



EMPLOYMENT LAW UPDATE NEWSLETTER

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JBW&K Employment Law Practice Group

JBW&K formed the Employment Law Practice Group in response to the growing needs of employers to keep abreast of the many laws, both federal and state, impacting the employment relationship. Our goal is to help our clients proactively understand and balance the rights of management and employees in order to maintain a healthy and stable workforce.

Our Employment Law Practice Group is ready to provide our clients with advice and guidance involving the myriad issues arising out of and involving the employer/employee relationship. In proactively managing the employment relationship, we offer advice, guidance, compliance review and document preparation.

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Update on FMLA Expansion Measure and Overview of FMLA Notice Requirements

By Jennifer L. Muse

In our last issue of the JBW&K Employment Law Update Newsletter, we noted that Congress was considering an amendment to the Family and Medical Leave Act ("FMLA") that would expand the FMLA to allow six months of unpaid leave for family members of wounded military personnel. The amendment was contained in a child insurance reauthorization bill, which President Bush vetoed. On October 18, 2007, the U.S. House of Representatives failed by 13 votes to override the presidential veto.

In its current form, the FMLA provides 12 weeks of job-protected leave to eligible employees for the birth or adoption of a child, to care for a spouse, child or parent with a serious health condition, or for an employee's own serious health condition. FMLA imposes certain notice requirements on employees and employers. Employers need to be aware of the notice requirements imposed by FMLA because failure to follow the notice provisions carefully could result in an employee's entitlement to additional leave.

Steps Employers Should Take When Faced with Requests for Leave

1. Employers should ensure that they have displayed the Department of Labor's FMLA poster in a conspicuous place where it can be seen by employees. Employers should also ensure that they have a policy in an employee handbook or other written format that has been provided to all employees.
2. Once an employer is notified by an employee of the need for leave, if the leave is expected to last more than three days, the employer should have the employee complete a leave of absence request form and a medical certification (if the leave is for the employee's or a family member's

serious health condition) in order to obtain sufficient information concerning the leave to determine whether the leave qualifies under the FMLA.

3. It is the employer's responsibility to designate leave as leave under the FMLA. Accordingly, the employer must determine whether the employee and the requested leave qualify under the FMLA and must notify the employee of its determination, preferably within two days of the request for leave. If the employer is unable to determine whether the leave qualifies because it is awaiting the employee's medical certification, the employer should notify the employee that it has conditionally designated the employee's leave as FMLA leave, pending receipt of the certification. This timely designation is critical as the FMLA regulations provide that if the employer fails to provide notice to the employee that the leave has been designated as FMLA leave, the employee's twelve weeks of leave do not begin to run until the notice has been provided. Thus, if the employer fails to provide notice up front, the employee could be entitled to an additional twelve weeks beginning when the employer designates the leave. This regulation, however, has been called into question in recent years by the U.S. Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, in which the Court struck down a similar provision in the regulations finding that it imposed a penalty without regard to whether the employer's failure to give notice caused actual harm to the employee. The Supreme Court, however, did not address specifically this regulation and declined to decide whether the notice and designation provisions themselves are valid. Despite *Ragsdale*, the regulations have not been amended. Thus, the law remains unclear concerning the effect of an employer's failure to provide notice. Accordingly, the safest course of action for employers is to provide the notice as soon as possible after the employee requests leave.
4. If the employee qualifies for leave, the employer should send notice that the employee's leave is being designated as FMLA leave as soon as possible after verifying that the leave qualifies. The employer must include in this notification the employee's rights and responsibilities under the FMLA, and the consequences of failing to abide by those responsibilities. These responsibilities may include any policy requirement that the employer has that requires the employer to keep the employee informed of his status during his leave. The notice should also request that if the employee needs additional leave or decides not to return from leave that he notify the employer on or before the date of his scheduled return.

5. Employers should track the amount of FMLA leave each employee uses to ensure that the employer has a clear record of all FMLA-qualifying leave taken by the employee in a twelve month period.
6. Employers should retain copies of all documentation sent to and received from the employee. Employers must keep all documents related to the leave in the employee's confidential medical file as these documents contain information about the employee's (or his family member's) medical condition.
7. If questions arise, employers should seek prompt legal advice regarding how to handle FMLA leave situations.

Mandatory Retirement Age: Age Discrimination

By Robyn Hansen

The Chicago based law firm of Sidley Austin, P ("Sidley") recently entered into a consent decree approved by Judge James Zagel of the United States District Court for the Northern District of Illinois settling a case with the EEOC and agreeing to pay \$27.5 million to 32 former partners under a claim arising under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621, et seq. The allegations were that Sidley had violated ADEA in connection with its October 19, 1999 expulsions, downgrades of partners and the implementation of a mandatory retirement policy since 1978. Sidley offered the defense that the partners in the law firm were employers and, thus, not covered as employees under ADEA. Judge Posner, writing for the United States Court of Appeals for the Third Circuit did not make a dispositive determination as to whether the partners were covered employees under ADEA, but rather held that enough doubt exists "about whether the 32 demoted partners are covered by the age discrimination law to entitle the EEOC to full compliance with that part, at least, of its subpoena." *EEOC v. Sidley Austin, Brown & Wood*, 315 F.3d 696, 707 (2002). After years of litigation, Sidley settled as opposed to litigating any further.

ADEA, originally passed in 1967, prohibits employers with 20 or more employees from discriminating against or taking adverse employment action against employees on the basis of their age, specifically, those 40 years of age or older with no upward cap. Accordingly, ADEA, generally, prohibits employers from implementing mandatory retirement ages.

Congress, however, did provide an exemption for bona fide executives or high policy making employees to the prohibition against mandatory retirement ages. Specifically 29 U.S.C.A. §1631(c)(1) provides, "[n]othing in this Act shall be construed to

prohibit compulsory retirement of any employee who has obtained 65 years of age and who, for the two year period immediately before retirement, is employed in a bona fide executive or higher policy making position, if such employee is entitled to an immediate non-forfeitable annual retirement benefit from a pension, profit sharing, savings or deferred compensation plan, or any combinations of such plans, of the employer of such employee, which equals, in the aggregate, at least \$44,000." The governing regulations provide that because this provision is an exemption from the nondiscrimination requirements of the Act, "the burden is on the employer to show that every element has been clearly and unmistakably met." 29 C.F.R. §1625.12(b). Thus, in order to meet the exemption, the employee must: (1) be 65 or older; (2) qualify as a bona fide executive; (3) be in a high policy making position; and (4) be guaranteed a non-forfeitable annual retirement benefit of \$44,000.

The exemption is intended to be limited to a very few top level employees who exercise substantial executive authority over a significant number of employees in a large volume of business. The employee does not qualify as a bona fide executive if the employee is a member of middle management regardless of how great his retirement income may be. The term "high policy making" is defined in the regulations referencing the Congressional Conference Report as "individuals who have little or no line authority but whose position and responsibility are such that they play a significant role in the development of corporate policy and effectively recommend the implementation thereof." 29 C.F.R. §1625.12. A high policy making employee would not qualify for this exemption if the employee merely supervises the development of various policies taking recommendations from his supervisors. Furthermore, the employee must have held the bona fide executive and high policy making position for at least two years prior to the mandatory retirement.

Lastly, and significantly, in order to qualify for the exemption, the executive must be guaranteed an annual non-forfeitable retirement benefit of \$44,000 or its actuarial equivalent. Accordingly, the benefit cannot be tied to any type of forfeiture clause such as a non-competition contingency. The regulations provide guidance on determining the actuarial equivalent of a \$44,000 annual benefit. 29 C.F.R. §1627.17. One key to this calculation is that amounts attributable to Social Security, employee contributions, contributions of prior employers and roll over contributions must be excluded in ascertaining the determination of the annual retirement benefit to be received. Thus, in the context of a qualified 401(k) plan, the employee deferral amounts plus gains and losses would have to be excluded from consideration.

Employers must be cognizant of the parameters of ADEA as they make decisions on restructurings, or

succession planning, and be aware that mandatory retirement is only available in very limited circumstances.



Procedural Steps for Virginia Unemployment Compensation Claims

by Matthew D. Meadows

The Virginia Unemployment Compensation Act, Va. Code § 60.2-100 et seq., is administered by the Virginia Employment Commission (VEC) and is designed to protect against wage loss that is not the fault of the employee. The process that ensues following an employee's separation from his or her employment commences when an individual applies for benefits. A questionnaire is then sent to the employer that includes the employee's purported reason for termination and questions concerning the termination. If the employer contests the employee's request for unemployment benefits, the VEC will then contact the employer and employee and set up an initial fact finding conference conducted by a VEC hearing officer. The employer and employee may be present for this interview, and may provide additional information in writing or by telephone to the examiner. The hearing may take place with both parties present or the hearing officer may choose to interview each party separately. The Hearing Officer then determines eligibility for benefits, and a notice of the results is sent to both interested parties.

Former employees who apply for unemployment benefits will be disqualified for benefits if (1) he or she voluntarily quits, or (2) if the former employee was discharged for misconduct connected or related to employment. The VEC consistently relies on the Virginia Supreme Court's decision in *Branch v. Virginia Employment Commission*, 219 Va. 609, 249 S.E.2d 180 (1978) in defining misconduct.

In our view, an employee is guilty of "misconduct connected with his work" when he *deliberately* violates a company rule reasonably designed to protect the legitimate business interests of his employer, or when his acts or omissions are of such a nature or so recurrent as to manifest a *willful* disregard of those interests and the duties and obligations he owes his employer. . . . Absent circumstances in mitigation of such conduct, the employee is "disqualified for benefits", and the burden of proving mitigating circumstances rests upon the employee. 219 Va. at 611.

Assuming that an employee or an employer is dissatisfied with the Hearing Officer's determination either may appeal the Hearing Officer's decision. The Appeal Hearing may be held in person or telephonically. At the Appeal Hearing, the Appeals Examiner presides over a hearing similar to a court trial. Documents may be presented as exhibits and witnesses may be called to testify. Following the Appeal Hearing, the Appeals Examiner issues a written opinion either disqualifying or qualifying the employee for unemployment benefits.

Finally, either party may within thirty days following the date of the decision of the Appeals Examiner appeal the Appeal Examiner's ruling to the VEC. Either party may appeal the decision of the VEC to the local Circuit Court and either party may appeal any Circuit Court ruling to the Virginia Court of Appeals. However, no new evidence may be introduced at any appeal following the original Appeal Hearing and all decisions are made based upon the record of evidence obtained at the Appeal Hearing.

Recent Developments Concerning the Department of Homeland Security's Safe Harbor Regulation for Social Security No-Match Letters

By Jennifer L. Muse

Annually, the Social Security Administration (SSA) sends no-match letters to employers whose W-2 wage reports result in more than ten mismatches if those mismatches constitute at least one-half a percent of all W-2 forms filed by that employer in one year. Recent developments in the law have raised questions as to how employers should handle these no-match letters. On August 15, 2007, the Department of Homeland Security (DHS) published a Final Rule regarding the obligation of employers to respond to the SSA's Social Security Number (SSN) mismatch notices. Under the rule, SSA was to include a "Special Notice" from DHS as part of SSA's standard no-match letter. DHS's Final Rule set forth a safe harbor procedure for employers who received no-match letters. This safe harbor procedure set forth specific steps an employer could take when faced with a no-match letter, which DHS indicated would guarantee that the no-match letter would not be used by DHS as evidence that the employer possessed constructive knowledge that the employer was employing an unauthorized worker. The Final Rule was to take effect on September 14, 2007.

Prior to the effective date of the rule, several labor groups and civil rights organizations filed suit in the United States District Court for the Northern District of California seeking to block implementation of the rule.

After an August 31, 2007 hearing, the federal court issued a temporary restraining order blocking DHS from including its special notice with SSA's no-match correspondence. On October 12, 2007, the Court granted a preliminary injunction preventing implementation of the final rule.

In a motion filed November 23, 2007, DHS informed the Court that it is commencing additional rulemaking to resolve the issues that led the Court to enjoin enforcement of the no-match rules. DHS has informed the Court that it intends to complete the rulemaking by March of 2008 and has requested that the Court stay the proceedings until then. On December 5, 2007, DHS filed an appeal to the Ninth Circuit Court of appeals requesting that the injunction be lifted.

In the meantime, employers have little guidance regarding how to proceed if a no-match letter is received. As noted above, DHS could consider the employer to have constructive knowledge that it is employing an unauthorized worker if the employer does not take steps to remedy the no-match. Employers, therefore, should consider adopting written procedures setting out how no-match letters will be handled, with reasonable time frames. If an employer receives a no-match letter, the employer should not ignore the letter, but should follow the employer's policy regarding how to respond to such a letter, as well as any steps contained in the letter itself. If the final regulations are implemented in a revised form in 2008, employers will need to reevaluate their policies at that point to determine whether changes are necessary to comply with the regulations or to receive the safe harbor protection.

EEOC Issues Guidance on Employment Test and Application Procedures to Screen Applicants, Workers

By Robyn Hansen

On December 3, 2007, the United States Equal Employment Opportunity Commission (EEOC) issued an extensive fact sheet on the application of the federal anti-discrimination laws to employer application tests and procedures used to screen applicants for employment. The EEOC noted that it issued this guidance in response to the increased employment testing due in part to the post-9/11 security concerns as well as concerns about workplace violence, safety and liability. The EEOC also noted that the increasing number of employers who are adopting on-line job applications has further motivated employers to seek ways to screen out the large number of on-line applicants in an objective manner. The EEOC noted that the number of charges raising issues of employment testing have been on the

increase although the numbers are still relatively small. In Fiscal 2003, 26 such charges were filed compared to 141 charges in Fiscal Year 2006. The guidance may be found at www.EEOC.gov/policies/docs/fact_employment_procedures.html. The JBWK Employment Law Group is available to discuss and review this new guidance and any impact it may have on your employment practices.

RELIEF GRANTED: IRS NOTICE 2007-86 EXTENDS 409A DEFERRED COMPENSATION TRANSITION RELIEF

By Lauren C. Baddar

Alert: On October 22, 2007, in response to comments and requests by numerous law firms and business groups, the Internal Revenue Service granted additional 409A transition relief by generally extending the compliance deadline to December 31, 2008.

What is 409A anyway?

In 2004, Congress enacted section 409A of the Internal Revenue Code (IRC) imposing strict restrictions on nonqualified deferred compensation arrangement and steep penalties for noncompliance. Congress passed this legislation in response to widespread awareness of tax avoidance by high level executives through such arrangements as the highly publicized actions taken by executives at Enron in 2001 deferring millions of dollars into nonqualified plans and accelerating millions of dollars worth of distributions in the weeks preceding bankruptcy.

A first look at the statute, which may occupy a page of the IRC, makes 409A seem relatively simple and straight forward. To summarize, if you have a nonqualified deferred compensation plan then you need to follow the rules or you will be subject to a 20% additional tax and possibility interest penalties. However, since the enactment of the statute in 2004, the IRS and Treasury Department have issued voluminous and complex guidance regarding the application and rules of 409A. On April 17, 2007, the Treasury Department issued its final rule regarding the application of 409A to nonqualified deferred compensation plans with a compliance deadline of December 31, 2007. To the relief of many employers, business groups and attorneys, the IRS issued Notice 2007-86 on October 22, 2007 generally extending transition relief until December 31, 2008.

The Basics

The final regulations issued on April 17, 2007 state that a plan provides for deferred compensation if the service provider (generally the employee) has a legally binding right during a taxable year to

compensation that, pursuant to the terms of the plan, is or may be payable to the employee in a later taxable year. Plan is defined BROADLY and covers individual contracts such as employment agreements. Furthermore, conditions placed on the right to payment do not nullify the legally binding right. Therefore, it is possible for a service provider to have a legally binding right to compensation before it vests. This means many, if not most, employment agreements that provide for severance pay, with or without contingencies, will be subject to 409A.

The Rule

As stated previously, the final rule and other applicable guidance regarding 409A are voluminous and complex. *In general*, any plan subject to 409A:

1. Must be in writing.
2. Deferred compensation may only be distributed upon:
 - (a) Separation from service,
 - (b) Disability,
 - (c) Death,
 - (d) At a time (or according to a fixed schedule) specified before the deferral,
 - (e) An unforeseeable emergency, or
 - (f) A change in control.
3. Initial election to defer compensation must be made before the beginning of the year in which the services will be performed.
4. Further changes are restricted.
5. Acceleration is prohibited.

Short-Term Deferral Exclusion

Plans may be able to avoid coverage under section 409A altogether by meeting the requirements for a short-term deferral. This can generally be accomplished by incorporating a statement into the plan stating that payment will be made within 2 ½ months following the end of the employee's or employer's first taxable year in which the substantial risk of forfeiture lapses. For example, a plan stating that an employee will receive an amount in lump sum within 2 ½ months following the end of his first taxable year, March 15 for calendar year taxpayers, following an involuntary termination without cause would be considered a short-term deferral and, therefore, not subject to section 409A.

Relief Provided by Notice 2007-86:

General Rule: Taxpayers are NOT required to comply with 409A final regulations during 2008, but rather must operate nonqualified deferred compensation plans in compliance with plan terms to the extent consistent

409A and applicable guidance including Notice 2005-1.

Due to the complexity of section 409A guidance and significant consequence of noncompliance, we recommend employers seek legal advice before designing new nonqualified deferred compensation plans or amending existing plans prior to the December 31, 2008 deadline.



Revised I-9 Form Issued

By Jennifer L. Muse

The U.S. Citizenship and Immigration Services published a notice on November 26, 2007 that employers must transition to using a revised Employment Eligibility Verification Form I-9 no later than December 26, 2007. Employers that do not transition to the revised form by that date will be subject to penalties. The changes to the I-9 form are minor, confirming existing guidance that the employee need not include his or her social security number in Section 1 and revising the list of List A documents that will suffice in Section 2 to establish both identity and employment eligibility. All employers should make efforts to transition to the revised I-9 form no later than December 26, 2007.

2008 Retirement Plan Limits

§401(k)/403(b) Elective Deferral Maximum	\$ 15,500
§415 Defined Benefit Dollar Maximum	185,000
§415 Defined Contribution Annual Addition Max	46,000
§457(b) Nonqualified Deferred Compensation Limit	15,500
§401(a)(17) Annual Compensation Limit	230,000
§414(1) Highly-Compensated Employee Limit	105,000
§14(v) Catch-up Contribution Limit	5,000

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Additionally, we provide employers with specially designed training and workshops in an effort to avoid complaints and lawsuits. In the event that employment disputes do arise, we are well prepared to represent our clients before administrative bodies or courts at the local, state or federal level.

The Employment Law Practice Group is available to assist our clients in evaluating any employment situations that arise; and, we are ready to help formulate a strategy which best serves the client's objectives and needs.

Members of the Employment Law Practice Group:



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Employment Law Practice Areas:

- Affirmative Action
- Discrimination & Harassment
- Drug and Alcohol Testing
- Employment Practices, Policies and Handbooks
- Executive Compensation Packages
- Employment Contracts, Noncompetition Agreements and Duty of Loyalty
- Employee Retirement and Health Benefits
- Family and Medical Leave Act (FMLA)
- Immigration
- Labor and Union
- Safety
- Unemployment Compensation
- Tax Issues
- Wage and Hour Issues
- Whistleblower and Retaliation
- Worker's Compensation