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LABOR UPDATE

Recent Developments in Labor and Employment Law

NEW FAMILY AND MEDICAL LEAVE REGULATIONS POSE TRAPS FOR THE UNWARY

Final regulations implementing the Family and Medical Leave Act of 1993 ("FMLA") which were recently issued by the U.S. Department of Labor may have an impact on many employers' existing leave of absence policies. The FMLA guarantees eligible employees up to 12 weeks of unpaid, job protected leave for certain personal and health-related conditions within a 12 month period of employment.

These final regulations make significant changes on how FMLA leaves must be granted and administered. Chief among these are important clarifications in the definition of what constitutes a "serious health condition" sufficient to trigger FMLA protected leave. Further changes concern an employer's ability to contact an employee's health care provider regarding the nature and extent of an employee's health condition and an expansion of the class of recognized health care providers which may authenticate an employee's need for leave.

Another item of concern is the consequence of an employer's failure to select a uniform method for calculating the 12 month period in which an employee's 12 week FMLA leave may be taken. Although the FMLA allows employers to choose among several methods for calculating this period and select that which is best suited to their needs (i.e., calendar year, employment anniversary year, etc.), the new regulations make clear that an employer's failure to properly choose and designate this method in advance of an employee's leave request will allow the employee to select the method most beneficial to him or her. Employers who have not yet selected their method for calculating this 12 month period should therefore do so immediately and notify employees of the method selected. Employers later wishing to change to a different method must give 60 days notice of the change, during which employees may choose whichever method affords them the greatest benefit.

Further changes address employer obligations with respect to the designation of absences as FMLA leave and important employee notification requirements.

The final regulations became effective on April 6, 1995. Employers should be aware that they may need to revise their leave of absence policies and employee handbooks in order to comply with these new regulations.

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ALCOHOLIC SCORES PARTIAL VICTORY UNDER THE AMERICANS WITH DISABILITY ACT

A federal district court recently held that although employers may discharge alcoholics who show up drunk to work, employers still may be liable under the Americans with Disabilities Act, if they apply no-alcohol rules more strictly against alcoholics than non-alcoholics.

Shawn Flynn was fired as a custodian at Raytheon after he showed up drunk to work. After completing treatment for alcoholism, Flynn reapplied for employment with Raytheon, but the employer refused to rehire him. Flynn responded with a lawsuit claiming that the employer violated the Americans with Disabilities Act.

Flynn claimed that Raytheon did not provide a reasonable accommodation of his alcoholism, prior to deciding to discharge and not rehire him. Flynn further alleged that he was discriminated against because of his alcoholism since the employer did not discharge other non-alcoholic workers who similarly violated the no-alcohol rule, and permitted other non-alcoholic workers to remain employed after completing rehabilitation programs.

The court initially pointed out that the Americans with Disabilities Act classifies alcoholism as a disability. However, this does not mean, the court stated, that alcoholics are protected from the consequences of alcohol-related misconduct. Thus, the court recognized that a company need not tolerate misconduct such as intoxication on the job, and, accordingly, may take appropriate disciplinary action. The court, nonetheless, let stand Flynn's claim that the employer enforced its no-alcohol rule in a discriminatory manner. The court explained that unlawful discrimination could still be demonstrated despite the employee's misconduct, if the employer treated him differently from other non-alcoholic employees who also engaged in similar misconduct.

The court's decision reinforces the importance of employers enforcing their work rules uniformly, as indicated by the facts, to avoid claims of unequal treatment by employees. Employers should carefully examine their past enforcement of work rules prior to instituting disciplinary action against employees. *Flynn v. Raytheon Co.*, 868 F. Supp. 383 (D. Mass. 1994).

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AN EMPLOYER'S NIGHTMARE: POORLY DRAFTED EMPLOYEE HANDBOOK HELD TO BE EMPLOYMENT CONTRACT

The New Jersey Supreme Court recently held that an employer's employee manual constituted an implied contract of employment that the employer breached when it discharged an employee without following progressive discipline. This ruling came despite the fact that the discharged employee never received a copy of the manual, which contained a specific provision disclaiming the formation of an employment contract! Although this case is not binding precedent outside of New Jersey, it once again illustrates the vital importance of careful handbook drafting.

The plaintiff in the case, a warehouse supervisor, was terminated after merchandise was taken from the employer's warehouse on two separate occasions. Although he was not accused of stealing, the supervisor was discharged for failing to safely protect the merchandise and for not following proper procedures for discovering thefts.

Although the employee had never received the employer's entire employee manual, he had received a section of the manual dealing with terminations. He contended that he was terminated in violation of this section, which provided that a three-step progressive disciplinary process "must" be followed in order to discharge an employee.

Noting the background surrounding the employer's preparation and distribution of the manual, the court held that it was sufficient to constitute an enforceable employment contract. The court ruled that the manual's contractual disclaimer was insufficient to negate the enforceability of its termination provisions, as the disclaimer did not clearly state that the employer reserved absolute power to fire anyone with or without cause.

The court found that the disclaimer's statements that the manual was "not contractual" and could be changed "at the sole discretion of the company" were "confusing legalese" which employees could not be expected to understand. Furthermore, the court also found that the disclaimer failed for lack of "prominence," in that it was not made sufficiently conspicuous via highlighting, capitalization, etc.

Illinois courts have previously held that in order for an employment manual or benefit plan to create an implied employment contract, the document must contain a "clear" promise of employment rights. Although the courts have never set forth a requirement that special "magic" language be used for an effective disclaimer, this New Jersey holding serves as a reminder that all questions as to the "clarity" of particular language will be resolved in employees' favor. Therefore, employers should carefully review their contractual disclaimers and their relationship to all other employment documents (handbook, application, etc.), in order to minimize exposure to implied contract claims.

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BITS AND PIECES

In Carson City, Nevada, prostitutes formed a picket line at the state capitol in hopes of getting legislative support to form a union. "We get up, get dressed, go to work, pay taxes. We deserve rights like everyone else," said Darlene Hendrickson, a paralegal who has worked at two Nevada brothels. While the success of their attempts to form a union is still uncertain, issues such as working conditions, fringe benefits and overtime pay would raise interesting topics for the bargaining table.

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According to statistics compiled by the Equal Employment Opportunity Commission ("EEOC"), 14,420 sexual harassment charges were filed with this federal administrative agency in 1994 alone. Twenty-four percent of those charges were found to have no merit by EEOC investigators. However, 13 percent of the charges ended with plaintiffs winning cash awards averaging \$12,000.00 dollars.

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The Bureau of Labor Statistics reported that major collective bargaining settlements reached in private industry during the first quarter of 1995 called for changes in wage rates and compensation over the contract term that were lower, on average, than were specified in the agreements they replaced. Settlements in the first quarter of 1995 specified wage rate changes averaging an increase of 1.9 percent in both the first year of the agreements and annually over the contract term. Corresponding changes in agreements they replaced, which were primarily negotiated in 1991 or 1992, were increases of 3.6 percent and 3.0 percent.

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QUOTABLE

"It is useless for sheep to pass a resolution in favor of vegetarianism, while wolves remain a different opinion."

William Ralph Inge

Since 1984, the LABOR UPDATE has been provided as a service to clients, fellow attorneys and other friends of the Law Offices of Donald F. Peters Jr. Written entirely by this office, it is intended to provide useful information as to the matters covered, but should not be viewed as an exhaustive treatment of the subjects addressed nor as covering all significant developments in labor and employment law. The LABOR UPDATE is not intended to be a substitute for legal advice.

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