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Employment Law Update December, 2008

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Congress Broadens Disability Discrimination Protections

In 1990, President George H.W. Bush signed the Americans with Disabilities Act ("ADA"), which broadened the rights of individuals with physical or mental impairments to be free from discrimination in the workplace. Over the years, Courts have narrowly construed a number of ADA legal principles, which critics contend unduly restricted the intended rights guaranteed by the ADA. In 2008, both the House and Senate overwhelmingly passed the ADA Amendments Act of 2008 ("ADAAA") and President George W. Bush has signed this Act into law.

Initially, the ADAAA would reverse prior Supreme Court decisions that recognized that ameliorative effects of mitigating measures, such as medication or other medical devices, should be considered when determining whether a physical or mental impairment was "substantially limiting." Thus, if an individual's medication controlled the symptoms or the effects of the underlying medical condition, many courts concluded that the individual was not "substantially limited" in a major life activity and was not a qualified individual with a disability.

In explicitly repudiating these decisions, the ADAAA prohibits a Court from taking into account the effects from medication, medical supplies, equipment or appliances, low-vision devices or prosthetics. Such items include hearing aids, oxygen equipment and mobility devices. However, Courts may still take into account the effects from "ordinary eyeglasses or contact lenses."



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DOL Issues Updated FMLA Regulations

After years of wait, the DOL has finally issued updated FMLA regulations. While the FMLA was enacted in 1993, employees, employers, healthcare providers and courts have struggled over the years to interpret and apply the regulations issued by the DOL initially in June 1993, which were later finalized in August 1995. In announcing the new regulations, the DOL promised that the "final rule will improve communications" and "provide clarity for both workers and employers about their responsibilities and rights under the FMLA leave."

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Employee Free Choice Act: A Guaranty of "Free Choice" or "No Choice"?

Organized labor has made it no secret that its #1 legislative initiative in the upcoming Obama Administration is passage of The Employee Free Choice Act. In 2007, a majority in both the House and Senate voted in favor of EFCA and its passage was only prevented by the threat of Republican led filibuster in the Senate and a threatened veto by President Bush. Now with a larger Democratic majority in the House and Senate, together with the pledge by President-elect Obama to sign, passage of EFCA is highly likely in 2009.

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EFCA Would Require Interest Arbitration

While much of the focus of the EFCA debate centers around the elimination of the secret election requirements, this act would affect employers in other significant respects. Presently, the NLRB does not regulate the terms of any collective bargaining agreement which is left to the inherent powers of both employees, collectively, and their employers to reach

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Congress Broadens Disability Discrimination Protection *(continued from page 1)*

The second fundamental change by the ADAAA is to reject the restrictive standards that the Supreme Court recognized should be used in determining when a "major life activity" is "substantially limited." The prior standard only protected individuals who were either prevented or severely limited "from doing activities that are of central importance to most people's daily lives." Further, the ADAAA additionally rejects as unduly restrictive the EEOC regulation that sought to clarify these standards and has mandated that the EEOC prepare new regulations. Finally, the ADAAA has broadened the concept of "major life activities" to now include "major bodily functions," such as the "immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions."

The ADAAA will become effective January 1, 2009, and will certainly result in expanded protections and greater exposure for employers. While expanding the concepts of major life activities and narrowing the burden to establish a substantial limitation, the ADAAA does reiterate that it is not intended to cover impairments that are transitory and minor in nature, which is further defined as an impairment that is not expected to last more than 6 months. While employers will have to wait for further clarification from the new EEOC regulations, it nevertheless will have to carefully review any employment decisions that are influenced by the underlying physical or mental impairment of an applicant or employee.

DOL Issues Updated FMLA Regulations *(continued from page 1)*

The new final regulations make a number of technical and substantive changes, including:

- Elimination of the categorical penalty for an employer failure to properly designate a medical leave as covered by the FMLA and replaced with an individual case-by-case assessment.
- Clarifies timing requirements for doctor visits under the continuing treatment provisions for FMLA leaves.
- Provides further guidance concerning healthcare provider treatment requirements for chronic medical conditions.
- Permits employers to require the substitution of all accrued time off during an FMLA leave regardless of the nature of the underlying leave.
- Updated the medical certification form and clarified the respective employer and employee responsibilities for incomplete forms.
- Clarified recertification rights for long-term or chronic intermittent conditions and updated the fitness-for-duty certification process.

The new FMLA regulations become effective on January 16, 2009. Further information is available from the DOL web site, www.dol.gov and specific changes will be addressed in more detail in upcoming Sandberg Phoenix Employment Law Updates.

Employee Free Choice Act: A Guaranty of "Free Choice" or "No Choice"? *(continued from page 1)*

Since 1935, the National Labor Relations Act ("NLRA") has regulated the ability of employees to select a union to collectively represent their interests in bargaining. While the NLRA has always permitted an employer to voluntarily recognize a labor union as a collective bargaining representative for its employees, historically, the National Labor Relations Board ("NLRB") typically conducted a secret ballot election and certified the union only if it receives a majority of the votes cast during the election.

Rather, than continue to use a secret ballot election, unions have long sought to require recognition simply based on obtaining signed authorization cards from a majority of the present employees in the proposed bargaining unit. While requiring certification of a union in the event it obtains signed authorization cards from a majority of the employees, this process would not apply in the event the employees later wish to de-certify the union. In that instance, the EFCA would still require that a secret election must be conducted by the NLRB.

So why eliminate a basic hallmark of democracy --- the right to vote? The percentage of private sector employees represented by labor organizations has declined significantly over the last several decades. While the reasons for such decline vary, and are subject to great debate, unions have long argued that the present NLRB election process inherently favors employers. Notwithstanding this belief, unions have won 63.1% of all NLRB-conducted elections during the period of April 2008 - September 2008 and the actual success rate has been increasing each fiscal year this decade.

EFCA Would Require Interest Arbitration *(continued from page 1)*

agreement. If enacted, the EFCA would mandate that government appointed arbitrators would determine the actual terms and conditions of the collective bargaining agreement in the event neither the employer nor the union are able to achieve agreement within four months after certification of the union.

In turn, the “agreement” imposed by an arbitrator would be binding for at least two (2) years thereafter unless the parties subsequently agreed to change this agreement. Essentially, this process would be similar to the use of arbitration by Major League Baseball where an arbitrator chooses either a player’s proposal or the team’s proposal. In reality, the person deciding the terms and conditions of employment, the arbitrators, is the person typically least knowledgeable of the specific challenges facing both the employer and the employees in the actual workplace.

Court Requires Employer Who Mistakenly Told Employee He Was FMLA Eligible To Honor Its Commitment

The Seventh Circuit Court of Appeals, which covers Illinois, recently held that an employee, who was in fact ineligible for FMLA leave, could otherwise nevertheless sue for failure to return him to the same or equivalent position upon his return from what he believed to be FMLA leave. In *Peters v. Gilead Sciences, Inc.*, the Court held that where the employer promises an employee FMLA leave, and that promise induces the employee to take leave, the employee will have a cause of action against the employer for failure to follow the guidelines of the FMLA, even if it is later determined that the employee is ineligible.

Mr. Peters took what he thought was FMLA leave from December 5 through December 16, 2002. He later took an additional leave from March 4, 2003 to May 5, 2003 for further treatment related to the injury. Gilead’s employee handbook contained representations that employees were entitled to FMLA leave of 12 weeks if they had worked for the employer for 12 months, and at least 1,250 hours. In addition to the handbook, Gilead also sent Peters a letter during his first leave of absence outlining the Family Medical Leave Act and indicating that the company deemed his leave of absence FMLA covered. Following Mr. Peters’ second leave of absence, he returned to work within the 12 week leave availability provided by the FMLA and specified in his handbook. However, upon his return to work he found that his position had been filled.

Mr. Peters sued in federal court and Gilead claimed as a defense to the FMLA cause of action that it did not employ the required 50 employees within 75 miles of Mr. Peters’ work site and, therefore, Mr. Peters did not meet the statutory requirements for FMLA eligibility. While it was correct that Mr. Peters was not an FMLA eligible employee, as defined by the Act, the Court held that Mr. Peters did have potential claims under state law for breach of contract and equitable estoppel. The Court based its decision on the fact that the employer misled the employee concerning his entitlement to family leave because, in part, the handbook specifying that employees who worked one year and 1,250 hours were eligible for 12 weeks of leave per year could be interpreted under state law to be a contract. Furthermore, Mr. Peters was also entitled to bring his state law claims of equitable estoppel, because the employer, by its handbook, provided FMLA-like leave benefits using eligibility requirements less restrictive than those in the FMLA.

Employers should be aware of using FMLA language in an employee handbook when it is not an FMLA qualifying employer because as this case shows, the promises in that handbook may give rise to recovery under promissory estoppel theories or contract theories in state court. For help in tailoring employment policies and handbooks, contact your employment counsel.

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H-1B Visa Application Deadline

Employers that employ non-immigrants to work in specialty occupations pursuant to an H-1B visa must be prepared prior to the annual rush for visa filings each Spring. Unless and until such time as Congress would pass further legislation, there is currently a 65,000 annual cap for new H-1B workers (6,800 of which are set aside for U.S.-Chile and U.S.-Singapore Free Trade Agreements); and for the past several years that cap has been exceeded in the first few days, requiring the USCIS to conduct a lottery for the 65,000 available spots. If you anticipate the new hire of a foreign worker under the H-1B professional category, remember that all applications MUST be filed with the appropriate United States Immigration and Citizen Services (USCIS) field office on April 1, 2009 to be considered for the fiscal year beginning October 1, 2009.

The H-1B Visa Reform Act of 2004 provided some cap relief by exempting the first 20,000 H-1B visas for foreign workers with a Master's or higher level degree from a U.S. academic institution. For each fiscal year, 20,000 persons who hold such credentials are statutorily exempted from the cap. These applications are also due by April 1, 2009 for Fiscal Year 2010 that begins October 1, 2009. Like the regular H-1B filings, USCIS received in excess of 20,000 request during the first week of filing in April 2008 and had to conduct a lottery for selecting petitions for processing.

H-1B Visa Alternatives

Because the H-1B visa cap has been hit each year for the last several years, employers have had few options to hire other professional employees during the year. As part of North American Free Trade Agreement ("NAFTA"), professional workers from Mexico or Canada are eligible to apply for a "TN" visa in order to work for a US employer. Historically, the TN visa would only be issued for up to one year and renewal was far from certain or guaranteed.

The TN Visa allows a non immigrant worker to enter the United States to work in a variety of professional positions listed under NAFTA. The majority of these positions require a Bachelor's degree and/or a professional license. However, and unlike the H-1B visa, there is no annual quota or cap on the number of TN visas that may be issued. On October 16, 2008, the Department of Homeland Security issued a final rule that increases the allowed initial and renewal period of a TN visa from one year to three years. Thus, employers who are unable to petition for any further H-1B visas due to the annual cap may still recruit individuals from Mexico or Canada jobs that are qualified for such jobs despite the H-1B cap.

Sandberg Phoenix attorneys are available to speak on a wide range of law-related subjects.

For more information, call Mary Jennings at 314-446-4215

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