EMPLOYMENT LAW UPDATE NEWSLETTER

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March 2008
Volume 2, Issue 1

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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FMLA Expansion for Military

By Lauren C. Baddar

On January 28, 2008 President Bush signed into legislation the National Defense Authorization Act (NDAA). This Act, in part, amends the Family and Medical Leave Act of 1993 (FMLA) to permit military servicemembers' relatives to take up to 26 workweeks of leave to care for their military family member under certain circumstances. This expansion to FMLA took effect upon the President's signature. To be eligible for this type of leave an employee must be a spouse, son, daughter, parent, or next of kin of a covered servicemember. The Act defines a "Covered Servicemember" to mean "a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness." The FMLA amendment also includes definitions of outpatient status and serious injury or illness to assist in determining whether a servicemember is covered under the Act.

Additionally, NDAA amends FMLA to permit employees to take FMLA leave for "any qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation." However, this portion of the legislation will not become effective until such time as the Secretary of Labor issues final regulations defining "any qualifying exigency". Although this portion of the amendment will not be effective until final regulations are issued the Department of Labor (DOL) does encourage employers to offer this type of leave to qualifying employees. The DOL issued a Notice of Proposed Rulemaking on February 11, 2008 seeking comments on defining a "qualifying

exigency" to be received by April 11, 2008. The DOL anticipates issuing final regulations promptly after reviewing comments.

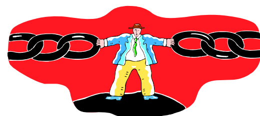
This legislation is of particular importance to employers and employees in the Hampton Roads area given the significant military presence. FMLA covered employers need to incorporate these amendments into their FMLA policies as soon as possible.

For more information, please contact a member of our Employment Law Group.

Retiree Health Benefits Freed from the Manacles of the Age Discrimination In Employment Act

By Robyn H. Hansen

The Equal Employment Opportunity Commission (EEOC) in December of 2007 issued regulations allowing employers to coordinate retiree health benefits with Medicare and state health benefits without concern that the coordination violated the Age Discrimination in Employment Act (ADEA). Prior to the enactment of these regulations, an employer who provided retiree health care could not coordinate the offerings of retiree health coverage with Medicare without running the risk of having engaged in age discrimination. The EEOC determined that the application of the ADEA to the coordination of retiree health benefits with Medicare was actually encouraging employers to cease providing health benefits, and, thus, was actually contrary to the interests of retirees. These new regulations, however, only cover retiree health benefits. The exemption does not apply to health benefits that are offered to current employees who are at or over the age of Medicare eligibility. The coordination of health benefits with Medicare for current employees must still be analyzed under the ADEA.



If you have any questions, please contact a member of our Employment Law Group.

IRS Issues New Proposed Cafeteria Plan Regulations

By Jennifer L. Muse

On August 26, 2007, the Internal Revenue Service (IRS) issued new proposed regulations governing the design and operation of cafeteria plans under Section 125 of the Internal Revenue Code. Cafeteria plans allow employers to offer one or more benefits to employees on a tax-favored basis. To qualify, a cafeteria plan must offer employees a choice between at least one taxable benefit, such as cash, and at least one non-taxable benefit, such as health coverage, with employee contributions typically made on a salary-reduction basis. With certain exceptions, the cafeteria plan regulations will become effective for plan years beginning on January 1, 2009. Some of the more significant changes and clarifications made by the proposed regulations are discussed below.

The new proposed regulations make clear that the only means by which an employer can offer employees an election between taxable and nontaxable benefits without the election itself being categorized as gross income to the employees is through a written cafeteria plan that complies with the requirements of Section 125. In addition, the proposed regulations expand the information that must be contained in the cafeteria plan document. For example, under the new proposed regulation, the cafeteria plan document must state specifically that participation in the cafeteria plan is limited to employees. In addition, the new regulations require that more detail be contained in plan documents with respect to various benefits and plan features, such as details regarding any grace period offered by the plan, paid time-off benefits, and distributions from a health FSA to a health spending account. The proposed regulations also make clear that any amendment to a cafeteria plan may only become effective for periods after the later of the adoption date or the effective date of the amendment.

The proposed regulations indicate that a cafeteria plan generally may not offer benefits that defer compensation, and benefits generally may not be carried over or applied to a later plan year. The proposed regulations provide several exceptions to this rule, however, including a long-term disability policy paying benefits over more than one year, certain advance payments for orthodontia, and salary reduction contributions in the last month of a plan year used to pay accident and health insurance premiums for the first month of the following plan year.

Interestingly, the proposed regulations permit a cafeteria plan to provide that employee coverage elections made within the first thirty days of employment can be effective retroactively to the date of hire. This rule eliminates the need to require a new employee to pay for retroactive coverage through after-tax contributions. The proposed regulations also confirm the qualified benefits that may be provided through a cafeteria plan, including accident and health benefits, health care FSA, contributions to HSAs, adoption and dependent care assistance, COBRA premiums, disability coverage, life insurance, and 401(k) deferrals.

As a result of the new proposed regulations, plan sponsors should review their cafeteria plan to identify compliance gaps that will require amendment of the plan once the proposed rules are finalized.

JBWK's Employment Law Group can assist employers and plan sponsors in evaluating their current plan documents for compliance with the regulations and current law.

IRS Issues Final Regulations for Section 403(b)

By Jennifer L. Muse

On July 23, 2007, the IRS issued final regulations for Section 403(b) tax-sheltered annuity plans. The final rules include a few significant changes from the proposed rules originally issued in November of 2004. With some exceptions, the final rules as effective as of January 1, 2009, but employers are permitted to follow the new rules now. This article highlights a few of the changes made by the final regulations.

Under the final regulations, all 403(b) plans must be maintained pursuant to a written plan document, which must be adopted by December 31, 2008. The written plan document does not need to be a single document, but may be a compilation of employer policies, annuity contracts, salary reduction agreements and other similar documents. Although the final regulations do not require a single plan document, if a compilation of documents is used, all of the documents taken together must satisfy all of the requirements of 403(b). This means the documents must include all of the necessary information concerning eligibility rules, benefits available, applicable limitations, contracts made available under the plan, and the time and form under which benefit distributions are made.

The final regulations also continue to permit contract exchanges, but the regulations place significant new limitations on the scope of permissible contract exchanges. Pursuant to the final regulations, contract exchanges are permitted after September 24, 2007 only if:

The recipient of the contract includes distribution restrictions that are at least as, or more, stringent than those in the transferring contract;

The participant's accumulated benefit after the contract exchange is at least equal to the participant's accumulated benefit before the exchange; and

The employer has entered into an agreement with the vendor of the recipient contract that provides that the employer and vendor will provide each other with information on an on-going basis, including information about the participant's employment status, hardship withdrawals, and plan loans.

Although these requirements are effective for contract exchanges after September 24, 2007, employers have until January 1, 2009 to have information sharing agreements in place covering those exchanges.

Section 403(b) requires all amounts under a 403(b) plan to be nonforfeitable at all times. The final regulations, however, permit employers to subject any nonelective contribution, such as matching and profit sharing contributions, to a vesting requirement. Under the final regulations, any nonvested contributions must be held in a separate account until they vest, at which time they will become subject to the rules of 403(b). If a plan has more than one vesting schedule, a separate account must be maintained for contributions under each vesting schedule. The employee will be taxed on the separate account, unless certain exceptions apply.

Although the final regulations generally are not effective until January 1, 2009, employer should begin planning the steps needed for compliance with these rules by that date.

JBWK's Employment Law Group can assist employers in evaluating their current plan documents and preparing them for compliance with the final regulations.

Upcoming Employment Cases before the U.S. Supreme Court

By Jennifer L. Muse

The United States Supreme Court has a heavy docket of employment cases during the 2007-2008 term. The Court has already heard argument on eight employment law cases and has argument scheduled on four more cases. The focus of the cases this term has involved primarily issues involving retaliation, the Age Discrimination in Employment Act (ADEA), and ERISA. For example, in April, the Court will hear argument in *Meacham v. Knolls Atomic Power Laboratory* and will determine whether the employee alleging disparate impact under the ADEA bears the burden of persuasion on a "reasonable factors other than age" defense. The Court will also hear argument in *Crawford v. Metropolitan Government of Nashville* to determine whether the anti-retaliation provision of Title VII protects an employee from being discharged because she cooperated with her employer's internal investigation of sexual harassment.

Stay tuned for more information on these and other cases heard this term in upcoming issues.

Federal Minimum Wage Increase

By Jennifer L. Muse

The federal minimum wage will increase to $6.55 per hour on July 24, 2008. The minimum wage will increase again on July 24, 2009 to $7.25. Employers should ensure that their federal minimum wage posters are up-to-date once this change occurs.

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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:

Robyn Hylton Hansen, Chairperson
Richard B. Donaldson, Jr.
Matthew D. Meadows
Rebecca S. Aman
Jennifer L. Muse
Lauren C. Baddar

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

This newsletter is intended only to provide general information and not to provide individual advice or to recommend a particular course of action in any particular circumstances.
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