It would permit employers to require employees to choose between taking unpaid leave provided by the FMLA or paid absence under an employer's collective bargaining agreement or other sick leave, sick pay, or disability plan, program, or policy of the employer.[73] Finally, it would direct the Secretary of Labor to review all existing implementing regulations for the FMLA, and to issue new regulations based on the revised Act.[74]

Advice to Employers

- Where an employee is absent for a reason that might be considered a "serious health condition" under the Act, the employer would be well-advised to notify the employee as early as possible, *in writing*, that his/her leave has been approved as FMLA leave *conditioned* on the timely receipt of a completed Certification of Health Care Provider form satisfactory to the employer. Including a copy of the company's FMLA policy and procedures, along with a detailed definition of "serious health condition," will help guard against an employee's claim that he or she did not understand his or her rights or what was expected of employees.[75]
- It is important that employers not allow too much time to pass before requiring medical documentation (such as the completed Certification form) from the employee. Many employers wait until the FMLA leave is completed, only to discover the employee claims he or she still cannot return due to further medical problems or complications. The fact that FMLA leave is concluded does not relieve most employers from having to comply with the ADA's obligation to provide a reasonable accommodation (which may include an extended leave of absence) to disabled employees.
- Employers should ensure supervisors and appropriate human resources personnel are sufficiently trained to determine whether a leave of absence qualifies as an FMLA leave, while exercising sensitivity to personal medical information and an employer's legal obligations vis-à-vis the ADA and HIPAA.

- Employers may not discipline or discharge employees for the use of FMLA leave. Sounds simple enough, but many employers still count FMLA absences against employees in no-fault absence control plans. That, of course, is unlawful. Employers should review their policies and procedures to ensure they are compliant with the FMLA.
- Nothing in the FMLA prohibits employers from treating employees on FMLA leave the same as they would have been treated if they had not taken the leave. In other words, if the employee would have been terminated or laid off had he or she not taken leave (e.g., as part of a reduction in force, or where the position has been eliminated), he or she still can be terminated or laid off. The employer, however, must be sure documentation exists to demonstrate the termination/layoff is unrelated to the leave. A proper paper trail can be invaluable.

Endnotes

1. President Clinton signed the Act into law on Feb. 5, 1993, but it went into effect on Aug. 5, 1993.
2. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C.A. §§ 2601–2654 (West 1999 & Supp. 2003)); Neil S. Levinbook, *The Family And Medical Leave Act: Unlocking the Door to the 'Key Employee Exemption*,' 15 Hofstra Lab. & Emp. L.J. 513, Spring 1998.
3. *See* Nancy R. Daspit, *The Family and Medical Leave Act of 1993: A Great Idea but a "Rube Goldberg" Solution?* 43 Emory L.J. 1351, 1352 (1994) ("While the Act is deceptively simple in its purposes, analysis and experience have made it clear that interpretation and execution of the Act and regulations are anything but simple.") (footnotes omitted)); *see also* Shay Ellen Zeemer, *FMLA Notice Requirements and the Chevron Test: Maintaining a Hard-Fought Balance*, 55 Vand. L. Rev. 261, 262 (2002) ("The FMLA finds employees and employers alike disillusioned, uncertain about rights and obligations, and still fighting to balance work and family needs by being forced to follow the FMLA's complex procedures. Furthermore, the FMLA and accompanying regulations provide attorneys and judges with a great deal of confusion . . .").
4. *Id.*
5. See http://www.spencerfane.com/content/content/157.asp and study conducted by the Kansas City, Missouri law firm of Spencer Fane Britt & Browne LLP, Final Report, Mar. 20, 2002, entitled "Reported Court Cases in Which The Validity of an FMLA Regulation Has Been Challenged." According to a study done by the law firm of Spencer Fane Britt & Browne LLP, following the Supreme Court's *Ragsdale* decision, 71% (36 of 51 court decisions addressing the FMLA regulations, including four that were overruled by the Supreme Court's decision in *Ragsdale*) have held that the FMLA regulation in question was invalid or would have held it to be invalid if the case had been decided after *Ragsdale*.
6. 535 U.S. 81, 122 S. Ct. 1155 (2002).
7. *Id.*
8. *See Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955 (10th Cir. 2002) (finding regulation section 825.216(a) valid); *Parker v. Hahnemann Univ. Hosp.*, 234 F. Supp. 2d 478 (D.N.J. 2002) (same); *Ruder v. Maine Gen. Med. Ctr.*, 204 F. Supp. 2d 16 (D. Me. 2002) (finding section 825.110(b) valid); *Rocha v. Sauder Woodworking Co.*, 221 F. Supp. 2d 818 (N.D. Ohio. 2002) (finding section 825.110(d) invalid); *Gurley v. Ameriwood Indus., Inc.*, 232 F. Supp. 2d 969 (E.D. Mo. 2002) (finding section 825.110(b), (d) invalid); *Dierlam v. Wesley Jessen Corp.*, 222 F. Supp. 2d 1052 (N.D. Ill. 2002) (finding sections 825.220(d), 825.215(c)(2) valid); *Phillips v. Leroy-Somer N. Am.*, 2003 U.S. Dist. LEXIS 5334 (W.D. Tenn. Mar. 31, 2003) (finding section 825.208(c) invalid); *see also* List of Reported Court Cases in Which the Validity of an FMLA Regulation Has Been Challenged, Updated Report, Aug. 1, 2003, Spencer Fane Britt & Browne LLP.
9. May 9, 1996, Senate Subcommittee on Children and Families, Committee on Labor and Human Resources, Senate Hearing Report No. 104-503, "Oversight of the Family and Medical Leave Act"; June 10, 1997, House Subcommittee on Oversight and Investigations Hearing, House Hearing, Report No. 105-44, "Hearing on the Family and Medical Leave Act [FMLA] of 1993"; July 14, 1999, Subcommittee on Children and Families, Committee on Health, Education, Labor, and Pensions, Senate Hearing Report No. 106-156, "Oversight Hearing on the FMLA. The Family and Medical Leave Act: Present Impact and Possible Next Steps"; March 9, 2000, House Subcommittee on Human Resources, Committee on Ways and Means Hearing, House Hearing Report No. 106-114, "FMLA and Unemployment Compensation"; Feb. 15, 2000, Subcommittee on National Economic Growth Natural Resources and Regulatory Affairs, House Hearing, Report No. 106-171, "Is the Department of Labor Regulating the Public Through the Backdoor?"; Apr. 11, 2002, Senate hearing Report 107-141, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs Report, "Paperwork Inflation—The Growing Burden on America."
10. 29 U.S.C. § 2612(a)(1).
11. The FMLA includes within the definition of employer "any person who acts, directly or indirectly, in the interest of an employer."
12. 29 C.F.R. § 825.214(a).
13. The employer must employ 50 employees within 75 miles of the employee's worksite (29 C.F.R. § 825.108), and the eligible employee must give notice of the need for FMLA leave to his/her supervisor or other appropriate person. 29 C.F.R. § 825.302.
14. 29 C.F.R. § 825.110.
15. *See* SHRM Family and Medical Leave Act Research, Apr. 2003.
16. *See* http://www.spencerfane.com/content/content/157.asp; and study conducted by the Kansas City, Mo., law firm of Spencer Fane Britt & Browne LLP, Updated Report, Aug. 1, 2003, entitled, *Reported Court Cases in Which The Validity of an FMLA Regulation Has Been Challenged.*
17. *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81, 122 S. Ct. 1155 (2002).
18. *Fulham v. HSBC Bank USA*, 2001 U.S. Dist. LEXIS 13570 (S.D.N.Y. Sept. 6, 2001).
19. *Id.*
20. *Id.* (citing *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 937–38 (8th Cir. 2000)); *see also Haggard v. Levi Strauss & Co.*, 8 Fed. Appx. 599 (8th Cir. 2001) (unpublished) (following *Ragsdale*).
21. *Id.* at *22.
22. *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155 (2d Cir. 1999).
23. *Id.*
24. *Id.*
25. *Id.; see also, e.g., Holmes v. E. Spire Communications, Inc.*, 135 F. Supp. 2d 657, 666–67 (D. Md. 2001); *Covey v. Methodist Hosp. of Dyersburg, Inc.*, 56 F. Supp. 2d 965, 971–72 (W.D. Tenn. 1999); *Rich v. Delta Air Lines, Inc.*, 921 F. Supp. 767, 773–74 (N.D. Ga. 1996).
26. *McGregor v. Autozone, Inc.*, 180 F.3d 1305 (11th Cir. 1999).
27. *Id.*
28. *Id.*
29. *Id.* at 1308.

30. *Id.*
31. *Plant v. Morton International, Inc.*, 212 F.3d 929, 935 (6th Cir. 2000).
32. *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81, 122 S. Ct. 1155 (2002).
33. 535 U.S. at 85, 122 S. Ct. at 1160.
34. *Id.*
35. *Id.*
36. 535 U.S. at 88–89, 122 S. Ct. at 1160–61.
37. 535 U.S. at 88, 122 S. Ct. at 1161.
38. 535 U.S. at 89, 122 S. Ct. at 1161.
39. *Id.*
40. 535 U.S. at 91, 122 S. Ct. at 1162.
41. 535 U.S. at 92, 122 S. Ct. at 1163.
42. 535 U.S. at 95–96, 122 S. Ct. at 1165.
43. *Id.*
44. *Id.*
45. 29 U.S.C. § 2653.
46. 535 U.S. at 95, 122 S. Ct. at 1164.
47. Many employers have found the regulation's requirement that they notify an employee in writing within two days of a leave request of his or her rights and obligations under the FMLA as well as whether the leave is FMLA-qualifying to be an undue burden. *See Testimony of Deanna R. Gelak, SPHR Director, Governmental Affairs for The Society for Human Resource Management, U.S. Senate Subcommittee on Children and Families, July 14, 1999* (recommending extension of the two-day period).
48. *Kosakow v. New Rochelle Radiology Associates, P.C.*, 274 F.3d 706 (2d Cir. 2001).
49. *Woodford v. Community Action of Greene County*, 268 F.3d 51 (2d Cir. 2001).
50. *See* http://www.spencerfane.com/content/content/157.asp; and study conducted by the Kansas City, Mo., law firm of Spencer Fane Britt & Browne LLP, Updated Report, August 1, 2003, entitled, *Reported Court Cases in Which The Validity of an FMLA Regulation Has Been Challenged.*
51. *See* 29 C.F.R. § 825.110(d).
52. *Kosakow v. New Rochelle Radiology Associates, P.C.*, 274 F.3d 706 (2d Cir. 2001); *Woodford v. Community Action of Greene County,* 268 F.3d 51 (2d Cir. 2001).
53. *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579 (7th Cir. 2000).
54. *Id.; see also Evanoff v. Minneapolis Public Schools*, 11 Fed. Appx. 670 (8th Cir. 2001).
55. 29 U.S.C. § 2611(11).
56. 29 C.F.R. § 825.114(a)(2)(1).
57. U.S. Congress Committee on Education and Labor, Family and Medical Leave Act of 1993, H.R. Rep. 103-8, Feb. 2, 1993, p. 40.
58. *See* 58 F.R. 31794, p. 9 (June 4, 1993).
59. See DOL Wage and Hour Opinion Letter, FMLA-86, Dec. 12, 1996; *see also FMLA 10th Anniversary Fact Sheet*, FMLA Technical Corrections Coalition.
60. See DOL Wage and Hour Opinion Letter, FMLA-86, Dec. 12, 1996.
61. 29 U.S.C. § 2614(a)(1); 29 C.F.R. § 825.100(c).
62. *See* 29 U.S.C. § 2614(b)(2); 29 C.F.R. § 825.217.
63. *Id.*
64. 29 U.S.C. § 2614(b)(1), (2).
65. "Salaried Employee" means "paid on a salary basis," as defined in 29 C.F.R. § 541.118; it uses the Department of Labor regulation defining employees who may qualify as exempt from the minimum wage and overtime requirements of the FLSA as executive, administrative, and professional employees.
66. *See* 29 U.S.C. § 2614(b)(2). In determining which employees are among the highest paid 10%, year-to-date earnings are divided by weeks worked by the employee (including weeks in which paid leave was taken). Earnings include wages, premium pay, incentive pay, and non-discretionary and discretionary bonuses but do not include incentives whose value is determined at some future date, e.g., stock options, or benefits or perquisites. Additionally, an employer must determine whether a salaried employee is among the "highest paid 10%" as of the time the employee gives notice of the need for leave. 29 C.F.R. § 825.217(c)(2). No more than 10% of an employer's employees within 75 miles of the worksite may be considered "key employees.'"
67. 29 U.S.C. § 2614(b)(1)(A).
68. *Id.*
69. 29 C.F.R. § 825.218(c).
70. 29 C.F.R. § 825.218(d).
71. *See* H.R. 35, 108th Cong., 1st Sess. (Jan. 7, 2003) Rep. Judy Biggert, R-Ill.; S. 320, 108th Cong. (Feb. 5, 2003), Senator Judd Alan Gregg, R-NH.
72. *Id.*
73. *Id.*
74. *Id.*
75. *See* 29 C.F.R. §§ 825.208(a), 825.301(b)(1).

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So What's ERISA All About?: A Concise Guide for Labor and Employment Attorneys

By Stephen E. Ehlers and David. R. Wise

Introduction

ERISA[1] touches virtually all areas of practice, from collective bargaining to family law. Labor and employment attorneys who avoid ERISA, believing it is confusing and incomprehensible, do themselves and their clients a disservice. Although the Act is replete with highly complex and technical issues, and the related common law is still evolving, counsel will seldom be involved with finite details of ERISA.

The purpose of this article is to provide an overview so that you will recognize ERISA issues when they arise and focus on the applicable principles.

Legislative History

ERISA was enacted by Congress to stem abuses in private pension plans.[2] In the past, employees sometimes failed to receive promised pensions because employers mismanaged the plans, abused their powers and imposed unreasonable requirements. From the 1940s to the late 1960s, the number and size of pension plans increased rapidly as employers sought ways to augment compensation in the face of wage and price controls, and due to the National Labor Relations Board's ruling that pensions were a mandatory subject of collective bargaining.

Senator Jacob Javits introduced the first broad pension reform bill in Congress in 1967 and ERISA finally became law on September 2, 1974. Congress had determined that no standards existed to ensure financial stability of pension plans, that employees were being deprived of benefit information, that there were few safeguards, that workers were often denied their expected benefits and that plans were terminated without adequate funds. ERISA was enacted to remedy these problems and is divided into four Titles:

Title I amends the Federal Labor Law. It protects the rights of employees and permits them to bring civil actions to recover benefits, clarify their rights and remedy breaches of fiduciary duty.

Title II amends the Internal Revenue Code. The provisions of Titles I and II are overlapping and often identical. Title II also deals with individual retirement accounts and Keogh plans and contains contribution and benefit limits for pension plans.

Title III divides the regulatory jurisdiction over employee benefit plans between the Department of the Treasury and the Department of Labor.

Title IV establishes the Pension Benefit Guaranty Corporation (PBGC), which pays pensions to participants in certain defined benefit pension plans when the plans cannot.

This article will focus on Title I because it is the most important and commonly encountered. The Secretary of Labor is authorized by section 1135 to promulgate regulations to implement Title I and has made extensive use of such power.

Overview

ERISA controls the establishment and operation of both types of employee benefit plans—pension and welfare. Pension plans provide retirement income; welfare plans provide all other employee benefits (section 1002[1]). Employee benefit plans regulated by ERISA include those maintained by a single employer, by groups of employers (multiple employer plans) and by unions and employers together (multi-employer plans). Government and church plans are generally exempt. ERISA is a comprehensive, remedial statute which largely addresses pension issues. Nevertheless, ERISA litigation often involves welfare plan issues. The main thrusts of ERISA are to see that employees have access to detailed information about their plans, to assure proper plan management and to ensure that sufficient assets are set aside to pay promised pensions. ERISA mandates no substantive pension or welfare benefits; it is purely procedural. Employers are not required by ERISA to provide any employee benefit plans or any particular level of benefits.

ERISA requires that plans operate pursuant to detailed written plan documents and that participants be given an easily readable abstract called a summary plan description (SPD). Participants must receive reports concerning their accrued pension benefits upon request and plans must submit detailed financial reports to the federal government. The Act requires that virtually all employees be allowed to participate in pension plans if one has been established (section 1052) and that pensions be vested in accordance with reasonable standards (section 1053). Once vested, employees cannot lose their accrued pension benefits even if they leave their jobs. The concept of vesting is inapplicable to welfare plans.[3]

The safekeeping of every plan is entrusted to fiduciaries who are individuals who either actually exercise control over employee benefit plans or who are named in the plan document. They must act prudently and for the sole benefit of the participants.

Funding

Employee benefit plans most often arise when a single employer establishes a plan for its employees or a union negotiates a plan for its members. The Taft-Hartley Act[4] generally prohibits payments from an employer to a union. However, contributions to qualified employee benefit plans are permitted under strict conditions, including the requirement that the plan's assets be held in trust pursuant to a written agreement.

Employers become bound to a collective bargaining agreement (CBA) and obligated to contribute to plans by signing a CBA or by delegation of its rights to an association of employers which signs a CBA. CBAs may appear to expire on a certain date but often contain automatic renewal ("evergreen") clauses. If an employer does not give a properly timed notice to terminate the CBA, the obligation to contribute may continue. Employers may also make voluntary contributions to pension plans such as a profit-sharing plan and employees may defer wages into a pension plan under IRC § 401(k).

Fiduciaries

Those who exercise discretionary control over employee benefit plans are charged with fiduciary obligations, and trust law permeates ERISA fiduciary litigation. ERISA requires that fiduciaries be named in the plan document (section 1102[a][1]). However, fiduciaries may also become such by reason of their actual exercise of discretionary control over the plan or its assets (section 1002[3]). Some plans are essentially insurance contracts; in others the fiduciaries hold the assets of the plan in trust, while others are a combination of the two. In all cases the fiduciaries must discharge their duties for the exclusive purposes of providing benefits to participants and defraying the reasonable expenses of the plan with the care and skill that a prudent person would exercise. They must also diversify the investment of the plan assets to minimize the risk of loss (section 1104).

Single-employer plans are often run by management personnel who may thereby become fiduciaries even if the plan document names someone else. However, in the multi-employer (or union) context, the Taft-Hartley Act requires that plans be managed by a board of trustees composed equally of employer and union representatives.

Fiduciaries may not engage in "prohibited transactions" which are specified in section 1106. These include transactions between a plan and a "party in interest," the acquisition of employer securities (with certain exceptions), dealing with plan assets for their own benefit and transactions which are adverse to the interests of the participants. Section 1107 contains exemptions to prohibited transactions and the Secretary has exempted certain classes by regulation.

The Secretary, participants, beneficiaries and other fiduciaries may sue fiduciaries for a breach of duty. The Second Circuit Court of Appeals has held that fiduciaries may seek contribution and indemnity from one another and District Courts have generally followed suit.[5] A plan may purchase insurance for its fiduciaries with plan assets but the insurer must reserve recourse against the fiduciaries. Fiduciaries may purchase a non-recourse rider but may not use plan assets to pay the premium (section 1110). Fiduciary liability insurance should not be confused with the requirement for a fidelity bond of at least 10% of the plan's assets (section 1112).

When representing an employer it is important to determine if management has created an ERISA plan, identify the fiduciaries (both named and functional) and explain their obligations under ERISA. The employer should monitor the activities of the plan's fiduciaries and its professionals. Often the employer is itself a fiduciary by default, by its actions or in accordance with a plan document.

Fiduciaries should be encouraged to obtain advice from capable consultants and experienced ERISA counsel. Plan design is important for tax qualification purposes and specialists can help ensure that plans meet the ever-changing requirements for participation, vesting and benefits.

Reporting and Disclosure

ERISA contains reporting and disclosure requirements which should be followed with care. Plans must be detailed and in writing (section 1102[a][1]). Significant plan modifications and annual financial reports are to be communicated in writing to participants. At certain times participants must be given a plan summary (SPD) understandable by the average participant (section 1022). If the plan document and the SPD differ, the courts have sometimes held that the one which is more generous to the participant controls.[6]

Section 1024 requires that the plan administrator provide a participant with a copy of the plan document, the SPD, the latest annual report and other relevant documents upon request. Under section 1132, an administrator who fails to provide the documents within thirty days may be liable for a penalty of $100 per day. While the plan administrator is often identified in the SPD, an employer (the plan sponsor) may be the plan administrator, intentionally or by default. Participants in pension plans must be given a statement of their accrued and vested benefits upon written request (section 1025).

Pension Plan Issues

There are two types of pension plans: a defined contribution plan (an individual account plan such as a

money purchase plan or profit-sharing plan) and a defined benefit plan which usually provides a monthly sum upon retirement. Individually-directed, defined contribution plans which are available under section 1104(c) are becoming quite popular and are governed by regulations found at 29 C.F.R. § 2550. Such plans should be contrasted with IRC § 401(k) salary deferral plans which constitute a type or component of a defined contribution plan.

Generally a participant may not assign his or her pension rights and a qualified pension is not subject to enforcement of a judgment (section 1056[d]). There are two statutory exceptions: a voluntary and revocable assignment of less than 10% of the benefit and a Qualified Domestic Relations Order (QDRO).

In the context of a divorce, a participant's pension may be divided with a former spouse. A Domestic Relations Order (DRO) must be submitted to the plan administrator for approval (the qualification process). After the DRO has been qualified, it becomes binding on the pension plan. A more convenient approach is to have the DRO "pre-qualified" before it is signed by the judge. ERISA requires that pension plans have a written procedure for qualifying DROs. Section 1005 provides that a spouse must share in a pension unless a written waiver has been executed by the participant and the spouse. Notwithstanding the "anti-alienation" provision, pensions in pay status may be attached by the federal government for unpaid taxes and to enforce alimony and child support orders. However, state tax authorities may not attach pension benefits.

ERISA imposes minimum funding standards for defined benefit pension plans to assure that promised benefits will be paid to pensioners. If a defined benefit plan is unable to pay promised benefits, the PBGC may assume liability, using premiums which are collected through a per capita tax.

Attorneys for employers participating in multi-employer plans should understand the concept of withdrawal liability as detailed in section 1381 *et seq*. Withdrawal liability is a highly technical, dangerous and complicated area of ERISA. An employer, and members of its control group (section 1002[40][B]), can incur a large financial obligation by completely or partially withdrawing from a multi-employer pension plan. Employers who withdraw (typically by ceasing operations) must act promptly upon receipt of a plan's notice of withdrawal liability. An attorney who is familiar with such matters can ensure that the employer's rights are protected. If not, they will be quickly forfeited, often with grave consequences. Some employers, such as those in the construction industry, have an unfounded fear of withdrawal liability, failing to realize that section 1388 often provides an exception for certain seasonal or cyclical businesses.

The termination of a qualified single-employer pension plan should also be approached with great caution since it often creates a complex series of legal and financial relationships which may result in an exposure of the employer's assets.

Welfare Plan Issues

Welfare plans provide employee benefits such as health and hospital care, disability pay, vacation money, severance pay, job training and legal services. In the single-employer context, eligibility to participate often depends only on one's status as an employee for a short period. In the multi-employer context, welfare plans usually require the employee to work in covered employment (i.e., at the trade described in the CBA) for a certain period to be eligible for benefits during a subsequent period.

There are significant differences between health plans which provide benefits through insurance and those which pay benefits directly. Insured plans are subject to the mandates of state insurance laws. For self-insured plans, ERISA preempts state insurance laws (section 1144). A self-insured plan may appear to be insured if either administered by, or benefits are paid through, an insurance company. However, the test for preemption purposes is whether the benefits are paid with the plan's own assets. Stop-loss insurance can cloud this issue, as the courts are divided over whether it equates to an insured plan.

A large body of case law is developing concerning the eligibility of retirees for lifetime health insurance. These cases turn on the contractual obligations undertaken to provide benefits to retirees and whether there has been a clear reservation of the right to amend the plan to discontinue the benefits.[7] In the multi-employer context, the plan documents and the CBA are contracts which will be examined to discern the parties' intent. If they are ambiguous, extrinsic evidence of intent may be considered. If there is no CBA then only the plan documents are reviewed for intent. The fact that one has retired on an employer's pension does not ensure lifetime participation in its health plan. Termination of coverage, reduction of benefits and increases in the former employees' level of contribution to the plan have all triggered litigation.

Contrary to pension benefits, welfare benefits can be assigned (to a provider or to others) and benefits, such as vacation pay, can be levied upon by judgment creditors. Attorneys must remember that unions, pension plans, and welfare plans are each distinct legal entities operating under unique plan documents, and subject to different laws.

The federal law pertaining to continuation coverage for group health plans (commonly known as COBRA) is

found at section 1161 *et seq*. It provides for the continuation of participation for persons who lose coverage as a result of a "qualifying event" such as the loss of a job or a divorce. Employers must comply with strict notice requirements to individuals eligible for COBRA. Those individuals must make their elections promptly and pay the premiums on time. COBRA invites "negative selection," encouraging the infirm or injured to elect coverage, while those who are healthy may decline coverage. The premium rate, however, is identical for all who are eligible. Many states have laws similar to COBRA (e.g., New York Insurance Law § 3221). Generally, ERISA does not preempt such laws for insured plans or employers with less than 20 employees.

COBRA should be contrasted with a conversion right which permits an individual to convert a group policy to an individual policy upon losing group coverage. New York Insurance Law §§ 4216(d) and 3221(e) require that group life and health policies contain such a conversion privilege.

Qualified Medical Child Support Orders (QMCSOs) are another unique aspect of welfare plans (section 1169). A QMCSO in effect mandates continued medical coverage for dependent children under a parent's health plan. The goal is to protect the rights of children to medical coverage during and after a divorce.

Administration

The operation of plans and processing of claims, which is referred to as administration, is the source of much litigation. Section 1133 sets forth the procedure which administrators must follow when denying a benefit claim. The Secretary has promulgated detailed regulations which are at 29 C.F.R. 2560.503-1. The claimant must receive a written notice which sets forth the specific reason for the denial and offers the opportunity to have the administrator's decision reviewed by the plan's fiduciaries. The review procedure must be set forth in the plan documents, including the SPD.

A plan's personnel or an employer's office staff sometimes offer interpretations of a plan document to a participant or to a service provider. While often well-intentioned, this is a dangerous practice which should be discouraged. Courts have held that a plan may be collaterally estopped from denying an interpretation of an ambiguous provision of the plan document once it has been relied on. The courts balance ERISA's requirement that the plan be in writing with the right of others to rely on a plan representative's interpretation of it.[8] However, if a representative makes a statement which clearly conflicts with the written plan, those who rely on the statement may be left without recourse. Courts have held that ERISA provides no remedy for a definite misstatement about the plan document and that state law remedies such as collateral estoppel and negligent misrepresentation are preempted by ERISA, leaving a misled participant or provider with no remedy.[9] Although federal courts have acknowledged their duty and power to develop a federal common law under ERISA, they have been reluctant to use that power to remedy such problems.[10] If instead a plan fiduciary misleads a participant, equitable relief may be obtained in some circumstances under section 502(a)(3).

Preemption

ERISA supersedes all state laws which "relate to an employee benefit plan" but it does not preempt federal laws (section 1144). The courts have struggled mightily with the issue of which state laws "relate to" ERISA plans. Section 1144 contains an exception to the general preemption provision for state insurance, banking and securities laws but then provides that employee benefit plans may not be "deemed" to be insurance companies, banks or investment companies.

The courts have held that ERISA preempts a wide range of state laws and have addressed the preemption issue in numerous contexts such as state anti-subrogation statutes that prohibit health plans from recouping benefit payments from the proceeds of a participant's claim against a responsible third party. Court decisions concerning this issue often turn on the distinction between an insured plan (state law is not preempted) and a self-insured plan (state law is preempted). The United States Supreme Court has affirmed the critical importance of this difference.[11]

Insured welfare plans willing to assume the risk of large losses may avoid the mandates of state insurance laws by becoming self-insured. Stop-loss insurance (which provides insurance for catastrophic losses) blurs the line and creates dangers and uncertainties, since the courts are divided as to whether it transforms a self-insured plan into an insured plan.[12]

Litigation

Section 1132 is the heart of ERISA for litigation purposes. It sets forth the types of civil actions which may be brought, who may institute each type and the available forms of relief. A benefit plan may sue and be sued as a legal entity. Section 1132 contains a venue provision which facilitates the participant's choice and also provides for the manner and place for service of process. The plan document must identify each plan's agent for service of process (section 1022). Section 1113 contains the applicable statute of limitations which may be shortened for benefit claims litigation by the terms of the plan documents. The exhaustion of a participant's administrative

remedy (the review process) has repeatedly been held to be a condition precedent to the commencement of benefit claims litigation.[13] The statute is silent, and there remains a division of authority, concerning the right to a jury trial in ERISA cases. Many cases turn on the distinction between claims for legal relief and equitable relief.[14]

Section 1132 confers the federal courts with jurisdiction over ERISA cases without regard to the amount in controversy or the citizenship of the parties. The federal courts are given exclusive jurisdiction over almost all civil actions. However, section 1132 gives concurrent jurisdiction to the federal and state courts in all benefit claim cases. ERISA is the applicable law in either court. If a benefit case is brought in state court, the plan's attorney usually will remove the action to the federal court.

Section 1140 makes it unlawful for employers to discriminate against employees for exercising their rights under an employee benefit plan.[15] This type of claim, in which an employer is sued for discriminatory employment practices, should be contrasted with a participant's claim directly against a plan. However, section 1132 is applicable to both kinds of claims, and the court may allow either party a reasonable attorney's fee in either case.

Until recently, it was thought by many that the standard for judicial review of fiduciary appeals was "arbitrary and capricious." However, the Supreme Court of the United States has held that a participant is entitled to a *de novo* review unless the plan documents give broad discretionary authority to the fiduciaries in making such decisions.[16] Labor counsel should review both the trust document and the plan documents to ensure that the fiduciaries are given broad discretion, as these documents will control the standard of judicial review.

Occasionally, employers become delinquent in their contributions to multi-employer plans. When this persists employers are sued by the plans under section 1145. ERISA severely restricts available employer defenses. Section 1132 permits the plan to recover the delinquency plus interest, penalty interest, the plan's attorney's fees and costs. Section 1132 provides that the court "shall" award these additional items in a successful action. The federal courts are divided on the issue of ERISA's preemption of state law remedies (such as mechanic's liens and construction payment bonds) to collect unpaid employer contributions.[17]

Conclusion

Not all labor counsel will need expertise in ERISA, but this overview should provide you with a working knowledge of its fundamentals and an awareness of potential problems so that you may better address ERISA issues when they arise.

Endnotes

1. The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq*.
2. Section 1002(3) defines the term "plan" as an employee benefit pension or welfare plan (the entity which provides the benefits), but ERISA also uses the term to mean the written description of the plan. All section references are to 29 U.S.C.
3. *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488 (2d Cir. 1988).
4. 29 U.S.C. § 186 *et seq*.
5. *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12 (2d Cir. 1991).
6. *Heidegerd v. Olin Corp*., 906 F.2d 903 (2d Cir. 1990); *McKnight v. Southern Life and Health Ins. Co.*, 758 F.2d 1566 (11th Cir. 1985); *Hansen v. Continental Ins. Co.*, 940 F.2d 971 (5th Cir. 1991); *Maher v. Stracham Shipping*, 817 F. Supp. 43 (E.D. La. 1993); *Cohen v. Barker,* F. 45 F. Supp. 289 (E.D. Pa. 1994).
7. *Hansen v. White Farm Equip. Co.*, 758 F.2d 1186 (6th Cir. 1986); *Anderson v. Alpha Portland Indus.*, 836 F.2d 1512 (8th Cir. 1988); *Smith v. ABS Indus. Inc.*, 890 F. 2d 841 (6th Cir. 1989).
8. *National Cos. v. St. Joseph's Hosp*., 929 F.2d 1558 (11th Cir. 1991).
9. *Degan v. Ford Motor Co.*, 869 F.2d 889 (5th Cir. 1989).
10. *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12 (2d Cir. 1991); *Bast v. Prudential*, 150 F.3d 1003 (9th Cir. 1998).
11. *FMC Corp. v. Holliday,* 111 S. Ct. 403 (1990).
12. *Michigan Food Workers Health and Welfare Fund v. Baerwaldt*, 767 F.2d 308 (6th Cir. 1985); *Moore v. Provident*, 786 F.2d 992 (9th Cir. 1986); *Northern Group Servs., Inc. v. Auto Owners Ins. Co.* 833 F.2d 85 (6th Cir. 1987); *Brown v. Granatelli*, 897 F.2d 1351 (5th Cir. 1990); *Thompson v. Talquin Building Products Co.*, 928 F.2d 649 (4th Cir. 1991).
13. *Denton v. First Nat'l Bank of Waco*, 765 F.2d 1295 (5th Cir. 1985); *Mason v. Continental Group Inc*., 763 F.2d 1219 (11th Cir. 1985); *Springer v. Wal-Mart Assocs. Group Health Plan*, 908 F.2d 897 (11th Cir. 1990).
14. *Sheet Metal Workers Local 19 v. Keystone Heating & Air Conditioning*, 934 F.2d 35 (3d Cir. 1991); *Crews v. Central States Pension Fund*, 788 F.2d 332 (6th Cir. 1980).
15. *Fleming v. Ayers & Assoc*., 948 F.2d 993, 14 EBC 1673 (6th Cir. 1991).
16. *Bruch v. Firestone Tire & Rubber Co.*, 109 S. Ct. 945 (1989).
17. *Iron Workers Mid South Pension Fund v. Terotechnology Corp.*, 891 F.2d 548 (5th Cir. 1990); *Fur Mfg. Indus. Ret. Fund v. Getto & Getto,* 714 F. Supp. 651 (S.D.N.Y. 1989); *Plumbing Indus. Bd. v. E.W. Harrell*, 126 F.3d 61 (2d Cir. 1997).

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Recent PERB Remedies

By Paul S. Bamberger

Several cases decided recently by the New York State Public Employment Relations Board (PERB) have contained detailed discussions of the appropriate scope of remedies in retaliation and discrimination cases. Two such decisions have been issued by the Board within the past year-and-a-half: *State of New York (SUNY Oswego)*,[1] and *County of Nassau*.[2] In both cases, the Administrative Law Judge (ALJ) found a violation of the retaliation and discrimination sections of the Taylor Law, sections 209-a.1(a) and (c). The PERB upheld the findings of violations in these cases, but narrowed the scope of the remedy in both cases.[3]

"[The] narrowing of remedies by the Board in retaliation cases raises concerns about whether the purposes of the Taylor Law are being served by these remedies, and the possible negative or chilling effect these decisions will have on the functioning of public sector labor relations in New York."

Those two cases, *SUNY* and *County of Nassau*, appear to follow in line with cases decided between 1998 and 2000, in which the Board also narrowed the remedies contained in ALJ decisions while upholding the ALJ's findings of violations. One such Board decision was overturned by the courts and one was affirmed by the courts.[4] This narrowing of remedies by the Board in retaliation cases raises concerns about whether the purposes of the Taylor Law are being served by these remedies, and the possible negative or chilling effect these decisions will have on the functioning of public sector labor relations in New York.

Several basic principles have been established in defining PERB's remedial authority. In all the decisions cited above, the Board and the courts make reference to these principles. It is generally understood that the purpose of a PERB remedial order in a retaliation case is to place the parties as nearly as possible in the position that existed prior to the act of retaliation. Remedies should be tailored to meet the particular circumstances involved in the proceeding. And, of course, PERB is authorized to take such action as will "effectuate the policies" of the Taylor Law which includes promoting "harmonious" relationships between public sector employers and unions.[5] Within these guidelines, PERB has broad discretion to fashion remedies.

In *County of Nassau*,[6] the Board sustained the ALJ's finding that the employer retaliated against an employee because of his union activity. The facts of the case involved the employer's decision not to promote Rinaldo. The ALJ held that two of Rinaldo's superiors, Mills and Neglia, denied Rinaldo's promotion because Rinaldo had been active in the union by filing several grievances.

The ALJ found that credible testimony of two independent witnesses established that Mills directly admitted to these witnesses on separate occasions that "even if [Rinaldo's] name had been submitted for a promotion, he would not have gotten it because of his grievance activity."[7] This kind of direct admission, the proverbial "smoking gun," is rarely found in these types of cases. Thus, the ALJ found clear and egregious violations of the anti-retaliation and discrimination protections of the Taylor Law.

The Board upheld the finding of a violation, and gave "substantial deference to the ALJ's credibility determination."[8] The Board found that the decision by Mills not to recommend Rinaldo for a promotion *was* the result of improper motivation, and therefore constituted a violation of the Act.

The ALJ ordered the employer to promote Rinaldo immediately. The Board overturned the remedy portion of the ALJ's decision and ordered the employer merely to review and reconsider the decision about Rinaldo's promotion without relying upon improper, anti-union motivation. By issuing this more restrictive remedial order, PERB placed the decision back in the hands of the same individuals who had already violated the Taylor Law. PERB also made the consequences of such violations less significant for the employer than in the ALJ order.

In a 1999 decision by the Albany County Supreme Court, the court overturned a PERB decision which contained a remedy similar to the one in *County of Nassau*.[9] In that case, the court observed:

> [t]o arbitrarily condition the award of those damages upon the further action of those who perpetrated the wrong in the first instance almost certainly assured them of the ability to continue that wrong under the guise of a further evaluation.

In the PERB decision under review in that case,[10] PERB issued a remedial order reinstating an employee

who had been terminated because of his union activity. The ALJ also ordered the employer to give the employee back pay. The Board, however, narrowed the remedy by denying back pay. The employee was still on probation when he was terminated and the Board's remedy stated that the employee would only receive back pay if, after reinstatement, he was found to have passed the probation. The Court decision overturned the PERB remedy and required immediate back pay, *regardless* of whether the employee passed probation.

In another recent case consistent with this "narrow-remedy" line of cases, *SUNY Oswego*,[11] the ALJ found a violation of the retaliation sections of the Taylor Law and the violation was upheld by the Board. In that case Martinez, a permanent Grade 5 Cleaner, was serving a probationary period in a higher job classification as a Grade 6 Laborer. Martinez was promoted to the Grade 6 position as a result of a grievance settlement. SUNY gave Martinez poor evaluations during his probation, and ultimately failed Martinez on his probation in the Grade 6 position. Because of the poor evaluations and his failure of probation, Martinez said he wanted to resign and SUNY immediately accepted his resignation.

The ALJ determined that Martinez received active assistance from the union before and during his promotion to the Grade 6 job, including the filing of grievances. The ALJ held, based upon direct evidence, that SUNY's decision to fail Martinez on his probation was in retaliation for Martinez's union activity. In the Board decision, the Board agreed with the ALJ's conclusion in this regard stating: "It is undisputed on this record that Buske [Martinez's supervisor] objected to Martinez seeking the assistance of [the union] in any disputes he had with Buske." Again, both the ALJ and the PERB Board found direct evidence of a violation of the Taylor Law in this case.

Although the ALJ ordered reinstatement of Martinez, the PERB Board overturned this remedy. The Board held that Martinez should not be ordered reinstatement because he resigned. Yet the ALJ had found that the resignation was a "direct result" of SUNY's improperly motivated evaluations and failure to pass Martinez on probation.[12] PERB, substituting its opinion for that of the fact trier, found instead that "Martinez was not forced to resign," and, therefore, reinstatement was inappropriate. Without hearing testimony or seeing witnesses, PERB viewed the resignation as an independent event, totally unrelated to the employer's improper, retaliatory acts.[13]

The same type of reasoning as used in *SUNY* involving a perceived lack of causation was also used by the Board in *Croton-Harmon Union Free School District*.[14] In that case, the ALJ ordered reinstatement of employees because of the employer's retaliatory termination of the employees for union activity. The Board upheld the finding of a violation, yet, as in *SUNY*, the Board held that reinstatement was inappropriate. The Board reasoned that the bad acts of the employees justified termination, even though the employer only discovered those bad acts as a result of an improperly motivated investigation. The *Croton-Harmon* case was affirmed by the courts.[15]

"The retaliation and discrimination prohibitions in the Taylor Law are fundamentally important in the statutory framework of labor law. Of this, there can be no question."

In the earliest case among the narrow-remedy cases discussed here, *Plainedge Union Free School District*,[16] PERB narrowed the language of the cease-and-desist order which was initially issued by the ALJ. That case involved disciplinary action against a union officer in retaliation for a speech given by the officer at a District function. The PERB order required the employer to stop disciplining the union officer, but did not order the employer to stop prohibiting speeches in support of the union at District functions, as the ALJ had ordered. In *County of Nassau*, *SUNY*, *Croton-Harmon, Plainedge*, and in the initial *Westchester* Board decision, the employer received nothing more from PERB than the proverbial "slap on the wrist." Yet, in all these cases, the employer was found to have directly retaliated against union activists because of their protected activity. This raises a concern about whether the Board's remedies are effectuating the purposes of the Taylor Law, and the chilling effect these decisions will have on the existing system of labor relations.

These developments in the area of PERB's remedial orders, from 1998 to the present, constitute a trend toward narrower Board remedies in retaliation cases. There have been no legislative enactments changing the basic principles of PERB's remedial authority since 1998; yet, these cases show a reluctance to order substantial remedial relief in retaliation cases.

The retaliation and discrimination prohibitions in the Taylor Law are fundamentally important in the statutory framework of labor law. Of this, there can be no question. If these protections are weakened, however, through less effective remedies, the labor relations system will be impaired. Harvard labor economists Richard B. Freeman and James L. Medoff in their book, *What Do Unions Do?*,[17] make the observation that unions

provide a voice for employees *only if employees feel they can speak up without fear of retaliation by the employers*. The authors state:

> [i]n the job market, voice means discussing with an employer conditions that ought to be changed, rather than quitting the job . . . [a] trade union is the vehicle for collective voice—that is, for providing workers as a group with a means of communicating with management.[18]

". . . strong legal protection against retaliation is necessary for unions to serve the function of providing representation and collective voice for employees."

The authors point out that strong legal protection against retaliation is necessary for unions to serve the function of providing representation and collective voice for employees. The authors state that workers are "unlikely to reveal their true preferences" if they fear retaliation.[19] If union activists and union leaders are *found* to be the objects of retaliation, and the employer experiences no significant consequences for such retaliation, union members will be reluctant to get involved in the union, thereby undermining the labor relations system as a whole.

In conclusion, a review of these recent Board decisions indicates an unsettling trend toward narrower remedies issued by the Board after employers were found to have violated the retaliation provisions of the statute. These remedies have diminished the consequences of employers' improper acts of retaliation against union activists. This, in effect, diminishes the legal protections for members and activists who want to get involved in their unions. It is another subtle shift in the already unlevel playing field of contemporary collective bargaining and labor relations.

Endnotes

1. 36 PERB ¶ 3015 (2003).
2. 35 PERB ¶ 3045 (2002).
3. Both cases are the subject of petitions for court review, under C.P.L.R. art. 78.
4. *Plainedge Union Free Sch. Dist.*, 31 PERB ¶ 3063 (1998); *Croton-Harmon Union Free Sch. Dist.*, 31 PERB ¶ 3086 (1998), *aff'd*, 180 Misc. 2d 869 (Sup. Ct., Albany Co. 1999); and *County of Westchester*, 32 PERB ¶ 3018 (1999), *overturned sub nom.*, *CSEA v. PERB*, 300 A.D. 929, 32 PERB ¶ 7011 (Sup. Ct., Albany Co. 1999), *aff'd*, 276 A.D.2d 976 (3d Dep't 2000), 33 PERB ¶ 7018 (2000), *lv. to app. denied*, 96 N.Y.2d 704, 34 PERB ¶ 7008 (2001) *on remand*, *sub nom.*, *County of Westchester*, 34 PERB ¶ 3013 (2001).
5. N.Y. Civ. Serv. Law §§ 200, 205.5.
6. 35 PERB ¶ 3045 (2002).
7. 35 PERB ¶ 4575 at 4747.
8. 35 PERB ¶ 3045 at 3124.
9. *CSEA v. PERB*, 32 PERB ¶ 7011 (Sup. Ct., Albany Co. 1999).
10. *County of Westchester*, 32 PERB ¶ 3018 (1999).
11. 36 PERB ¶ 3015 (2003).
12. 35 PERB ¶ 4591 at 4833.
13. In a related proceeding, the New York State Supreme Court, Albany County, found that the employer was arbitrary and capricious when it refused to allow Martinez to rescind his resignation. The court ordered reinstatement of Martinez with back pay. However, the order was automatically stayed because the employer appealed the court's decision. The appeal is pending.
14. 31 PERB ¶ 3086 (1998).
15. *CSEA v. PERB*, 180 Misc. 2d 869, 694 N.Y.S.2d 301 (Sup. Ct., Albany Co. 1999).
16. 31 PERB ¶ 3063 (1998).
17. Basic Books (New York 1984).
18. *Id.* at 8.
19. *Id.* at 9.

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FACT Act Eliminates Need for Prior Consent When Third Parties Conduct Workplace Investigations

By Susan M. Corcoran

On December 4, 2003, President Bush signed into law the Fair and Accurate Credit Transactions Act, the "FACT Act," providing some relief to employers using third parties to conduct workplace investigations. Under the FACT Act, an employer who uses a third party to conduct a workplace investigation no longer needs to follow the consent and disclosure requirements of the Federal Fair Credit Reporting Act (FCRA) if the investigation involves suspected misconduct, a violation of law or regulations, or a violation of any pre-existing written policies of the employer. In effect, this means the element of surprise again may be used by employers as a technique when using an outside consultant or investigator to conduct a workplace investigation.

Since April, 1999, the Federal Trade Commission (FTC), the federal agency overseeing the implementation of the FCRA, had taken the position that the FCRA consent and disclosure requirements were triggered when a third party, such as a law firm or outside human resources consultant regularly assisting employers with investigations, undertakes a workplace sexual harassment investigation on behalf of an employer.[1] For example, under the FTC's interpretation, an employer was required to obtain the consent of an employee under investigation for alleged harassment *prior to* the third party conducting the investigation. Under those circumstances, the employer was required to disclose to the employee the nature and scope of the investigation. The FTC interpretation also required the employer to provide the employee being investigated with a copy of the resulting report at the "pre-adverse action" stage of the proceeding, ultimately permitting the names of sources removed from the report.

Now, under the FACT Act, to be excluded from the disclosure requirement at the "pre-adverse action" stage, communication of the report resulting from the third-party investigation must generally be limited to the employer or an agent of the employer. Disclosing the report to others within an organization may create issues under FCRA, including inadvertently creating an "investigative consumer report," thereby triggering disclosure requirements.

In the event "adverse action" is taken against the employee based on the results of the investigation, the FACT Act still requires the employer to provide the affected employee a summary of the report. "Adverse action" has been broadly defined under FCRA as *any* employment decision that adversely affects an employee.[2] Employers using outside consultants to conduct internal investigations must therefore remember to provide this summary whenever an adverse action is taken, even if a written warning results. However, the summary does *not* have to identify the individuals interviewed or other sources of information.

Specific Consent Required for Medical Information

In a separate provision, the FACT Act requires employers requesting medical information about a "consumer" applicant or employee to obtain a *specific* written consent describing in "clear and conspicuous language" the use for which the information will be furnished. The medical-related information sought by the employer must be, in effect, job-related. For example, a consumer reporting agency would be prohibited from disclosing any medical-related information disclosed while conducting a background investigation, unless the employer had a *specific* consent form from an applicant or employee.

In this regard, the legislation adds a further layer of privacy, by specifically reminding employers that medical information should not be disclosed, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by law. This does not necessarily mean that drug testing or medical examination results received about applicants are subject to FCRA.

Reports prepared by health care providers and laboratories are generally not considered consumer reports because such communications fall within the "transactions and experiences" exception, as, for example, a drug counselor reporting the results of a test done by a laboratory is not creating a "consumer report."[3] In contrast, an entity that retains copies of drug tests and regularly sells this information to a third party for a fee is considered a "consumer reporting agency" preparing a "consumer report."[4]

In any event, employers will need to be cognizant of the authorization requirements of the Health Information Portability and Accountability Act (HIPAA) before obtaining a copy of such reports. HIPAA's rules require covered health care providers who prepare these reports to obtain specific authorization when an employer requests a copy of employee medical information.[5]

Certain entities subject to the HIPAA privacy regulations may have further compliance obligations. For example, a hospital that is a covered health care provider under HIPAA may conduct a workplace investigation with respect to an employee that involves certain health information of some of the hospital's patients. Although the HIPAA privacy regulations may permit disclosures of this kind as part of the hospital's health care operations (a defined term under HIPAA) without the patient's authorization, the hospital would also need to review the privacy regulations and applicable state law to determine its obligations in this regard.

In sum, the amendments to FCRA, including the additional medical information privacy provisions of the new FACT Act, will require employers to take a close look at their policies and practices involving background checks, workplace investigations, and requests for employee medical information. Requests for, or the use of, medical-related information will also need to be reviewed to determine whether a separate HIPAA authorization would be required. Finally, under federal law, in the event of a workplace investigation involving the use of a third party, the employer must provide the employee a summary of the results if any adverse employment action is taken.[6] Like many workplace laws, sound documentation remains a key to an employer's successful compliance efforts under this law.

Endnotes

1. *See* FTC *Vail* Op. Letter (Apr. 5, 1999).
2. 12 U.S.C. § 1681a(k)(1)(b)(ii).
3. *See* FTC *Islinger* Op. Letter (June 9, 1998).
4. *Id*.
5. 45 C.F.R. Parts 160 and 164.
6. New York has its own fair credit reporting law as well. N.Y. Gen. Bus. Law § 380 (McKinney 1996).

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The Dog That Didn't Bark: Labor and Employment Cases That Were Denied *Cert* by the U.S. Supreme Court

By Daniel D. Dashman

In 2003, according to the BNA *Daily Labor Report* (*DLR*), 339 petitions for writs of *certiorari* for labor and employment law cases were denied by the United States Supreme Court. Of those 339 petitions, the DLR and the BNA *Employment Policy and Labor Daily* (*EPLD*) selected 65 to report on in greater depth; of those 65 cases, several stand out as being of particular interest.

A. Affirmative Action

The one case that absolutely leaps to the most casual observer's attention is *Concrete Works of Colo. Inc. v. Denver.*[1] In an extremely rare action, Justice Antonin Scalia wrote a dissent from the denial of *certiorari* and the Chief Justice joined the dissent.

Concrete Works is a challenge to the contractor affirmative action ordinances passed by the city of Denver in 1990, 1996 and 1998. Denver's ordinances gave a percentage preference to minority and woman-owned businesses. The 10th Circuit Court of Appeals held that the "empirical evidence that demonstrates 'a significant statistical disparity between the number of qualified minority contractors and the number of such contractors actually engaged by the locality or the locality's prime contractors'" presented by the city of Denver was sufficient to satisfy the strict scrutiny requirements of *Richmond v. J. A. Croson*.[2]

A key point made by *DLR* is that Denver's contractor affirmative action law is the only law that has ever been "upheld after trial that applies *Croson*'s strict scrutiny and evidentiary standards for finding discrimination." In his dissent, Justice Scalia associates denying *certiorari* in *Concrete Works* with the Court's decision in *Grutter v. Bollinger*,[3] the University of Michigan affirmative action case from the 2002-2003 term, and draws the conclusion that *Croson* is overturned by implication. Since the major evidence of discrimination in *Concrete Works* is empirically derived and supplemented by six studies done by the city of Denver, Justice Scalia concludes that the evidentiary requirements of *Croson* have been eroded, if not completely dashed.

Interestingly, denying *certiorari,* by itself, may have allowed other cities to argue that they followed the same course as Denver and therefore their affirmative action ordinances should also be found to comply with *Croson*; however, the argument would have relied on a rather tenuous assumption regarding the intent of the Court. By publishing a dissent which only garnered the support of the Chief Justice, Justice Scalia has greatly strengthened that assumption of the Court's intent. If there was any question where a majority of the Justices stood on the question, there is now far less uncertainty. This leaves the Circuits to discover whether a holding against a city that carefully crafts its affirmative action ordinances after the form and methodology of the city of Denver would survive Supreme Court review.

B. Class Certification

Another interesting case is *Skipper v. Giant Food Inc*.[4] This is a case in which two separate classes failed to receive certification by the District Court for the District of Maryland. The Fourth Circuit Court of Appeals' decision is highlighted in the *DLR* for two reasons. First, the court pointed to a lack of typicality and commonality of the claims, and second, the court "found that the workers' attorney at the time lacked the experience and financial wherewithal to represent a class adequately."[5]

In its brief opposing the granting of *certiorari*, Giant Food argued that all nine of the named plaintiffs had their individual claims dismissed by the District Court and did not appeal those decisions. Giant Food claimed in its brief that by failing to appeal the dismissal of the individual claims none of the named plaintiffs have standing to appeal the denial of class status as none of them has a case or controversy for the courts to decide.

Although, attorneys are continually instructed in law school to pay attention to the procedural niceties, an error of some consequence appears to have been made in this case. In light of the Fourth Circuit's admonishment of the plaintiffs for the inexperience of their counsel, a procedural error at this level may have weighed heavily in the decision to deny *certiorari*.

C. Actuarial Responsibility in Pension Funds

An ERISA case, *Savasta and Co. v. Gerosa*,[6] has very interesting and wide-reaching issues regarding the responsibilities of actuaries. Cement Masons Local 780's pension fund was reported by Savasta and Co., the fund's actuary, to be overfunded and benefits were increased to correct the overfunding. A year later, the fund discovered it had not been overfunded, but had actually been underfunded and now had insufficient funds to meet its vested benefits. The union pressed

both federal ERISA and state claims. The District Court for the Southern District of New York dismissed the state claims only. Savasta and Co. appealed to have the ERISA claims dismissed and the union appealed to have the state claims reinstated.

The Second Circuit Court of Appeals basically said "you're both right," by dismissing the ERISA claims and reinstating the state claims. The Second Circuit reasoned that the union claim was for the predicted shortfall from the union's reliance on the actuary's incorrect information. That is not appropriate equitable relief under ERISA.

On the state claims, the Second Circuit reasoned that they were not preempted by ERISA, since the actuary's wrongdoing was of the sort that all of the Circuits regularly allow to be governed by state law. The Second Circuit went further and stated that liability under state law would present the actuaries with an incentive to maintain high standards and the exercise of federal preemption would in these circumstances harm the very plans that Congress intended to protect with ERISA.

D. Who Is a Supervisor?

The definition of a supervisor once again becomes important, this time in the federal context, in *Lotz v. United States*.[7] Supervisory border agents desired non-supervisory treatment regarding overtime under the Department of Labor's (DOL) salary-basis test. The Office of Personnel Management (OPM) is the controlling entity for the supervisory border agents and it does not have a salary-basis test rule.

The salary-basis test denies the overtime exemption provisions of the FLSA if the employee's wages are withheld for any reason other than a safety violation. Under Title V, federal employees may have their wages withheld for many other reasons. Because their wages are subject to being withheld by their employer, the government of the United States, for reasons other than safety, the supervisors argued that they were eligible for overtime.

The Circuit Court of Appeals for the Federal Circuit held that the OPM's rule for determining supervisory personnel was reasonable and that the OPM was not bound by the DOL's salary-basis test. The court also commented that if the private sector salary-basis test was applied to the federal government very few if any of the supervisory personnel would be exempted from overtime and that could not have been the intent of Congress.

E. Supervisors and Wage Deductions

A second FLSA overtime case contrasts with *Lotz*. In this second case, *Moore v. Hannon Food Serv. Inc.*,[8] seven managers of Kentucky Fried Chicken stores had shortages at their restaurants deducted from their wages over a four-month period. The seven sued to have back overtime paid to them on the basis that the deductions from their pay nullified the supervisor exemption under the FLSA. On the eve of trial the company halted the practice of withholding pay, repaid the seven the withheld amounts and returned to its former practice of withholding the cash register shortfalls from the managers' monthly bonuses. The company repaid $600 to the employees and avoided $10,000 in fines plus extensive legal fees.

The seven argued the court should follow the DOL's lead in this matter and order the overtime be paid. The Fifth Circuit Court of Appeals held that the "window of corrections" in the present regulations applied and that the company had fulfilled its obligations under the rule, thereby saving the managers' exempt status.[9]

The instant controversy centered on the DOL's proposed new regulations under the FLSA. Under the new regulations the "window of correction" would be closed to an employer that has displayed a "pattern and practice of not paying an employee on a salary basis." The DOL's *amicus* brief argued that Hannon Food had demonstrated just such a "pattern and practice." It was further argued that several other Circuits had accepted the DOL's view and the Circuits were now split. It would appear that the Supreme Court, although aware of the split in the Circuits, considered two issues: first, that the rules are possibly going to be changed by acceptance of the DOL's proposed new rule, and second, that the instant case, being fact-specific, may not be applicable to other cases.

F. Evidence of Mixed Motive

In two cases, the issue was the evidence needed to bring a claim of mixed-motive termination.[10] In *Patten*, the mere mention of the plaintiff's disability was not enough for the Fifth Circuit Court of Appeals to find proof of discrimination without some direct evidence that it was a negative factor in her termination, when there were legitimate reasons for the termination. In *Sandstad*, the fact of his age, in light of the severity of the possible liability from a jury verdict for his alleged sexual harassment of a co-worker and other negative job performance reviews, was not enough to find discrimination without direct evidence of the discrimination.

These cases are in stark contrast to the Supreme Court's decision in *Desert Palace*.[11] In that case, the Court held that the holding in *Price Waterhouse* did not prevent plaintiffs from using circumstantial evidence in mixed-motive termination cases where there were both permissible and impermissible reasons for termination.[12] The denials of *certiorari* in *Patten* and *Sandstad* can be read to

clarify the holding in *Price Waterhouse* even further. The lack of direct evidence may not always be fatal to a case, but there are situations in which the lack of direct evidence might still decide the issue.

A *caveat* to the reader regarding the underlying rights being defended in each of these cases and their relative constitutional weight is in order here. *Desert Palace* and *Price Waterhouse* were Title VII cases, while *Sandstad* and *Patten* were brought under the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA), respectively. The Supreme Court has held that the rights in age and disability discrimination cases do not have the constitutional weight of gender, race and national origin cases. It is possible that the Supreme Court is allowing more leeway in how the separate Circuits handle age and disability cases than it allows in those with more direct constitutional connections. That is another possible reason why, so soon after having held that circumstantial evidence is enough in *Desert Palace*, the Court denied *certiorari* in two cases where the Circuits required direct evidence.

Conclusion

There are many other cases that one could choose to profile and many opinions as to which should have been included. There are also probably many opinions about what each case means. The BNA *Daily Labor Report* and BNA *Employment Policy and Labor Daily* found 65 cases to be interesting enough to separately analyze them. To aid the curious in looking into other 2003 labor and employment law cases that were denied *cert* by the Supreme Court, the following endnote contains citations that, on Westlaw®, will yield the 25 documents that contain summaries of all 339 cases.[13]

Endnotes

1. U.S., No. 02-1673, *cert. denied*, Nov. 17, 2003, 124 S. Ct. 556 (Mem).
2. 488 U.S. 469, 53 FEP Cases 197 (1989).
3. 123 S. Ct. 2325, 91 FEP Cases 1761 (2003).
4. U.S., No. 03-524, *cert. denied*, Dec. 8, 2003, 2003 WL 22327204 (Mem).
5. *Carson v. Giant Food, Inc.*, 187 F. Supp 2d 462 (Md. 2002).
6. U.S., 03-523, *cert. denied*, Dec. 8, 2003, 2003 WL 22327200 (Mem), and *Gerosa v. Savasta*, 03-263, *cert. denied*, Oct. 20, 2003, 124 S. Ct. 435 (Mem).
7. U.S., No. 03-146, *cert. denied*, Nov. 3, 2003, 124 S. Ct. 465 (Mem).
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9. *Moore v. Hannon Food Services, Inc.*, 317 F.3d 489, 494 (5th Cir. 2003).
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12. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 49 FEP Cases 954 (1989).
13. 09 DLR E-1, 2003; 14 DLR E-1, 2003; 18 DLR E-27, 2003; 37 DLR E-1, 2003; 42 DLR E-1, 2003; 47 DLR E-22, 2003; 57 DLR E-1, 2003; 67 DLR E-1, 2003; 77 DLR E-1, 2003; 82 DLR E-1, 2003; 87 DLR E-1, 2003; 97 DLR E-3, 2003; 102 DLR E-16, 2003; 106 DLR E-1, 2003; 116 DLR E-1, 2003; 125 DLR E-1, 2003; 194 DLR E-22, 2003; 199 DLR E-1, 2003; 203 DLR E-1, 2003; 213 DLR E-1, 2003; 218 DLR E-1, 2003; 222 DLR E-1, 2003; 231 DLR E-1, 2003; 236 DLR E-1, 2003; 241 DLR E-1, 2003.

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LABOR MATTERS
Labor Law: Still on the Horizon!

By Frank Flaherty

In our initial article on classic labor law, which appeared in the Summer 2003 of the *L&E Newsletter*, we celebrated the fact that for the first time in more than two years the NLRB had its full complement of five members. The ink was hardly dry on the printed page, when the White House announced that Member Alex Acosta had been selected to be Assistant Attorney General for Civil Rights. He completed his tour with the Board in late August 2003, after serving only 7½ months.

". . . there has been a dearth of new issues arising before the NLRB and 2003 was no exception."

It should be noted that the NLRB issued 64 decisions in the month of August, well above its normal average. Yet as of September 1, 2003, there were 660 cases remaining to be decided by the Board.[1] Subsequent comments by Board General Counsel Arthur Rosenfeld indicated that a replacement had been identified to replace Acosta prior to the congressional Labor Day recess, but the individual apparently "stubbed his toe" between the time of identification and announcement and the NLRB continues with only four members equally divided along political lines.[2] On November 20, 2003, President Bush announced that he was nominating Ronald E. Meisburg, a management attorney with Ogletree, Deakins, in Washington, D.C., to replace former member Acosta, but he has yet to take office. Experience has shown that the absence of a total complement of five members severely hampers the decision-making process of the board, with fewer decisions issued and significant matters set aside.

As discussed in our last article on classic labor law, there has been a dearth of new issues arising before the NLRB and 2003 was no exception. Still, there are several decisions that are noteworthy and deserving of your attention.

The first is *Verizon New York and CWA Local 1103*.[3] This case is included not because of any particular new law that has been established by the NLRB decision, but rather as an example of how *not* to handle relations with a labor union. In this writer's opinion, the case is an example of a public relations *faux pas* by the company.

In this dispute, the company had sponsored blood drives twice a year with the union for more than 30 years. Employees involved spent an overage of four hours of work time for each drive, which included travel time to the collection location and the actual time for donating blood.

Historically, union stewards employed by the company scheduled and organized the blood drives, which generally occurred at company locations. In March 2001, a representative of the company advised the union's Executive Vice President by phone that the company would no longer pay employees for employees participating in the blood drives. The Verizon representative said the change was due to customer service demands and that it would continue to advertise the blood drives and permit use of its facilities.

A grievance challenging this action was filed, alleging that the company bargained in bad faith by changing the Blood Donation Policy, without first negotiating with the union. The company responded that the change was a corporate level decision and did not need to be negotiated because it was not a term and condition of employment. As might be expected, a three-member panel of the Board had little difficulty in affirming the ALJ's decision that the company violated section 8(a)(1) and (5) of the Act. It concluded that unilaterally changing the practices surrounding the blood drive violated the duty to bargain about "wages, hours, and other conditions of employment," citing Supreme Court decisions involving *Fibreboard*[4] and *Ford Motor Co.*[5]

Next, I will mention several other recent NLRB cases, not necessarily because new issues were involved, but because they touch on subjects that I feel confident practitioners will be addressing in the future, as a better-educated and more independent employee enters the workforce:

- *Phillips Petroleum Co. and PACE Local 8-590*,[6] which involved a probationary employee at an oil refinery who was discharged for seeking to secure FMLA benefits. In addition, he was deemed to have an "attitude" problem by his superiors.
- *Anheuser-Busch Inc. v. NLRB*.[7] In this case, in a 2-1 decision, the Fourth Circuit Court of Appeals determined that the company, at its Baldwinsville, New York, brewery had committed four unfair labor practices against three employees. Included

were charges that the employer refused to provide a *specific* shop steward during a "Weingarten" investigative interview, and that employees were disciplined for making disparaging remarks about the company during a communications meeting and filing safety grievances.

- *International Business Machines Corp. and CWA Local 1120*.[8] Following a finding of a violation of section 8(a)(1) by the company for maintaining a rule which prohibited employees from displaying pro-union signs on their cars in company parking lots, the usual posting notice was required. When the union sought to have the notice also posted on the company's electronic mail (e-mail) system, the request was rejected. Without doubt this issue will be revisited.

- *NLRB v. Kentucky River Community Care, Inc*.[9] The Board earlier in 2003 requested an *amicus* brief on this dispute (due in September 2003) which involves determining "supervisory status" and defining "independent judgment." The case had been earlier remanded to the Board by the U.S. Supreme Court. Justice Scalia wrote for the majority in a 5-4 decision. It seems evident that deep divisions exist within the Board on these subjects, as it attempts to provide guidance.

Noteworthy in 2003 was the announcement by the U.S. Department of Labor that plans were underway to modernize the Fair Labor Standards Act, particularly the rules governing "exempt" and "non-exempt" employees from the Act's overtime rules.[10] According to the Associate Solicitor of the USDL, litigation involving these provisions has increased in recent years and now rivals discrimination cases in volume. He added that the Department of Labor is seeking to publicize the proposed changes to all its publics, including labor unions and management, since it appreciates that the entire overtime compensation issue is volatile. He continued that his agency is interested in reform of the compliance procedure—and seeks a smarter approach that primarily identifies repeat and deliberate violators of the Act.[11]

As you might suspect, this announcement created quite a stir both in the labor and management areas. Not unexpectedly, those who were deemed "non-exempt," e.g., covered by the overtime compensation provisions of the Act, wanted to stay covered and others applauded the examination of the changes that had occurred in industry, communications, labor-saving devices, compensation, etc., during the past 60 years, which impacted who was and was not covered by these overtime rules. With presidential elections scheduled for later in 2004, the odds are that these proposed changes will not occur until 2005, but it would certainly appear that the Act does require modernization.

Just as computers and their use play a significant role in determining changes required to update the FLSA, so did they in a recent decision of the New York Court of Appeals and also reported in the *New York State Law Digest*.[12] We are all aware of the recent innovations of working at home and making only periodic visits to the employment site office. In this case, which involved a claim for unemployment benefits, the claimant worked for a financial data company in New York for several months. Later the employee moved to Florida and continued to work from there.

With the passage of several years, the company wanted the employee to return to New York but she refused and was terminated. She was denied unemployment benefits from Florida, apparently because she was deemed to have quit voluntarily. She then sought to recover in New York. The dispute finally reached the Court of Appeals, which also denied benefits, holding that under the provisions of section 511 of the New York State Labor Law, such benefits are payable only if the employment is "localized" in New York. Judge Read, writing for the Court, opined that when the employee works in and out of the state, section 511 deems it localized in New York, only if New York is the base and the work performed outside the state was either "incidental" or "temporary." That was not the case here!

As we enter the fifth year of a new century, I would like to conclude this article by recommending an article from the *New York Times*,[13] which I think you will find mentally stimulating and informative. I believe this is particularly true when you consider that "classic" labor law has existed for less than 60 years and that we have a better-informed workforce population than ever before. So the obvious question is what does the future hold for a workforce that is different by race, color, heritage, education, experience, etc.?

The correspondent for the *Times* article describes the attitudes of America's newest labor force, 30-something workers (Generation X) and their 20-something counterparts (Generation Y) who are about to start a career. This group, ages 20 to 34, makes up approximately a third of the working population, according to the Bureau of Labor Statistics.[14] This group is frequently deemed disloyal and unwilling to pay their dues, yet corporations broke the old arrangement unilaterally, thereby causing workers to trade stability for mobility. Young workers are interested in benefits, rewards and opportunities—what's in it for me?

We all appreciate that job security, including that in the public sector, no longer exists. In the last twenty years business has embraced workforce reductions in the name of cost-cutting, while reducing pay and benefits for those employees who dodged the "pink slip" (read AT & T, Baby Bells, airlines—to name just a few).

American industry has embraced the "Age of Wal-Mart," which is leading to an economic future of maximum efficiency and low prices.[15]

But what is the impact on workers, competitors and communities? What do those changes in the attitudes of workers and employers have on the survival, further decline or growth of labor unions, labor arbitration, etc.? We can't know the answer today, but it appears certain that the decades to come will be different and that as practitioners, we will have to continue to upgrade our skills and knowledge. Hang on—it will probably be a bumpy ride.

Endnotes

1. 173 LRR 76 (Sept. 22, 2003).
2. *Recent NLRB and DOL Initiatives,* Comments at The Bar Assoc. of the City of New York, Oct. 16, 2003.
3. 339 NLRB No. 6, 172 LRRM 1193 (May 16, 2003).
4. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).
5. *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979).
6. 339 NLRB No. 111, 172 LRRM 1433 (July 31, 2003).
7. 172 LRRM 3214, 4th Cir. (Aug. 1, 2003).
8. 339 NLRB No. 120 (Aug. 8, 2003).
9. 532 U.S. 706, 167 LRRM 2164 (2001).
10. 171 LRR 299 (Feb. 3, 2003).
11. Comments at The Bar Assoc. of the City of New York, *supra* note 2.
12. *Allen v. Commissioner of Labor,* 100 N.Y.2d 282, 763 N.Y.S.2d 237 (July 2, 2003); also reported in N.Y.S. Law Digest No. 526, Oct. 2003, David D. Siegel ed.
13. Julie Connelly, N.Y. Times, Oct. 28, 2003.
14. *Id.*
15. Steve Lohr, N.Y. Times, Dec. 28, 2003, *available at* http://www.nytimes.com.

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For Your Information

Ford & Harrison LLP announces the opening of its New York City office. **Kenneth D. Stein, Stephen E. Zweig** and **David M. Safon**, formerly partners at Benetar Bernstein Schair & Stein, have become partners of the firm, and **Lisa M. Brauner**, formerly associated with Benetar Bernstein Schair & Stein, has become associated with the firm. Kenneth D. Stein is the managing partner of Ford & Harrison's New York City office.

Lamb & Barnosky, LLP announces that **Richard Zuckerman** and **Sharon Berlin**, formerly of Rains & Pogrebin, have become partners of the firm and **Michele Battiste** (Rains & Pogrebin) has become an associate of the firm. Their office is located in Melville, Long Island.

Bertrand B. Pogrebin, Bruce R. Millman and **John T. Bauer**, formerly of Rains & Pogrebin, have joined the management labor & employment law firm of **Grotta, Glassman & Hoffman, P.A.** Bert and Bruce are resident in the firm's New York City office, where they join **Craig R. Benson** and **David M. Wirtz**. They are joined by associate **Brian J. Turoff.** John heads up the new Long Island office of Grotta, Glassman & Hoffman in Melville, Long Island. Bruce will be resident in the Long Island office, as well as in New York City. All five former R&P partners will work from the Long Island office from time to time, as will other GGH attorneys.

Bond, Schoeneck & King, PLLC has opened offices in New York City and Garden City, Long Island. At the metropolitan New York office will be **Louis P. DiLorenzo**, Co-Chair of the BS&K Labor and Employment Law Department, along with **Michael I. Bernstein** and **Stanley Schair** from the Benetar Bernstein Schair and Stein firm, plus **George M. Buckley, Jr., Richard G. Kass** and **Ernest R. Stolzer** from the Rains & Pogrebin firm in Long Island. Associates **John J. Ho** (Rains & Pogrebin) and **Michael P. Collins** (Benetar Bernstein Schair and Stein) will also be resident in the Manhattan office.

Among those resident in **Bond, Schoeneck & King's** new Garden City office will be **Terry O'Neil**, **James P. Clark, Howard M. Miller, Craig L. Olivo** and **Mark N. Reinharz**, formerly of the Rains & Pogrebin firm, and Associate **Lauren J. Darienzo** (Rains & Pogrebin).

Wachtell, Lipton, Rosen & Katz announces that **James Cole, Jr.** and **Stephen R. DiPrima** have become members of the firm.

Gary Phelan has become of counsel to the firm of **Outten & Golden, LLP,** and heads its new Connecticut office. **Douglas C. James** and **Justin M. Swartz** have become associates of the firm.

Scott D. Price, formerly of Cravath, Swaine & Moore, has joined the **Law Offices of Joseph E. Bachelder**.

Peter R. Jerdee has become of counsel to the **Gregory P. Joseph Law Offices LLC**.

Fair Labor Standards Act Overtime Exemptions: Proposed Regulatory Changes

By Rachel Geman

Depending on events over the next few months, it is possible that employment law practitioners will see a far-reaching change in the Fair Labor Standards Act's (FLSA's) overtime exemption provisions. Nearly a year ago, on March 31, 2003, the Wage and Hour Division of the Department of Labor (DOL) issued a proposed regulation and requested comments on guidelines for determining which employees are exempt from minimum wage and overtime pay.[1]

The DOL proposed substantial changes to the existing guidelines. The net result of the proposal, in all likelihood, would be an expansion of the non-exempt category to encompass a greater range of currently exempt employees.[2] Exempt employees are not paid overtime regardless of the number of hours they work a week, and there are no maximum hours provisions in the FLSA. However, employees may continue to be exempt under state law, even if the regulations are finalized and implemented.[3]

In response to the proposal, more than 75,000 comments were sent to the DOL.[4] In the wake of the intense debate that followed, both the House and the Senate voted down the proposal this past fall. However, the language blocking the funding for the proposal was subsequently removed from the omnibus appropriations bill that passed the House in early December 2003.[5] On January 22, 2004, the Omnibus Spending bill was passed in the Senate. As of the time of this writing, though, the future of the regulations is still unclear. Democrats have stated that they will continue to attempt to re-insert a veto of the DOL measure through other legislation.[6] In addition, the DOL has indicated that it may take into account concerns expressed about the regulations before issuing a final rule this spring.

Therefore, while this summary sets out the key provisions of the proposed regulation, Fair Labor Standards Act[7] (FLSA) practitioners should keep a watchful eye on the events of the coming months to determine whether and how significantly current law is changed.

Current Law

The FLSA requires employers to pay a wage premium for employees who work more than 40 hours per week. The 40-hour work week was supposed to reduce the burden of excessive hours on employees and to increase employment.

Recognizing that a small percentage of employees perform tasks that cannot be performed simply by hiring additional workers, Congress built in certain narrow exceptions to the FLSA overtime provisions.[8] The statute as enacted in 1938 exempted from the overtime provisions those employed in a "bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman."[9]

Whether an employee is exempt depends on what she does, how much she makes, and the form in which she is paid. If the employee is paid an hourly rate, *or* if an employee earns less than $155 a week, that employee is non-exempt and is entitled to an overtime premium. If the employee is paid a set amount each pay period, whether she is exempt depends on the level of her salary and her job duties.

A base salary of $155 per week for executive and administrative employees, and $170 per week for professional employees, triggers a longer test ("long duties test"), while a salary of $250 per week triggers a shorter test ("short duties test"). It is harder for an employer to demonstrate that a lower-paid employee is exempt.[10] The current salary figures have not been updated since 1975, and are considered to be outdated[11] in that they are not high enough to exclude the vast majority of non-exempt employees.[12]

The duties tests differ by type of job. They are as follows:

1. Executive employees are those with management responsibilities. Generally, an executive employee is exempt from receiving overtime pay if he or she has a primary duty of managing the enterprise (or a recognized department or subdivision thereof), even if the employee spends less than 50 percent of his or her time performing this duty, and customarily and regularly directs the work of two or more other employees. Under the long test, for employees earning between $155 and $250 per week, other factors are also considered in determining whether the employee is exempt. These are: whether the employee has authority to hire or fire other employees or has particular weight given to his or her suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status; whether the employee customarily and regularly exercises

discretionary powers; and whether the employee devotes no more than 20 percent (or as much as 40 percent in retail or service establishments) of hours worked per week to activities that are not directly and closely related to performing exempt managerial work.[13]

2. Administrative employees consist of executive and administrative assistants, staff employees, and those who perform "special assignments."[14] The short test for administrative employees exempts those who have a primary duty of performing office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers, and customarily and regularly exercise discretion and independent judgment. The short test also requires that the work be related to the administrative operations of the business as opposed to the production, and that it be of substantial importance to the management or operation of the business.[15] Courts have relied heavily on the "administrative/production" dichotomy in particular in determining whether or not an administrative employee should be exempt from overtime pay, both in and out of the manufacturing context.[16]

   The long test looks at the primary duty[17] and discretion-and-judgment factors above, and also requires that employees (1) regularly and directly (a) assist another exempt employee or perform work along specialized or technical lines requiring special training, experience or knowledge under only general supervision, or (b) perform special assignments and tasks under only general supervision; and (2) devote no more than 20 percent (or as much as 40 percent in retail or service establishments) of work hours in a week to activities that are not directly and closely related to the performance of exempt work.

3. Professional employees are those that belong to either the learned, artistic, or teaching professions.[18] Learned professionals are exempt from overtime pay under the short test if their primary duty consists of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study (as distinguished from a general academic education, an apprenticeship, or from training in the performance of routine mental, manual, or physical processes), and if they consistently exercise discretion and judgment. The long test also requires that a learned professional employee's work is predominantly intellectual and varied in character, such that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and that he or she devotes no more than 20 percent of work hours in a week to activities that are not an essential part of and necessarily incident to exempt work.[19]

   Artistic or creative professionals are exempt from overtime pay under the short test if they perform work requiring invention, imagination, or talent in a recognized field of artistic endeavor. The long test for artistic or creative professionals requires that the employee has a primary duty of performing work that is original and creative in character in a recognized field of artistic endeavor, and the result of which depends primarily on the invention, imagination, or talent of the employee; that he or she consistently exercises discretion and judgment; that he or she performs work that is predominantly intellectual and varied in character (i.e., cannot be standardized in relation to time); that he or she does not devote more than 20 percent of time to activities that are not closely and directly related to exempt work.

   Teachers are exempt under the short test if their primary duty consists of teaching, tutoring, instructing or lecturing in the activity of imparted knowledge and if they consistently exercise discretion and judgment. Under the long test, they must also be engaged in these activities as a teacher in the school system or educational establishment at which they are employed.

4. Starting in the 1990s, computer employees were exempt from overtime pay if they (1) have a primary duty of performing work requiring theoretical and practical application of highly specialized knowledge in computer systems analysis, programming, or software engineering; (2) are engaged in performing these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field; (3) consistently exercise discretion and judgment; and (4) are paid more than $250 per week on a salary basis or $27.63 per hour if paid an hourly rate.[20]

5. A worker employed "in the capacity of outside salesman" is defined in the existing regulations as an employee (1) who is customarily and regularly engaged away from the employer's place of business making sales or obtaining orders or contracts for services or the use of facilities, where making sales or taking orders is that employee's chief duty or primary function; and (2) who does

not spend more than 20 percent of a work week, based on the hours worked by comparable non-exempt employees or (if there are no such employees) on a 40-hour week, performing duties unrelated to his or her own outside sales or solicitations.[21] There is no salary level requirement for this category of employee; all outside salespeople are exempt.

The Regulations

The stated goal of the revisions is to combat the "considerable confusion" reported by some "regarding who is, and who is not, exempt,"[22] and to address employers' concerns that "the regulatory tests are too complicated, confusing, and outdated for the modern work place, and create potential liability for violations when errors in classification occur."[23] Unfortunately, the new tests may introduce as much complexity as they purportedly remove. The key provisions are summarized below:

1. **Modification of minimum salary level.** In response to comments from employee groups, the proposed regulation sets the minimum salary level to qualify for exemption from the FLSA minimum wage and overtime requirements at $425 per week (not indexed for inflation), i.e., just over twice what a full-time minimum wage worker earns.[24] The revised salary level test by itself will protect an estimated 20 percent of salaried employees from exemption. However, many or most of these individuals are likely already exempt by nature of the duties they perform and because of existing salary requirements. For the remaining 80 percent of salaried employees, the burden will fall on those interpreting the revised duties test to distinguish effectively between exempt and non-exempt employees.

2. **Elimination of differential duties test.** As stated above, for employees in the executive, administrative, and professional fields, there is a longer (harder) test to satisfy when employees earn less than $250 per week. The proposed regulations do away with making the type of duties test a function of salary level. A single "standard" test is triggered once an employee reaches the $425 per week level.

3. **New exemption for "highly compensated" employees.** Employees earning $65,000 or more annually (equivalent to $1,250 per week) who perform non-manual work are automatically exempt, as long as they have an "identifiable executive, administrative or professional" function. The figure, which is not indexed for inflation, was apparently chosen for its symmetry, as it corresponds to the top 20 percent of salaried employees according to the data relied upon by the DOL.[25] However, the categories of exempt and non-exempt employees were not intended to be numerically symmetrical; to the contrary, as indicated above, exemption has always been viewed as a narrow exception to a statute whose "scope was stated in terms of substantial universality."[26] It is also foreseeable that the brunt of this salary cut-off, and the loosening of the exemptions for persons in service industry jobs, will fall on women.[27]

4. **New executive employee test.** Under the proposal, an executive employee would be exempt from overtime pay if he or she (1) has a primary duty of managing the enterprise in which he or she is employed or a customarily recognized department or subdivision thereof; (2) customarily and regularly directs the work of two or more other employees; and (3) has the authority to hire or fire other employees or has particular weight given to suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees.[28]

   Gone is the requirement from the long test that the employee customarily and regularly exercise discretionary powers. Gone also is the requirement that employees spend less than 20 percent—or 40 percent in retail or service jobs—of their time on activities that are not directly and closely related to exempt work. Proposed section 541.700 indicates that an employee who spends over 50 percent of his or her time performing exempt work will be considered to have a primary duty of performing exempt work.[29] An employee who spends less than 50 percent of his or her time performing exempt work will be subject to a case-by-case examination of "all the facts."[30] For example, according to the proposed regulation,

   > an assistant manager in a retail establishment who performs exempt work such as supervising and directing the work of other employees, ordering merchandise, handling customer complaints and authorizing payment of bills may have management as the primary duty, even if the assistant manager spends more than fifty percent of the time performing non-exempt work such as running the cash register.[31]

This proposal stands in tension with the FLSA's intention of prohibiting employers from classifying employees as exempt simply because of their job title or their performance of certain exempt duties. In addition, employees who spend more than 40 percent of their time on non-managerial duties are not necessarily entitled to overtime.

The DOL states that "the discretionary powers provision and the percentage limitations on particular duties formerly applied under the now dormant long test are not useful criteria that should be reintroduced for defining the executive exemption in today's work place."[32] However, the exercise of discretion and independent judgment forms the crux of non-fungibility, the basic distinguishing characteristic of exempt employees. There exists a well-developed body of jurisprudence interpreting and applying these tests. In addition, while the DOL suggests that it is difficult or onerous for employers to track the nature of the work of exempt employees as part of the rationale for moving away from the percentages requirements, this argument is not convincing.[33] First, the DOL continues to utilize other percentage requirements. Second, the point of the duties tests are to determine what employees actually do, as opposed to what their titles say.

5. **New administrative test.** Under the proposal, an administrative employee would be exempt from overtime pay if he or she has a primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customer; and if he or she holds a "position of responsibility" with the employer. Position of responsibility is defined as either performing work of substantial importance *or* performing work requiring a high level of skill or training.[34] The fact that these are alternative requirements indicates that the exemption will apply to people who do not perform work of substantial importance if their work requires a high level of skill—a substantial departure from existing law. In addition, if "position of responsibility" is interpreted too broadly, the new regulations will exempt from overtime pay numerous workers who are, in fact, interchangeable.[35]

   Proposed section 541.201 specifies that the requirement of "office or non-manual work" refers to the type of work performed by the employee, and includes an illustrative list of work areas that meet this requirement: tax, finance, accounting, auditing, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations and similar activities.[36] This essentially means that an employee who performs one of the above types of work and holds a "position of responsibility" with the employer will be treated as exempt from overtime pay, even if he or she does not exercise the type of discretion and independent judgment that makes him or her non-interchangeable with other similarly qualified employees.

   Finally, the proposed regulations de-emphasize the administrative/production dichotomy, discussed above. Downplaying this bright-line distinction increases uncertainty faced by employers and courts. It also controverts the statutory requirement that exceptions to the overtime provisions be narrowly construed. Employees whose duties are simply arguably or tangentially related to the management of business operations were not intended to be exempt.

6. **New professional test.** The proposed regulations divide professional employees into learned professionals, creative professionals, and teachers; they relocate the rules applicable to computer employees to a different section. Section 541.301 exempts from overtime pay learned professionals who have a primary duty of performing office or non-manual work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by an equivalent combination of intellectual instruction and work experience. The Department explains that this proposed test "would focus on the knowledge of the employee and how that knowledge is used in everyday work, not on the educational path followed to obtain that knowledge."[37] This shift in focus is meant to reflect changes in the "21st century workplace," where an employee might end up possessing an advanced level of knowledge without the typical academic degree generally required by the profession.[38] According to this rationale, an employee who has acquired an advanced level of knowledge on the job is no longer fungible, and should therefore be exempt from overtime pay.[39]

   The elimination of the advanced degree requirement transforms an existing bright-line rule into a subjective assessment of an employee's level of knowledge. If the DOL seeks clarity and ease of

application, it would be better to leave intact the existing degree requirement.

The standard test in proposed section 541.302 would deem exempt from overtime pay as a creative professional any employee with the primary duty of "performing work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor."[40] The Department specifies that this language is not intended to make any material changes from the existing regulations.[41]

Teachers would be considered exempt from overtime pay based on the existing short test, minus the existing requirement that they consistently exercise discretion and judgment.[42] The Department indicates that its consolidation of existing provisions on teachers into proposed section 541.303 is not intended to cause any substantive changes.[43]

7. **Computer employees.** Proposed regulations sections 541.400–.403 raise the salary level to $425 per week and delete the requirement that the employee consistently exercise discretion and judgment. While the existing regulations look at both specialized knowledge and independent judgment as indicia of non-fungibility, the proposed regulations focus on specialized knowledge. While this factor might be readily ascertainable, it runs the risk of exempting groups of employees whom the FLSA was intended to protect by including within the exemption persons who are skilled but do not exercise independent judgment or discretion.

8. **Outside sales employee.**[44] Under the proposal, outside sales employees will be exempt if they have a primary duty of making sales; or of obtaining contracts for services or for the use of facilities for which a consideration will be paid by the client/customer; and if they are customarily and regularly engaged from the employer's place of business. The DOL proposes to remove the 20 percent limitation on non-exempt work, again arguing that it is difficult for employers to monitor. However, a de-emphasis on employer monitoring would appear to increase uncertainty (for example, employers would be unaware if employees' non-exempt work such as deliveries were more than "incidental" to their sales work), and to remove focus from what employees are actually doing.

Summary

Practitioners of employment law should closely follow the legislature's and the DOL's actions over the next couple of months. If the proposals are finalized, it will be easier to apply the tests for certain employees, such as those earning more than $65,000 a year. However, for most employees, practitioners should be prepared to revise their procedures for assessing the propriety of employee classifications. It will be less important if the employees exercise discretion and judgment, and certain bright-lines tests (such as the administration/production test and the degree requirement) will be gone. Instead, practitioners should look to the specific new tests, to the complexity of procedures employees are required to follow, and to courts' interpretations of such requirements as "positions of responsibility." This wholesale change in emphasis from the existing duties tests to tests that emphasize salary and "position of responsibility" means that more workers will be deemed exempt even though they are not employed in what Congress and the courts have consistently understood as *bona fide* administrative, executive, or professional capacities.

Endnotes

1. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 68 Fed. Reg. 15560 (proposed Mar. 31, 2003) (to be codified at 29 C.F.R. pt. 541).
2. http://www.epinet.org/content.cfm/briefingpapers_flsa_jun03.
3. This article does not address state overtime law. However, insofar as some states' laws refer to or incorporate the FLSA provisions, these new regulations would likely impact state courts' interpretations of state overtime laws as well.
4. Cong. Rec., Oct. 2, 2003, p. H9155.
5. Wash. Post, Jan. 2, 2004, p. D10.
6. *After Disputes, Congress Passes Spending Plan*, N.Y. Times, Jan. 23, 2004.
7. Fair Labor Standards Act of 1938, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219).
8. *See, e.g.*, *Bilyou v. Dutchess Beer Dist., Inc.*, 300 F.3d 217, 222 (2d Cir. 2002) (exemptions to the FLSA are to be narrowly construed against the employers).
9. 29 U.S.C. § 213(a)(1).
10. *See* Harry S. Kantor, Report and Recommendations on Proposed Revisions of Regulations, part 541 at 2 (Mar. 3, 1958) ("The terms bona fide executive, administrative and professional imply a certain prestige, status and importance, and the employee's salary serves as one mark of his status in management or the professions. . . . Generally speaking, salary is a good indicator of the degree of importance attached to a particular employee's job.").
11. *See* 68 Fed. Reg. at 15562.

12. *See* Harry Weiss, *Report and Recommendations on Proposed Revisions of Regulations*, part 541 at 18 (June 30, 1949) ("The salary level adopted must exclude the great bulk of non-exempt persons if it is to be effective.").

13. 68 Fed. Reg. at.15562; *see* 29 C.F.R. §§ 541.1, 541.101–541.119.

14. 29 C.F.R. § 541.201.

15. 68 Fed. Reg. at 15565–66; *see* 29 C.F.R. §§ 541.2, 541.201–541.215.

16. *See Reich v. State of New York*, 3 F.3d 581, 587–588 (2d Cir. 1993) (the administrative/production dichotomy "has proven useful to courts in a variety of non-manufacturing contexts").

17. Alternatively, an employee can perform functions in the administration of a school system, or educational establishment or institution, in work directly related to academic instruction or training.

18. 68 Fed. Reg. at 15567; 29 C.F.R. §§ 541.3, 541.300–541.315.

19. 68 Fed. Reg. at 15567.

20. *Id.* at 15569; *see* Pub. L. 101-583, 104 Stat. 2871 (Nov. 15, 1990) (expanding the exemption to include computer systems analysts, computer programmers, software engineers, and similarly skilled professional workers, including those paid on an hourly basis if paid at least 6.5 times the minimum wage); *see* 29 U.S.C. § 13(a)(17); 29 C.F.R. §§ 541.3(a)(4), 541.303.

21. 68 Fed. Reg. at 15569; *see* 29 C.F.R. §§ 541.5, 541.500–541.508.

22. *Id.* at 15560.

23. *Id.* at 15563; *see also id.* at 15581.

24. *Id.* at 15570.

25. *See id.*

26. *Powell v. United States Cartridge Co.*, 339 U.S. 497, 516 (1950).

27. *See* 149 Cong. Rec. S11,195 (daily ed. Sept. 9, 2003) (statement of Sen. Harkin). U.S. Gen. Accounting Office, Fair Labor Standards Act: White-Collar Exemptions Need Adjustments for Today's Workplace, GAO/T-HEHS-00-105, at 1 (May 2000) (reporting 1999 findings that "The rapidly growing services sector had a higher proportion of exempt workers than other sectors, and is responsible for much of the overall increase in numbers of exempt workers. Similarly, our data indicated that more women than men entered full-time white-collar exempt positions over this period.").

28. 68 Fed. Reg. at 15564.

29. *Id.* at 15595.

30. *Id.*

31. *Id.*

32. *Id.* at 15565.

33. *Id.* at 15564.

34. *Id.* at 15587.

35. The example provided in the proposed regulations is not reassuring on this point. Proposed § 541.205:

> would ensure that the administrative exemption is not denied to a highly trained and skilled employee who performs administrative functions merely because the employee uses a procedures manual, so long as the manual contains information that can only be interpreted properly by someone with a high level of specialized skills or training, as opposed to a manual in which the employee simply looks up the correct answer for a particular set of circumstances. 68 Fed. Reg. at 15566.
>
> A very highly skilled employee will likely be characterized as a professional, rather than an administrative, employee. Bearing that in mind, it does not seem advisable to base an employee's exempt status on the complexity of the procedures manual that he or she is required to follow.

36. *Id.* at 15566.

37. *Id.* at 15567.

38. *Id.* at 15568.

39. The Department cites *Leslie v. Ingalls Shipbuilding, Inc.*, 899 F. Supp. 1578 (D. Miss. 1995), in which the court concluded that an employee who had studied engineering for three years at a university and who had many years of experience in engineering was properly classified as a professional employee, even though the employee did not satisfy the usual requirement of a bachelor's degree in engineering. 68 Fed. Reg. at 15568.

40. 68 Fed. Reg. at 15568.

41. *Id.*

42. *Id.*

43. *Id.*

44. The regulations change "outside salesman" to "outside sales employee."

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Mandatory Arbitration Agreements in Employment Contracts: A Necessary Evil?

By Laura Marino

Following a year in which input was solicited from the deans and faculty of the New York State law schools as well as from the Executive Committee of the Labor and Employment Section regarding ways in which the relationship between the law schools and the LSLC could be improved, the LSLC restored the Dr. Emanuel Stein Memorial Writing Competition and initiated the Law School Student Awards. The Committee gave a third-prize award to the following article by Laura Marino, a graduate of St. John's University School of Law.

Introduction

In the face of crowded courtrooms and court dockets as well as the high cost of litigation, many Americans are using forms of alternative dispute resolution to solve their problems. For example, the use of arbitration is growing with each passing year.[1] The use of arbitration has become especially extensive in the employment law arena. More employers are requiring prospective and current employees to sign mandatory arbitration agreements as a condition of employment. This has proved to be a controversial practice. This article will trace the history of such agreements, from the adoption of the Federal Arbitration Act through the relevant case law. Next, it will discuss the positive and negative aspects of using arbitration to solve employment-related disputes, as well as the consequences to both employers and employees of having mandatory arbitration agreements. Finally, it will present an alternative practice of requesting a jury trial waiver.

Mandatory arbitration agreements in the employment context require applicants or employees to agree to bring any future claims against their employer before an arbitrator instead of before a jury.[2] Usually these agreements are contained in applications for employment, the employment agreement itself, or in an employee handbook.[3] Often, an employee is first informed of the requirement of mandatory arbitration when the employer extends to him an employment offer; most times the employee learns that he must sign the agreement as a condition of employment.[4] In these agreements, employers favor mandatory arbitration over voluntary arbitration, which allows the employee to retain the choice to bring a claim to court.[5] Additionally, employers usually choose binding arbitration instead of non-binding arbitration because it produces a more "conclusive" result; the employee can almost never file a suit to appeal the arbitrator's decision on the merits.[6]

These types of agreements have generated a great deal of controversy. Agreements to arbitrate that are made after a dispute has arisen do not seem to be problematic, and pre-dispute agreements to arbitrate contractual claims appear to be "relatively uncontroversial."[7] However, pre-dispute agreements to arbitrate statutory employment claims have fanned the flames of a raging controversy.[8] Many argue that employees' statutory employment discrimination claims that stem from violations of statutes such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act should not be subject to mandatory arbitration.[9] Others have a more fundamental problem with these agreements: often there is a lack of "informed, voluntary consent," unequal bargaining power, and coercion.[10] Finally, there is controversy surrounding the use of these agreements in collective bargaining agreements.[11]

"More employers are requiring prospective and current employees to sign mandatory arbitration agreements as a condition of employment. This has proved to be a controversial practice."

I. Historical Context

The Federal Arbitration Act (FAA)[12] was enacted in 1925, and reenacted and codified in 1947 as Title IX of the United States Code,[13] to respond to the hostility of American courts to arbitration,[14] and to place arbitration agreements on "the same footing as other contracts."[15] Section 2 of the FAA compels judicial enforcement of many written arbitration agreements.[16] The statute authorizes federal district courts to enter stays when the issue before the court is referable to arbitration, and the statute also allows court orders that compel arbitration when a party fails or refuses to comply with an arbitration agreement.[17] The law also has important exclusions; section 1 excludes from coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[18]

Between 1974 and 1991, the Supreme Court decided three cases relating to mandatory arbitration provisions in the employment context. These three cases show that as time passed, the Supreme Court changed its tone toward arbitration from one of "complete repudiation" to one of "widespread acceptance."[19] In *Alexander v. Gardner-Denver Co.*,[20] the Court held that an employee, who claimed that he was terminated because of his race, had two separate rights: his contractual right to termination for just cause and his statutory right under Title VII to a prohibition of termination based on race.[21] The Court ruled that an individual's Title VII rights could not be waived by a union in a mandatory arbitration provision.[22] Therefore, the Court made an important distinction between statutory rights of individual employees and contractual rights covering union activities—a union could waive the latter, but not the former.[23]

The Supreme Court abandoned this distinction between contractual and statutory rights in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[24] when it decided that a dispute involving statutory claims could be submitted to arbitration as per a mandatory arbitration agreement.[25] The Court noted that when a party agrees to arbitrate a statutory claim, that party is not waiving its substantive rights under the statute—it is merely submitting that claim to an "arbitral rather than judicial forum."[26] Thus, the Court created a new presumption: absent express congressional intent to prohibit a waiver of judicial remedies, a party must adhere to mandatory arbitration agreements.[27]

In 1991, with its decision in *Gilmer v. Interstate/Johnson Lane Corp.*,[28] the Court concluded its dramatic change in attitude toward mandatory arbitration agreements.[29] The Court held that an ADEA claim could be arbitrated pursuant to a mandatory arbitration provision.[30] It reasoned that as long as a claimant can assert a claim in an arbitration setting, the ADEA will serve its remedial and deterrent function.[31] This decision affirmed *Mitsubishi*'s presumption in favor of mandatory arbitration.[32] However, the Court in *Gilmer* left an open question: Must *all* employees who sign an individual employment contract containing a mandatory arbitration agreement submit their statutory claims to arbitration, or does the FAA provide an exemption for certain employees under section 1?[33] This question was resolved by the Supreme Court's decision in *Circuit City, Inc. v. Adams*.[34]

II. Recent Decisions: *Circuit City* and *Waffle House*

In 2001, the Supreme Court in *Circuit City* clearly expressed its view that mandatory arbitration clauses in employment agreements should be enforced.[35] The Court overruled the Ninth Circuit's decision that *all* employment contracts were excluded from the FAA.[36] The Ninth Circuit had interpreted section 1's exclusion of "contracts of employment of . . . any other class of workers engaged in . . . commerce" to mean that *no* employment contracts were covered by the statute,[37] and therefore a mandatory arbitration clause in any employment contract did not have to be enforced. The Supreme Court interpreted section 1 more narrowly and held that the statute excluded from coverage only employment contracts for transportation workers.[38]

"[T]he Court made an important distinction between statutory rights of individual employees and contractual rights covering union activities—a union could waive the latter, but not the former."

The ramifications of this case are far-reaching. The Supreme Court unequivocally stated its preference for arbitration,[39] and made it clear that statutory claims (including employment discrimination claims) can be arbitrated under a mandatory arbitration agreement.[40] This firm statement will undoubtedly provide a sense of certainty and security to any employer who is considering the use of a mandatory arbitration agreement.[41] One open question that the Supreme Court left was which, if any, procedural safeguards should apply to guide enforcement of mandatory arbitration agreements.[42] It has been suggested that courts will probably look at several factors when making a decision whether to enforce a mandatory arbitration agreement:[43] whether the agreement contains no limitation on statutorily imposed remedies and provides for adequate discovery;[44] whether there will be a written arbitrator's award and limited judicial review available;[45] the employee will not pay unreasonable costs or fees;[46] there will be a neutral arbitrator;[47] and the agreement is not unconscionable.[48]

Even more recently, in *EEOC v. Waffle House*,[49] the Supreme Court dealt with the EEOC's role in the application of mandatory arbitration agreements.[50] The Court first noted that both Title VII and the ADA clearly gave the EEOC authority to get relief for the complainant.[51] Next, the Court reasoned that the FAA does not provide that a mandatory arbitration agreement between an employer and employee would affect the EEOC's role and duties.[52] The Court further stated that such an agreement could not be binding on a third party without its consent.[53] Therefore, the Court held that an

agreement between an employer and employee to arbitrate statutory claims did not prevent the EEOC from "pursuing victim-specific judicial relief, such as back pay, reinstatement, and damages."[54] Thus, with the case law relatively settled,[55] an employer must only weigh the positives and negatives of the arbitration process itself, and thus mandatory arbitration agreements, before choosing a course of action.

Arbitration: Is It Really Worth It?

The Supreme Court has made it clear that it believes arbitration provisions have "real benefits."[56] One reason for this is that arbitration costs less than litigation.[57] Both parties save money, and also save in other "less quantifiable" ways; arbitration causes less disruption in the workplace, it is less damaging to employee morale, and the lack of bad publicity causes less damage to the employer's business interests.[58] Secondly, some say that arbitration proceedings lead to a more speedy resolution, thus resulting in less expense.[59] Lower costs often provide employees with a greater opportunity to bring a claim and to have their voice heard.[60] Finally, there are several benefits to having an arbitrator presiding over the proceedings instead of a judge. Often an arbitrator is an expert in the subject of the dispute and is less likely to be swayed by emotion or political pressures.[61]

Many people view some of these same characteristics of arbitration as negatives—especially employers.[62] First, an arbitrator must give all remedies available under the statute, including punitive damages. This can be especially "scary" to employers because there is little or no review of an arbitrator's award.[63] In fact, employers' worst fears may have been confirmed when a New York State Supreme Court justice upheld an arbitrator's award of $25 million in punitive damages to an employee.[64] This award may have put "a nail in the coffin" in the argument that arbitrators are less likely than juries to award "stratospheric damages to individuals."[65]

Second, some argue that the cost of arbitration proceedings can actually be quite high, and usually the employer bears the lion's share of that cost.[66] These costs can be exacerbated by the fact that often an arbitration proceeding is "bifurcated" (not on consecutive days) which necessitates repeated preparation both by the attorneys and of the witnesses, increasing the costs.[67] Additionally, if a panel of arbitrators is appointed, the costs can as much as triple.[68] Because arbitration proceedings can often be surprisingly long, especially if an employee represents himself, the costs can quickly become very high.[69] Finally, employers with mandatory arbitration clauses often end up paying litigation costs anyway when their employees litigate the validity of these agreements.[70]

The flexibility of the arbitration proceeding often is a disadvantage to both employers and employees. Employers often complain that the lack of evidentiary rules allows many inappropriate statements on the record.[71] The limited right to appeal, the almost nonexistent use of summary judgment, and a lack of obligation on the arbitrator's part to discuss his decision all work to the disadvantage of both parties in certain situations.[72] The lack of discovery can be a negative aspect of arbitration proceedings for both parties as well;[73] some argue that without proper discovery procedures, an employee often has a very slim chance of successfully alleging a violation of an employment discrimination statute.[74]

"The Supreme Court has made it clear that it believes arbitration provisions have 'real benefits.'"

Finally, advocates for employees argue that mandatory arbitration clauses are bad social policy. The extreme inequality of bargaining power that employees face forces them to agree to these provisions; often an employee must accept the arbitration clause or look for another job.[75] The EEOC has denounced the use of mandatory arbitration clauses since 1995, and has not changed this policy statement even in the wake of the Supreme Court's decisions in *Circuit City* and *Waffle House*.[76] With the negatives of arbitration seeming to outweigh the positives for employers, some members of the employment law field have begun looking for alternatives to mandatory arbitration clauses.

Jury Trial Waivers

One alternative an employer might try is a jury-trial waiver: an employee agrees to submit all disputes to a bench trial, rather than to arbitration or a jury trial. There are several reasons employers might favor this alternative. First, it ensures that the trier of fact will be a neutral with lifetime tenure who is a "real life judge," rather than a retired judge or an arbitrator who might not even be a lawyer.[77] A judge can handle summary judgment motions and order discovery, and his decision can be appealed.[78] A second advantage is that bench trials could actually take less time than an arbitration proceeding, especially in a complex discrimination dispute, because a bench trial will meet on consecutive days. In fact, one practitioner estimated that what could be a thirty-five-day arbitration hearing can often be resolved in a ten-day bench trial.[79] A third positive aspect of having resolution through a bench trial is that often the

judge will order pre-filing mandatory meditation. During that mediation, if an employee rejects an offer made by the employer and then recovers less at the bench trial there would be fee shifting. This often deters employees from pursuing litigation.[80]

It has been argued that jury trials are not as valuable in this context as critics make them out to be. For example, few employees can afford to hire their own private lawyer. Instead many claims come to courts through "overworked, understaffed administrative agencies."[81] Jury trials were not a part of the most powerful employment discrimination statutes until 1991;[82] major advances were made in the employment discrimination context in the last twenty-five years without their use.[83] Additionally, as mentioned above, juries can often be unpredictable, and will sometimes return verdicts and awards based on emotion rather than an objective evaluation of the facts in evidence and the law.[84] It has been suggested that the jury trial system is one rife with uncertainty for employers and bad for employees because it is "a system in which a few individuals in protected classes win a lottery of sorts, while others queue up in the administrative agencies."[85]

A recent case in a federal district court in New York confirms that the jury trial waivers are appropriate and enforceable in the employment context.[86] In response to the plaintiff/employee's argument that her jury trial waiver was invalid, the court first recognized Second Circuit authority for the "well-established" ability of parties to waive their rights to a jury trial.[87] The court then held that such a waiver was valid as long as it was "'knowing, voluntary' and 'intentional.'"[88] The factors to determine if the waiver was knowing and voluntary include: the "negotiability of contract terms," the "conspicuousness of the waiver provision," the bargaining power of the two parties in relation to each other, and the business sophistication of the party seeking to invalidate the waiver.[89] The court reasoned that the plaintiff in this case was a sophisticated party (she had a Harvard M.B.A. degree and had worked in business before signing this contract) and awarded no merit to her claim that the waiver was not conspicuous because she failed to read the contract before she signed it.[90] Therefore, the court enforced the contractual jury trial waiver for all of her claims, including the claims of violation of federal and state employment discrimination statutes.[91]

Conclusion

One response to the controversy over mandatory arbitration agreements has come from Congress. For example, the Civil Rights Procedures Protection Act of 2001 was recently introduced in the Senate.[92] This Act would amend seven civil rights statutes, including Title VII and the ADA,[93] in order to guarantee that a plaintiff raising a claim of a violation of federal civil rights would have access to a remedy through the court systems.[94] This right could only be waived by a voluntary agreement between the employer and employee to arbitrate such a dispute after it has arisen.[95]

"The great controversy surrounding the use of mandatory arbitration agreements in the employment context may provide the greatest reason for employers not to use them."

A bill introduced in the House of Representatives, the Preservation of Civil Rights Protections Act,[96] would have an even more expansive effect.[97] This legislation would seek to overturn the Supreme Court's decision in *Circuit City* by amending the FAA to prohibit the formation of mandatory arbitration agreements before a dispute has arisen.[98] Parties could only voluntarily consent to arbitrate a dispute after it had already risen.[99]

The great controversy surrounding the use of mandatory arbitration agreements in the employment context may provide the greatest reason for employers not to use them. Although there are many positive aspects to using arbitration, and therefore many incentives for compelling employees to agree to arbitrate disputes before they even arise, there are also many negative aspects to arbitration. Although the Supreme Court has supported the use of mandatory arbitration agreements, there is little congressional support for this practice, and there is great debate within the population as to the morality of these agreements. With all the negatives surrounding the practice, perhaps more employers will begin to seek alternatives, such as jury trial waivers. This alternative can have benefits to both parties, and may serve as a sorely needed compromise to quell the debate.

Endnotes

1. Russell D. Feingold, *Mandatory Arbitration: What Process is Due?*, 39 Harv. J. on Legis. 281, 282 (2002). The American Arbitration Association noted that 2000 was "its sixth year in a row with record caseloads." *Id.*
2. Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 Cal. L. Rev. 1203, 1209 (2002).
3. *Id.*
4. *Id.*
5. Feingold, *supra* note 1, at 283.
6. *Id.*

7. Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. Rev. 1344, 1346–47 (1997).
8. *Id.*
9. Dana T. Blackmore, *An Employer's Guide to Understanding the Arbitration of Statutory Employment Claims*, 13 World Arb. & Mediation Rep. 103, 104 (2002).
10. Feingold, *supra* note 1, at 284.
11. Michael P. Wolf, *Give 'em Their Day in Court: The Argument Against Collective Bargaining Agreements Mandating Arbitration to Resolve Employee Statutory Claims*, 56 J. Mo. B. 263, 265 (2000).
12. 9 U.S.C. §§ 1–16 (2000).
13. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 288–89 (2002).
14. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001); Wolf, *supra* note 11, at 264.
15. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).
16. *Circuit City Stores*, 532 U.S. at 111. Section 2 of the FAA states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

17. 9 U.S.C. §§ 3, 4; *Waffle House*, 534 U.S. at 289.
18. 9 U.S.C. §1; Feingold, *supra* note 1, at 286.
19. Reilly, *supra* note 2, at 1213.
20. 415 U.S. 36 (1974).
21. Blackmore, *supra* note 9, at 104.
22. *Id.*
23. Wolf, *supra* note 11, at 264.
24. 473 U.S. 614 (1985).
25. Blackmore, *supra* note 9, at 104.
26. *Id.*
27. Reilly, *supra* note 2, at 1214.
28. 500 U.S. 20 (1991).
29. Wolf, *supra* note 11, at 264.
30. Blackmore, *supra* note 9, at 105.
31. Wolf, *supra* note 11, at 264.
32. Reilly, *supra* note 2, at 1214.
33. Carlton J. Snow, *Collective Agreements and Individual Contracts: Employment in Labor Law*, 50 Am. J. Comp. L. 319, 320 (2001).
34. 532 U.S. 105 (2001).
35. Reilly, *supra* note 2, at 1207 ("Absent congressional intervention, mandatory arbitration is here to stay."). In *Circuit City*, the plaintiff signed an application that contained a mandatory arbitration provision and later filed an employment discrimination lawsuit in state court. 532 U.S. at 109–10. The employer then filed suit in federal court seeking an injunction and order compelling arbitration. *Id.* at 110.
36. *Id.* at 110–11.
37. *Id.* at 114.
38. *Id.* at 119. The Court reasoned that if Congress had intended section 1 to apply to all employment contracts, it would not have specifically mentioned only "seamen" and "railroad employees." Blackmore, *supra* note 9, at 105.
39. Garry Mathiason & George Wood, *Arbitration in Employment Settings: Implications of* Circuit City *and* Waffle House, 59-Jul Bench & B. Minn. 21, 23 (2002).
40. Blackmore, *supra* note 9, at 105. The Court did not overrule *Alexander*, so courts could still decide that in a collective bargaining situation any contractual claims may be arbitrated pursuant to a mandatory arbitration clause, but statutory claims may not be. *Id.* at 106.
41. Adrienne B. Koch, *Mandating Arbitration After* Circuit City, N.Y.L.J., June 7, 2001, at 1. Additionally, because the FAA preempts state law, an employer who has an operation spanning several states can use mandatory arbitration agreements with assurance they will uniformly be upheld. *Id.*
42. Elizabeth H. Murphy, *Arbitration at Work*, L.A. Law. 27, 30–31 (2001).
43. *Id.* at 31 ("Since *Circuit City* was silent on this issue, federal courts will undoubtedly look to *Armendariz's* five-part test and try to harmonize it with federal law.").
44. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 103–05 (2000).
45. *Id.* at 106–07. The decision should contain the arbitrator's main findings of fact and law. *Id.*
46. *Id.* at 107–08. This includes prohibiting the employee from bearing a substantial risk of having to pay these costs. *Id.*
47. *Id.* at 103.
48. *Id.* at 113–21. The court stated that a contract would be considered unconscionable if it was procedurally unconscionable (there was an extreme inequality of bargaining power) or if it was substantively unconscionable (the agreement's terms were extremely one-sided). Murphy, *supra* note 42, at 29.
49. 534 U.S. 279 (2002).
50. In this case, an employee signed an application containing a mandatory arbitration clause; the employer fired him soon after he started work and after he suffered a seizure on the job. *Id.* at 282–83. The employee did not use the arbitration proceeding, but instead filed a claim with the EEOC. The EEOC then filed an action in federal court (to which the employee was not a party) alleging the employer had violated the ADA. *Id.* at 283. The employer then sought a stay of the EEOC's suit and an order compelling arbitration. *Id.* at 284.
51. *Id.* at 287.
52. *Id.* at 288.
53. *Id.* at 294. The Court also noted that the FAA could not force the EEOC to give up its statutory power without its consent. *Id.*
54. *Id.* at 282. Such a holding is consistent with the public policy behind the FAA because before the EEOC can bring litigation it is required by statute to engage in a conciliation process. *Id.* at 290. This, combined with the small number of cases it chooses to litigate, ensures that there are not overpowering numbers of litigations despite mandatory arbitration clauses. Blackmore, *supra* note 9, at 107.
55. Some have argued that *Waffle House's* real value is in its assumptions; the Court assumed the agreement was valid and enforceable under the FAA and that Title VII and ADA claims could be arbitrated. Mathiason & Wood, *supra* note 39, at 23.
56. *Circuit City v. Adams*, 532 U.S. 105, 122–23 (2001).
57. *Id.* at 123. The Supreme Court noted that lower costs were especially beneficial for employment litigation, which typically involve lower amounts of money in a dispute.
58. Blackmore, *supra* note 9, at 107. The fact that awards are kept confidential may have the same effect. A. Michael Weber, *Arbitration for Employment Disputes: Courts Provide Guidance on Craft-*

ing Agreements that Stand Up to Challenge, N.Y.L.J., June 25, 2001, at s4.

59. Feingold, *supra* note 1, at 282–83; Wolf, *supra* note 11, at 266.
60. Wolf, *supra* note 11, at 267. In addition, the fact that the rules of evidence and procedure are more lax helps employees who will be representing themselves. *See* Feingold, *supra* note 1, at 283.
61. Wolf, *supra* note 11, at 267 (stating that an arbitrator is usually "an expert in the subject matter of the dispute"); Weber, *supra* note 58 (noting that "arbitrators are relatively insulated from the community pressures and attitudes that tend to influence juries").
62. Philip M. Berkowitz, *Employment Law Arbitration Revisited*, N.Y.L.J., July 11, 2002, at 5. ("The advantages to employers of mandatory arbitration may be becoming more difficult to discern.").
63. Telephone Interview with Terry O'Neil, Rains & Pogrebin (Nov. 11, 2002) (hereinafter "O'Neil").
64. Berkowitz, *supra* note 62.
65. Berkowitz, *supra* note 62.
66. O'Neil, *supra* note 63. Mr. O'Neil estimates that an arbitration proceeding can cost as much as $2,500 per day. *Id.*
67. Berkowitz, *supra* note 62; O'Neil, *supra* note 63.
68. O'Neil, *supra* note 63. The American Arbitration Association typically appoints one arbitrator, but will sometimes appoint a panel of three if the claim is for a large sum of money. This can make a large claim even more valuable to the employer. *Id.*
69. *Id.* An arbitration proceeding involving an employment discrimination claim can last as long as twenty-five to thirty days. *Id.*
70. Weber, *supra* note 58.
71. O'Neil, *supra* note 63. Additionally, such informality may act as an incentive for employees to file claims. Weber, *supra* note 58.
72. Feingold, *supra* note 1, at 289; O'Neil, *supra* note 63. The fact that an arbitrator is not required to discuss his reasons for the decision can lead to a lack of precedent, which could disadvantage both parties. Wolf, *supra* note 11, at 267.
73. Feingold, *supra* note 1, at 289; O'Neil, *supra* note 63.
74. Wolf, *supra* note 11, at 269.
75. Estreicher, *supra* note 7, at 1353; Feingold, *supra* note 1, at 291.
76. Reilly, *supra* note 2, at 1220; Berkowitz, *supra* note 62.
77. O'Neil, *supra* note 63.
78. *Id.*
79. *Id.*
80. *Id.* This fee shifting falls under Federal Rule of Civil Procedure 68, which dictates when costs shift. *Id.* While the fees might not be as much as attorney's fees, they will still deter litigation. *Id.*
81. Estreicher, *supra* note 7, at 1356–57.
82. *Id.* at 1357 (noting that jury trials were added in the 1991 amendments to Title VII and the ADA).
83. *Id.*
84. *Id.* (examining the risk that juries will "dispense their own views of social justice").
85. *Id.*
86. *Brown v. Cushman & Wakefield, Inc.*, 2002 U.S. Dist. LEXIS 13787 (July 29, 2002). In that case, an employee alleged that her employer had discriminated against her based on her gender, and had breached the employment contract. *Id.* at *2. Plaintiff wanted the jury trial waiver in her employment contract to be struck because she claimed that she had not read her contract before she signed it, and therefore the waiver was not valid. *Id.* at *60.
87. *Id.* at *62 (citing *Herman Miller v. Thom Rock Realty Co.*, 46 F.3d 183, 189 (2d Cir. 1995)).
88. *Id.* at *62 (quoting *Morgan Guar. Trust Co. v. Crane*, 36 F. Supp. 2d 602, 603 (S.D.N.Y. 1999)).
89. *Morgan Guar. Trust Co.*, 36 F. Supp. 2d at 603–04. It is still an open question whether an employee can waive his right to a jury trial if he does not know the exact claims that are covered by the waiver. Murphy, *supra* note 42, at 28.
90. *Brown*, at *63.
91. *Id.* at *65.
92. S. 163, 107th Cong. (2001). *See* Feingold, *supra* note 1, at 292.
93. The other statutes that would be amended include the Rehabilitation Act of 1973, The Equal Pay Act, The Family and Medical Leave Act and the FAA. Feingold, *supra* note 1, at 292.
94. *Id.* at 292–93.
95. *Id.* at 293.
96. H.R. 2282, 107th Cong. (2001).
97. Feingold, *supra* note 1, at 293.
98. Snow, *supra* note 33, at 321.
99. *Id.*

Laura Marino won third prize in the 2002-2003 Labor and Employment Law Section Dr. Emanual Stein Memorial Writing Competition. Laura is a graduate of St. John's University School of Law.

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