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CHANGING ELIGIBILITY FOR RETIREMENT BENEFITS: THE SUPREME COURT IMPOSES LIMITATIONS

The Supreme Court has issued a decision which limits the right of companies and pension plans to place restrictions on a retired employee's entitlement to retirement benefits. *Laborers' Pension Fund v. Heinz*, DLR, June 8, 2004. In this case, the plaintiffs were laborers covered by a multi-employer pension plan which allowed for early retirement. The plan provided that if a retiree accepted employment as a construction worker, pension benefits would be suspended as long as the retiree continued to work as a construction worker. That restriction had been in effect for years and remained in effect when the plaintiffs retired. After they retired, however, the plan was amended to provide that retirees could not receive retirement benefits if they worked in the construction industry in any capacity. Because of this amendment, the plaintiffs' retirement benefits were suspended when they accepted jobs as supervisors in the industry. The Supreme Court held that this restriction was illegal under ERISA.

At issue was the so-called "anti-cutback" rule of ERISA, which provides that "the accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." The

issue before the Court was whether the plan amendment had the effect of eliminating or reducing an accrued retirement benefit that was earned by service before the amendment was passed. The Court held that it did. It agreed with the circuit court that "a participant's benefits cannot be understood without reference to the conditions imposed on receiving those benefits, and an amendment placing materially greater restrictions on the receipt of the benefit reduces the benefit just as surely as a decrease in the size of the monthly benefit payment...We simply do not see how, in any practical sense, this change of terms could not be viewed as shrinking the value of [plaintiff's] pension rights and reducing his promised benefits."

The Court's decision addresses *accrued* benefits, not restrictions that were in place before retirement. Thus, the restriction against a retired employee receiving pension benefits while working as a construction worker was not struck down because that restriction was in place and known to the plaintiffs for years before their retirement. The decision addresses only restrictions imposed after plaintiffs began to receive their retirement benefits. The decision will restrict the ability of employers and pension plan trustees to impose new conditions on the receipt of benefits for employees already retired.

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LABOR LAW

Republicans Assume NLRB Majority

President Bush has appointed Ronald Meisburg, a Republican and management lawyer, to fill the fifth seat of the NLRB. Many important decisions have been held in abeyance awaiting a full NLRB. Because most NLRB decisions are decided by a three-member panel, there have been many decisions issued since the Bush presidency in which the two Democratic members of the Board have issued decisions over the dissent of a Republican Member. Since President Bush was elected, the labor law community has anticipated significant changes in NLRB decisions as a consequence of President Bush's appointments.

The first major decision of the Republican-controlled Labor Board was issued on June 15, 2004. In that case, *IBM Corp.*, 341 N.L.R.B. No. 148 (June 15, 2004), the new Labor Board overruled the 2000 decision in *Epilepsy Foundation*, in which the Board had extended *Weingarten* rights to non-union workers.

In a 1975 decision, *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), the Supreme Court upheld a Board decision holding that employees are entitled to union representation upon request in an investigatory meeting that could lead to discipline. Four times since 1975, the NLRB has shifted position on the question of whether the *Weingarten* rule applies to non-union workers, specifically, whether workers in non-union plants are entitled to co-worker representation in the same circumstances. In the *IBM* case, the Board ruled that non-

union workers do not have *Weingarten* rights. In a decision that was widely anticipated, the three Republican-appointed members concluded that because of the many changes that have occurred in the workplace environment, including security and other investigations, companies need the right to conduct investigations in a thorough and confidential manner. While acknowledging that the Board's position in *Epilepsy Foundation* was a permissible interpretation of the statute, the new Board found that denying *Weingarten* rights to non-union employees was a better interpretation of the statute.

In this newsletter, we have expressed concern about the *Epilepsy Foundation* decision, specifically in terms of how it might apply to sexual harassment investigations. There is nothing in the Board's decision in *Epilepsy Foundation* to indicate that the Board majority thought through the consequences of its ruling as applied to investigations like sexual harassment investigations where confidentiality is not only desired but required. The notion that a co-worker would gain access to confidential information had disturbing consequences which, we believe, largely underlay the Board's decision to deny *Weingarten* rights to non-union employees.

This decision is the first concrete indication of the major changes in labor law that are likely to take place as long as the Republicans control the NLRB.

Restricting Employee Communications on Confidential Issues: What Are the Limits?

The NLRB has issued a number of decisions addressing the question of whether employers violate the NLRA by limiting employee communications on confidential matters. Can an employer, for example, limit the rights of employees to discuss their salary with other employees? The Board's concern is that such a rule would infringe on the protected rights of employees to engage in concerted activity for their mutual aid and protection. In addressing the legality of such a rule, the Board seeks to determine whether the rule is reasonably likely to limit protected communications.

In its decisions, the Board has distinguished between a limitation on disclosure of confidential *business* information and a limitation on information that relates to employee terms and conditions of employment. Under this approach, a rule prohibiting disclosure of "hotel private information" was found lawful because it was limited to business documents. However, a rule which prohibited employees from revealing "confidential information about fellow employees" was found unlawful because it could be reasonably construed to limit discussions about terms and conditions of employment, including wages. In a recent decision, *Double Eagle Hotel and Casino*, (DLR, February 6, 2004), the Board struck down a rule which prohibited disclosure of "confidential information," which was defined in the rule as including information about disciplinary procedures, grievances, salaries and

termination data. The Board found that this limitation unlawfully prevented employees from discussing wages and working conditions.

The general lesson to be derived from these cases is that rules and handbook provisions *can* restrict employees from divulging confidential business information but not information about employee terms and conditions of employment. These cases have direct application to email policies in which companies attempt to limit the ways that employees use company email. For example, a policy which allows employees to use company email but not to discuss "confidential" matters would, under current Board law, be viewed as an overly-broad restriction of protected rights.

When Must a Company Open its Books to a Union?

It has long been a rule of labor law that a company which asserts an inability to pay for bargaining proposals made by a union must corroborate that claim by disclosing its financial records. This rule has always confronted employers with a difficult choice: if the employer asserts an inability to pay and thereby enhances the credibility of its bargaining position, it must be prepared to produce profit and loss information which would otherwise be immune from disclosure. The NLRB has issued a decision which creates a new ambiguity in the traditional rule to the benefit of employers.

In *American Polystyrene Corp.*, 341 N.L.R.B. No. 67 (2004), the employer, during bargaining, resisted paying an increase in employer-matching 401(k) contributions. When the union

asked if the employer was saying that it couldn't afford the increase, the employer's negotiator stated, "No, I can't. I'll go broke." The union then demanded that its accountant be allowed to examine the company's books. Under traditional NLRB law, it is clear that the employer had pleaded an inability to pay which required financial disclosure if requested by the union.

The new NLRB ruled otherwise. It noted that in response to the union's request for financial information, the employer immediately responded by stating, "While I have told you that times are tough, at no time have I ever told you that we cannot afford your proposals." The Board found that under these circumstances, the employer effectively rescinded its earlier "plea of poverty." It is certainly difficult to reconcile the employer's subsequent denial with its previous statement that "I'll go broke." We have little doubt that a different Labor Board would have discredited the employer's denial – which was made only after the union demanded financial information and, presumably, only after the employer understood the consequences of its earlier claim of inability to pay. This decision is a good example of the shifting attitudes of the NLRB, and it signals the new direction that the Labor Board is taking.

FAMILY MEDICAL LEAVE ACT

The Employee Who Doesn't Return on Time

The Family and Medical Leave Act ("FMLA") recently celebrated its tenth anniversary. Nonetheless, employers continue to struggle in their efforts to comply with the

intricacies of the law, which unfortunately have received too little illumination during the past decade. It is worth noting that between August 1993 and July 2003, the validity of thirteen of the Department of Labor's interpretative regulations have been challenged in court, and one was struck down in part by the Supreme Court in Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002).

There does, however, appear to be a clear answer to one common scenario: the employee who is unable to return to work upon the expiration of his or her FMLA leave. The facts presented in Sarno v. Douglas Elliman-Gibbons & Ives, Inc., 183 F.3d 155 (2d Cir. 1999), provide a helpful example. In that case, Samo was injured on-the-job and went out on concurrent FMLA and workers' compensation leave. Throughout the duration of his 12-week leave of absence, Samo did not inform the company of the specific date upon which he would return to work, and in one conversation indicated that he was, in fact, unsure of his return date. At the end of the 12-week leave period, the company again inquired when he planned to return to work, but Samo's only response was that he was still disabled. At that point, needing to fill his position, the company terminated Samo's employment. Samo subsequently brought a lawsuit claiming, among other things, that his discharge violated the FMLA.

The Second Circuit Court of Appeals affirmed the district court's dismissal of Samo's FMLA claim on the grounds that the company was not required to restore him to his former or any other position. Because Samo could not perform the essential

functions of his job, and because he was unable to return to work after his concurrent FMLA and workers' compensation leave had expired, the regulations make clear that the company had satisfied its obligations under the FMLA and was not required to restore Sarno's employment. See 29 C.F.R. §§ 825.214(b), 825.216(d).

The lesson to be learned from the Sarno case is that the FMLA does not require an employer to indefinitely hold a position open for an employee out on leave. Even the FMLA has a point of no return, and that line is crossed where the employee, after receiving at least twelve weeks of concurrent FMLA and workers' compensation leave, is unable or return to work and/or perform the essential functions of his or her job. Keep in mind that an employee who is unfit for duty after 12 weeks of FMLA leave may be entitled to additional leave under the Americans with Disabilities Act. That, however, is a separate issue unrelated to the employee's rights under FMLA. (By Josh Rose)

Advising Employees About Their FMLA Rights

Another interesting FMLA case, which effectively establishes an exception to the *Sarno* rule, is *Conoshenti v. Public Service Electric & Gas Co.*, DLR, April 14, 2004. In that case, the plaintiff, Conoshenti, had signed a "last chance agreement" after numerous absentee problems which said that he would be fired if he did not report to work on time every day. Conoshenti was seriously injured in an automobile accident and notified the employer that he would be off from work for at least two weeks. The company

did not advise Conoshenti that he was entitled to FMLA leave. Due to surgery, Conoshenti was out of work for more than the 12 weeks of leave protected by FMLA. When he sought to return, he was terminated for absenteeism based on the last chance agreement.

The employer argued that Conoshenti's claim should be dismissed because he was absent beyond the period of time protected by FMLA. Conoshenti argued that the employer had not advised him about his FMLA rights and that, if he had been advised, he could have structured his surgery and rehabilitation in order to allow him to return within 12 weeks.

The court of appeals in Philadelphia agreed with Conoshenti. It distinguished the Supreme Court's decision in *Ragsdale*, in which the employer granted a non-FMLA leave of absence for 12 weeks and then denied the employee's request for 12 additional weeks of FMLA leave. EEOC and the employee argued that the employee was entitled to 12 more weeks of leave because the employer had not advised the employee that the 12 weeks of leave granted to him constituted FMLA leave. The Supreme Court rejected the employee's claim in *Ragsdale*, finding that requiring an additional 12 weeks of FMLA was a penalty on the employer unrelated to any injury suffered by the employee. In *Conoshenti*, the court found that Conoshenti, unlike *Ragsdale*, was damaged by the company's failure to advise him that he could take 12 weeks of FMLA leave and that the failure by the employer interfered with Conoshenti's exercise of rights under FMLA.

This case illustrates the risk of

failing to advise employees about their FMLA rights when they seek leave for a condition covered by FMLA. Company HR personnel should be aware that when employees are entitled to seek leave for reasons protected by FMLA, those employees should be advised about their FMLA rights.

Taking Leave in Anticipation of Childbirth

Steve Aubuchon asked his employer for leave under the FMLA on August 21, 2000. His wife gave birth on September 2. When he asked for FMLA leave, Aubuchon did not tell his employer that his wife had gone into false labor a day or two before August 21; he simply told the company that he wanted to stay home with his wife until she gave birth, and before the company determined whether he was entitled to FMLA leave, Aubuchon stopped coming to work. The written form that he filled out requesting FMLA leave did not state that leave was being requested because his wife was having complications in pregnancy.

Based on what Aubuchon told it, the company denied Aubuchon's request for FMLA leave and fired him for excessive absenteeism. Aubuchon sued under the FMLA, claiming that the company improperly denied his request for FMLA leave.

The court of appeals in Chicago dismissed the lawsuit. *Aubuchon v. Knaut Fiberglass*, 9 WH Cases 711 (7th Cir. 2004). It began by noting that employees can take FMLA leave to care for a spouse who has a "serious health condition" and that under the Department of Labor regulations, "incapacity due to pregnancy"

qualifies as a "serious health condition." It also noted the requirement that employees who request FMLA leave must provide advance notice to their employer either 30 days before the leave is to begin (if the need for leave is foreseeable) or "as soon as is practicable" if it is not. If the required notice is not provided, the employer may deny the leave.

The court ruled, however, that being pregnant, as distinct from being incapacitated because of pregnancy, is not a "serious health condition." While it was understandable that Aubuchon wanted to be with his wife until she gave birth, that "is not the same thing as wanting to stay home to care for a spouse who has a serious health condition." While Mrs. Aubuchon may have had a "serious health condition," Aubuchon never disclosed that condition to his employer. According to the court, "The requirement of notice is not satisfied by the employee's merely demanding leave. He must give the employer a reason to believe that he's entitled to it... If you have brain cancer but just tell your employer that you have a headache, you have not given the notice that the Act requires."

In clarifying the scope of its ruling, the court explained that the employee's duty to communicate his reason for FMLA leave does not require a full or detailed explanation; it is sufficient if the employee says enough to place the employer on notice of a probable basis for FMLA leave. If the employer requires additional information, it may then request verification of the serious medical condition. Aubuchon's mistake was that he simply demanded leave without providing any ground on which FMLA leave had

to be granted.

The teaching of this decision is that employees are not entitled to FMLA leave unless they provide timely notice to the employer and some indication of the grounds which entitle them to FMLA leave. This decision, while authored by a very distinguished judge (Posner), should not be read as guideline to follow in processing requests for FMLA leave. When an employee asks for FMLA leave, a company would be well advised to ask the employee why leave is being requested, rather than simply denying the leave because the employee didn't provide an adequate explanation. If the employee says that he wants to be with his wife before labor begins, it would be appropriate for the company to ask if there are any medical reasons which require his presence. If the answer is no, the company can then deny the request for FMLA leave without exposing itself to unnecessary legal risk.

THE DOCTRINE OF FEDERAL PREEMPTION: LIMITS ON STATE REGULATION OF LABOR ISSUES

California enacted a statute that which prohibited employers which receive state funds in excess of \$10,000 from advocating against union organizing. The purpose of the statute was to prohibit covered companies from campaigning against unions and thereby assist unions in organizing. The court of appeals in San Francisco held that the statute was preempted by the National Labor Relations Act and unenforceable. *Chamber of Commerce v. Lockyer*, 174 LRRM 2876 (9th Cir.2004).

The Supreme Court held years ago that the NLRA preempts state legislation in the areas reserved for NLRB regulation. The theory is that by regulating certain parts of the collective bargaining process, Congress intended that other parts should be left free from state regulation and be controlled by market forces. The court held that the California statute was preempted because it regulates the union organizing process and in that way interferes with an area that Congress intended to leave free of state regulation. Specifically, the court noted the so-called "free speech proviso" of the NLRA, which allows employers to express their opinions on any subject as long as the employer communication does not contain a threat or promise of benefit. The ability of unions and employers to engage in a vigorous debate about the pros and cons of unionization was deemed by the court to be "an overriding principle" of the NLRA. Since the California statute interfered with that federally-protected interest, the court found it to be preempted and unenforceable.

In another preemption decision, a federal district court in Illinois held that an Illinois law prohibiting the employment of "professional strikebreakers" was preempted by federal labor law. *Caterpillar Inc. v. Lyons*, 174 LRRM 3200 (C.D. Ill., May 14, 2004). Caterpillar has long been known for aggressive labor relations and in past disputes has hired permanent replacements for striking employees. At issue in this case was an Illinois law that prohibited companies from hiring "professional strikebreakers." That term was defined in the law to include any individual or employment agency which repeatedly provided temporary

replacements for employees whose work has ceased because of a strike or lockout. Caterpillar sought a declaratory judgment that the Illinois law was preempted by federal labor law. The district court agreed with Caterpillar.

The court found that the NLRA allows labor or management to enhance their bargaining positions by exerting economic pressure on the other side, and that Congress has specifically outlawed certain types of economic actions, thereby leaving other forms of self-help unregulated. By restricting the right of employers to hire temporary replacements, the Illinois law enhances the bargaining power of the union and simultaneously decreases the power of the employer. Since economic pressure is "part and parcel of the collective bargaining process," the court concluded that these limitations on the employer's right to exert pressure intrude upon an area that Congress chose to leave unregulated.

JURY TRIAL WAIVERS: A SENSIBLE MIDDLE GROUND

For many years employers and their attorneys have debated the relative merits of defending employment discrimination claims in the arbitral versus the judicial arena. On the one hand, arbitration is regularly touted by its proponents as the speedier, less expensive option. On the other hand, its critics point to the lack of discovery, loose application of evidentiary rules and precedent, and absence of summary judgment procedures, as well as the limited right of appeal.

Regardless of one's own viewpoint, the Supreme Court's endorsement of mandatory

arbitration provisions, as most recently expressed in *Circuit City, Inc. v. Adams*, 532 U.S. 105 (2001), clearly establishes the two divergent paths facing employers. But is there also a third in-between path, a road less traveled? Yes, and that is the contractual waiver of jury trials.

Jury trial waivers, which limit employees to bench trials, provide all the benefits of litigating in court (*i.e.*, extensive discovery, strict adherence to the rules of evidence and settled case law, availability of summary judgment, the right to appeal, etc.), without the additional costs and uncertainty associated with trying a case before a jury. Such contractual provisions in employment agreements are enforceable if they are entered into knowingly and voluntarily. Courts consider the following factors in determining the knowing and voluntariness of a particular waiver: (1) the conspicuousness of the waiver provision; (2) the employee's business acumen; (3) the negotiability of contract terms and negotiations between the parties regarding the waiver provision; and (4) the parties' relative bargaining power. *See Brown v. Cushman & Wakefield, Inc.*, No. 01 Civ. 6637, 2002 U.S. Dist. LEXIS 13787, at *62-63 (S.D.N.Y. July 29), *adopted*, 235 F. Supp. 2d 291 (S.D.N.Y. 2002).

Employers interested in the jury trial waiver option should insure that the jury trial waiver is carefully drafted to clearly encompass statutory employment discrimination claims. It should also be a conspicuous part of the employment agreement (*e.g.*, displayed in capitalized and boldfaced text). Finally, the contract should make clear that the provision was explained to and

reviewed by the employee (*e.g.*, by requiring employees to sign or initial an acknowledgment). (By *Joshua Rose*)

NEW MANDATORY POSTING REQUIREMENT FOR NEW YORK EMPLOYERS

The New York State Division of Human Rights has recently promulgated a new mandatory poster describing the legal prohibitions against discrimination based on marital status and sexual orientation. All businesses employing four (4) or more people must display this poster. To obtain a copy of this poster, you can call the New York State Division of Human Rights Public Information Unit at (718) 741-8459. (By *Joshua Rose*)

A PERSONAL NOTE

We are pleased to announce that Andy Zelman's younger daughter, Elissa, gave birth to a girl, Sophia Hannah Kuber, on May 4, 2004. Mom and baby Sophia are fine, and Dad and Sophia's grandparents are thrilled.

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