Recent Developments in Employment Law

By: Kate M. Heideman and Mikela T. Sutrina

HUSCH BLACKWELL

FMLA Update

- Military Leave Updates
  - Military Caregiver Leave
    - Protects Certain Veterans
    - Covers Some Pre-Existing Conditions
  - Qualifying Exigency
    - New “Qualifying Exigencies”
    - New Certification Requirements
- Notice Requirements

Updated DOL poster can be found at:
http://www.dol.gov/whd/regs/compliance/posters/fmla.htm

FLSA Update

Genesis Healthcare Corp. v. Symczyk

United States Supreme Court, April 16, 2013

The Court found that a "collective action" cannot continue once the individual claim is satisfied. Unless others have come forward to participate in the litigation, nothing survives the satisfaction of the plaintiff's claim, and the case is effectively moot.

FLSA Update

Comcast v. Behrend

United States Supreme Court, March 27, 2013

A class cannot be certified when questions of individual damage calculations would overwhelm questions that were common to the class because it violates the current predominance standard.

FLSA Update

White v. Baptist Mem'l Health Care Corp.
Sixth Circuit, November 6, 2012

- Automatic meal period deductions

- Employer policies regarding reporting time worked outside of work must be clear and widely broadcast.

Social Media

Bettie Page Clothing

National Labor Relations Board, April 19, 2013

Facebook posts of three employees constituted protected activity and the employer could not take action against the employees for criticizing their supervisor on Facebook.

Social Media

Five Questions to Ask Before Taking Action

- 1. Does the post address wages or working conditions?
- 2. What's the context?
- 3. Does the post trigger an obligation to act?
- 4. Who is doing the posting?
- 5. Will this affect the company's reputation?

Confidentiality in Workplace Investigations

Banner Health – Update

- Employers cannot have blanket confidentiality policies during workplace investigations.
- No need to abandon your policies on workplace investigations, just make sure to handle issues on a case-by-case basis and avoid broad policies.

Illinois

Wharton v. Comcast Corporation

Northern District of Illinois, December 6, 2012

Court held that an employee handbook *could* establish an "agreement" for purposes of claims under the Illinois Wage Payment and Collection Act, despite disclaimers stating that the handbooks were not intended to create any contract of employment.

Missouri

- *Templemire v. W&M Welding, Inc.*
  - *Missouri Court of Appeals, Western District, Dec. 26, 2012*
  - Upheld "Exclusive Causation Standard for Workers' Compensation Retaliation Claims
- Right to Work Legislation Pending

Coming Up in 2013 . . .

- *University of Texas Southwestern Medical Center v. Nassar*
  - Retaliation Standard Under Title VII
  - United States Supreme Court – Argued April 24, 2013
- *Vance v. Ball State University*
  - Who Is A "Supervisor" For Title VII Harassment?
  - United States Supreme Court – Argued Nov. 26, 2012
- Working Families Flexibility Act of 2013 (H.R. 1406)
  - Would Allow Employees to Take Compensatory Time Rather Than Receive Overtime Pay
  - Bill Introduced April 9, 2013

Bluff the Audience Game

L&E Seminar “Humor” – Round 1

HUSCH BLACKWELL

Bluff the Audience Game Rules

- You will hear three stories told by Husch Blackwell attorneys about workplace accidents that had legal ramifications.
- Only one of the stories is true.
  - [Insert joke about how lawyers always lie.]
- You, the audience, will then try to separate the fact from the fiction.
- Audience members who guess correctly will be receive a heartfelt congratulatory remark.

10 Steps Employers Should Be Taking in the Interactive Process

Americans with Disabilities Act (ADA) Reasonable Accommodation

By: Randy S. Thompson and A.J. Weissler

HUSCH BLACKWELL

10 Steps Employers Should Be Taking in the Interactive Process

- 29 C.F.R. § 1630.2(o)(3):

To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

10 Steps Employers Should Be Taking in the Interactive Process

- Twin Goals for the Employer in the Interactive Process:
  - Reach an appropriate reasonable accommodation for your disabled employee.
  - Position your company to effectively defend against claims of ADA discrimination.

1. Maintain (Accurate) Job Descriptions

- Ensure each job description accurately identifies the position's "essential functions."
- Job descriptions often trump a specific employee's experience.
  - *Knutson v. Schwan's Home Service, Inc.*, 711 F.3d 911 (8th Cir. 2013)
    - "Knutson's specific personal experience is of no consequence in the essential functions equation. Instead, it is the written job description, the employer's judgment, and the experience and expectations of all Managers generally that establish the essential functions of the job."
- Regularly review and update job descriptions if possible.

2. Meet with the Employee

- Demonstrates your willingness to participate in the interactive process to the employee, and to a court.
- Schedule a meeting as soon as possible.
- You do not necessarily need to allow the employee's lawyer to attend (but you can).
  - *See Ammons v. Aramark Uniform Servs., Inc.*, 368 F.3d 809 (7th Cir. 2004).

3. Ask the Employee What They Want

- Ask the employee to make a specific request for an accommodation.
- Provides a starting point for the interactive process.
- Use the employee's job description.
  - Have the employee identify the job duties that he or she can and cannot perform without accommodation.
- Note: If the employee cannot or does not provide a specific request, it does not relieve you of your duty to identify and implement a reasonable accommodation.

4. Take Time to Consider

- There is no need to respond to a request at the exact moment it is made.
  - A hasty “yes” can lead to an unnecessarily broad accommodation and a difficult precedent for future employee requests.
  - A hasty “no” can lead to litigation or the loss of a good employee.

- Document any discussions of the requested accommodation that take place internally.
  - Creates a record that the employer considered the request in good faith.

5. Always Try to Offer Alternatives
(Rather than Just Rejecting a Requested Accommodation)

- "An employer is not obligated to provide an employee the accommodation he or she requests or prefers, the employer need only provide some reasonable accommodation."
  - *Gile v. United Airlines*, 95 F.3d 492 (7th Cir. 1996)

- Once an employer offers a reasonable accommodation, the "failure to engage in the interactive process by itself does not give rise to relief."
  - *Bellino v. Peters*, 530 F.3d 543 (7th Cir. 2008)

6. Confirm Medical Information

- Ask for clarification as to the extent of the medical restrictions and the duration of those restrictions.
- Clarify any "return to work" notes by asking what restrictions, if any, the employee will have upon return.
- An employee's failure to provide adequate medical documentation can be fatal to their ADA claim.
  - *Jackson v. City of Chicago*, 414 F.3d 806 (7th Cir. 2005).
  - *Matthews v. Bank of America*, No. 4:10CV1097 JAR, 2011 WL 6884795 (E.D. Mo. Dec. 29, 2011).

7. Explain Your Decision(s)

- Provide a clear and concise explanation for any decision to deny an accommodation or to offer an alternative.
- Shows the employer is not simply rejecting the requested accommodation.
- Helps frame future interactions, enabling the employee to work toward a compromise.

7. Explain Your Decision(s)

- Demonstrates thoughtful participation in the interactive process.
  - *Murray v. AT&T Mobility LLC*, 374 F. App'x 667 (7th Cir. 2010)
    - "In any case, we think that AT&T did engage in the interactive process. It considered her request, explained its reasoning for not being able to accommodate it, and reminded her of another accommodation it was already making. This was sufficient."

- Avoids the appearance of post hoc rationalization that can arise when the rationale behind a decision is not explained until litigation begins.

8. Close the Loop

- Summarize the interactive process and the result reached (even if not “final”).
- Instruct the employee how to communicate any additional questions or concerns.
- Gives the employee an opportunity to correct any misunderstandings or to provide missing information.
- Minimizes an employee’s ability to quibble with the facts of the process during litigation.

9. Schedule a Follow-up

- Calendar a follow-up with the employee and the employee's supervisor(s).
- Helps ensure the supervisor is properly implementing the accommodation.
- Allows you to confirm whether the accommodation is effective and whether it is still needed.
- *Cloe v. City of Indianapolis*, No. 12-1713, 2013 WL 1405428, (7th Cir. Apr. 9, 2013)
  - "The City had no way of knowing that its other seemingly reasonable accommodations – a different lot, visitor parking, street parking – would be insufficient. And, more importantly, once the City found out that its proposed accommodations were insufficient, it acted with reasonable speed to come up with new ones."

10. Try to Avoid "Absolutes" in Your Leave Policies

- The ADA can require employers to deviate from their disability-neutral policies in order to provide a reasonable accommodation.

- Therefore, it is best to avoid "absolute" statements in your leave policies when possible. For example:
  - All employees who are on unpaid leave for one year will have their employment terminated.
  - All employees will be terminated once they qualify for long-term disability.

10. Try to Avoid "Absolutes" in Your Leave Policies

- An employee can use the absolute policy as an excuse for their failure to request additional leave.
  - "I would have requested more leave, but the policy says . . . ."
- Consider using language that establishes a presumption that employees will be terminated after a certain amount of leave, but leaves room for accommodation. For example:
  - There is a presumption that employees who are on unpaid leave for one year will have their employment terminated. Disabled employees may request and receive additional time in order to reasonably accommodate their disability as required by federal and/or state law. The Company will determine whether to extend leave beyond one year on a case-by-case basis.

BREAK

The Patient Protections and Affordable Care Act (Obamacare) & Its Expected Impact on Businesses

By: Alan H. Kandel and Bob J. Tomaso

HUSCH BLACKWELL

Employer Shared Responsibility

- Which Employers Are Subject to Pay or Play Penalties
  - At least 50 full-time employees and full-time equivalents
  - An "employer's" employees are determined on an aggregated employer basis, i.e., include employees of controlled group and affiliated service group members

Employer Shared Responsibility

- Which Employers Are Subject to Pay or Play Penalties?

Example:

Company A	Company B
35 employees	25 employees

If same 5 or fewer persons directly or indirectly own ≥ 80% of both companies, A and B are treated as one employer with ≥ 50 employees.

Employer Shared Responsibility

- Employer Penalty – No Coverage Offered
  - Minimum essential coverage offered to < 95% of FT employees and children to age 26
  - No spousal requirement
  - At least one FT employee in subsidized coverage
  - Nondeductible penalty: $2,000/FT employee minus 30

Employer Shared Responsibility

- Employer Penalty – Coverage Offered but Not Affordable
  - 95% of full-time employees and children to age 26
  - MEC does not provide "minimum value" or is not "affordable"
  - At least one FT employee in subsidized coverage
  - Nondeductible penalty of $3,000/FT employee in subsidized coverage

Employer Shared Responsibility

- Affordable Coverage
  - No more than 9.5% of income
  - Proposed Regulations: **single coverage** only
  - Use lowest cost option that provides minimum value

Employer Shared Responsibility

Affordable Coverage

- How to measure income?
  - W-2
  - Rate of pay
  - 100% of Federal poverty level ($11,170)
  - Use different measures for different employee groups

Employer Shared Responsibility

- Minimum Value
  - Plan pays at least 60% of total expected costs
  - Employer contributions to HSAs and HRAs count towards minimum value

Employer Shared Responsibility

- Minimum Value cont'd
  - Wellness incentives
    - Generally do not count toward minimum value
    - Exception: incentives to prevent or reduce tobacco use count toward minimum value

Employer Shared Responsibility

- Minimum Essential Coverage
  - Future regulations
  - Does not include "excepted benefits" (such as accident or disability plans, specified illness plans, dental plans, vision plans, flexible spending accounts)

Employer Shared Responsibility

- Application of Pay or Play Mandate and Penalties in a Controlled Group
  - Penalties apply separately for each employer in the group
  - Example:
    - Company A covers its 35 FT employees
    - Company B provides no coverage for its 25 employees
    - Only Company B has penalty

Employer Shared Responsibility

- Application of Pay or Play Mandate and Penalties in a Controlled Group
  - Allocate 30 "free" employees pro rata based on the FT employees employed by each member
  - Example:
    - Companies A and B have 60 combined FT employees
    - Company B is allocated 25/60 of the 30 free employees, or 12 employees
    - Company B pays the $2,000 penalty on 13 employees, i.e., $26,000

Employer Shared Responsibility

- Assessment of Payment
  - Section 1411 Certification to employer if any employee is in subsidized coverage
  - When will IRS contact an employer? After the due date for employee Form 1040 and after employer deadline to report FT employees and coverage offered
  - Employers can respond before penalty is assessed.
  - If IRS determines employer is liable, IRS will send notice and demand with instructions for payment

Identifying Full-time Employees

- Full-time Employees
  - At least 30 hours per week (or 130 hours per month)
  - Expected FT employee must be offered not later than initial 3 months of employment

Identifying Full-time Employees

Example:

- Employer allows employees into health plan on first day of month following 60 days of service
- Amanda is hired January 1 and elects coverage
- 60 days after January 1 is March 2
- Amanda's coverage begins April 1
- Amanda's coverage does not begin within first 3 months

Identifying Full-time Employees

- Employees with Variable Hours
  - Non FT employees: determine average hours over a "measurement period" of from 3 to 12 months
  - If ≥ 30 per week, employee is FT for a "stability period" of at least 6 months, regardless of actual hours worked in the stability period
  - If < 30 per week, employee is not FT for the stability period
  - Different measurement and stability periods may be used for reasonable categories of employees

Identifying Full-time Employees

- Employees with Variable Hours

  Example:

  - Employer hires Cliff on August 15
  - Employer cannot reasonably determine if Cliff will average ≥ 30 hours/week
  - Cliff can be excluded from coverage without penalty during the measurement period plus the administrative period
  - Total exclusion period can exceed 13 months

Identifying Full-time Employees

- Seasonal Employees
  - Excluded from 50-employee count
  - Counted for penalties if average ≥ 30 hours/week
  - "Seasonal employee" to be defined in future regulations
  - Educational employees who work only during active portions of an academic year cannot be treated as seasonal employees
  - Employers may assume that a new seasonal employee is not expected to be employed for the entire initial measurement period to determine average hours

Identifying Full-time Employees

- Seasonal Employees
- Example:
  - Retailer hires Brenda for three months for the holiday season
  - Brenda is expected to work 45 hours/week
  - Brenda can be excluded from the 50 FT employee count
  - Retailer pays no penalty for Brenda if her average weekly hours < 30 over the measurement period

Some Transition Rules

- Dependent Coverage: If as of December 2012 a plan did not offer dependent coverage, no penalties until 2015 if the employer takes steps in 2014 to begin providing dependent coverage
- 50 Employee Test: Employers can use 6-consecutive month measurement period in 2013

Action Steps for Employers

- Determine if the employer group is a "large employer"
- Determine methods to measure FT status for employees with variable hours
- Begin tracking hours and maintain documentation
- Identify FT employees of each employer in the group

Action Steps for Employers

- Does each employer in the group offer MEC to at least 95% of its FT employees?
- If not, choose between extending coverage or paying the $2,000/FT employee penalty.
- Consider alternative corporate and/or workforce structures to minimize penalty if decision is made not to offer MEC to at least 95% of full-time employees.

Action Steps for Employers

- Determine whether coverage offered meets the minimum value test. The insurer (or TPA for a self-funded plan) should be able to provide this
- Determine method for measuring affordability and whether coverage offered meets the affordability test
- If tests are not satisfied, consider modifying plan design and/or employee cost-sharing structure

Action Steps for Employers

- Determine the employees that may be eligible for subsidies (household income up to 400% of FPL: $44,680 for a single person and $92,200 for family of four for 2012)
- Compare:
  - Costs of plan design and/or cost-sharing changes (deductible), to
  - Paying the $3,000 unaffordable coverage penalty (nondeductible)
- During open enrollment, document offer of coverage to FT employees; require employees who do not enroll to sign waivers
- Amend plan documents as necessary

ACA Plan Design Requirements in 2014

- Requirements for All Plans
  - No more than a 90-day waiting period for participation (except for new employees who are not reasonably expected to be FT)
  - Dependent coverage must be offered to children up to age 26, regardless of other employer-provided coverage
  - No annual dollar limits on essential benefits
  - Pre-existing condition exclusions/limitations are prohibited for adults (eliminated for children in 2011 plan year)

ACA Plan Design Requirements in 2014

- Key ACA Provisions Deferred Pending Guidance
  - Nondiscrimination rules for nongrandfathered insured health plans
  - Automatic enrollment (with opt-out opportunity)

ACA Plan Design Requirements in 2014

- Cafeteria Plan Elections
  - Availability of coverage through an exchange is not a change of status event that permits change of cafeteria plan elections

ACA Notice and Reporting Requirements

- Notice of grandfathered plan status (if applicable)
- W-2 reporting of value of coverage, (began with W-2 issued in January 2013 for 2012 coverage)
- Summary of Benefits and Coverage (SBC) (began with enrollment periods for 2013 plan year)
- 60-day advance notice of any benefit changes

ACA Notice and Reporting Requirements

- Employers must provide notice of coverage available through exchanges by March 1, 2013; delayed because no regulations
- Insurers and plans report annual enrollment count to HHS for transitional reinsurance fee by November 15, 2014, 2015 and 2016
- Employers report health coverage offered and workforce information to IRS beginning in 2015 for 2014 coverage

New ACA Fees

- Comparative Effectiveness Research Fee
  - Payable for each plan year or policy year ending after October 1, 2012 and before October 1, 2019; for calendar year plans first payment due July 31, 2013
  - Payable by health insurance issuers and plan sponsors of self-insured health plans, including retiree-only plans
  - Annual fee: $2 times the average number of covered lives ($1 for plan/policy years ending before October 1, 2013)
  - Fees are treated as excise taxes, and will be reported annually and paid on IRS Form 720
  - DOL: fees cannot be paid from plan assets

New ACA Fees

- Transitional Reinsurance Fee
  - Payable for three calendar years beginning in 2014.
  - Collected annually by HHS and used for reinsurance for issuers covering high risk individuals in the individual market
  - Fee is assessed against health insurance issuers and self-insured plans providing major medical coverage
  - Applies per capita basis for all covered lives
  - 2014 proposed fee is $5.25 per month per covered person ($63 per year); states may require more from insured plans
  - DOL: fees may be paid from plan assets