Barley Snyder

Employment Law Update April 2009

PUBLISHED ON
April 1, 2009

TABLE OF CONTENTS

Employee Free Choice Act Introduced

On March 10, 2009, the Employee Free Choice Act (EFCA) was introduced in both the U.S. House (H.R. 1409) and U.S. Senate (S. 560). Also referred to as "Card Check" legislation, the EFCA proposes dramatic changes to union organizing and how non-union businesses handle their employee relations. Under the EFCA, a union could avoid the secret ballot election process by having a majority of employees in the defined group indicate their preference for a union by signing cards collected by the union. The EFCA also imposes tight time deadlines on negotiating first contracts, and if no contract is reached after mandatory mediation, the contract would be settled by binding arbitration.

As we go to print, Senator Arlen Specter announced that he would not support the controversial legislation, saying that the main reason for his opposition is "the elimination of the secret ballot, which is the cornerstone of how contests are decided in a democratic society." Specter's opposition makes it unlikely that there will be the 60 votes in the Senate needed to end debate and have a majority final passage vote.We first reported on the Employee Free Choice Act in our December 2008 Employment Update Newsletter, and we will continue to monitor the newly-introduced legislation as it works its way through Congress.

Dave Keller and Rick Hackman, both members of our Employment Law Group, have been making numerous presentations to our clients and to local Chambers of Commerce about the EFCA and what employers should be doing to prepare for these potential changes. You can contact them at dkeller@barley.com; 717-399-1513, rhackman@barley.com; 717-852-4978; if you would like more information or are interested in having one of them speak to your management staff.

View PDF of Entire Publication: Employee Free Choice Act Introduced

Back To Top

Stimulus Package May Stimulate Increase in Employee Whistleblower Claims

By: Jill Sebest Welch

Buried in the provisions of the recently-enacted American Recovery and Reinvestment Act of 2009 are broad protections for employees who blow the whistle on their employers for misconduct related to the spending of covered funds granted in the stimulus package. These whistleblower protections are referred to as the "McCaskill Amendment." Given the close scrutiny that the recipients of stimulus funds -- as well as the ways that the funds are spent -- will receive, there will likely be an uptick in the number of whistleblower complaints and claims under the Recovery Act.

The whistleblower provisions found in Section 1553 of the Recovery Act apply to employees of private employers, as well as state and local governments, that receive covered funds. They do not apply to federal employees. Employers may not "discharge, demote, or otherwise discriminate against" an employee who makes a protected disclosure under the Recovery Act, specifically, a disclosure that the employee reasonably believes is evidence of:

A gross waste of covered funds or gross mismanagement of an agency contract or grant relating to covered funds;

A substantial and specific danger to public health or safety related to covered funds' use or implementation;

An abuse of authority related to the implementation or use of covered funds; or

A violation of a rule, law, or regulation related to an agency contract granted, awarded, or issued relating to covered funds.

Employee complaints -- even if made to a supervisor in the ordinary course of the employee's duties, or to any person who has authority to investigate, discover, or terminate misconduct such as a compliance officer or human resources representative -- trigger the protections from retaliation set forth in the Recovery Act. Complaints made to the Recovery Accountability and Transparency Board, an Inspector General or Comptroller General, a member of Congress, or a State or Federal regulatory or law enforcement agency are also protected activities.

These disclosures and protections are much broader than those afforded under the Sarbanes-Oxley Act, which addresses primarily employee complaints related to fraud or securities violations.

An employee who believes that he or she has been retaliated against for making such a protected disclosure may submit a complaint to the appropriate Inspector General. The head of the agency has 30 days after receiving the Inspector General's report to make a determination. If the head of the agency has not done so within 210 days after the submission of the complaint (unless an extension has been granted), the complaining employee may bring an action in federal court with a right to a jury trial.

From a litigation perspective, Section 1553 of the Recovery Act is attractive to potential whistleblowers and plaintiff's attorneys because there is no express statute of limitations, no statutory cap on damages, and allows for the recovery of attorneys' fees as well as reinstatement, back pay, and compensatory damages.

Section 1553 also includes a more-plaintiff/employee friendly burden of proof. An employee can establish a violation of the anti-retaliation provisions by evidence that the employee's complaint was "a contributing factor in the reprisal." This can be done by circumstantial evidence, including "evidence that the official undertaking the reprisal knew of the disclosure" or "evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable

person could conclude that the disclosure was a contributing factor in the reprisal." The employer may escape liability only where it can prove by clear and convincing evidence -- a high standard -- that it would have taken the same action in the absence of the employee's disclosure.

This standard is a significant departure from other whistleblower and anti-retaliation protections, and will likely make it easier for an employee to prove a claim. The inclusion of the word "or" is important, because even a supervisor or human resources representative who has no knowledge of an employee's complaint can nevertheless violate the whistleblower provisions if the employment decision falls close on the heels of such a complaint. It is thus imperative that supervisors, managers, and HR professionals be in communication with one another when receiving such a complaint and when making a decision to demote, terminate, or take an adverse action against an employee. Employers should take these complaints seriously, investigate them promptly, and document them thoroughly.

Importantly, whistleblower protections and rights under the Recovery Act cannot be waived in an employment, separation, or settlement agreement, and whistleblower claims may not be arbitrated unless they are subject to the arbitration provisions in a collective bargaining agreement.

There is also a posting requirement. Any employer receiving covered funds is required to post notice of the rights and remedies provided under this section.

With the passage of broad whistleblower protections in the American Recovery and Reinvestment Act of 2009, employers that receive stimulus funding face not only increased scrutiny over the expenditure of those funds, but face the prospect of increased employee complaints and claims of retaliation as well.

Barley Snyder's Employment Law attorneys routinely work with employers to review personnel decisions and to guide them through workplace investigations to minimize legal risks, and provide training on issues related to retaliation in the workplace to supervisors and managers and human resources personnel who are on the front lines every day managing employees. Please contact any member of our Employment Law Group for assistance in any of these areas.

View PDF of Entire Publication: Stimulus Package May Stimulate Increase in Employee Whistleblower Claims

Back To Top

Special Alert: President Obama Issues Three New Executive Orders Aimed at Federal Government Contractors

By: Jennifer Craighead Carey

On January 20, 2009, President Obama issued three new executive orders directed at federal government contractors who are covered under Executive Order 11246. They are as follows:

Non-Displacement of Qualified Workers:

Government service contractors are required to offer jobs to qualified workers of a predecessor contractor when a government service contract changes hands. The purpose of this order is to reduce the disruption of services when a government service contract changes hands. Qualified employees are given the right to priority consideration for vacancies created when the succeeding contractor fills jobs. Managerial and supervisory employees are not covered by this requirement. The Order has received criticism in the contractor community because of the subjectivity of the

"qualified" standard and the perceived limitations on contractors to hire the best qualified candidate for a given position. The Secretary of Labor is expected to issue final regulations on this subject in the near future.

Notification of Employee Rights Under Federal Labor Laws:

This Order is a reversal of the Order under President Bush that required federal contractors to notify employees that they can restrict the use of their union dues for political purposes (the "Beck Poster"). Government contractors no longer need to display the Beck Poster in their workplaces.

Government Contracting Costs:

President Obama has ordered that executive branch contracting agencies treat as unallowable costs "any activities undertaken to persuade employees about whether or not to organize a union/collectively bargain and the manner of exercising those rights."

The above orders are effective immediately.

View PDF of Entire Publication: Special Alert: President Obama Issues Three New Executive Orders Aimed at Federal Government Contractors

Back To Top

EEOC Proposes Regulations for the New Genetic Information Non-Discrimination Act (GINA)

By: David J. Freedman

On February 27, 2009, the U.S. Equal Employment Opportunity Commission (EEOC) published proposed regulations regarding the Genetic Information Non-Discrimination Act (GINA). The EEOC's regulations address Title II of GINA, which prohibits employers of 15 or more employees from using "genetic information" in employment decisions, prohibits those employers from intentionally acquiring such information, and imposes confidentiality restrictions on covered employers who innocently obtain genetic information.

Although these regulations are not yet final -- and will not become effective until November 21, 2009 -- employers should consider how to incorporate GINA's prohibitions and requirements into their current employment policies, handbooks, and applications. Likewise, as the proposed regulations suggest, entities may have to implement new procedures for identifying "genetic information," especially when responding to subpoenas and court orders for employee information.

The proposed regulations generally track GINA's prohibitions and exemptions. (For an overall review of GINA's employment law provisions, please see "The Latest Addition to Federal Employment Law: The Genetic Information Non-Discrimination Act (GINA)" by David J. Freedman, Esq. available at https://www.barley.com/publications/article.cfm?Article_ID=278). The regulations, however, provide definitions for some of the law's undefined or unclear terms. For example, the regulation's definition of "employee" clarifies that GINA's prohibitions apply equally to job applicants, former employees, and current employees.

The regulations also detail the following six exceptions to the general prohibition on an employer's acquisition of genetic information:

Obtaining information during the Family and Medical Leave Act (FMLA) certification process;

Obtaining genetic information as part of an employer-sponsored voluntary wellness program;

The acquisition of genetic information through publicly-available information;

Conducting genetic monitoring of the biological effects of toxic substances in the workplace;

Requiring employees to provide genetic information as a quality control marker, but only for those employers engaged in conducting genetic testing for law enforcement purposes; and

Inadvertently obtaining genetic information.

With regard to the exception for inadvertently obtaining genetic information, the proposed regulations address employer concerns regarding GINA's broad definition of "genetic information." Under this exception, an employer is not liable when it obtains genetic information "by overhearing a conversation between the individual or others," "by receiving it from the individual or third-parties without having solicited or sought the information," when the information is provided to support a disability accommodation request, or where the information is provided in support of a leave request (both legally protected and non-protected). Likewise, an employer does not violate GINA where it "learns genetic information about an individual in response to an inquiry about the individual's general health, an inquiry about whether the individual has any current disease, disorder, or pathological condition, or an inquiry about the general health of an individual's family member." An employer, however, may not use any obtained genetic information in employment decisions, even if the manner of its acquisition falls within one of the exceptions.

The proposed regulations also provide clarification regarding an employer's confidentiality obligations for genetic information that it obtains. Specifically, an employer who obtains genetic information orally need not reduce it to writing, but any documentation containing genetic information must be maintained in a separate, confidential medical file, as already required under the Americans with Disabilities Act. The regulations also impose fairly simple obligations on employers responding to subpoenas that require the disclosure of genetic information. An employer, however, may have additional confidentiality responsibilities where the genetic information is also "protected health information" under the Health Insurance Portability and Accountability Act (HIPAA).

Perhaps most importantly for employers, the proposed regulations state that a test for the presence of drugs and/or alcohol is ***not*** **a prohibited "genetic test" under GINA. Similarly, tests to detect the presence of viruses not composed of DNA, RNA, chromosomes, proteins, or metabolites fall outside of GINA's prohibitions.**

The EEOC is actively soliciting comments regarding the proposed regulations and several of GINA's definitions, such as "family member," "family medical history," "genetic test," and "manifested or manifestation" of a genetic disease. The EEOC also seeks public comment on how "voluntary" a wellness program must be to qualify for the exception regarding the acquisition of genetic information as part of an employer-sponsored wellness program, and whether the exception for publicly-available information should also cover genetic information obtained from electronic media such as the Internet, television, the movies, personal web sites, and social networking sites. **Employers are encouraged to provide comments on the proposed regulations, which may be submitted online at www.regulations.gov until midnight on May 21, 2009.**

When the regulations become final, members of Barley Snyder's Employment Law Group can assist in revising employment policies and forms, providing compliance training, and otherwise implementing GINA's requirements in advance of the November 21, 2009 effective date.

View PDF of Entire Publication: EEOC Proposes Regulations for the New Genetic Information Non-Discrimination Act (GINA)

Back To Top

DOL Offers Cautionary Guidance on Reducing Exempt Employees' Hours Due to Lack of Work

By: Richard L. Hackman

On March 6, 2009, the U.S. Department of Labor, Wage and Hour Division (DOL) posted a significant number of new FLSA opinion letters. In connection with these postings, the DOL issued the following statement:

"The Division has posted 36 Administrator opinion letters and four Non-Administrator opinion letters that were signed prior to January 21, 2009...Some of the posted opinion letters, as designated by asterisk, were not mailed before January 21[2009]. While the Wage and Hour Division is making these letters available to the requestor and to the public, the agency has decided to simultaneously withdraw these letters for further consideration. A final response to these opinion letter requests will be provided in the future."

The opinion letters designated with an asterisk will be reconsidered by the Obama administration because the opinions expressed in these letters are not consistent with the new administration's philosophy. The best course of action is to avoid relying on any of the withdrawn letters until the DOL either issues final approval or completely withdraws the letters.

However, several of the newly posted letters that were not conditionally withdrawn merit immediate attention because they address an issue many employers are facing in these difficult economic times. Specifically, how does an employer reduce the work week of an exempt employee without losing the exemption and violating the Fair Labor Standards Act (FLSA)?

Financial constraints are causing many employers to consider cost-savings in the area of employee compensation. As employers weigh their options, careful consideration must be given with respect to an employer's continuing obligation to pay its exempt employees on a "salary basis" in order to preserve the exemption. Paying an employee on a "salary basis" means that for every work week in which the person performs any work, the employee must receive a fixed, predetermined salary of at least $455 per week. This salary may not be reduced "because of variations in the quality or quantity of work performed." The FLSA provides for certain limited exceptions to this rule; however, generally speaking, the employee's salary may not be docked for absences during a work week caused by the employer or by the organization's operating needs.

On March 6, 2009, the DOL issued three Opinion Letters that provide guidance on this question. In FLSA2009-2, the DOL approved an employer's plan to require exempt employees to use accrued vacation time during a plant shutdown of less than a work week without violating the salary basis test and jeopardizing their exempt status. Specifically, the DOL reiterated its longstanding position that:

"[s]ince employers are not required under the FLSA to provide any vacation time to employees, there is no prohibition on an employer giving vacation time and later requiring that such vacation time be taken on a specific day(s). Therefore, a private employer may direct exempt staff to take vacation or debit their leave bank account . . . , whether for a full or partial day's absence, provided the employees receive in payment an

amount equal to their guaranteed salary" Wage and Hour Opinion Letter FLSA2005-41 (Oct. 24, 2005).

However, if an exempt employee does not possess any accrued vacation or other leave benefits, or has a negative balance in his/her account, the employee still must receive the employee's guaranteed salary for any absences caused by the employer or the operating requirements of the business.

In Opinion Letter FLSA2009-14, the DOL addressed an employer's proposal to reduce the hours worked by exempt employees due to "short-term business needs," i.e., low patient census. The DOL drew a distinction between a reduction in an exempt employee's salary for "short-term business needs" (day-to-day or week-to-week) versus a reduction in hours in the normal scheduled work week. The employer proposed occasionally reducing the hours worked by exempt employees and offered two options: (1) "voluntary time off" (VTO) where employees may, at their option, use paid annual, personal or vacation leave; or if there are not enough volunteers for VTO, then (2) "mandatory time off" (MTO) under a seniority-based system where employees required to take MTO may elect to use accrued paid leave or take unpaid leave. If the employee elected not to use paid leave, or did not have sufficient paid leave to cover VTO or MTO, the employer would deduct the amount from the employee's salary if the reduced hours are less than one week. If the reduction lasts an entire work week, the employer would not pay any salary for the week.

The DOL determined that such salary deductions due to a reduction of hours worked for short-term business needs do not comply with the regulations. Specifically, the DOL stated that:

"Deductions from an employee's fixed salary based on short-term business needs are different from a reduction in salary corresponding to a reduction in hours in the normal scheduled work week, which is permissible if it is a bona fide reduction not designed to circumvent the salary basis requirement . . . Unlike a salary reduction that reflects a reduction in the normal scheduled work week and is not designed to circumvent the salary basis requirement, deductions from salary due to day-to-day or week-to-week determinations of the operating requirements of the business are precisely the circumstances the salary basis requirement is intended to preclude."

Finally, in Opinion Letter FLSA2009-18, the DOL reiterated its previously held position that **an employer who requires a salaried exempt employee to stay home due to insufficient work may deduct such nonworking time from the employees' accrued paid time-off bank** without jeopardizing the employee's exempt status so long as the employees receive their regular salaries during such work week. However, in the event that an employee has insufficient leave bank hours to encompass these nonworking periods, the employer must pay the employee's full salary even if the employee has no accrued benefits in the leave bank. Failure to do so would result in a violation of the salary basis test.

Based on the guidance from the DOL, employers do have some options with respect to the reduction of exempt employees' salary as a cost-saving measure:

Formally adopt a "reduced work week schedule," and adjust exempt employees' salaries accordingly. Although the salary basis test requires payment of the exempt employee's full salary in work weeks where work is performed, it is permissible for employers to implement a formal, reduced work week schedule and lower salaries accordingly. For example, an employer could announce to employees that, due to the economic downturn, the employer will, for the next three to six months, implement a four-day work week and reduce exempt employees' salaries commensurately. While this may seem akin to an impermissible salary deduction due to "operating requirements" of the business, the

employer is effectively not making work available one day per work week. The DOL has approved this practice in prior Opinion Letters for economic reasons. Under these circumstances, the exemption would not be lost so long as the employee receives the minimum salary required by the regulations ($455 per week) and meets all other requirements for the exemption.

Implement a reduction in pay without reducing the work week -- i.e. a reduction in exempt employees' salary by 5%. The only caveat is that exempt employees must be paid a salary of at least $455 per week.

Mandate exempt employees' exhaustion of PTO benefits during periodic plant shutdowns of less than a work week. However, if the exempt employee has insufficient accrued PTO to cover these nonworking periods, or a negative PTO bank, the employer must pay the exempt employee's full salary for the work week.

An exempt employee's salary need not be paid for any work week in which the exempt employee performs no work. Accordingly, if the employee is "furloughed" for one or more entire work weeks, then the salary basis test does not require that the employee be paid any salary at all during those weeks.

Please do not hesitate to contact Barley's Employment Group if you have any further questions regarding these recently issued Opinion Letters.

View PDF of Entire Publication: DOL Offers Cautionary Guidance on Reducing Exempt Employees' Hours Due to Lack of Work

Back To Top