



MetroWest HRMA

2010 Annual Employment Law Update for HR Professionals

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Morning Agenda

- 1. Legislative and Regulatory Update
- 2. What's in the Legislative pipeline?
- 3. Other timely issues
- 4. Case Law Update



LEGISLATIVE AND REGULATORY UPDATE



American Recovery and Reinvestment Act (P.L. 111-5)

- COBRA subsidy expired May 31, 2010
 - Employees involuntarily terminated after this time are not eligible for the subsidy
 - Extended multiple times – with minor modifications each time.
- President Obama signed the Continuing Extension Act on April 16, 2010.
 - Expanded COBRA health continuation coverage for those employees who involuntarily lost their jobs
 - Gave prior rejections right to change their mind
- Retroactive extension of program not out of the question



Hiring Incentives to Restore Employment (HIRE) Act

- President Obama signed into law on March 18, 2010
 - exempts employers from paying the 6.2% Social Security portion of the Federal Insurance Contribution Act (“FICA”) taxes on qualified new hires through the end of this year
- Payroll tax forgiveness
 - Employer must hire an unemployed worker between February 3, 2010 and January 1, 2011
 - New hire must certify by affidavit not employed for more than 40 hours during the 60-day period ending on the date they started employment



Hiring Incentives to Restore Employment Act (cont.)

- Payroll tax forgiveness
 - Can claim COBRA premium assistance credit on same tax return, but not Work Opportunity Tax Credit
 - Max value of exemption is \$6,621.60



Hiring Incentives to Restore Employment Act (cont.)

- Retention Credit
 - Each employee that qualifies for payroll tax credit and is employed for 52 consecutive weeks
 - During last 26 weeks, must pay employee at least 80% of what employee was paid in first 26 weeks
 - Credit equal to lesser of \$1,000 or 6.2% of retained worker's wages during 52 consecutive week period



Patient Protection and Affordable Care Act (H.R. 3590)

- Section 4207 - Amendment to Fair Labor Standards Act
 - Effective March 23, 2010
 - employers must provide a “reasonable break time” to express milk
 - employers must provide location where employee can express milk



Patient Protection and Affordable Care Act (H.R. 3590)(cont.)

- Section 4207 - Amendment to Fair Labor Standards Act
 - Employers with fewer than 50 employees are exempt if “undue hardship”
 - Does not preempt state laws



EEOC Guidance on Severance Agreements

- Issued July 15, 2009
 - http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html
- Agreements cannot prohibit employees from engaging in protected activity
- Restates statutory requirements for individual and group waivers under ADEA and OWBPA



EEOC Guidance on Severance Agreements (cont.)

- Additional requirements for group layoffs
 - Written notice
 - 45 days to consider offer
 - Need to provide information and data relating to layoff decisions
- Curing defective release
- Guidance only



DOL Guidance on Internships and FLSA

- help employers determine whether interns must be paid the minimum wage and overtime under the FLSA
- DOL fact sheet lists 6 criteria to determine whether intern or not
- If all 6 met, then an employment relationship does not exist under the FLSA and the law's minimum wage and overtime provisions do not apply to the intern



WHAT'S IN THE LEGISLATIVE PIPELINE?



EEOC Regulations - Americans with Disabilities Act Amendments Act

- President Bush signed into law on September 25, 2008
- EEOC public comment period closed November 23, 2009, but no final regulations yet



EEOC Regulations - Americans with Disabilities Act Amendments Act (cont.)

- Effective January 1, 2009
 - Broadens ADA definition of “disability”
 - Directs EEOC to revise that portion of its regulations defining the term “substantially limits”
 - Expands the definition of “major life activities” by including two non-exhaustive lists



EEOC Regulations - Americans with Disabilities Act Amendments Act (cont.)

- Changes definition of “regarded as”
- Regulations discuss duration of disability
- Changes to definition of “mitigating measures”



Mass Noncompete Bill

- Compromise bill is gathering steam
- Came out of HR-related committee in fall
- 5/24 → referred to judiciary committee
- Other states are considering increasing regulation of noncompetes.



Healthy Families Act

- Potential paid sick leave
- Would provide employees who work 30 or more hours with 56 hours of paid sick leave per year.
- Likely to be debated in House and Senate Labor Comms.



FMLA Amendment?

- Several moves afoot to further modify FMLA
 - Potential paid leave tapping UI funds
 - Expansion of coverage protections
 - Increase duration of leave
- Economic climate likely to forestall these measures



Federal Job Creation Measures

- HIRE act recently signed
- More measures expected leading into 11/10 elections



Paycheck Fairness Act

- Women still earn 78% of what men are paid
- Legislation would require employers to base employee pay differentials only on seniority, merit and production
- Shifts BOP to employer
- Already passed the House
- Languishing in Senate



Employment Non-discrimination Act (ENDA)

- would prohibit workplace bias based on sexual orientation and gender identity
 - DC and 21 states already prohibit
 - Many employers adopt policies anyway
- The House Committee on Education and Labor is likely to consider ENDA in 2010



Mass Transgender Rights Bill

- Bill pending – would protect against employment and housing discrimination
- As of 5/17, delayed in Judiciary Comm.
- Widely supported in House/Senate
- Bill could face steeper odds after 11/10



OTHER TIMELY ISSUES



Employer Provided Educational Assistance

- IRC Sec. 127
- Can exclude from income up to \$5,250 per year for education costs
- Sunset provision – expires at end of 2010



What's Up with EFCA?

- Passed House in 07-08
- Filibustered in Senate
- Senate may take up bill in this Congress
 - Many have concerns
 - May seek to pass a watered down version
- Don't lose sleep over it



Moves to modify credit report checking by employers

- HR 3149 – pending bill would ban employers from using credit reports for employment purposes
- Other states have pending or adopted similar measures
 - Maryland
 - Hawaii
 - Washington
 - Oregon



CASE LAW UPDATE



TRUE OR FALSE

- A company receives notice from a competitor that one of its new employees is allegedly misusing confidential information. The employee vehemently denies it. That employer can be liable for multiple damages for violating unfair competition law.



TRUE

- *People's Choice Mortgage, Inc. v. Premium Capital Funding, LLC*
- New employer failed to conduct reasonable investigation into alleged misuse of confidential info
- Violated 93A and interference with business relations
- Multiple damages plus liable for former employer's attorneys' fees
 - Damages = 2x lost profits of stolen deals



TRUE OR FALSE

- An employee only needs to show that age was a “motivating factor” in the employer’s decision to demote him under the Age Discrimination in Employment Act (“ADEA”).



FALSE

- Gross v. FBL, 526 U.S. 356 (2009)
 - A plaintiff in an ADEA disparate treatment claim must prove by a preponderance of the evidence that age was the “but for” cause of the challenged adverse employment action.



TRUE OR FALSE

- When evaluating an employee's age discrimination claim, courts may consider the employer's nondiscriminatory reason.



FALSE

- Velez v. Thermo King de Puerto Rico Inc., 585 F.3d 441 (1st Cir. 2009)
 - Court may not consider employer's legitimate nondiscriminatory reason when evaluating employee's *prima facie* case
 - To show pretext, not enough for employee to simply attack the truthfulness of employer's nondiscriminatory reason



TAKE AWAY

- Offer a consistent reason for the termination
- Avoid vague terms – be certain of terms when enforcing company policy
- Consistent enforcement of policy



TRUE OR FALSE

- A male employee's complaint that women were being afforded the benefit of lax enforcement of a company break policy is a complaint of gender discrimination.



FALSE

- *Morales-Vallellanes v. USPS*
- Selective enforcement of a break policy not discrimination
- Must have a material effect on P's employment
- Clamp down on entire staff after complaint was not "retaliation"



TRUE OR FALSE

- An indefinite leave of absence is a reasonable accommodation.



FALSE

- Fiumara v. President and Fellows of Harvard College, No. 08-1129, 2009 WL 1163851 (1st Cir. May 1, 2009)
 - Under the Americans with Disabilities Act, employers are not required to grant an employee an indefinite leave of absence as an accommodation



TRUE OR FALSE

- A town that refused a women's request to sign up for an all male golf tournament engaged in unlawful discrimination.



TRUE

- *Joyce v. Town of Dennis*
- G.L.c. 272, §92A
- prohibits any distinction, discrimination or restriction on account of sex in a place of public accommodation



TRUE OR FALSE

- Bipolar disorder is not a “disability” under the ADA.



FALSE

- *Anderson v. United Parcel Service*
 - MCAD hearing officer Betty E. Waxman determined that the employee's bipolar and anxiety disorders were qualified "disabilities" under the Americans with Disabilities Act ("ADA") and Chapter 151B
 - Almost \$1 million in damages



TAKE AWAY

- Mental health disorders may qualify as disabilities under the ADA and c. 151B
- Employers must remain diligent during the "interactive process"
- Perceived rigidity may have led to large damage award



TRUE OR FALSE

- Firing an employee for being “too sexy” gives rise to a discrimination claim.



Probably

- *Lorenzana v. Citibank* (NY)
- EE terminated for job performance
- Filed suit, claiming that he was actually fired for being too attractive
- Male bosses dictated clothes she could not wear





MBJ

TRUE OR FALSE

- Disclaimers in employer handbooks will protect employers from liability in lawsuits brought based on the terms of these handbooks.

MBJ

FALSE

- *Buttrick v. Intercity Alarms, LLC*, No. 08-ADMS-40004, Massachusetts District Court, Appellate Division (June 17, 2009)
 - Despite the existence of disclaimers in the employee handbook, the court upheld a jury verdict finding the employer liable for a breach of contract action



TAKE AWAY

- Only include policies you are prepared to follow
- Review handbooks regularly and closely
- Take affirmative steps to ensure policies are consistently enforced



TRUE OR FALSE

- It is perfectly lawful for a current employee to prepare to form a competing company while still employed.



TRUE

- *Augat v. Aegis*
- Provided – no noncompete
- Prepares in off hours
- Doesn't usurp company opportunities
- Leaves all property, info and data behind
- Does not rely on proprietary info



TRUE OR FALSE

- An employer's alcohol prohibition policy does not impose liability on the employer for the negligent actions of its employees.



TRUE – for now

- *Lev v. Beverly Enterprises-Massachusetts, Inc.*, 74 Mass. App. Ct. 413 (2009), *review granted*, 455 Mass. 1103 (2009).
 - Employer's alcohol prohibition policy did not impose a duty of care on the employer so as to hold it liable for the negligent acts of its employees
 - Liability turned on who *controlled the alcohol* consumed by employees



TAKE AWAY

- Employer's policy may create liability
 - Off company premises language
 - Potential liability when employees consume alcoholic beverages in business-related social settings



TRUE OR FALSE

- Speaking of alcohol use policies ...
- Workers recently went out on strike because their employer decided to limit the time they could drink alcohol on the job to lunchtime only.



TRUE

- Carlsberg Brewery in Denmark (4/10)
- Right to drink at work more than 100 years old
- Right to drink curtailed to lunch hour only, and no more than 3 cups
- Drivers can drink up to 3 beers per day
 - Delivery trucks equipped with Alcolocks



TRUE OR FALSE

- An employer who inserts a clause into a contract with an out-of-state employee that requires application of Mass law can expect a court to uphold that choice of law clause.



TRUE (generally)

- *Inner-Tite Corp. v. Brozowski*
- Noncompete enforced against GA resident
- Applied Mass law – substantially reformed the contract
- Important to think ahead about these clauses



TRUE OR FALSE

- An employer must pay earned, unused vacation time to an employee who is involuntarily terminated.



TRUE

- *Electronic Data Systems Corp. v. Attorney General*, 454 Mass. 63 (2009)
 - SJC ruled that an employer's failure to pay earned, unused vacation time to an employee who was involuntarily terminated violated the Massachusetts Wage Act (M.G.L. c. 149, s. 148)
 - Requirement to pay unused, earned vacation at the time of discharge applies regardless of vacation policy terms



TAKE AWAY

- Review vacation policy for compliance
- Consider “use it or lose it” policy
- Unclear if ruling applies when employee voluntarily leaves job



TRUE OR FALSE

- A senior executive calls Mass employees from VA and secretly records the conversations for use in lawsuit
- VA law requires 1 party consent; Mass requires all party consent
- The VA executive cannot be liable under Mass law because he called from VA.



FALSE

- *Heffernan, et al. v. Hashampour, et al.*
- Court held that privacy violation occurred in Mass, so Mass law applied to out of state initiated calls
- Rejected previous federal court precedent that held otherwise



TRUE OR FALSE

- An employee has a right to privacy in her personal text messages she sent using a device provided by her employer.



Stay Tuned

- [City of Ontario v. Quon](#)
- Supreme Court just heard oral arguments (end of April 2010)
- Case involved govt employee, but decision could have wide ranging implications.

