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Giving Nursing Moms a Break: Mandatory "Reasonable Break Times" Under Federal Law

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Quietly included in last year's healthcare law was a change to the Fair Labor Standards Act (FLSA) that required employers of non-exempt hourly employees to provide "reasonable break time" for nursing mothers. Under the new law, employers must allow nursing moms breaks to express breast milk for up to one year after her child's birth. Employers are also required to provide a private place, other than a bathroom, for the nursing moms' use. This new requirement became effective on March 23, 2010.

In December 2010, the Department of Labor (DOL) issued preliminary interpretations of the new law and requested public input from employers, employees and other stakeholders on issues raised by the new law, including the following:

- **Who Must Comply?**
  Basically, all employers. According to the DOL, employers with 50 or more employees must comply with the law without exception (and without regard to how many employees are at a specific worksite or within a geographic area). Employers with fewer than 50 employees are also expected to comply with the law unless they can show that compliance with the law would be an "undue hardship" or would result in "significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business."

- **Is Compensation for the Break Time Required?**
  Generally, no. Employers are not required to compensate nursing moms for this break time. However, if the employer already provides compensated breaks, a nursing mom who uses the allotted break time to express milk must be compensated the same as other employees taking the break for any other reason.

- **How Long is a "Reasonable" Break Time?**
  The law requires employers to provide a reasonable break time as frequently as the nursing mom needs to express milk. According to the DOL, nursing moms typically need two to three breaks during an eight hour shift, of 15 to 20 minutes per break. In determining whether the overall break time needed is "reasonable," employers must consider factors including the time needed to walk to and from the lactation space, whether a sink and running water is nearby, and the time needed for the employee to store her milk in a refrigerator or personal cooler.

- **Is a Private Room Required?**
  Yes. However, there may be circumstances in which it is not practicable to provide a private room. In those instances, employers can meet the requirement by creating a space with partitions or curtains and covered windows to ensure that the space is "shielded from view." A bathroom does not meet the requirements of the new law; however, an anteroom or lounge area connected to the bathroom may be sufficient so long as the space allows for privacy and is free from

intrusion from coworkers and the public. Locker rooms that function as changing rooms may also be adequate, but because of their proximity to bathrooms, may not be appropriate based on health and sanitation concerns. At a minimum, the space must have a place for the nursing mom to sit and a flat surface (other than the floor) on which to place the pump.

- **Do Moms Need to Provide Notice?**
  To facilitate an employer's ability to provide an appropriate space, the DOL encourages nursing moms to provide employers advance notice of their intent to take breaks. While the DOL believes that a simple conversation between the employee and a supervisor or human resources representative would facilitate an employer's ability to make arrangements, it sought comment on this issue. The DOL also noted that an employer may ask an expectant mother if she intends to take breaks to express milk at work, reasoning that doing so would inform the employee of her rights under the law.

- **Is there a Penalty for Non-Compliance?**
  Where violations are found, the DOL may recommend changes in practices to bring an employer into compliance. While the FLSA does not specify any penalty if an employer is found to have violated the break time law, if an employer refuses to comply with the law, the DOL may seek injunctive relief in federal district court, and may obtain reinstatement and lost wages for the employee. Also, if an employer treats nursing employees who take breaks to express milk differently than employees who take breaks for other personal reasons, the nursing employee may have a claim for discrimination under Title VII.

By the end of February 2011, and in response to the preliminary interpretations above, the DOL received almost 2,000 comments. Many of these comments came from women who detailed their difficulties finding sufficient time and space to express milk at work. For example, one commenter stressed that milk demands vary by child and that a nursing mom could need "up to two hours a day to pump." Lactation consultants commented on the importance of a private and clean space and one calculated that a population of 1,000 employees would require six lactation spaces. Several employers commented that they should have a right to contact a doctor or request medical certification if nursing moms request extended breaks beyond 30 minutes. And the Society for Human Resources Management (SHRM) commented that employers should not have to ask an expectant mother if she intends to take these breaks (as this can be seen as an invasion of privacy), and suggested that employees be required to give employers a minimum 10 days notice of their desire to take such breaks.

The public comment period has concluded, and the DOL is now developing final rules. Until that time, the preliminary interpretations above provide useful information for establishing policies for break time for nursing moms. If you have questions or concerns about the new law, the preliminary interpretations or your company's compliance obligations, please contact Troutman Sanders LLP's Labor & Employment Practice Group.

FAQs About FMLA Certification: You Ask, We Answer

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Employers face many challenges when dealing with claims under the Family and Medical Leave Act (FMLA), including the initial determination of whether the leave is covered by the FMLA. Many illnesses and injuries qualify as a "serious health condition," thus entitling an employee to covered leave. However, many injuries and illnesses do not. The first step in making this determination is to request a certification.

Below are ten of the most common questions and answers with respect to FMLA certifications:

1. When Should You Request a Medical Certification?

If you are unsure whether an alleged medical condition is covered by the FMLA, you may request a medical certification from your employees. However, any requests for a certification should be made when you first learn of an employee's need for leave or within five business days thereafter. If the leave is unforeseen (i.e., the employee is involved in an accident), you should request a certification within five business days after the leave commences.

2. Do You Have to Use the Certification Forms Provided by the Department of Labor (DOL)?

No, but you cannot request more information than what is already set forth in the DOL's forms. To ensure that you are in compliance with the FMLA, use the certification forms provided by the DOL, available here. Remember to use form WH-380-E for certification of an employee's own serious health condition and form WH-380-F for certification of a family member's serious health condition.

3. How Long Does An Employee Have to Provide the Certification?

Employees must be allowed at least fifteen (15) calendar days from the date of the initial request to provide a medical certification, unless the circumstances require additional time. The DOL has advised employers to "be mindful that employees must rely on the cooperation of their health care providers and other third parties in submitting the certification and that employees should not be penalized for delays over which they have no control."

4. What Can You Do If an Employee Returns a Certification That Is Incomplete or Non-Responsive?

A certification is "incomplete" if an entry on the certification form is left blank. A certification is "insufficient" if the information provided is vague, ambiguous, or non-responsive. You should notify employees in writing as soon as possible after receiving a certification that you believe is incomplete or insufficient. Employees must be given seven (7) calendar days (unless the circumstances require additional time) to cure deficiencies if their certification is incomplete or insufficient. You must advise the employee of the consequences of failing to provide adequate certification, including the denial of FMLA leave until the required certification is provided.

5. When Can You Request Additional Information from an Employee's Health Care Provider?

If you receive a certification that is incomplete or insufficient, you cannot contact an employee's health care provider. Instead, you must give the employee the opportunity to cure the deficiencies, as discussed in Number 4 above. Once you have received a complete and sufficient certification from an employee, you may request additional information from an employee's health care provider, but only under two circumstances:

1. Authentication. You may ask a health care provider to "authenticate" the certification by requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document.

2. Clarification. If you can't read the handwriting on a certification or you don't understand the meaning of a response, you may request a "clarification" from the health care provider. However, you cannot request information beyond that required by the certification form.

6. Who Can Contact the Employee's Health Care Provider?

Be careful with this one! Contacting an employee's health care provider can be a hazardous venture (even when done properly) because of the risk that information beyond what is required by the certification form may be disclosed. Also, the employee's supervisor cannot be the one to make the call. The only individuals who may contact an employee's health care provider are (1) a health care provider hired by the employer; (2) a human resources professional; (3) a leave administrator; or (4) a management official (other than the supervisor). If possible, try to use an individual that will not be involved in the decision-making process and remember to keep the conversation limited to the information that was previously contained in the certification form.

7. What Can You Do If an Employee Fails to Provide a Certification?

You may deny the employee's request for leave. A certification that is not returned to the employer is not considered incomplete or insufficient, but constitutes a failure to provide certification. An employee who fails to return a certification has no right to cure. In addition, you are not required to provide the employee with notice when a certification is not received. This doesn't mean that you should deny an employee's request for FMLA leave as soon as the fifteen-day period for providing the certification expires. If you have reason to believe that the employee is acting diligently and in good faith to obtain the certification, but it is simply taking longer than expected, be flexible on the timing requirement before deciding to deny leave.

8. Can You Obtain a Second Opinion?

Yes. If you have reason to doubt the validity of a certification, you may require the employee to obtain a second opinion at your expense. You may choose the health care provider, but it cannot be one that is regularly used by your company. If the second opinion does not establish the employee's entitlement to FMLA leave, the leave should not be designated as FMLA leave and may be treated as paid or unpaid leave under your established leave policies. Also, if the employee fails to cooperate with the request for a second opinion (i.e., if the employee fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition), leave may be denied. If necessary, you may obtain a third opinion, however, the regulations provide that this opinion shall be "final and binding."

9. Can You Request a Recertification to Determine if Leave is Still Necessary?

Yes. As a general rule, you may request recertification no more than once every thirty days. If a certification indicates that the minimum duration of the condition will last more than thirty days, however, you must wait until that minimum duration expires before requesting a recertification. For instance, if you learn that an employee will need sixty days to recover from knee replacement surgery, you cannot request a recertification after only thirty days. You should wait the full sixty days.

There are some circumstances in which you may request recertification in less than thirty days. For example, if you receive information that casts doubt upon the employee's reason for the absence, or the continuing validity of his or her absence, you may request a recertification at any time.

10. Can You Require a Certification for Non-Medical Leave?

Yes. Remember that the FMLA now allows certain military personnel to take leave for "any qualifying exigency," which could be entirely unrelated to an employee's medical condition. You may require an employee to provide a copy of his or her active duty orders or other documentation issued by the military.

U.S. Supreme Court Expands the Scope of Employment Claims

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Three recent Supreme Court cases, *Thompson v. North American Stainless, Staub v. Proctor Hospital, and Kasten v. Saint-Gobain Performance Plastics Corp.*, have expanded the scope of employment claims in significant ways. This article briefly summarizes these cases and provides practical guidance for employers in light of these decisions.

Title VII Protects "Third Parties" from Retaliation

Can an employee who has never complained of harassment or discrimination under Title VII sue his or her employer for retaliatory termination based on a complaint made by a fiancée or family member? In January, in *Thompson v. North American Stainless*, the Supreme Court answered this question, "yes." The Court reasoned that "a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired." Accordingly, the Court held that the employee, who never personally engaged in any protected conduct, was entitled to bring a retaliation claim under Title VII based on the theory that he was terminated because of his fiancée's protected conduct.

The Court's decision in *Thompson* leaves open some important questions. Does the Court's decision mean that an employer is at risk for a retaliation claim whenever it fires an employee who has some connection with another employee that has engaged in protected conduct? What about firing an employee's girlfriend, close friend, or trusted co-worker? The Court acknowledged these open questions, but did not provide a categorical or bright-line rule to answer them. Rather, the Court held that an individual's right to bring a Title VII retaliation claim based on a co-worker's protected conduct must be decided on a case-by-case basis. However, the Court did provide some parameters for this case-by-case analysis by noting that a retaliatory firing of "a close family member will almost always" be impermissible, but that a "milder reprisal on a mere acquaintance" might not. Within these general parameters, lower courts are left to determine the circumstances under which other potential relationships may entitle an employee to rely on another's protected conduct as the basis for the employee's retaliation claim.

Independent Investigations Do Not Automatically Protect Employers from Liability

Under what circumstances may an employer be liable for the discriminatory bias of supervisors who caused or influenced, but did not make, the ultimate employment decision? In a case decided this past March, *Staub v. Proctor Hospital*, the Court addressed that question in the context of a discrimination claim brought under the Uniformed Services Employment and Reemployment Rights Act of 1984 (USERRA). The Court held that an employer can be liable for the discriminatory acts of a supervisor, even if the supervisor did not actually make the final employment decision, if (1) the supervisor performs an act (e.g., a recommendation for a termination) with discriminatory bias, (2) the supervisor intends this act to cause an adverse employment action, and (3) the act is a proximate cause of the adverse employment action. While the Court applied this standard specifically to a claim under USERRA, the Court suggested that this standard would also apply to claims brought under many other federal discrimination laws, such as Title VII, because such laws contain similar language prohibiting discrimination.

In formulating this theory of liability, the Court also expressly rejected a bright-line rule that would shield an employer from liability for a supervisor's acts when an employer conducts an independent investigation before making an employment decision. Instead, the Court held that if the employer's investigation takes the supervisor's discriminatory actions into account in any way when making its employment decision, then the supervisor's discriminatory actions could be considered a proximate cause of the employment action and, therefore, the employer could still be liable. But, the Court also held that, if the investigation does not take the supervisor's biased actions into account and the investigation results in an adverse action for reasons entirely unrelated to the supervisor's actions, then the employer will not be liable.

Oral Complaints Are Protected by the FLSA

Oral complaints under Title VII have long been considered protected conduct. In a case decided this past March, *Kasten v. Saint-Gobain Performance Plastics Corp.*, the Court held that oral complaints are also protected conduct under the Fair Labor Standards Act (FLSA). Accordingly, the FLSA's anti-retaliation provision protects employees who "file any complaint" regarding purported wage and hour violations, whether that complaint is written or oral.

Practical Guidance: What Should Employers Do?

In light of these recent decisions, employers should take the following steps to minimize the risk of a discrimination or retaliation claim:

1. If An Employee or An Employee's Closely Associated Co-worker Has Engaged In Protected Activity, Exercise Caution Before Taking An Adverse Action.
In light of the *Thompson* decision, if an employer knows that an employee or an employee's closely associated co-worker, such as a family member or fiancé, has engaged in protected conduct, the

employer should ensure that it has a clear, legitimate reason for any adverse actions it plans to take against either employee. In such situations, employers should also exercise caution and document their decisions carefully and thoroughly. The *Thompson* decision also underscores the importance of keeping personal information about various employees, such as their relationship to other co-workers in their company, confidential and not sharing information between supervisors in different departments unless absolutely necessary.

2. When An Employee Complains, Conduct a Thorough and Independent Investigation.
The *Staub* decision provides at least two important reminders for employers. First, when an employee complains about discriminatory treatment by supervisors, such complaints should be thoroughly and independently investigated before the employer takes any employment action against the employee. Second, the company's investigators should look for signs that a supervisor is taking or recommending an adverse action because of some sort of discriminatory or retaliatory animus. If any sign of such a bias is found, the employment decision should be based entirely on information obtained (or at least corroborated) independent of the employee's supervisor and not on information the supervisor provided.

3. Develop and Maintain Clear Policies to Handle Employees' Written or Oral Complaints.
In light of the *Kasten* decision, it is critical that employers ensure that their policies address the process for handling employees' concerns and complaints. Managers need to understand that oral complaints can constitute protected activity and that they should be taken seriously and must be investigated. Employers also need to be cautious about taking adverse action against employees who make such complaints.

For more in-depth advice or training regarding the application of these decisions in your business, please contact an attorney in the Troutman Sanders' Labor and Employment Group.

EEOC Warns of Increased Scrutiny Over Employers' Use of Credit Reports As A Screening Tool

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Reviewing a job applicant's credit report can serve as a useful tool in the candidate screening process. Indeed, the common rationale for doing so is that individuals who have large debts or other credit problems may be less responsible and more likely to steal from the company or commit fraud. Generally, under current law, it is not unlawful for an employer to make hiring and other employment decisions based on an individual's credit history, provided the employer complies with the Fair Credit Reporting Act (FCRA). Recently, however, use of credit histories in making employment decisions has been subject to greater scrutiny.

For the past few years, the EEOC has expressed its belief that relying on applicants' credit histories could disproportionately exclude minority groups. Early last year, the EEOC noted in an informal opinion letter that, although it had no authority to prohibit use of credit checks in making employment decisions, if an employer's reliance on credit history had a disparate (i.e., disproportionate), adverse impact on a protected class (such as women, minorities, or particular ethnic groups), it could be unlawful under Title VII of the Civil Rights Act of 1964 (Title VII). The EEOC's concern about the potential for misuse of credit reports has been percolating for years, and in the face of current high employment and an unstable economy, the EEOC recently took action.

EEOC Files Lawsuit Challenging Use of Credit Reports

On December 21, 2010, the EEOC filed a lawsuit against a nationwide provider of career-oriented education programs. In the lawsuit, the EEOC alleges that the employer "engaged in an on-going, nationwide pattern or practice of race discrimination against Black job applicants and incumbents in violation of Title VII." The EEOC contends that, since at least January 2008, the manner in which the employer evaluated credit reports had a “significant disparate impact” on African American applicants and incumbent employees, which was neither job-related nor based on business necessity.

In response to a critical reaction to this case from employer groups and associations, an EEOC spokesperson stated: “It’s not clear that employers who are relying on credit histories know if someone has never paid a bill for 10 years or if someone was a very responsible bill payer for years until they lost a job or someone in their family had a medical emergency and they suddenly couldn’t make a payment. We don’t think it’s a good marker for responsibility in employment.” The EEOC stated its belief that credit reports have little or no bearing on an employee’s ability to do the job—just on his or her ability to pay bills—which it contends may have a disparate impact on African American applicants. This case is one of the few cases that the EEOC has ever brought relating to credit reports, and it is a strong signal that the EEOC is willing to dedicate more time and resources to eradicating this employment practice.

The EEOC is not alone in its concern about the potential negative effect of using credit reports as a basis for disqualification from a job. A growing movement in state and federal legislatures is attempting to restrict employers’ use of credit reports. Several states, including Hawaii, Washington, Oregon, and Illinois, have banned or severely limited the use of credit reports for hiring decisions. Other states, including Connecticut, Georgia, Maine, Maryland, Michigan, Missouri, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, Vermont, and Wisconsin, have proposed similar legislation. The California Legislature passed a bill limiting the use of credit reports in hiring, but it was vetoed by the Governor. Finally, earlier this year, the U.S. House of Representatives introduced a bill to amend the FCRA to “prohibit the use of consumer credit checks against prospective and current employees for the purposes of making adverse employment decisions.”

Tips for Employers

Given this increased scrutiny, employers should be cautious when using credit history as a basis for employment decisions. Below are some best practices:

- **Ask why the credit history is needed for each job**
  Ensure that a clear, objective business need exists for using an applicant or employee’s credit history when making a decision regarding employment. Evaluate each job position individually and determine what background checks and information are relevant to the particular position before obtaining any credit histories. There may be a legitimate business reason for obtaining credit reports on company executives or financial officers, but a credit report may not be necessary for information technology professionals, sales employees, or administrative support professionals.
- **Don’t rely on a credit report as the primary screening tool**
  An applicant’s credit history should be considered, if at all, as only one of many factors when making an employment decision. Focusing on other factors, such as personal or professional references, may provide a broader snapshot of the applicant.
- **Consider auditing your applicant disqualification records**
  Employers who use applicants’ credit histories as a screening tool should consider auditing records of applicants who were disqualified due to their credit history to ensure that there is no statistically significant disparity regarding factors such as race, gender, or national origin.

Remember, the best of intentions are largely irrelevant in a disparate impact case. Instead, the focus is on the effect of an employment practice on a particular group, not the employer’s intent. As the EEOC Regional Attorney stated in a press release: “Employers need to be mindful that any hiring practice must be job-related and not screen out groups of people, *even if it does so unintentionally*.”

Practice Does Not Always Make Perfect: Top Ten Qualified Plan Errors

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Mistakes happen. Even with the most vigilant plan sponsor, errors can occur when administering a qualified retirement plan. These mistakes often are unintentional and may seem minor, but they can have serious consequences (including plan disqualification), which can result in adverse tax consequences for both the employer and the employees.

However, there is good news. Recognizing that plan administration errors occur, the Internal Revenue Service (the IRS) has established a voluntary correction program that permits plan sponsors to correct plan errors on their own, at much less cost, before they are discovered in an audit. This article discusses the IRS's voluntary correction program and identifies ten common errors for which plan administrators should be on the lookout.

Mistakes Happen: What to Do if a Failure Occurs

A qualified plan is a retirement plan, which meets requirements under the Internal Revenue Code (the Code) and, therefore, receives certain tax benefits. For example, a 401(k) plan is a qualified plan that, if it meets the Code's requirements, permits participants to defer income tax on salary deferrals made to the 401(k) plan. If a qualified plan becomes disqualified, the IRS unwinds the tax benefits provided to the plan sponsor and the participants, resulting in extreme adverse tax consequences for both the employer and the employee.

Because of the harsh consequences of disqualification, the IRS created a correction program known as the "Employee Plans Compliance Resolution System" or "EPCRS." Under EPCRS, the IRS provides model correction methods for certain common failures. If correction is completed by the end of the second plan year after the plan year in which the failure occurred or if the failure qualifies as "insignificant" based on IRS criteria, the plan sponsor can self-correct the error without IRS involvement (with certain exceptions). Otherwise, an application explaining the failures and the proposed correction methods must be submitted to the IRS. The plan must also pay an application fee based on the number of participants in the affected plan. If, after reviewing the application, the IRS approves the correction methods, a Compliance Statement will be issued that will preclude the IRS from disqualifying the plan based on the failures addressed in the application.

Top Ten Qualified Plan Errors

Listed below are ten of the most common plan errors, which if not properly corrected, could result in plan disqualification. For many of these failures, correction is available under EPCRS.

1. Failure to follow the plan's definition of compensation when determining contributions

The amount of contributions an employee receives and the limitation applied to an employee's benefit are often based on the amount of compensation received by the employee. A common error is to exclude (or include) certain types of compensation from the plan's definition in calculating contributions or benefit limitations. The result is that the employee then receives either too much or too little in benefits, resulting in a violation of the plan's terms, which generally constitutes a qualification failure.

2. Failure to amend the plan for changes in the tax law within the required amendment period

If a plan is not timely amended for legal changes, the plan fails to operate in accordance with the current law. The most recent laws requiring plan amendments were the Pension Protection Act of 2006, which for most plans required amendments on or before the last day of the plan year beginning on or after January 1, 2009, and The Heroes Earnings Assistance and Relief Tax Act of 2008, which for most plans required plan amendments by the end of the 2010 plan year. If a plan fails to timely amend for necessary amendments and that is the plan's only failure, the employer might be able to correct the failure under EPCRS using an abbreviated correction method and a reduced fee.

3. Failure to follow the plan's eligibility requirements

Qualified plans oftentimes have eligibility requirements (such as age and service requirements) that employees must meet to become participants in the plan. Plan sponsors may accidentally include in the plan participants who did not meet the eligibility requirements or, conversely, exclude from the plan participants who meet the eligibility requirements.

4. Failure to follow plan loan provisions and IRS loan requirements

Qualified plans are permitted to make loans to plan participants from the participant's own account, subject to certain restrictions, including restrictions on how loans should be repaid and the maximum amount for which a loan can be issued. Failure to follow these restrictions could result in taxation on the amount of the loan.

5. Impermissible in-service withdrawals

The law restricts when distributions can be made from the plan and often prohibits in-service withdrawals unless certain criteria are met. If in-service withdrawals are permitted in contravention of the law or the plan document, the distributions could be taxed and participants subject to additional excise taxes.

6. Failure to satisfy the minimum distribution rules of Section 401(a)(9) of the Code

Participants are required to receive a distribution upon attainment of a certain age. If such distributions are not made, the participant must pay a tax of 50% on the amount of the required distribution.

7. Failure to timely remit plan contributions

Participant contributions, such as elective deferrals and loan repayments, must be remitted to the plan on the earliest date on which the contributions and repayments can reasonably be segregated from the employer's general assets, but generally no later than the 15th business day of the month following the month in which the contributions and repayments are withheld by the employer from the employee's wages. Failure to timely remit employee contributions can result in personal liability for plan fiduciaries.

8. Failure to pass the ADP/ACP nondiscrimination test under Code Section 401(k) and 401(m)

The Code restricts highly-compensated employees from receiving benefits that greatly exceed the average level of benefits of non-highly compensated employees. This includes the level of contributions highly-compensated employees are allowed to make on their own behalf. These requirements are measured through the "ADP/ACP" nondiscrimination tests. The Code provides a method for correcting ADP/ACP failures; however, if the failure is not corrected within certain specified time limits, the plan could risk disqualification.

9. Failure to properly provide the minimum top-heavy benefit or contribution under Code Section 416 to non-key employees

The law requires certain minimum contributions for non-highly compensated employees if the aggregate account balances of key employees in the plan exceed 60% of the aggregate account balances of all employees in the plan. If such a top-heavy failure is not corrected through a top-heavy contribution on behalf of non-key employees within the amount of time prescribed by law, the plan could risk disqualification.

10. Failure to satisfy the limits of Code Section 415

The law imposes limitations on the aggregate contributions (for a defined contribution plan) and the aggregate benefits (for a defined benefit plan) that an employee may receive through one or more qualified plans in a single year. If a plan sponsor does not closely monitor contribution and benefit accruals, these limits can be violated resulting in potential disqualification of the plan.

IRS Compliance Statement: Plan Disqualification Insurance

The administration of qualified plans is very complex and, even with best efforts, failures can occur. If a plan sponsor discovers a plan error, the best solution is often to correct the error through the EPCRS program if available. A fee may be involved if a filing is required; however, a final Compliance Statement can serve as a valuable insurance policy against a future IRS audit with respect to the disclosed failures.

To Friend or Not to Friend: How Best to Handle Facebook Friendships With Employees

Kristina N. Klein

Let's FACE it…Facebook is here to stay. Its founder was declared Time Magazine's Person of the Year. A movie about its creation has received critical acclaim and numerous best picture awards. It has over 500 million active users and it was recently valued at $50 billion. It has reconnected us with old friends, ignited social and political revolutions in the middle east, and it recently beat out both Google and Yahoo as the most visited website in the country. Facebook has redefined who we identify as "friends" and has made the word "friending" part of our lexicon.

For the handful of non-Facebook-users reading this article, here's a quick synopsis of how Facebook friendship works: you set up a Facebook page, add the close friends who begged you to join, and then, usually within only a few hours, people from all stages of your life request to be added as your friend. From that point forward, you can share as much (or as little) about your life as you choose with your Facebook friends. So, how should companies handle Facebook friendships between management team members and employees?

To Friend or Not To Friend?

Should managers be Facebook friends with subordinate employees? Well, it depends. For those that truly prefer to keep work life and personal life completely separate, the decision is simple: deny all employee friendship requests and, if you feel it is necessary, explain that your Facebook page is solely for family and close friends. For those that enjoy getting to know their coworkers and employees on a more personal level, the answer is not as easy. Here are some of the pros and cons of "friending" subordinate employees:

- **Pro:** Friending employees can help you discover common interests with your staff and can build camaraderie between people in your workforce.
- **Con:** Access to your employees' Facebook pages may reveal their personal problems or issues and can introduce "drama" into your work environment.
- **Pro:** Allowing your employees access to your Facebook page may show your more personable side, which can make you more "approachable" to employees.
- **Con:** Connecting through Facebook may make managers too "approachable" and can blur the line between supervisor and subordinate.
- **Pro:** Friending employees may provide insight on how best to motivate employees, which can lead to new, more effective ways of relating to your employees.
- **Con:** Reviewing an employee's Facebook page may result in discovering an employee's religious affiliation or health problems, which can be pointed to if claims of discrimination are ever raised by the employee.
- **Pro:** Friending your employees may uncover their hidden talents and hobbies which could be useful to your business.
- **Con:** To avoid "playing favorites," if you accept a Facebook friend request from one employee, you probably need to accept friend requests from all your employees.

So what's the best approach? Should your company's managers "friend" or "not friend" employees? While it may seem like the social networking craze is creating new problems for employers, the decision to become Facebook friends involves the same risks associated with enjoying happy hours with those you supervise. Some managers enjoy connecting with their employees on a more personal level, others do not. At the end of the day, if your company's social media policy prohibits "friending" subordinates, you should follow that policy. If your company does not have a social media policy (or if the policy is silent on "friending" subordinate employees), the decision is a personal choice. You should weigh the considerations in this article or consult your human resources department for guidance.

Congress Heats Up for the Summer: A Summary of Potential Changes to Federal Employment Laws

Rebecca E. Ivey

The economy, the military, the debt ceiling—Congress has its hands full this Summer. Notwithstanding the nation's current challenges, federal employment laws remain an area of focus for our lawmakers. This article summarizes some of the new legislation that has been proposed and how the new legislation, if passed, may affect your company.

THE SMALL BUSINESS ENCOURAGEMENT ACT (H.R. 1663)

Current status of law: The Internal Revenue Code allows employers to take a Work Opportunity Tax Credit (WOTC) for hiring new employees under certain circumstances. The WOTC is a federal tax credit incentive that encourages private-sector businesses to hire individuals from nine target groups who have consistently faced significant barriers to employment.

What would change: This proposed legislation would amend the Internal Revenue Code to temporarily provide the WOTC for small businesses hiring unemployed individuals, saving employers up to $12,000 a year per hire in some areas of the country. To qualify, small businesses must have gross receipts in the preceding taxable year not exceeding $20 million, or they must employ less than 100 full-time employees. Employers seeking the tax credit will be required to hire unemployed individuals for at least one year, full-time, with a start date during or after January 2012. The credit will also extend for employers hiring unemployed Americans in 2013.

What this means to employers: This legislation may provide the necessary support for certain employers to start hiring again. New employees are costly, but this type of offset minimizes the employer's risk and expenditure.

Likelihood of becoming law: This bill is one of the rare pieces of legislation that started with bipartisan support. It has received similar across-the-aisles support in the press. While its journey through the legislative process has just begun, the odds are already in its favor.

10K RUN FOR THE BORDER ACT (H.R. 43)

Current status of the law: The Immigration and Nationality Act (INA) sets forth the conditions for temporary and permanent employment of aliens in the United States and imposes a strict enforcement scheme. Unlike some other federal employment laws, the INA applies to all employers, of any size.

What would change: This proposed legislation would amend the INA to substantially, and we mean substantially, increase employer penalties for violations. Some of the changes would include the following:

The penalties for knowingly hiring or recruiting an undocumented worker, or continuing to employ an illegal alien when the employee's legal status changes or becomes known would increase to between $10,000 and $80,000 for each violation, an increase from the current $250-$2,000 penalty range.

For an employer with a prior violation, the penalties would be increased to between $80,000 and $200,000, up from $2,000 to $5,000 per violation under current law.

For a repeat offender, the fine skyrockets to a range of $120,000 to $1.6 million. The current fine for such a repeat offense is a minimum penalty of $3,000 and a maximum of $10,000.

What this means to employers: Ouch! Those figures are painful to an employer of any size.

Likelihood of becoming law: Previous versions of this bill have fared poorly. However, between the positive signs surrounding the proposed E-LAW Act (addressed in the last Legislative Update, available here) and the Supreme Court's approval of Arizona's law in U.S. Chamber of Commerce v. Whiting, the bill's time may have come.

THE PAYROLL FRAUD PREVENTION ACT (S. 770)

Current status of the law: The Fair Labor Standards Act (FLSA) requires, among other things, that non-exempt employees be paid minimum wage and overtime, and dictates the standards for exemptions from this rule. Employers who misclassify employees as independent contractors or who misclassify non-exempt employees as exempt are vulnerable to DOL investigations and collective action FLSA lawsuits, which are notoriously difficult to defend, and expensive. Troutman Sanders' Labor and Employment group has discussed employer concerns with the existing FLSA in the article The Crackdown Continues on Worker Misclassification – Employees v. Independent Contractors, available here, and the article Dispelling Common Myths About the FLSA's Overtime Requirements, available here, among others.

What would change: This bill would change the existing law in numerous ways. It would create the presumption that individuals working for an employer are employees, rather than independent contractors. The bill would also increase penalties for employers who intentionally misclassify their employees as independent contractors, impose new reporting requirements on employers, increase penalties for exempt/non-exempt classification violations, and offer whistleblower protections for workers who believe they have been misclassified.

What this means to employers: If you thought the law was unfavorable to employers before, just wait. Not only does this impose greater penalties for violations, it increases costs for compliant employers as well. Further, the whistleblower protections make it increasingly likely that employees will challenge employer classifications.

Likelihood of becoming law: Somewhat unlikely. Republicans control the House, so this bill, whose predecessor failed to pass last Congress, doesn't have the best chance.

HEALTHY FAMILIES ACT (H.R. 1876, S. 984)

Current status of the law: The Family and Medical Leave Act (FMLA) provides up to twelve weeks of leave for an employee's serious health condition; however, no federal law requires employers to pay employees for this time away from work. Under many employers' leave policies, employees are first required to exhaust all paid leave (such as vacation or other paid time off), but their remaining time off is unpaid.

What would change: This bill, introduced in both the House and Senate on May 12, 2011, would require employers to provide paid sick leave to employees. It would allow employees to earn one hour of paid sick time for every 30 hours worked, up to a maximum of 56 hours (seven days) annually. Employees could take this leave to attend to their own or a family member's illness, or use the paid time off for preventative care such as medical appointments. In addition, the bill provides leave for employees who are the victims of domestic violence, stalking, or sexual assault. The law would apply to employers with 15 or more employees.

What this means to employers: If your company doesn't provide paid leave, or if your paid leave policy is less generous than the provisions of the bill, you'll need to find room in your budget for additional paid sick leave for employees. And, remember, if this bill passes it applies to your company even if you are not a covered employer under the FMLA (i.e., if you have fewer than 50 employees).

Likelihood of becoming law: Next to none. When the Democrats had control of the legislature, the bill was seen as a slam dunk, but nothing happened. The legislation's chances this time around pale in comparison.

PAYCHECK FAIRNESS ACT (H.R. 1519, S. 797)

Current status of the law: The Equal Pay Act (EPA), enacted in 1963, prohibits discrimination on account of sex in the payment of wages by employers. Class members must affirmatively give written consent to opt in to any action. Employers have an affirmative defense to claims under the EPA if a discrepancy in pay is due to "any factor other than sex."

What would change: The Paycheck Fairness Act would amend the EPA by narrowing the employer's affirmative defense from discrepancies due to "any factor other than sex" to discrepancies that are "not based upon or derived from a sex-based differential in compensation," are job-related with respect to the position in question, and are consistent with business necessity. The bill would also allow for previously unattainable compensatory and punitive damages, plus opt-out (rather than opt-in) class actions.

What this means to employers: If passed, the Paycheck Fairness Act would make gender-based pay discrimination claims more prevalent, more difficult to defend, and more costly.

Likelihood of becoming law: Similar proposals have been introduced for the last 14 years. Last year the proposed law stalled in the Senate, failing to receive enough cloture votes for consideration. We've been reporting on it for quite some time because it would create substantial changes. It is unclear how well the bill will fare this year, as presumably last year was its best shot, and that didn't go so well.

JOB PROTECTION ACT (H.R. 1976, S. 964)

Current status of the law: Under the current law, the National Labor Relations Board (NLRB) has the authority to bring suit against employers for retaliation against union employees. A recent example is the Board's decision to file a complaint against a large manufacturer of airplanes, alleging that the company's decision to locate an assembly plant in South Carolina (a right-to-work state), rather than Washington (where a substantial number of union members were located), represented illegal retaliation against union employees. According to the NLRB, the company's decision was made solely to avoid the likelihood of further strikes at the company's Washington facility.

What would change: If an employer were to give advance notice to the union of the economic reasons for relocating, closing a facility, or transferring work, the NLRB would be unable to prevent the closure, relocation, or transfer. An employer's comments regarding the costs associated with having a unionized workforce could not be used as evidence in an anti-union discrimination claim.

What this means to employers: This legislation is one of many bills moving through Congress that attempts to limit the power of the NLRB (see S. 504 and H.R. 2118 as well). Under the bill, an employer would have more freedom to relocate to right-to-work states without worrying about consequences from the NLRB. Legislation like this is one symptom of a broader dispute about the role of unions in the workforce.

Likelihood of becoming law: Not likely. The right-to-work issue is highly partisan, with great support from the GOP and next-to-none from the Democrats. So, the bill likely won't clear all the obstacles on the road to becoming law.

JOBS ACT OF 2011 (H.R. 1745, S. 904)

Current status of the law: Under the current scheme, states pay the first 26 weeks of unemployment insurance benefits for workers who lost their jobs through no fault of their own. During recessions, Congress temporarily provides additional weeks of federally-funded benefits, and during the current jobs crisis, the federal government has given the long-term unemployed in 25 states an unprecedented 73 weeks of extra aid (although this federal program expires at the beginning of next year).

What would change: The Jobs, Opportunity, Benefits and Services Act (JOBS Act) of 2011 would allow states to use the remaining $31 billion in federal unemployment funds for this year to replenish their underfunded accounts instead of raising payroll taxes. According to a press release issued by the bill's backers, under current law, that money could only be spent for unemployment benefits stretching up to 99 weeks in many states. Under the JOBS Act, states could also use the money to prevent unemployment tax hikes or for programs designed to get unemployed workers back on the job. The JOBS Act also would require those individuals close to exhausting their benefits to strengthen their job searches and engage in education or training.

What this means to employers: Did you WANT an unemployment tax hike? We didn't think so.

Likelihood of becoming law: Likelier than some, but still not great. On May 11, 2011, the House Ways and Means Committee, by a vote of 20 to 14, favorably reported the bill out of committee. The bill will be sent to the House floor for consideration. A parallel bill has been introduced in the Senate. Things are moving, but numerous hurdles still stand in the way, such as the approval of the Senate and the President's signature. The bill's effect on the unemployed is highly polarizing, which does not bode well for its ultimate success.

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