

Looking Back at 2007 and Forward in 2008: Important Developments for Employers

Every year brings many new developments in the dynamic area of employment law, and 2007 certainly had its share. This issue of the *Employment Law Advisor* summarizes important developments over the past twelve months and offers suggestions for employers on how to respond going forward in 2008.

U.S. Department of Labor Addresses the Effect of Partial-Day Salary Deductions on Overtime Exempt Status

On February 8, the U.S. Department of Labor (DOL) issued an opinion letter addressing types of deductions that an employer may take from an exempt employee's salary without affecting that employee's exempt status under the overtime provisions of the Fair Labor Standards Act (FLSA). These deductions include full-day deductions from pay for absences due to personal reasons, other than sickness and disability, and partial or full-day deductions for leave taken under the Family and Medical Leave Act (FMLA).

Significantly, however, in the letter DOL takes the position that an employer destroys the exempt status of an employee under the FLSA if the employer makes a partial-day deduction from that employee's salary for leaves taken pursuant to the Massachusetts Small Necessities Leave Act (SNLA), or any similar state leave act. According to DOL, an employer may take a partial-day deduction from an exempt employee's salary only if the leave would qualify under the FMLA, and the type of leave allowed by the SNLA does not meet this requirement. This DOL opinion letter provides helpful guidance, and serves as a reminder that employers should be very careful when considering making deductions from the pay of exempt salaried employees. The opinion letter is available from DOL at http://www.dol.gov/esa/whd/opinion/FLSA/2007/2007_02_08_06_FLSA.pdf.

MCAD Issues New Pre-Determination Procedures

On February 20, the Massachusetts Commission Against Discrimination (MCAD)

issued a new Standing Order on procedures for cases at the pre-determination stage. Under the MCAD's new Standing Order:

- ✓ The MCAD's Boston and Springfield offices will now be governed by the same pre-determination procedures. The Springfield office's two units, the attorney assisted unit and the *pro se* unit, will no longer exist.
- ✓ Complainants must now serve employers with a copy of their rebuttal to the position statement unless a protective order has been issued for "good cause shown."
- ✓ Investigating Commissioners may now order pre-determination discovery (including interrogatories, document requests and depositions) at their discretion: (i) upon request from the parties; (ii) if recommended by MCAD staff; or (iii) when fairness so requires. Such pre-determination discovery is to be completed within 90 days. The MCAD also may conduct pre-determination discovery in its own name. Parties providing information to the MCAD in response to discovery requests also must provide the same information to the opposing party absent a protective order.
- ✓ Within 30 days of the close of the pre-determination discovery period, the parties may submit memoranda of fact and law.

The new Standing Order signals the MCAD's intent to take a more customized or case-tailored approach to handling complaints of discrimination, including involving MCAD attorneys in every case at inception whenever possible. This means that employers and their counsel should consider being more proactive with the MCAD to influence the direction and scope of the investigation. The Standing Order is available from the MCAD at <http://www.mass.gov/mcad/documents/stanord022007.pdf>.

EEOC Issues Enforcement Guidance on Discrimination Against Workers with Caregiving Responsibilities

On May 23, the EEOC issued a new Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities. According to the EEOC, changing workplace demographics, includ-

ing women's increased participation in the labor force, and increased responsibilities of males for caregiving, have created the potential for greater discrimination against working parents and others with caregiving responsibilities. Although federal discrimination laws do not prohibit discrimination against caregivers *per se*, there are circumstances in which discrimination against caregivers might constitute unlawful disparate treatment.

The new Enforcement Guidance is not intended to create a new protected category but rather to illustrate circumstances in which stereotyping or other forms of disparate treatment may violate Title VII or the prohibition under the Americans with Disabilities Act against discrimination based on a worker's association with an individual with a disability. Undoubtedly, some employees and their counsel will use the Enforcement Guidance to support claims of unlawful discrimination. Employers will need to be increasingly careful in their treatment of employees who have family responsibilities affecting their attendance or job performance. The Enforcement Guidance is available from the EEOC at <http://www.eeoc.gov/policy/docs/caregiving.html>.

U.S. Court of Appeals Holds "Unsupervised" FMLA Waiver Invalid

On July 3, 2007, the United States Court of Appeals for the Fourth Circuit held that an employer cannot obtain a valid release of FMLA rights from an employee without prior DOL or court supervision. The Appeals Court refused to enforce the employee's release of FMLA rights contained in a separation agreement under which the employer paid the former employee \$12,000 in separation pay.

Although it is controlling only in states within the Fourth Circuit (Maryland,

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Virginia, West Virginia, North Carolina and South Carolina), the decision makes questionable on a national scale the enforceability of private separation or settlement agreements that waive FMLA rights. In response to this development, we suggest that employers consider contacting DOL and seeking approval of a proposed separation agreement and release (with the assistance of counsel) when the separation involves a possible FMLA claim. Second, the employer can include in the separation agreement an admission by the employee to the effect that his or her FMLA rights were not violated. Third, the employer can include a covenant not to sue on claims covered by the release.

No-Match Letter Developments

In our September ELA we addressed the Department of Homeland Security's (DHS's) new rule establishing "safe-harbor" procedures for employees to follow to avoid liability that otherwise could arise from the employer's "constructive knowledge" that an employee was not authorized to work in the United States. On October 10, a federal court in California issued a preliminary injunction preventing DHS and the Social Security Administration (SSA) from implementing the rule. The court enjoined SSA from sending out the no-match letters because the letters were to include DHS language threatening possible criminal and civil liability for employers that failed to respond to the letters.

On December 5, DHS announced that it filed an appeal requesting that the Ninth Circuit Court of Appeals lift the injunction against implementing the DHS no-match rule and stated that it would issue a supplement to the rule to address the court's concerns over its implementation. We will continue to follow these developments and to keep our clients apprised.

USCIS Releases New Form I-9

On November 7, the U.S. Citizenship and Immigration Services ("USCIS") released a revised Employment Eligibility Verification Form, commonly called an "I-9." The new Form I-9 more prominently displays a nondiscrimination statement and

changes the types of documents a new employee must provide to prove identity and employment eligibility.

The new Form I-9's revised List A of Acceptable Documents no longer includes the Certificate of U.S. Citizenship, Certificate of Naturalization, Alien Registration Receipt Card, Unexpired Reentry Permit, and Unexpired Refugee Travel Document. According to the USCIS, the five documents were removed from the verification list "because they lack sufficient features to help deter counterfeiting, tampering, and fraud." The most recent version of Form I-766 (Employment Authorization Document) was added to the list of acceptable items under List A.

The new Form I-9 became effective on December 26, 2007. Employers do not need to complete new forms for existing employees, except when employees require re-verification. The new form is available from USCIS at <http://www.uscis.gov/files/form/I-9.pdf>. A USCIS fact sheet on the new form is available at <http://www.uscis.gov/files/pressrelease/FormI9FS110707.pdf>. The revised handbook is available from USCIS at <http://www.uscis.gov/files/nativedocuments/m-274.pdf>.

The IRS Extends §409A Compliance Deadline to December 31, 2008

On November 13, the IRS issued Notice 2007-86, granting a one-year extension of the §409A compliance deadline. Internal Revenue Code §409A was enacted in 2004 to provide comprehensive rules for the taxation of deferred compensation plan, including certain severance and equity compensation arrangements. The IRS issued final regulations implementing §409A on April 10, 2007, with an effective date of January 1, 2008. The one year extension is in response to concerns that employers have not been provided with enough time to digest and implement the final regulations. Notice 2007-86 is available from the IRS at http://www.irs.gov/irb/2007-46_IRB/ar11.html.

MA Attorney General Seeks Comments on Proposed Advisory on the MA Independent Contractor Law

On December 11, the Massachusetts Attorney General announced that she is seeking written comments from any interested parties on a proposed new Advisory on the Massachusetts Independent Contractor

Law, M.G.L. c. 149, §148B (MICL). If implemented, the Advisory will provide new guidance concerning the Attorney General's understanding and enforcement of the law and will supersede the Attorney General's 2004 Advisory. We addressed MICL and the 2004 Advisory in an article available at http://www.mbbp.com/resources/employment/independent_contractor.html.

The proposed Advisory includes some significant new statements. For example, it states that the Attorney General will enforce MICL against businesses "which allow, request or contract with corporate entities such as LLCs or S corporations that have been created in an attempt to avoid the Law." The proposed Advisory also lists factors considered to be "strong indications of misclassification," including independent contractors performing services similar to those performed by employees. The proposed Advisory and the 2004 Advisory are available from the Attorney General's office at <http://www.mass.gov/?pageID=cagosubtopic&L=3&L0=Home&L1=Workplace+Rights&L2=Independent+Contractor++Proposed+New+Advisory&sid=Cago>.

Written comments to the proposed Advisory will be accepted until January 25, 2008. The MBBP Employment Law Group expects to provide comments to the Attorney General and, of course, we welcome your input. Regardless of its final form, we expect the issuance of the new Advisory to spark renewed attention concerning independent contractor relationships in Massachusetts. We recommend that clients utilizing independent contractors review their compliance with MICL and the other applicable laws.

The Morse, Barnes-Brown & Pendleton, PC, [Employment & Immigration Practice Group](#) provides sophisticated legal services and practical advice to employers of all sizes, ranging from technology start-ups to Fortune 1000 companies.

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