Employer Law Report

Reporting on recent legal developments and trends affecting employers

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Healthy Families Act of 2009 Introduced in Congress

» Posted on May 20, 2009 by Brian Hall

On May 18, 2009, Representative Rosa L. DeLauro, a Democrat from Connecticut, introduced the Healthy Families Act of 2009 (H.R. 2460) in the U.S. House of Representatives. The bill, which is largely the same as bills issued in prior sessions of Congress, would require employers with more than 15 employees to provide workers with up to 56 hours of paid sick leave each year. Under the bill, workers would accrue paid sick leave at the rate of one hour for every 30 hours worked, could begin using the paid sick leave after 60 days of employment, and could roll over unused sick leave into the next calendar year. Similar to the proposed Ohio legislation that was withdrawn before the 2008 November elections, employers would not be permitted to ask for written documentation of the need for leave until after the employee has missed three consecutive days.

Most of you will recall that last year's Ohio legislative proposal was withdrawn following political negotiations with Governor Strickland's office due to concern that the bill would devastate Ohio's business climate. While H.R. 2460 would not appear to disproportionately impact Ohio, it would impact more Ohio employers than the proposed Ohio legislation

continued on page 2

EEOC Issues Technical Guidance on ADA-Compliant Employer Preparedness for the H1N1 Flu Virus

» Posted on May 11, 2009 by Brian Hall

We have been receiving more and more questions from human resources professionals asking how the ADA might impact their preparation for a potential pandemic flu. Now the EEOC has issued technical guidance on the topic, focused primarily on employers' rights to make medical inquiries and require medical examinations of applicants and employees. With respect to applicants, the EEOC notes that the ADA operates normally to preclude all disability-related questions and medical exams until after a conditional offer has been made. With respect to current employees, who can be required to respond to medical inquiries or undergo medical exams only if they are job-related and consistent with business necessity, however, the EEOC recommended a model survey of employees that could be issued to all employees in preparation for a pandemic. The model survey is reprinted on our blog.

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Keeping Pace with Labor and Employment Law Developments

Welcome to another issue of our blog newsletter — *Employer Law Report* — which features several recent highlights from our blog. With the pace that labor and employment laws are changing, we are using our blog as our primary means to educate our clients and friends on important developments that impact their workplace.

If you are not yet a regular visitor to our blog, we invite you to sign up for the blog either through an RSS feed or by e-mail. Visit us at www.employerlawreport.com and see what we're blogging about today.

– Brian Hall, *Employer Law Report Editor*

HEALTHY FAMILIES *continued from page 1*

would have impacted since the Ohio law would not have required employers with 25 or fewer employees to provide paid sick leave. At a time when American businesses, particularly small businesses, are still reeling from the economic downturn, federally mandated paid sick leave — while perhaps laudable in its intent — looks like it will create more problems than it cures. The change in Presidential administrations and the make up of Congress, together with the concerns over the H1N1 flu virus, suggest that this might be the year that mandated paid sick leave passes.

Supreme Court Issues Decision in *AT&T v. Hulteen*

» Posted on May 20, 2009 by Jaime Powell

On May 18, 2009, the Supreme Court of the United States issued its opinion in *AT&T v. Hulteen*. Reversing the Ninth Circuit's decision, the Court held that AT&T did not violate the Pregnancy Discrimination Act of 1978 (PDA) by calculating the accrual of pension benefits in a way that gives less retirement credit to employees who took pregnancy leave before enactment of the PDA than to employees who took other kinds of medical leave.

AT&T offered pension benefits based on Net Credited Service, which was calculated based on an employee's date of hire and adjusted for any time the employee was not working, i.e. not earning service credits. Before 1978 (and the enactment of the PDA), employees were credited a maximum of 30 days for pregnancy leave. In contrast, employees on regular temporary disability had no limit on the days they could remain off work while continuing to accrue service credits. This method of accrual was changed after the PDA went into effect, but not retroactively. As a result, the plaintiffs in Hulteen received smaller pensions than they otherwise would have received had they received full credit for pregnancy leave taken before enactment of the PDA.

Employers Court Danger When Using Technology to Investigate Employee Misconduct or Gather Evidence Without Prior Legal Advice

» Posted on May 18, 2009 by Brian Hall

Perhaps it's the economy. Perhaps it's the lure of trying to catch someone in the act. Perhaps it's something else entirely, but we're starting to see more instances of employers getting themselves in trouble because they're monitoring employee use of employer technological resources to investigate possible employee misconduct without first seeking legal advice. Two fairly recent examples: *Hay v. Burns Cascade Co., Inc.* out of the Northern District of New York and *Van Alstyne v. Electronic Scriptorium, Ltd.* out of the Fourth Circuit.

In *Hay*, the employer, concerned that the plaintiff, one its customer service employees, was bad-mouthing it to customers, began monitoring her telephone calls. While listening to one telephone call, the president of the company determined that the conversation was between plaintiff and a male customer and overheard her saying that she "can't believe these guys are managers" and that she had "lost all respect" for the company's CEO. The president testified that he knew it was a customer because it was during work hours, and "there was nothing to indicate that it was anything other than a business call." The president did not ascertain, however, which company the customer was affiliated with or whether the company was an existing or prospective customer. According to the court's decision, the president listened to the conversation for 30-40 seconds before he stopped monitoring. Based apparently on this one telephone call, the company decided to terminate the plaintiff's employment due to "poor performance."

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CTPAT Program Includes Employee Security Provisions to Consider

» Posted on May 1, 2009 by Brian Hall

More and more federal non-employment statutes, regulations and programs are coming with strings attached for human resources professionals to grapple with. For instance, who would have expected that the federal plan for rescuing troubled financial institutions would have anything to do with immigration, that the federal stimulus statute would include whistleblower provisions and changes to COBRA benefits laws, or that consumer protection laws would contain whistleblower provisions? Now comes the Customs and Border Protection's (CBP's) Customs Trade Partnership Against Terrorism (CTPAT) program, which grew out of September 11 to help improve supply-chain security, and its employment-related provisions. CTPAT is a voluntary partnership program between the private sector and CBP to secure the supply chain for products entering commerce in the United States. Many view CTPAT certification as the equivalent of an ISO certification, and it can be a significant marketing tool. Companies that want to obtain CTPAT certification, in addition to implementing various security measures, must meet certain minimum criteria for personnel security including background checks, reference checks, exit interviews, procedures for providing employee ID, keys and fobs etc. If you are a human resources professional in the transportation and logistics industry, you should check with the business or operations side of your organization to find out whether your company is planning to participate in the CTPAT program so that you can get a jump on aligning your employee security procedures with the program's requirements.

D.C. Circuit Upholds "Direct Observation" Requirements for USDOT Return to Duty and Follow Up Testing

» Posted on May 22, 2009 by Brian Hall

In a decision released May 15, 2009, the U.S. Court of Appeals for the District of Columbia upheld a Department of Transportation (DOT) regulation that requires employees who are returning to safety-sensitive duties after having completed a drug treatment program due to failing or refusing to take a drug test, to submit to return to duty and follow up testing under "direct observation" conditions. This decision and the regulation it upholds applies to employers in the aviation, rail, motor carrier, mass transit, maritime and pipeline industries that are subject to the DOT drug-testing regime. Under the regulation's "direct observation" procedures, the employer must require a same-gender observer to "watch the urine go from the employee's body into the collection container." To comply, employees must raise their shirts above the waist and lower their clothing so as to expose their genitals and allow the observers to verify the absence of any devices that would permit the employee to cheat the test.

Previously, the employer had the option to require direct observation, but this was not mandatory under the former regulation. Concerned that employers were reticent to require direct observation and in light of the rise in commercially available devices, such as the "Whizzinator," that enable people to cheat on their drug tests, the DOT promulgated this new regulation requiring direct observation for all return to work and follow up tests conducted under the DOT's auspices as of November 1, 2008.

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Missed Our Recent Employment Relations Seminar?

Download the materials on our blog.

If you missed our recent Employment Relations Seminar: *The Changing Landscape of Labor and Employment Law*, that was held on Monday, May 4, 2009 in Columbus, we invite you to download a copy of our materials, which are posted on our blog.

The Sixth Circuit Holds that a Waiver Request Option Saves an Otherwise Questionable $500 Arbitration Fee for Employees

» Posted on May 22, 2009 by Jenni Edwards

Ever wonder if you can require an employee to split the costs of mandatory arbitration? The Sixth Circuit reinforced its 2003 en banc decision that allows for cost-splitting provisions in arbitration awards in the decision it issued Tuesday in the case of *Mazera v. Varsity Ford Services, LLC* et al. Of course, the court's decision is not simply an affirmation that cost-splitting provisions are okay — rather, it is an affirmation that the validity of these provisions must be assessed on a case-by-case basis.

In this case, Omari Mazera was fired from his job as a car porter at Varsity Ford Services, LLC ("Varsity"). Mazera filed a lawsuit alleging that Varsity had discriminated against him on the basis of his race and disability; he also moved the district court to declare that the arbitration provision in Varsity's employee handbook was unenforceable.

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We hope you find this resource helpful and welcome your questions or feedback. Please send your comments or questions to Erin Hawk at ehawk@porterwright.com, or contact her at 614/227-1983.

Other recent blog posts include:

- Bill Introduced to Add Sexual Orientation and Gender Identity and Expression to Protected Classes Under Ohio Law
- Michael Vick Now in the Doghouse with DOL for Alleged ERISA Violations
- Supreme Court Restricts Use of Identity Theft Statute to Combat Undocumented Workers
- Ohio BWC Eliminates DFWP Discount for Group-Rated Employers
- E-Verify Bill Introduced in Ohio House
- DOL Issues Opinion Letter Requiring Employees Requesting FMLA Leave to Comply with Employer's Usual and Customary Policies

Two Conflicting Federal Circuit Court Decisions Issued Today Call Into Question All NLRB Opinions Issued in the Past Year

» Posted on May 1, 2009 by Jamie LaPlante

As a result of two contradictory opinions issued today, over 300 decisions issued by the National Labor Relations Board (NLRB or "Board") in 2008 are potentially in jeopardy because, according to one federal circuit, they were issued by a two-member panel without the authority to issue binding opinions.

By way of background, the NLRB is a federal agency that administers the National Labor Relations Act (NLRA), which governs the relations between private employers and unions. It is made up of five members. Yet, the NLRA allows for the five-member Board to delegate power to issue rulings and opinions to a three-member panel. On December 28, 2007, the Board had only four members. On that date, the four-member Board voted to delegate all of its power to a three-member panel. Just three days later, the terms of two of the four members that made the vote to delegate expired, leaving only two remaining members. During all of 2008 and early 2009, the Board had three vacancies for which Congress and the President clashed on the nomination of replacement Board members. Yet the two-member panel issued over 300 published and unpublished opinions in the labor relations area, proceeding as a quorum of the three-member panel — with two of the three required members of the three-member panel to whom the Board delegated its power.

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