Human Resources Update

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Family Responsibilities Discrimination

Joseph Beachboard, a shareholder with Ogletree Deakins, noted at the SHRM Annual Conference and Exposition held recently in Las Vegas, that family discrimination is not a new protected category. Furthermore, the family responsibilities discrimination concept does not prohibit an employer from treating parents/caregivers the same as childless workers.

Nevertheless, the EEOC does recognize employment discrimination based on stereotypes. The EEOC sees this new form of discrimination as an amalgamation of Title VII, FMLA, and ADA. EEOC's new family focus has been influenced by the fact that there are more women in the workforce, more families with two parents working, and the acceptance of family responsibilities discrimination by the courts and legislatures.

Essentially, says Beachboard, the EEOC is looking for a few high profile cases and it "strongly encourages" employers to adopt best practices to make it easier for all workers, whether male or female, to balance work and personal responsibilities.

The key factor, says Beachboard, is when a personnel action is taken because of a stereotype based on an employee's status as a caregiver. The stereotype essentially says that an employee cannot be both a good caregiver and a good employee; that is, it assumes that "caring for another" must interfere with the employee's ability to perform their job.

Some comments from FRD-related lawsuits:

- Warning a male employee not to take time off to take care of his ill father: he would be "cutting his own throat" if he took the leave.
- To woman who asked why she wasn't promoted: "Because you have kids."
- To a woman turned down for a job: "a woman who stayed home to raise her daughter over the past years was worthless to the department."

Beachboard recommends that employers:

- Review policies, practices and hiring/assessment criteria
- Consider adopting policies that are family-friendly and that prohibit all forms of association discrimination or retaliation
- Educate and train all managers and employees about this issue
- Train your interviewers that bad questions can lead to bad consequences
- Make employment related decisions based on facts, not stereotypes

The IRS changed the mileage reimbursement rate to $0.555 per mile, effective July 1st for the remainder of 2011.

Arizona + Colorado + California = Money

In June the California Supreme Court in *Sullivan v. Oracle* held that California overtime laws apply to Arizona and Colorado employees who enter California to do some work, if done for a California employer.

The three plaintiffs worked for Oracle as trainers on Oracle's software products and lived and worked in either Colorado or Arizona. Occasionally, they traveled to California to work (between 20 and 110 days per year during the years in question). Oracle applied the overtime laws of the employees' respective state of residence to all hours worked, regardless of which state the work occurred.

The California Supreme Court's decision is limited to the application of California overtime laws to Colorado and Arizona employees who perform work within California for California-based employers, but every business owner out there knows that plaintiffs' attorneys will argue that the opinion has broader implications.

Employee Free Choice Act - Again

Recent actions by the NLRB, including a June 22 proposal that would speed up the union election process, have some private-sector employers bracing themselves for a renewed organizing push. While union membership has been steadily declining since its peak in the 1950s, recent battles over collective bargaining rights in Wisconsin and other states and a more labor-friendly Obama administration appear to have re-energized labor activists.

"Over the next several months you're going to see a renewed emphasis on organizing," says Mike Asensio, with a partner in law firm Baker & Hostetler in Columbus, Ohio. "This will put a big burden on employers to get involved in labor relations issues on a day-to-day basis rather than waiting until there is a threat."

Asensio says that the recent NLRB proposal, which would shorten the time between filing a petition to take a vote on joining a union and the actual election, will "deprive employees of an opportunity to hear an opposing or contrarian view and that will be extremely detrimental to employees." An organizing campaign lasts about 40 days, but the new proposal could compress it into as few as 10.

The proposed rule is "a very modest change to a seriously broken labor law," Josh Goldstein, a spokesman for the AFL-CIO, says. "I think the effect on organizing is yet to be seen. I don't think anyone expects this to have the same effect of EFCA. It's a very small tweak in removing a barrier to a process that doesn't work for employees or management."

In addition to the NLRB proposal to accelerate elections, the Labor Department issued a June 22 proposal to clarify when employers must publicly disclose agreements made with labor relations consultants advising them during an organizing campaign. The move to regulate what the Labor Department calls "persuader activities" is widely viewed as another boon for unions.

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