

Third Quarter, 1999

## **LABOR UPDATE**

### *Recent Developments in Labor and Employment Law*

#### **SUPREME COURT RESTRICTS COVERAGE OF THE AMERICANS WITH DISABILITIES ACT**

In a case closely watched by employers and disabilities-rights groups, the Supreme Court drastically reduced the scope of the Americans with Disabilities Act by ruling that the law does not cover individuals with “correctable” disabilities that can be alleviated by medication or physical devices such as glasses or prosthetics. In doing so, the Court curtailed the breadth of the ADA’s coverage from a possible 160 million Americans who suffer from poor eyesight, high blood pressure, and diabetes to an estimated 43 million who suffer from uncorrectable disabilities.

The case arose when two twin sisters applied for work as pilots for United Air Lines. The two met all United’s requirements in terms of experience and physical abilities except for the fact that both were severely nearsighted. Even though their vision could be corrected to almost 20/20 with glasses or contact lenses, they failed to meet United’s requirement that their uncorrected vision be at least 20/100. When the two were not hired because of their eyesight, they sued claiming that United discriminated against them because they were “disabled” under the ADA.

United defended its actions by claiming that the sisters were not disabled as that term is defined by the ADA. According to the Act, a disability is a condition which “substantially limits a major life function”. Since the plaintiffs’ eyesight could be corrected to almost 20/20, United argued, the condition could not possibly be “substantially limiting”. United also contended that Congress never intended to protect the millions of Americans with easily correctable conditions.

In a ruling of tremendous significance to employers, the Supreme Court agreed with United’s arguments. The Court noted that the Act requires individuals to be evaluated on an individual basis. If corrective measures were ignored, then all people with a certain condition, such as diabetes, would be considered disabled per se. This would include people whose diabetes does not substantially limit a major life function. The Court also noted that the Act is written in the present tense and requires people to be evaluated with their current restrictions.

The Act does not require speculation or hypotheticals about who might be disabled if corrective measures were not considered.

This ruling constitutes a major victory for employers. Excluding employees who have common and easily correctable conditions from ADA coverage will result in less litigation and lower exposure. It will also allow companies to evaluate and accommodate employees based on their individual limitations.

## **AVOIDING THE PERILS POSED BY TEMPORARY EMPLOYEES**

In the current era of record low unemployment, where permanent employees can be difficult to find, employers are increasingly turning to temporary agencies to supplement staffing. Temporary employees can provide employers with advantages such as staffing flexibility, lower benefit costs, lower overall staffing costs and the opportunity to test with lower risk, an individual's suitability for future, regular employment. However, in addition to these advantages, employers often erroneously believe that hiring temporary employees decreases their liability for employment-related lawsuit since the employees supposedly "belong" to the temporary agency, and not to the employer who temporarily engages them.

However, judicial interpretation of guidelines published by the Equal Employment Opportunity Commission and the United States Department of Labor have established that this is not the case. Not only can employers be sued under federal anti-discrimination laws by temporary employees, but engaging temporary employees can subject small employer to coverage under anti-discrimination laws and the Family and Medical Leave Act of 1993. Therefore, employers who want to take advantage of the obvious benefits of temporary employees must to exercise caution.

### **FMLA Issues**

The FMLA requires employers with fifty or more employees to provide "eligible" employees with at least twelve weeks of unpaid leave in a twelve month period to care for a newborn or newly adopted child, the employee's own serious health condition, or the serious health condition of the employee's child, spouse or parent. Eligible employees are those who have worked at least twelve months prior and have put in at least 1,250 hours of work during that time.

What smaller employers may not realize is that when an employer engages a temporary employee, that employee is counted as "belonging" to both the client/employer *and* the temporary agency, even if the employee is only on the agency's payroll. This means that an employer who has only 35 employees on its payroll but engages 15 or more temporary employees for a long period of time will satisfy the 50 employee threshold for FMLA coverage. One must offer FLMA leave benefits to all of its own, eligible, permanent staff members.

In sum, employers who hire temps from agencies must be aware that doing so may subject them to FMLA coverage if the addition of the temps to the employer's regular staff gives

it fifty or more employees.

### **Anti-Discrimination Issues**

For purposes of the anti-discrimination laws, temporary employees may be deemed to be employees of the temporary agency, the client/employer, or both, depending upon the given situation. Where an employer/client sets the work schedule, provides the necessary equipment and supplies, specifies how the work is to be accomplished, and provides day-to-day supervision, the temporary employee “belongs” to the employer/client. In that case, the company can be liable for discrimination.

In order to take advantage of the flexibility and savings that temporary employees have to offer while protecting themselves, employers should take the following steps:

- The company EEO policy should expressly apply to temporary employees
- Copies of the EEO policy and any information regarding reporting a complaint should be provided to each temporary employee when they begin work
- Ensure that permanent staff understand that all EEO policies apply to temporary employees as well.
- Refrain from making any request or demand of a temporary agency which could be construed as discriminatory.

These precautionary measures will go a long way to limiting liability for what may be an increasing source of discrimination claims: the ever growing number of temporary employees.

### **NEW STANDARD AND DEFENSE TO DISCRIMINATION DAMAGES**

The Supreme Court recently clarified when employment discrimination plaintiff's are entitled to extra damages designed to punish the company. And in the same decision, the Court gave employers a new defense to these punitive damages.

The case arose in Chicago when a female lawyer for the American Dental Association sued for sex discrimination after she was passed over numerous times for a promotion. Each time the position was open, she alleged, it was filled by a male with inferior qualifications. While she ultimately prevailed in her case, the question of whether she could collect punitive damages remained unsettled. The Supreme Court ruled that the plaintiff would need to prove that the Association acted with “malice or reckless indifference” to be entitled to these extra damages.

More importantly, however, the Court recognized a way for employers to protect themselves from punitive damages. According to the ruling, punitive damages are not recoverable where an employer acts in good faith to comply with the law. This means that a

company with a strong anti-discrimination policy with a track record for responding to discrimination complaints may well be immune from punitive damages.

\* \* \* \* \*

## **BITS AND PIECES**

A temporary production worker in a publishing company walked ten feet from his workbench to offer a co-worker a piece of gum. Shortly thereafter, his supervisor instructed him to put his right leg adjacent to the table leg and wrapped an eight foot length of chain tightly around both and padlocked him to the table. The supervisor stated that this was the only way to get any work out of the employee. Released after an hour, the employee worked the rest of the day, then resigned and sued for “false imprisonment, outrageous conduct, and an extremely abusive work environment”. A trial is pending.

\* \* \* \* \*

A growing number of job seekers are getting onto the Internet to find services that will tell them what their former employer is saying about them. These services often pose as potential employers and ask unsuspecting companies questions such as the reason the employee is no longer employed, the employee’s weaknesses, or whether the employer would recommend the individual for employment. A negative response can land the company in court defending a slander or libel suit. Although many of these services have existed for years, their debut on the Internet has resulted in a tremendous increase in business.

\* \* \* \* \*

A New York court recently ruled that a company which prevents a good samaritan from aiding another person may be held liable for the resulting harm. The issue arose when an employee of an animal sanctuary collapsed. Although a co-worker was certified in CPR, she was stopped by her supervisor, who did not believe CPR was an appropriate treatment. The employee eventually died and her estate sued contending that she would have lived if CPR had been immediately performed. The New York Supreme Court found that employers cannot prevent its employees from rendering aid to one another. Unfortunately, this ruling puts companies in a difficult situation. If employees render aid incorrectly, the company may be liable. However, according to this ruling, employers can be liable if they prevent the rendering of aid as well.

---

Since 1984, the LABOR UPDATE has been provided as a service to clients, fellow attorneys and other friends of our firm. Written entirely by Peters & Lyons attorneys, 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.

The LABOR UPDATE may be quoted or reproduced if credit is given to the source.