Hot Issues Alerts – Law Firms

Hot Topics In Labor And Employment Law

The Editor interviews ***Patrick T. Collins*** *and* ***M. Karen Thompson****, Members of Norris McLaughlin & Marcus PA, and its Labor & Employment Law Group.*

Editor: The firm is presenting a seminar on Hot Topics in Labor & Employment Law on June 3, 2009 and again on June 18, 2009 from 8:30 a.m. to 11:30 a.m. at the firm's Bridgewater office. As one of the participants how did you decide on the seminal topics for your discussion?

Collins: It was not easy. This has been a busy year as far as new labor and employment regulations and laws are concerned. Our Labor & Employment Group meets regularly to discuss any new laws in our field as well as to share those questions we are getting from our clients. We chose the topics for the seminar based on those discussions. We recently conducted a seminar on the Employee Free Choice Act, which has warranted a great deal of attention.

Editor: One area that you have chosen for the seminars has to do with the significant changes in COBRA, now incorporated in the American Recovery and Reinvestment Act. Would you summarize these important changes? What effects do you think the extension of benefits to employees who were terminated during the latter part of 2008 and all of 2009 will have on cushioning the harmful effects of termination?

Collins: Unfortunately, the U.S. has been dealing with many job eliminations and reductions in force. The changes that the American Recovery and Reinvestment Act ("ARRA") has had on COBRA afford a cushion to a lot of folks who perhaps would have been unable to afford to continue their health insurance under COBRA, namely those who were involuntarily terminated between September 1, 2008 and December 31, 2009. The new law allows an employer to receive up to a 65 percent subsidy on COBRA premiums that it pays on behalf of terminated employees, which is reimbursed through the crediting of payroll tax payments. The remaining 35 percent of the premium will be paid by the employee. For example, if family coverage under the old arrangement costs an employee $1,000 per month and if he loses his job, paying out $350 per month rather than $1,000 is more attractive to enable the continuation of the family's health coverage.

COBRA applies to employers who have twenty or more employees in their workforce and covers only those having health insurance. The ARRA, however, applies to all employees so that even small employers and their employees may benefit. In addition to the subsidy provisions, the Act provides for a 60-day election period for certain qualified beneficiaries (employees, spouses and dependents) who are eligible for subsidized COBRA coverage. This coverage is only supposed to last up to nine months or until the end of this year at which time Congress is expected to take a second look to determine whether it should be extended.

Editor: Can an employee extend it beyond the nine months if he/she pays for it?

Collins: No, it is only available for nine months. A typical COBRA period would run for 18 months and so it is only for the first nine months of that period that an ex-employee would be eligible for this subsidy.

Editor: The "Lilly Ledbetter" Fair Pay Act represents an overruling by Congress of a Supreme Court decision that members of Congress felt to be unfair to women employees receiving unequal pay. How does this Act rectify this discriminatory treatment?

Patrick T. Collins

M. Karen Thompson

Thompson: In *Lilly Ledbetter v. Goodyear Tire & Rubber Co*., the Supreme Court limited the time period in which a litigant could bring suit after learning he or she had been the victim of discrimination resulting in disparate pay. It is interesting how quickly Congress acted in the current session to overrule that decision. *Ledbetter* was decided in 2007 and President Obama's first piece of legislation was signed in January of this year – a quick turn-around.

In the case of Lilly Ledbetter the discriminatory job evaluations that led to her getting a lower salary had been done many years before she filed her suit. Although a jury had awarded her back-pay and damages totaling more than 3.3 million dollars on her Title VII claim, the Supreme Court reversed this judgment. It held that the statute had run because her claim should have been filed within 180 days of the original discriminatory decision.

Even as late as 2008 woman were still earning less than men. The statistics I have suggest that women earned 78 cents compared to every dollar that men performing like tasks were earning, so it was obviously a continuing problem that needed to be addressed, and this statute does address it. What the new Fair Pay Act provides is basically an extension of the statute of limitations so that each payment that is the result of a discriminatory decision resets the period to file a claim with the EEOC or with a court. It is important to know also that the Act just doesn't affect women – it addresses any claims of disparate pay that might be based on race or other protected classes, handicap or age. The Act amends not only Title VII of the Civil Rights Act but also the Age Discrimination in Employment Act and the Americans with Disabilities Act, as well as the Rehabilitation Act. The other aspect of this law that I find interesting is that it is not just limited to paychecks, but also to pension payments and severance payments, thus expanding the class of people who can file a claim. Another unusual feature is that the statute applies retroactively to all claims that were pending or filed on or after May 28, 2007, the date of the *Ledbetter* decision. Thus claimants can look back to recover pay or benefits for up to two years preceding the filing date of their charge, even though the actual act of discrimination occurred much earlier. It is significant legislation in that it dramatically lengthens the statute of limitation in these types of cases.

Editor: As I recall in reading about that case she didn't realize that she was being discriminated against for a long while.

Thompson: That is absolutely correct. Goodyear had a policy in place that prohibited employees from discussing their compensation with other workers. It wasn't until just before she retired after 19 years with the company that she learned she was not receiving equal pay for equal work. That is when she consulted an attorney and filed suit.

Editor: The opposition to passage has stated that the new law would impose "potentially staggering costs" on employers. Is their case warranted?

Thompson: Employment lawyers are viewing the Fair Pay Act as a sea change in employment litigation. We anticipate that there will be an increase in EEOC and state agency filings as well as in lawsuits. It is going to make claims somewhat more difficult for employers to defend since alleged discriminatory acts that resulted in disparate pay may have occurred some years prior. There may be problems locating relevant documents or absentee managers and, even if located, they may be unable to recall or reconstruct the basis for a particular pay decision made years earlier. The legislation will also impose a greater responsibility on employers to be proactive and address effects of past discrimination.

Editor: The EEOC recently issued an enforcement guidance document regarding unlawful disparate treatment of workers with caregiving responsibilities in keeping with the Civil Rights Act of 1964 and the ADA. How will the EEOC determine when a caregiving act oversteps the line and no longer deserves favorable treatment?

Collins: This topic was chosen because the EEOC has issued enforcement guidelines this year that build upon 2007 guidelines the EEOC has issued on employer best practices for workers with caregiving responsibilities. What these guidelines explain is that workers who do have these caregiving responsibilities could be subjected to discrimination of a subtle form based upon gender, a disability, or a worker's association with someone with a disability. These guidelines are instructive because they walk you through the different scenarios that could arise in the workplace. There is not a bright-line test as to whether someone is discriminating against someone or whether someone is crossing the line as a caregiver. These cases are always determined on a case by case basis. There are more cases of discrimination filed by individual employees with caregiver responsibility. Employers need to be aware of this new protected class of employees.

Editor: Another area to be discussed at your seminar is that of social networks – Facebook, MySpace, Twitter etc. An important case just recently decided dealt with cyber-bullying and cyber-hate crimes occasioned by cyber-bullying of a teenager resulting in her suicide.

Collins: What we are seeing is a number of levels of issues here. Not only serious problems like the one described in the case that you have just explained, but there are also problems of employees spending time at work on Facebook or Twitter. Employers must have policies in place so that employees specifically understand what their rights are as well as those of the employer. Policies need to be clearly articulated and broadcast to all employees as well as enforced when an issue arises.

Editor: How does an employer police the use of social networks in the workplace?

Collins: An employer has full control over its electronic systems in the workplace.

Employment policies play a big role in letting employees know that they really do have a limited expectation of privacy when they are at work using company equipment and performing their job duties instead of surfing the social networks. An employer can police this by letting folks know that they have the right to monitor the computer usage throughout the day.

Thompson: In addition, there are monitoring programs to the extent that the employer wants to have its IT staff invest the time to monitor what the workforce is engaged in. Once an employer undertakes such monitoring, however, it may be assuming additional responsibilities to third parties who are injured by improper use of these social networks.

Editor: Another area of discussion has to do with employee references – what can be said about a departed employee? Do you have a rule of thumb for guidance for former employers?

Collins: The rule of thumb for most employers would be the name, rank and serial number explanation. Generally references should only include limited information, dates of employment, the individual's job title, perhaps the department that he worked in. Employers should try to designate individuals within the company who are responsible for providing these references.

Thompson: I currently have a case where an independent contractor had performed services for a well known company. After the services were completed, for some reason the company put a "do not hire" notation in his file. Placement agencies have questioned what this person did to generate that entry and that may result in litigation to remove the negative inference created. So I agree stating only the name, rank and serial number approach to giving references is correct, but I would add that an employer should also indicate that limiting this disclosure to those items is standard company policy.

Editor: What other major legislative and administrative initiatives do you see coming down that employers should be alert to?

Collins: The Employee Free Choice Act was the subject for one of our earlier seminars. That is a hot topic we are all closely watching, especially given my understanding that Senator Specter was one of the final deciding votes on this bill at an earlier time and now that he has switched parties, it will be interesting to see how that all plays out.

Thompson: Another is the Paycheck Fairness Act that was recently passed by the House of Representatives. This was originally paired with the Fair Pay Act, but it was separated out because it was delaying passage of the latter. If enacted, this bill would strengthen the remedies that are available to successful claimants under the Fair Pay Act. It would require employers to prove that wage disparities are job-related and consistent with business needs rather than the product of a discriminatory motive. It would also protect employees who discuss or share salary information from retaliation by their employers. The problem in *Ledbetter* was that she was not allowed to discuss comparative salaries with her co-workers under a company policy. So if a company were to retaliate that would be prohibited under the Paycheck Fairness Act.

Collins: One last issue: it would be prudent for companies to become familiar with some of the issues relating to preparing for a flu season that may occur in the fall, including the privacy issues related to such a pandemic.

Please email the interviewees at ptcollins@nmmlaw.com or mkthompson@nmmlaw.com with questions about this interview.