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Labor and Employment Law Update

IMMEDIATE CHANGES TO THE MILITARY LEAVE PROVISIONS OF THE FMLA

On October 28, 2009, President Obama signed the 2010 National Defense Authorization Act ("NDAA"), which is primarily a defense appropriations law, but which contains several amendments to the military leave provisions of the Family and Medical Leave Act. As you may recall, when President Bush signed the NDAA for Fiscal Year 2008, the law added two new qualifying circumstances for which eligible employees may take FMLA leave: "qualifying exigency leave" and "military caregiver leave." Those changes went into effect on January 6, 2009.

Although the FMLA portion of the 2010 NDAA does not have an effective date, according to the staff of the Subcommittee on Military Personnel of the House Armed Services Committee, the NDAA took effect when the President signed it last week.

Qualifying Exigency Leave

"Qualifying exigency leave" includes leaves for short-notice deployment, military events and related activities, financial and legal matters, child care and school activities, rest and recuperation, post-deployment activities, and additional activities agreed upon by the employer and the employee. In its prior incarnation, it was intended to help those family members with imminent leave situations and obligations where their spouse, parent or child, was called to active duty in support of a contingency operation.

Qualifying exigency leave was initially confined to family members of those in the National Guard or Reserves. The NDAA now extends exigency leave to a member of any regular component of the Armed Forces, and removes the requirement that it be in support of a contingency operation. Instead, covered active duty now relates to when a member of the regular or reserve components of the Armed Forces is deployed to any foreign country.

The NDAA does not alter the actual leave period, which continues to provide for up to 12 weeks of FMLA leave annually.

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Military Caregiver Leave

The January 2009 FMLA amendments provided that eligible employees could take up to 26 weeks of military "caregiver leave" in a single 12-month period to care for a service member who has a serious illness or injury that was incurred in the line of duty while on active duty.

Initially, eligibility for caregiver leave had been confined to the family of active duty members. The NDAA extends caregiver eligibility to close family members of veterans who were members of the Armed Forces (including the National Guard or Reserves) within five years of the date of the medical treatment, recuperation, or therapy for which the care is required. As a result, the family members of our nation's veterans now enjoy the same leave rights as those afforded relatives on active duty status.

The NDAA also revises the definition of "serious injury or illness" for active duty members, and provides a slightly different definition for veterans. Both are now defined to include an injury or illness that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces. For veterans, the definition of "serious injury or illness" further adds that the injury or illness may manifest itself before or after the member became a veteran.

Impact of the Changes and Steps to Take Now

A significantly larger percentage of employees are now eligible for military leave under the FMLA, and a larger percentage will be eligible for longer periods of caregiver leave. In order to comply with the NDAA's amendments to the FMLA, you should immediately update your FMLA policies and documentation as follows: (1) include Regular Armed Forces under the scope of qualifying exigency leave and delete references to "contingency operations;" and (2) provide caregiver leave for family members of veterans. You should also make sure that

your staff (and anyone else who may administer attendance or leave matters) is aware of the broadened military leave provisions.

The Department of Labor has been tasked with issuing new regulations to address the NDAA's amendments, and it is likely that the DOL will also issue a new poster, certifications and other FMLA-related forms in the near future.

NEW EEOC POSTER AVAILABLE

The Genetic Information Nondiscrimination Act ("GINA") is effective as of November 21, 2009. Title II of GINA applies to all private (including nonprofit), state and local government employers with 15 or more employees. The law requires employers to refrain from using genetic information in employment decisions and from intentionally acquiring genetic information about applicants and employees. The law also requires covered employers to post a notice in the workplace advising employees of their rights.

Accordingly, the Equal Employment Opportunity Commission ("EEOC") has recently updated its "Equal Employment Opportunity is the Law" poster to reflect the changes required by GINA. The new poster is currently available on the EEOC's website at www.eeoc.gov/posterform.html. According to the EEOC, the poster will also be available in Spanish, Chinese and Arabic.

Consistent with this new posting requirement, covered employers may also wish to update their handbooks or other policies to reflect GINA's new requirements. For more information about GINA and its substantive provisions, please see our July 2008 Newsletter at www.rubinrudman.com/Documents/PRACTICEAREAS/39/July2008newsletter.pdf.

EEOC PROVIDES GUIDANCE ON WORKPLACE PANDEMIC FLU PLANNING

Seasonal illnesses, particularly influenza, often create problems in the workplace due to higher rates of employee absenteeism. Not only are employees out sick due to personal illness, but they are often out of work to care for their children and family members who are sick. Furthermore, as we have all learned from the media coverage, the 2009-2010 influenza season will be particularly harsh due to the emergence of the H1N1 virus.

As of October 30, 2009, the Centers for Disease Control and Prevention ("CDC") reported influenza activity to be widespread in 48 states, including all of the New England states. Total hospitalization rates for laboratory-confirmed influenza are also higher than expected for this time of year for adults and children. Visits to doctors for influenza-like illness will continue to increase in most areas of the country.

Consequently, it is prudent – arguably necessary – for employers to develop a plan for dealing with influenza in the workplace. To that end, the EEOC has issued a valuable guidance that provides direction to employers in formulating flu strategies without running afoul of the Americans with Disabilities Act

("ADA"). The EEOC's guidance, "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act," can be accessed in full here: www.eeoc.gov/facts/pandemic_flu.html.

The ADA may come into play when an employee request time off due to illness. Normally, asking an employee to supply a simple doctor's note to excuse an absence in accordance with a published and enforced absence policy would not likely implicate the ADA, but a request for additional information about the nature of the employee's medical condition could trigger the ADA's requirements. In its guidance, the EEOC cautions employers that the ADA restricts when and how employers may request information from an employee (or applicant) regarding the H1N1 flu virus (or any other medical condition), regardless of whether the employee has a disability. More specifically, the EEOC guidance addresses the following points:

- Employers may use a pre-pandemic employee sample survey to gather information from employees about whether they would be able to report to work in the event of a pandemic.
- Employers may ask employees whether they have symptoms of a cold or the seasonal flu as it is not a disability related inquiry.
- Employers may not ask employees who do not have symptoms of H1N1 flu to disclose whether they have a medical condition that could make them especially vulnerable to influenza complications.
- Employers may send employees home if they display influenza-like symptoms.
- If employees report feeling ill at work or call in sick, employers may ask them if they are experiencing influenza-like symptoms, such as a fever, chills, and cough or a sore throat.
- Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.
- During a pandemic, an employer may ask an employee why she has been absent if the employer suspects a medical reason.
- Measuring an employee's body temperature is considered a medical examination. Consequently, it must be job-related and consistent with business necessity.
- Employers may require employees to adopt infection control practices in the workplace, such as regular hand washing and wearing of personal protective equipment (e.g., face masks, gloves, etc), or telecommuting.
- Employers should consider encouraging, rather than requiring, employees to get the seasonal and H1N1 influenza vaccines. (An employee may be entitled to an exemption from a mandatory vaccination requirement based on a disability that prevents the employee from taking the vaccine. Title VII might also entitle employees to an exemption where an employee's sincerely-held religious belief, practice or observance prevents him or her from taking the vaccine.)

- Employers may require employees who have been away from work during a pandemic to provide a doctor's note certifying their fitness to return to work.
- Employers should make their best efforts to obtain public health advice that is both contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.

As a reminder, none of the above measures can be used to discriminate against employees or applicants on the basis of any protected status, including disability. In addition to developing a pandemic illness plan, employers should review their absence, health and safety, and other related policies now in order to ensure that they are equipped to handle a pandemic. For up-to-date information on pandemic flu, consult these websites: www.eeoc.gov, www.flu.gov and www.mass.gov/flu.

E-VERIFY COMPLIANCE: IS YOUR COMPANY READY?

E-Verify is a free internet system that verifies employees' identity and work status. The federal government requires all employers to participate in E-Verify if awarded a federal contract on or after September 8, 2009. Previously, Immigration Services (USCIS), in partnership with the Social Security Administration (SSA), allowed employers to voluntarily participate in the electronic verification of its employees. This "optional system" however, became mandatory on September 8, 2009 for organizations utilizing certain federal contractors and subcontractors, in addition to completing Form I-9, Employment Eligibility verification.

If awarded a federal contract, the company is required to enroll in E-Verify in 30 days and has 90 days to verify employees who will work on the contract and all new hires thereafter. E-Verify requires that a company submit the employee's name and Social Security number into the system, which is then matched to the SSA's database and the Department of Homeland Security's (DHS) immigration databases to make a proper verification.

Who is required to use E-Verify? The program applies to businesses awarded federal contracts over \$100,000 and subcontractors with more than \$3,000 contracts. The rule requires that employers agree to participate in E-Verify to confirm the employment eligibility of employees hired during the term of the contract. If a company fails to register and participate in E-verify, it may be ineligible to receive and/or may lose its right to federal contracts.

When using E-Verify, the first step is to register through the USCIS website. A tutorial is provided for the company "user"; the company "user" enters the necessary information into the E-verify system to properly register. Once registered, employee information from the I-9 is entered into E-Verify. E-Verify however, does not serve as an alternative to I-9 verifications, but it does provide the necessary information. Once entered in the E-Verify program, the employee's data is compared against 449 million records in the SSA database and more than 80 million records in the DHS immigration database. When the employee is confirmed, work is authorized. If, however, the employee's

information does not match, the employer is required to notify the individual of the non-confirmation. The employee has eight working days to contest the finding. If the employee does not or cannot resolve the issue, he/she receives a "final non-confirmation," and the employer must terminate employment.

Organizations that may be awarded federal contracts cannot afford to have an essential employee risk a "non-confirmation" in the E-Verify system as it could disrupt the day-to-day work flow. Therefore, companies need to understand and be familiar with the E-Verify registration process. If your company currently receives federal financing or anticipates receiving funding in the future, it is advantageous for you to get familiar with the E-Verify system and train key personnel to navigate the process.

E-Verify is both a complicated and tedious process, so it is important to receive proper training and counsel. For more information or questions, please contact Michele Vakili at (617) 330-7119 or mvakili@RubinRudman.com.

RECENT SUPREME COURT DECISIONS FAVOR EMPLOYERS

ADEA Mixed Motive Circuit Split Resolved: Age Must Be "But For" Cause Of Discrimination Under ADEA

In a 5-4 decision in Gross v. FBL Financial Services, 557 U. S. ____ (2009), the Supreme Court held that plaintiffs cannot assert mixed motive claims under the Age Discrimination in Employment Act ("ADEA"). Under this holding, an employee alleging a disparate treatment claim under the ADEA must prove that age was the "but for" cause of the challenged adverse employment action. According to the Court, even where the employee has produced evidence that age was one motivating factor in that decision (a "mixed motive"), the burden of persuasion does not shift to the employer to show that it would have taken the action without regard to age.

Gross sued FBL Financial Group, alleging that his reassignment to a different position was a demotion based on his age (53) because many of the responsibilities of his former position were transferred to a new position held by a woman in her early forties. At trial, Gross presented circumstantial evidence demonstrating that Gross was highly qualified for the position given to the younger employee, that the younger employee was less qualified than Gross for the position, that Gross was never offered an opportunity to interview for the position, and that FBL's explanations for his demotion were false. The jury found for Gross. On appeal, however, the Eighth Circuit Court of Appeals overturned the judgment on the grounds that the trial judge improperly gave the jury an instruction on a mixed-motive discharge, which switched the burden of proof to the employer, given that Gross failed to present any direct evidence of age discrimination.

At that time, the eleven circuit courts of appeal were split on the question of whether direct evidence of age discrimination was required in mixed-motive cases. The First Circuit, in which Massachusetts cases are heard, was among the group that had rejected the argument that direct evidence of age discrimination

must be provided before a mixed-motive instruction is appropriate. Other circuits had agreed with the Eighth Circuit, finding that direct evidence of age bias is a prerequisite to a mixed-motive instruction. The Court's decision in *Gross* resolves this split.

In the *Gross* decision, the Court found that Title VII and ADEA cases are "materially different" in terms of the relevant burden of persuasion. Unlike Title VII, which Congress specifically amended to authorize discrimination claims in which an improper consideration was "a motivating factor" for an adverse employment decision, the ADEA does not allow employees to establish discrimination by showing that age was simply a motivating factor. Further, the Court noted that to find a violation of the ADEA, an employer must take an adverse action "because of" age, meaning that age was the "reason" that the employer decided to act. Consequently, for *Gross* to establish a disparate treatment claim under the ADEA, he had to show that his age was the "but for" cause of FBL's decision to reassign him.

Gross is a victory for employers, who may now defend an age discrimination claim brought under the ADEA without the difficult burden of having to prove a negative. In today's economy, when reductions in force and layoffs are increasingly common, legitimate, non-discriminatory decisions may involve criteria that naturally correlate with age, or be muddled by facts unrelated to the ultimate decision. *Gross* is therefore a helpful decision for employers in defending ADEA claims of discrimination.

Supreme Court Heightens Pleading Standard For All Federal Complaints

The Court set aside a 50 year-old rule regarding federal court complaints in *Ashcroft v. Iqbal*, 557 U.S. ____ (2009). In another 5-4 decision, the Court abandoned the interpretation of Federal Rule of Civil Procedure 8 that a federal complaint need only have a "short and plain statement of the claim" to be viable. Now, federal judges must determine whether a complaint states a "plausible claim for relief" based on "judicial experience and common sense."

In *Iqbal* the Court held that the plaintiff's complaint failed to plead sufficient facts to state a claim against numerous federal officials, among them former Attorney General John Ashcroft, for racial and religious discrimination against individuals detained after the terrorist attacks of 9/11. The plaintiff, Iqbal, was arrested and detained in November 2001 on charges of conspiracy to defraud the United States. He pleaded guilty to the charges and, after serving a term of imprisonment, was removed to Pakistan. Iqbal then sued Ashcroft and the other defendants, regarding the conditions of his detention.

The Court explained that the Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." To the contrary, to present a viable claim, the Court held that a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."

The Court's decision in *Iqbal* is a significant victory for employers who are sued in federal court. In the three months since the *Iqbal* decision was issued, federal judges have cited it over 500 times to dismiss complaints that would have been found viable under the more lenient "short and plain statement" standard. Under *Iqbal*, employers stand a much better chance at winning dismissals of factually-unsupported, conclusory and speculative complaints by employees.

RECENT STATE COURT DECISIONS AFFECTING MASSACHUSETTS EMPLOYERS

Employees Must Arbitrate Discrimination Claims If Employment Contract States Clear Intention

In *Warfield v. Beth Israel Deaconess Medical Center, Inc.*, 454 Mass. 390 (2009), the Massachusetts Supreme Judicial Court ("SJC") held that an employment contract purporting to waive or limit an employee's rights under the Massachusetts Fair Employment Practices Act (Mass. Gen. Laws c. 151B) is enforceable only if the intent to do so is stated in "clear and unmistakable terms."

Warfield, a former employee of Beth Israel Deaconess Medical Center, sued the hospital in state court. She alleged gender discrimination and retaliation in violation of Chapter 151B. On the basis of an arbitration provision in *Warfield's* employment contract, the hospital moved to dismiss the action and compel arbitration of *Warfield's* claims. The contract provided: "Any claim, controversy or dispute arising out of or in connection with this Agreement or its negotiations shall be settled by arbitration."

The trial court denied the hospital's motion, finding that the contract provision did not cover her discrimination and retaliation claims "because the agreement did not govern her employment relationship . . . generally, but only the narrow topic of her duties" at the hospital. On appeal, the SJC upheld the trial court. The SJC held that while "parties to an employment contract are free to agree on arbitration of statutory discrimination claims . . . parties seeking to provide for arbitration of statutory discrimination claims must, at a minimum, state clearly and specifically that such claims are covered by the contract's arbitration clause."

Warfield clarifies that unless an individual employment contract clearly articulates that statutory discrimination claims are subject to arbitration, courts will not compel arbitration of those claims. While there are positives and negatives regarding mandatory arbitration clauses in employment agreements, here the SJC has indicated that employers now have the opportunity to channel discrimination claims into an arbitral forum. Employers who currently use mandatory arbitration clauses should consider whether it makes sense to revise the language going forward to ensure that discrimination claims are clearly and unmistakably designated to the arbitral forum. Those employers who do not currently use mandatory arbitration clauses should consider whether the ability to designate discrimination claims for arbitration justifies the incorporation of mandatory arbitration clauses into their employment agreements.

Wage Act Claim Subject To Arbitration

In October, the Massachusetts Appeals Court held that a claim under the Massachusetts Wage Act (Mass. Gen. Laws c. 149, § 148) was subject to a mandatory arbitration provision in the parties' employment agreement. Like Warfield, the Appeals Court's decision in Dixon v. Perry & Slesnick, P.C., 75 Mass.App.Ct. 271 (2009), is consistent with recent jurisprudence finding that statutory claims may be subject to arbitration provided that the parties have agreed to arbitrate such claims.

Dixon, a dentist, entered into an employment contract with a dental practice. The contract included a mandatory arbitration provision. After she resigned, Dixon sued the practice for breach of contract and for violation of the Wage Act. The practice moved to dismiss and compel arbitration pursuant to the contract. While Dixon conceded that her breach of contract claim was subject to arbitration, she argued that her statutory Wage Act claim was not. Relying on Warfield, the Appeals found that Dixon's claim was, in fact, subject to the parties' arbitration agreement because her claim arose directly from her rate of compensation, which was a term directly in her employment agreement.

In holding Dixon's claim subject to mandatory arbitration, two of the Appeals Court's comments are of note. First, the Appeals Court stated that a mandatory arbitration provision would not prevent an aggrieved employee from filing a wage complaint with the Attorney General. The Court did not address, however, what remedial powers the Attorney General would have in such circumstances. Second, the Appeals Court stated that the arbitrator has the authority to award all the remedies available under the Wage Act, including treble damages and attorneys' fees.

Split Developing Among Trial Judges Regarding Retroactive Application of Mandatory Treble Damages For Wage Act Violations

In July 2008, the Massachusetts Legislature amended the Wage Act to make treble damages mandatory for all state wage and hour law violations. See our July 2008 Newsletter at www.rubinrudman.com/Documents/PRACTICEAREAS/39/July2008newsletter.pdf for more information on the Wage Act's damages provisions. Following the amendment, however, judges have disagreed as to whether the amendment should be applied retroactively to mandate treble damages for conduct that occurred before the effective date of the amendment.

In 2008, the Superior Court held in Pantano v. Artificial Life, Inc., No. SUCV2008-04-1879 (Mass. Super. Sept. 23, 2008), that the amendment should not be applied retroactively. In that case, the Superior Court looked to the well-established legal principle that an amendment that substantially changes parties' rights and expectations should only be applied retroactively where the legislation specifically provides for retroactive application, or where the context indicates that the Legislature intended for the amendment to be applied retroactively. In Pantano, the Superior Court found that the amendment to the Wage Act met neither criteria, and therefore should not be applied retroactively.

More recently, in Rosnov v. Malloy, No. ESCV2009-07-0740C (Mass. Super. Apr. 10, 2009), a different Superior Court judge came to the opposite result. In Rosnov, the Superior Court did not consider the two alternate requirements under Massachusetts law consulted in Pantano for applying a statute retroactively. Instead, the Rosnov court relied solely on the (incorrect) assumption that "violators of the Wage Act have always been subject to treble damages" in reaching its decision that the amendment did not "substantially change[] parties [sic] rights and expectations." Treble damages, however, were not added to the Wage Act until 1993.

Until the Massachusetts Appeals Court or SJC addresses the specific issue of the retroactive application of mandatory treble damages, this split in the trial court decisions leaves some uncertainty for employers. For now, employers defending Wage Act claims should be prepared to face the possibility of paying treble damages for conduct that occurred prior to the Wage Act's amendment.

Employers Must Pay Unused Vacation Time To Discharged Employees Under Wage Act

In another Wage Act case, Electronic Data Systems v. Attorney General, 454 Mass. 63 (2009), the SJC held that the failure to pay unused vacation time to involuntarily terminated employees violates the Wage Act, which requires employers to pay all wages that are due to an employee on the day of his or her discharge. The Wage Act further provides that "wages" include "vacation payments due an employee under an oral or written agreement." Employers may not, however, contract around the requirements of the Wage Act by entering into "special contracts" with employees.

A terminated employee filed a complaint against Electronic Data Systems ("EDS") with the Massachusetts Attorney General claiming that EDS failed to make timely payment of wages. EDS, citing its vacation policy, which provided that EDS would not pay any employee leaving the company on a voluntary or involuntary basis for unused vacation time, declined to pay the employee for his unused vacation time. The Attorney General cited EDS for failure to make timely payment of wages, and EDS appealed.

EDS's appeal ultimately reached the SJC, where EDS argued that terms of its written vacation policy should control whether an employee is entitled to a payout of vacation time. Because "vacation payments" under the Wage Act's definition of "wages" are only those due under the terms of an employment agreement, and its policy explicitly provided that employees leaving EDS would not be paid for unused vacation time, EDS maintained that no payment was due the employee "under a written agreement." The Attorney General countered that once the employee had accumulated vacation time under the vacation pay policy, it became due under the definition of "wages," and therefore constituted "wages earned," which the Wage Act required EDS to pay on the day of the employee's discharge. The Attorney General argued that the portion of EDS's vacation policy denying payment for unused vacation time was an unenforceable "special contract."

The Attorney General's argument prevailed. The SJC held that vacation pay was in fact "earned" under the policy, despite the policy's language to the contrary, because employees were eligible for vacation based upon the number of hours they worked per week and their years of service. Additionally, where an employer provides for vacation in an employment agreement or policy, that vacation becomes due to the employee for Wage Act purposes day by day as the employee works. The SJC noted that vacation may be "lost by disuse," but vacation earned pursuant to an employer's policy may not be forfeited at termination.

While Electronic Data Systems makes it clear that employers must pay discharged employees all accrued, unused vacation pay, the decision leaves open pertinent questions regarding the application of the Wage Act to vacation pay policies. For example, the SJC did not address payment of unused vacation upon voluntary termination or the circumstances under which vacation may be forfeited pursuant to a "use-it-or-lose-it" policy.

No "Safe Harbor" For Independent Contractor Misclassification

Much to the consternation of employers, Massachusetts has one of the strictest tests for determining which workers can be genuinely classified as independent contractors. Under the Independent Contractor Law (Mass. Gen. Laws c. 149, § 148B), any worker who performs services in the "usual course" of an employer's business must be classified as an employee and not as an independent contractor. Consequently, employers who use independent contractors are vulnerable to lawsuits challenging the legitimacy of their classification decisions. A recent case, Somers v. Converged Access, Inc., 454 Mass. 582 (2009), demonstrates that the incorrect classification of workers as independent contractors remains a persistent and complex problem.

Somers had unsuccessfully applied for employment twice with Converged Access, Inc. ("CAI"). Subsequently, CAI agreed to take Somers on as an independent contractor. As an independent contractor, Somers received a higher rate of pay than he would have earned as an employee, but CAI did not pay him overtime or provide him with any of the other benefits extended to its employees. CAI ultimately terminated Somers' contract, and did not respond to his third application for employment. Somers then sued CAI, claiming that CAI failed to pay him wages based on his misclassification as an independent contractor.

At the trial court level, CAI argued that even if it had misclassified Somers, he was not harmed by the misclassification because he earned more as an independent contractor than he would have earned as an employee. The trial court agreed with CAI and dismissed the claim.

On appeal, however, the SJC reversed. Finding that Somers had suffered damages in the form of lost overtime, vacation pay, holiday pay and other benefits, the SJC held that an employee misclassified as an independent contractor may sue for nonpayment of wages even if the employee earned more as an inde-

pendent contractor than he or she would have earned as an employee. Further, the SJC held that any such misclassified individual is entitled to overtime and other benefits at the rate he or she was paid as an independent contractor rather than the rate the individual would have been paid as an employee.

Somers teaches that employers cannot defend a nonpayment of wages claim by arguing that a worker earned more as an independent contractor than the worker would have earned as an employee. The bottom line is that there are very few defenses available to employers accused of failing to pay wages. Essentially, the Wage Act imposes strict liability on employers. Somers once again demonstrates the critical importance of proper worker classification.

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