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LABOR WATCH

A MONTHLY REPORT ON THE DEVELOPMENTS IN LABOR RELATIONS, EMPLOYMENT LITIGATION, IMMIGRATION, AND HUMAN RESOURCE MANAGEMENT

WORKERS' COMPENSATION POP QUIZ, PART III: COMPENSABLE OR NONCOMPENSABLE INJURY?

In this, the third installment of the pop quiz, please remember that the goal here is not to bring up any traumatic memories of grade school pop quizzes. Instead, the goal is to see how well you know the area of workers' compensation. But trust us, even if you are not an expert in the area, each question is designed to be interesting and informative. With that said, put on your thinking cap and begin.

Question #1. Employer sponsors a lake retreat for its employees. In preparing for the retreat, the employer asks an employee, Daredevil, to help plan the retreat, including that he find locations for employees to cliff dive into the lake. The employer required attendance at the retreat and paid its employees for attending. While at the retreat, Daredevil suffered an injury while cliff diving.

Is Daredevil's injury a compensable work comp injury?

Answer #1. Yes. This one is tough on two levels. First, the injury occurred off of the employer's premises during a recreational activity. Second, the nature of the accident makes the injury seem willfully negligent and outside the scope of employment, even if the retreat itself could be considered within the scope of employment. However, the fact Daredevil's employer sponsored the retreat, had the employees (especially Daredevil) plan the retreat, paid the employees to attend, and most of all, required attendance at the retreat, brings this activity within the scope of employment.

The act of jumping off the cliff may be willful, but the injury is not. Instead, the most Daredevil would be charged with is negligence, so there is no willful negligence defense. In addition, the fact the employer had Daredevil locate spots where employees could cliff dive is evidence the employer expected and acquiesced to that activity.

It should be noted that this set of facts and finding of compensability was taken from a case recently decided by the Arkansas Court of Appeals.[1] However, the mere fact the employer required attendance would make this injury compensable in most states. In fact, even in states that statutory limit the compensability of injuries occurring during recreational activity would probably find Daredevil's injury compensable because the recreational activity was sponsored by the employer, paid for by the employer, the employer paid the employees to attend, and the employer required the employees to attend.

Question #2. Slick is a sales manager for a car dealer when he is paged to respond to a customer question on the floor. He stands up and faints. As a result he falls backwards, landing on his chair and striking his head on his desk, causing significant physical injury. All doctors agree that Slick fainted due to personal health reasons unrelated to his work.

Will Slick's injuries be found compensable as work related?

Answer #2. Yes. Most states consider idiopathic falls, that is, falls caused by a condition personal to the plaintiff, e.g., a heart attack or "trick" knee, outside the course and scope of employment. However, where the employment contributes in some way to cause or aggravate the injury, then the effects of the fall will be considered work related. In this example, Slick's injury occurred due to his head hitting his desk. The desk is a part of the work environment

(Continued on Page 2)

WHAT'S INSIDE

Managing a Multi-Generational Workforce 2
SPECIAL FOCUS: Confidentiality Policies in 2007 . . . 3
Down with Ledbetter: Congressional Action in the Blink of an Eye 4
New Compliance Rules for 2007 EEO Filing 5
Plastic – The New Trend in Pay . . . 6

MANAGING A MULTI-GENERATIONAL WORKFORCE

Where were you when the space shuttle Challenger was lost? In today's multi-generational workforce, the answers can range from "a twinkle in my father's eye," to "bouncing my granddaughter on my knee." Never before in the history of the American workforce have so many distinct generations worked together.

Today, Veterans (born 1922-1945), Baby Boomers (1946-1964), Generation X's (1965-1980), and Generation Y's (1981-1994) often share the same workplace. Due to exponential technological changes, each generation comes from a smaller year sampling than the one prior. Consequently, gone are the days of shared experiences. Generational differences can affect everything from recruiting to motivation. Understanding, acknowledging, and ultimately managing the generational differences will lead to a more productive workforce.

Communication is the first obstacle that must be given attention. Each generation has a distinct set of values, attitudes, habits, and motivations. Understanding these core beliefs and gearing communication to eliminate confrontations and misunderstandings is essential. Managers must not manage to their own value system but to the employees'. For example, Baby Boomers have consistently respected long hours and "face time" at work, while Gen Xer's typically value productivity and work/life balance. If a different system than your own is effective, its value must be considered.

Never disregard contributions from employees based on their generational position. In addition to being legally indefensible, it simply is business suicide. Imaginative and innovative ideas can come from any generation group.

Encourage interaction and collaboration between members of different generational groups. While it may sound "touchy feely," seeing a problem from a different point of view can potentially unlock previously unseen solutions. An employee mentoring program is a great way to introduce different generations.

Offer flexible workplace choices. As mentioned above, different generations of employees have different ideal work/life balances. Valuable employees, including retirees and young parents, can be productive in part-time, consulting arrangements or telecommuting roles.

Above all, recognize the advantages of a generational diverse workforce. Managing employees with their unique set of values in mind will lead to a happier and more productive workforce and may decrease employee turnover.

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WORKERS' COMPENSATION POP QUIZ, PART III: COMPENSABLE OR NONCOMPENSABLE INJURY? *(Continued from page 1)*

and contributed to the injury. Thus, the head injury would be work related. Likewise, if Slick was working off the ground, his fall would have been greater, thus making his injury worse and, consequently, work related.

In the case of an idiopathic fall, the exception to liability is clearest when nothing in the work environment contributes to the injury. For example, where a worker is walking across a level, cement floor and his or her knee suddenly gives out. Any injury to the knee would then most likely be related solely to a condition personal to the employee and the injury would be determined not work related. However, if the floor was not level, but uneven, a different result may be reached.

Once again, please remember that workers' compensation laws are very state specific. Therefore, each case should be looked at in light of the law of the state where the injury occurred or where a possible workers' compensation claim may be brought.

We hope you fared well on our quiz, and thank you for playing.

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[1] *Engle v. Murray*, No. CA 06-81 (Ark. Ct. App. 9/20/06).

CONFIDENTIALITY POLICIES IN 2007

According to a recent court decision, broad confidentiality policies may violate employee rights protected by the National Labor Relations Act—regardless of whether the employees belong to a union or whether the employer had a non-union workplace. In recent months, a surprising trend has emerged in which the courts have broadly interpreted employee rights under the NLRA to invalidate employment practices including confidentiality policies.

Most employers are aware that any rule prohibiting employees from discussing their own wages or terms and conditions of employment with coworkers violates Section 8(a)(1) of the NLRA, unless the employer has a legitimate and substantial business justification for the rule. The NLRA guarantees employees the right to form, join, or assist labor organizations and to engage in other concerted activities for their mutual aid and protection.

Historically, NLRA violations have been found where employers explicitly instructed employees not to discuss their wages or similarly protected topics or disciplined them for doing so. However, according to the U.S. Court of Appeals for the District of Columbia, certain handbook policies were too broad and infringed employees' NLRA rights even though: (1) the policies did not explicitly prohibit protected activity under the Act; (2) there was no evidence that any employee interpreted the policies as prohibiting such protected activity; and, (3) there was no evidence that the employers ever applied or enforced the policies to prohibit protected activity.[1]

The *Cintas* case involved a confidentiality policy providing that employees should "recognize and protect the confidentiality of any information concerning the company, its business plan, its employees, new business efforts, customers' accounting, and financial matters. Employees could be sanctioned for violating confidence or [for the] unauthorized release of confidential information." Despite the apparent innocuous intent and reality of the confidentiality policy, the court found that an employee "could reasonably construe" the policy to prohibit employees from discussing their terms and conditions of employment with other employees or a union. The court also found similar violations under the employer's complaint, solicitation, and fraternization policies.

> *"The key is to draft a policy that strikes the right balance of protecting the company's legitimate interests without imposing restrictions or limitations that affect its employees' rights to communicate about their wages, hours, and other terms and conditions of employment to the extent protected under the NLRA."*

Why is this decision important to employers?

Broad confidentiality policies are prevalent. Many such policies implicitly prohibit employees from discussing wages and other terms and conditions of their employment with one another. Even if the restriction is an unintended, unenforced consequence, these policies nevertheless leave employers open to liability under the NLRA. The lesson to be learned is that the NLRA has broad-reaching implications on the employment policies of employers. Accordingly, employers should review their confidentiality policies and any related policies immediately. The key is to draft a policy that strikes the right balance of protecting the company's legitimate interests without imposing restrictions or limitations that affect its employees' rights to communicate about their wages, hours, and other terms and conditions of employment to the extent protected under the NLRA.

Fortunately, the *Cintas* antidote should be fairly painless. Employers should take the following three simple steps to appropriately tailor their confidentiality policies without sacrificing their legitimate interest in protecting confidential information:

1. Employers should remove any specific prohibitions barring employees from discussing wages, hours, and

(Continued on Page 4)

DOWN WITH LEDBETTER: CONGRESSIONAL ACTION IN THE BLINK OF AN EYE

For those of you who are regular *Laborwatch* readers, this month we have a refresher course on high school civics, "checks and balances," and "separation of powers." Last month, we reported to you on a new Supreme Court ruling in *Ledbetter v. Goodyear Tire and Rubber Co.* In the *Ledbetter* decision, the Supreme Court determined that an employee's discriminatory pay claim starts ticking when the discriminatory pay decision is made, such as a performance evaluation, rather than each time the employee receives a paycheck that reflects the allegedly discriminatory decision. Apparently very unhappy with the Supreme Court's ruling, 53% of the House passed the Ledbetter Fair Pay Act of 2007 (named for the disgruntled employee in the lawsuit with the same name) that would overturn the Supreme Court's decision.

Now sitting on the Senate's legislative calendar, the Ledbetter Fair Pay Act (H.R. 2831) would specifically amend Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act of 1973 to create a new unlawful employment action each time an employee receives a paycheck tied to a discriminatory pay decision. This Act, if passed as written, would essentially eliminate the statute of limitations that currently applies to wage-related claims. As Representative Howard McKeon (R-CA) has stated, this legislation would be a "major fundamental change to civil rights law."

For example, the Supreme Court's *Ledbetter* ruling would give an employee 180 or 300 days, depending on the jurisdiction, to file a discrimination claim based upon an unfair performance evaluation that resulted in little or no raise for the employee. This is the same period of time that the employee would have to file a claim for actions including termination from employment, demotion, or failure to accommodate a disability. The Ledbetter Fair Pay Act would allow that same employee to sue the employer, for example, five years after the performance evaluation because each pay period would result in a new "unlawful employment action."

However, there isn't cause to panic just yet. As Representative McKeon also noted, "bad process makes for bad product," and the bill's rushing through the House will likely cause problems for its passing in the Senate or its ability to overcome President Bush's already-threatened veto. Even traditionally employee-friendly groups such as the National Organization of Women have noted that it's "too soon to declare victory" on the issue.

So, for now, the Supreme Court's ruling in Ledbetter stands as the law on the matter, and the clock on employees' discriminatory pay claims begins with the discriminatory decision itself rather than each payment of wages. If or when further developments occur, we'll provide an update.

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CONFIDENTIALITY POLICIES IN 2007 *(Continued from page 3)*

other terms and conditions of employment with one another. Even prior to this decision, such restrictions were likely unlawful.

2. Employers should add disclaimer language to broad or ambiguous confidentiality policies explaining that nothing in the policy is intended to prohibit employees from discussing with one another (or with third parties who are not competitors of the company) wages, hours, and other terms and conditions of employment. This type of language should negate the argument that employees might "reasonably construe" the policy as a restriction on their right to discuss wages and other terms and conditions of employment.
3. Employers should clearly communicate the new or revised policy to all employees as appropriate.

This decision serves as a great reminder for employers to periodically review personnel policies and procedures and ensure that previously drafted language does not run afoul of either new interpretation or recent changes to federal and state law.

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[1] *Cintas Corp v. NLRB,* 482 F.3d 463 (D.C. Cir. 2007).

NEW COMPLIANCE RULES FOR 2007 EEO FILING

On September 30, 2007, many employers will need to file their EEO-1 Report Form with the Equal Employment Opportunity Commission. The EEOC requires this report to be filed annually by all employers with 100 or more employees, or employers with 50 or more employees if the employer had government contracts of $50,000 or more. The EEO-1 form provides a count of employees by job category and then by ethnicity, race, and gender. Just when you thought it was safe to file, new rules and a new form have been created for the 2007 filing.

ONLINE FILING

Beginning with the EEO-1s due by September 30, 2007, the EEOC will require virtually all EEO-1s be filed online. Paper EEO-1 forms will be allowed only in extreme cases where Internet access is not available to the employer.

JOB CATEGORIES

The EEOC has made several changes to the job categories portion of the report. The most significant change is dividing "Officials and Managers" into two subcategories. The first subcategory is entitled "Executive/Senior Level Officials and Managers." This new subcategory is defined to include employees who plan, direct and formulate policy and provide the overall direction of the organization. The rule of thumb in larger organizations is that this new category includes individuals within two reporting levels of the CEO.

The second subcategory is entitled "First/Mid-Level Officials and Managers." The second subcategory is defined as those who direct implementation or operation within the parameters established by executive/senior level management. This second subcategory also includes individuals overseeing the day-to-day operations of the organization. Finally, business and financial occupations have been moved from the Officials and Managers category to the Professionals category.

ETHNIC AND RACIAL CATEGORIES

The modification of various categories in the form will require the employer to rethink how employees are classified. As to race/ethnicity categories, the EEOC highly recommends that employees be encouraged to self-identify, which should make it easier for employers to provide race/ethnicity information on the EEO-1. Employers should also revisit their own forms to see whether they should be revised to provide categories consistent with the new EEO-1 categories. The new EEO-1 adds a category for "two or more races," which previously did not exist. The new EEO-1 also divides "Asian or Pacific Islander" into two separate categories: "Asian" and "Native Hawaiian or other Pacific Islander." The new EEO-1 renames "Black" as "Black or African American" and renames "Hispanic" as "Hispanic or Latino."

EMPLOYER SURVEYS

When compiling data for the new form, employers must use employment figures from any pay period between July and September 2007. While the EEOC is not requiring employers to resurvey employees for the 2007 report, 2007 hires should have been surveyed using the new categories. The EEOC directs employers who do not resurvey employees for the 2007 report to count employees previously treated as "Asian/Native Hawaiian or other Pacific Islander" as "Asian" for the 2007 EEO-1 report.

When resurveying employees, the EEOC strongly prefers the use of self-identification rather than visual observation when gathering data. Even if an employer believes an employee is of a different race, the employer must accept the employee's self-identification by race and by ethnicity. Only when an employee declines to self-identify may observation or employment records be used.

PENALTIES

The penalties for a failure to file the new EEO-1 form by September 30, 2007, can include record keeping violations and, for federal contractors, debarment.

COMPLIANCE TIPS

To comply with the new EEO-1 Report Form, employers should immediately take steps to reassign job titles to the new EEO-1 job categories. Employers should also create or modify post-hire forms used to gather EEO-1 information for new employees to include the newly created race/ethnicity groupings. Any software used to track EEO-1 information to include the newly created job categories and race/ethnicity groupings should be updated accordingly. The EEOC expects that existing employees will be resurveyed as soon as practicable, therefore, employers should also develop a schedule for distributing updated post-hire forms to existing employees.

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PLASTIC—THE NEW TREND IN PAY

In the past, employers have only been able to pay employees by paycheck or cash. As time marched on, technology boomed, and "direct deposit" became the buzzwords. Now, paycards are the new rage.

A "paycard" is a payroll debit card. Employees are paid their wages through a debit card rather than by paycheck or direct deposit. Paycards have gained popularity with employers who have many "unbanked employees" (employees without bank accounts).

Generally speaking, paycards can make financial sense for employers. According to the Electronic Payments Association, employers save $.60 per paycheck when paper paychecks are not used. For employers in states that require immediate payment upon termination, paycards make meeting such payment deadlines more convenient.

What are the legal issues surrounding paycards?

Historically, most state laws require employers to pay employees their wages without discount and without cost to the employee. These laws were in effect far before paycards became a reality. These laws were designed to protect employees from employers who might, for example, require employees to cash their paychecks in company stores.

Because many of these laws are still on the books, they must be taken into consideration when using paycards. For example, if an employee must pay a fee to use his or her paycard at an ATM, have the wages been paid without discount? Maybe not. To avoid this potential problem, many employers who use paycards offer at least one ATM withdrawal without a fee.

There are other potential legal issues. Employers must look at each individual state's laws to determine if use of a paycard (even without cost to the employee) is allowed. Unfortunately, not all state laws have kept pace with technology. Therefore, many state laws do not specifically address paycards. If the state has addressed direct deposit, it is helpful to look at those laws because direct deposit is similar to paycards. However, issuance of paycards even in those states where direct deposit is allowed is not without risk if the state legislature has not specifically addressed paycards.

In those states that have addressed paycards, an employer must ensure it is complying with all the particulars of that state's law. The Vermont Department of Labor specifically states on its website that payment of wages through a debit card is prohibited by state law. A legislative bill is pending in Vermont to modify the law to allow paycards.

On the other hand, North Dakota law specifically addresses paycards and allows their use, provided certain requirements are met. For example, all wages must be deposited in an account insured by the Federal Deposit Insurance Corporation or National Credit Union Administration.

Nevada law also allows payment through a paycard but is more stringent. For example, the employee must be able to obtain immediate payment in full and receive at least one free transaction per pay period. In addition, all fees or other charges must be prominently disclosed and subject to the employee's written consent, among other requirements.

Lastly, there is federal law to consider. The Federal Reserve Board issued a final rule effective July 1, 2007, that prohibits employers from requiring employees to receive payment by paycard as a condition of employment unless the employee can choose the institution that will receive the deposit. Providing this choice to employees is difficult given the employer is responsible for setting up the account and may have opted for a single account with subaccounts for each employee. Therefore, employers may find that they cannot mandate use of paycards. However, they may still offer it as an alternative form of payment that, in all reality, employees may be happy to choose.

In closing, a study by the Pelorus Group, an independent research and consulting firm, reported that seven million paycards were in circulation in 2006. This is triple the number in use during 2004, and use of paycards is expected to continue growing. Therefore, even if you are not contemplating the use of paycards today, you may be tomorrow, so keep abreast of state law to ensure that any program you implement is legally compliant.

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