Employment Law Update March 2009

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New COBRA Provisions Have Implications for Employer Severance Agreements

In our most recent Employment Law Alert, we reported that the American Recovery and Reinvestment Act of 2009, signed by President Obama on February 17, 2009, provides essentially all workers who are involuntarily terminated between September 1, 2008 and December 31, 2009, with a 65% federal subsidy of the cost of continuation coverage under their former employer's group health plan. The federal subsidy will be available whether the terminated employee has health care plan continuation coverage rights that arise under the federal continuation coverage statute, applicable to employers with 20 or more employees and commonly referred to as "COBRA," or under one of the 40 or so separate state continuation coverage statutes that typically apply to all employers with as few as two employees.

To recap, beginning March 1, 2009, under the new COBRA subsidy program, the federal government will pay 65% of an eligible individual's COBRA premium, which in most cases is set by the employer at 102% of the employer's actual cost of providing the coverage. For example, if the employer's cost of providing a former employee with single coverage is $250/month, and as a result the employer charges a COBRA premium of $255/month, the federal government will pay as its subsidy 65% of $255, or $165.75, provided the eligible individual pays the 35% balance of $89.25.

The new COBRA provisions also have implications for employers who have recently undertaken layoffs or otherwise have offered employees being involuntarily terminated with a severance agreement that includes subsidizing a portion of the employee's COBRA premiums. In such cases, the federal subsidy of 65% will only be applied to the amount the employee is required to pay toward his or her health care continuation rather than the full cost of COBRA to the employer. Employers who have included such a subsidy for separating employees as of September 1, 2008 may wish to consider discontinuing the subsidy for health care continuation for the balance of 2009 in order to take advantage of the full federal subsidy. In lieu of the health care subsidy, employers could supplement severance pay or consider commencing its COBRA subsidy when the federal program ends, where appropriate.

As we advised in the recent Alert, if you sponsor a group health plan or cafeteria plan, it may need to be modified by April 1, 2009 to avoid adverse consequences. For assistance with the new COBRA provisions or other employee

benefits questions, please call Mark Smith at (717) 399-1526 or Harry Booker at (717) 399-1561.

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U.S. Supreme Court Again Expands Scope of Retaliation Claims

By: Jennifer Craighead Carey

There have been a lot of conflicting opinions issued among the various federal District and Appellate Courts over what actually constitutes protected activity under Title VII's prohibitions against retaliation. Title VII, which prohibits discrimination against an employee on the basis of race, sex, national origin and religion, also includes an anti-retaliation provision that in essence prohibits an employer from taking adverse action against an employee who has: (1) opposed any practice made an unlawful employment practice under Title VII (the "opposition clause"); or (2) has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under Title VII (the "participation clause"). Recently, our U.S. Supreme Court once again expanded the scope of retaliation claims when it ruled that an employer violated the "opposition clause" of Title VII's anti-retaliation provisions when it fired an employee who spoke out about discrimination, not on her own initiative, but in answering questions during an employer's internal investigation. This ruling continues a trend in expanding employer liability for retaliation under Title VII.

In *Vicky S. Crawford v. Metropolitan Government of Nashville and Davison County, Tennessee*, Crawford's employer began looking into rumors of sexual harassment by the Metro School District's employee relations director, Gene Hughes. In connection with that investigation, the employer interviewed Vicky Crawford, a 30-year employee who had witnessed inappropriate behavior on the part of Hughes. Crawford recounted to the investigator several incidents of lewd and crude behavior by Hughes directed towards her which she had never reported on her own initiative to her employer. In the course of the investigation, two other employees interviewed also reported being sexually harassed by Hughes. At the conclusion of its investigation the employer took no action against Hughes for his reported behavior, but later terminated all three women who had recounted sexual harassment by Hughes, including Crawford, for reasons ostensibly unrelated to their participation in the investigation. In Crawford's case, she was fired for alleged embezzlement shortly after the investigation.

Crawford sued for retaliation under Title VII, alleging that her participation in the employer's investigation constituted opposition to illegal activity under Title VII, for which she was later fired. The issue was whether her activity was really protected under the anti-retaliation provisions of Title VII because Crawford did not initiate the investigation against Hughes, but merely offered passive participation as an identified witness in the investigation. The case went up to the Sixth Circuit Court of Appeals (the federal appeals court for Michigan, Ohio, Kentucky and Tennessee), which held that Title VII's opposition clause "demands active, consistent opposing' activities" to be considered protected activity, and dismissed the suit.

The U.S. Supreme Court disagreed and ruled that Crawford was protected by the anti-retaliation prohibition under Title VII and could move forward with her retaliation claim. The Court noted that a person could certainly oppose unlawful activity under Title VII by responding to someone else's question in an investigation even if the person was not the source of the complaint which led to the employer's investigation. The Court found that to rule otherwise

would mean that an employee who reported discrimination in response to inquiries by an employer might be penalized for speaking up. Further, the Supreme Court's opinion also refers to "silent opposition" -- that is, employees who never expressed their opposition to harassment or discrimination to management, but nonetheless may have chatted with co-workers about it over lunch -- as included in Title VII's protected activity.

What impact does this ruling have on employers? The ruling continues a trend in expanding employer liability for retaliation under Title VII, and as such, employers need to be aware of the following:

1. An employee who informs an employer of unlawful practices under Title VII in response to a company investigation has engaged in conduct protected from retaliation under Title VII.

2. Employers need to carefully review adverse actions taken against such employees to ensure that the employees are not being singled out because they engaged in protected activity. This precaution does not mean that persons who participate in company-sponsored investigations get a free pass to violate the company work rules; however, such persons are protected against disparate treatment and being targeted because of the protected activity.

3. In situations where employers are contemplating discipline, termination, demotion, layoff or some other adverse action against individuals who have engaged in opposition conduct like Crawford's, employers would be well-served to consult legal counsel to ensure that they have followed their polices, that they have a well-documented file to substantiate their decisions, and that the affected employees are being treated in the same or similar manner as other similarly situated employees. Prevention is the best way to avoid the legal landmine demonstrated in the *Crawford* case, above.

Barley Snyder's Employment Law attorneys routinely review personnel decisions with employers before action is taken against an employee to ensure that the employer is protected from liability in the event that a discrimination or retaliation claim is made by a current or former employee. We also work with employers to guide them through workplace investigations to minimize legal risks, and provide training on issues related to harassment and retaliation in the workplace to supervisors and managers and human resources personnel who are on the front lines every day managing employees. Please contact Jennifer Craighead or any member of our Employment Law Group for assistance in any of these areas.

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U.S. Department of Labor Issues Guidance on Paying for On-Call Time

By: Jill Sebest Welch

As business realities and our service economy move ever-increasingly toward a 24-hour, 7-day-a-week model, employers have implemented on-call policies to keep pace with both internal and external customer demands. It is critical, however, that these on-call policies be developed with the wage and hour regulations under the Fair Labor Standards Act (FLSA) and state law in mind. Depending on the restrictions that your on-call policy places on employees' use of the time, the time that they spend "on-call" may need to be paid under the FLSA and/or state law.

The U.S. Department of Labor (DOL) recently issued an Opinion Letter on compensating employees for on-call time. Although the DOL Opinion Letter does not break new ground, it does provide helpful guidance on some of the factors

that the agency and courts consider when determining whether an employer's on-call policy is so restrictive of its employees' activities that the employees must be paid for their on-call time.

The three questions addressed by the DOL in this Opinion Letter are likely questions that employers routinely have when developing an on-call policy:

1. What restrictions can an employer impose during on-call periods?

2. Is the employer responsible for compensation when restrictions are imposed during on-call periods?

3. Is the number of call backs a factor in determining whether the on-call period is compensable?

On-call policies are often as unique as the businesses that have developed them, which is why the DOL and the courts review them on a case-by-case basis. The federal regulations begin with the general proposition that an on-call employee who is not required to remain on the employer's premises, but is only required to notify the employer where he or she may be reached, is not working while on-call. This is true so long as the employee is free to engage in personal activities when he or she is on-call. In this technological age of pagers and beepers, these principles still apply, even though the employee must carry a pager and report to work within a reasonable period of time following a call. However, the on-call policy will cross the line, and render on-call time compensable, if the on-call conditions are so restrictive or the calls are so frequent that the employee cannot use the time for personal activities.

What are some of the factors that determine whether the on-call policy allows the employee to use on-call time effectively for personal purposes?

- Whether there are excessive geographical limitations on an employee's movements;
- Whether the frequency of calls received is unduly restrictive;
- Whether the fixed time limit to respond to calls is unduly restrictive;
- Whether the employee could easily trade on-call responsibilities;
- Whether the use of a pager could ease restrictions; and
- Whether the on-call policy is based on an agreement between the parties.

Number of Calls Received While On-Call

The DOL confirmed that the number of calls received is a relevant factor in the analysis. For example, in one case, *Bright v. Houston Nw. Med. Ctr. Survivor, Inc.*, a hospital required its on-call biomedical equipment repair technician to be reachable by beeper, remain sober, and arrive at the hospital within approximately 20 minutes after being called. The technician received calls when on-call an average of 4 to 5 times per week. The Federal Appeals Court for the Fifth Circuit concluded that under these circumstances, the employee was able to use the on-call time "effectively for his own personal purposes" and the hospital did not need to pay the technician for all of the time spent on-call.

On the other hand, in *Renfro v. City of Emporia*, the Federal Appeals Court for the Tenth Circuit ruled that the employer had to pay firefighters for on-call time because the firefighters were required to wear pagers and respond to call backs within 20 minutes. The firefighters received an average of three to five calls, or up to thirteen calls, in a 24-hour on-call period and were not free to use the on-call time for their own personal activities.

In the on-call policy addressed in the DOL Opinion Letter, the on-call employee must be reachable at all times, abstain from alcohol or other substances, and report to work within one hour of the call. Call backs are rare. Based on those limited facts, the DOL concluded that the on-call period is not compensable and the employer need not pay the employee for the entire on-call period. Of course, any time spent working in response to the call would normally be compensable.

The factors addressed by the DOL Opinion Letter are certainly not exhaustive -- there are many aspects of an on-call policy to consider -- and no one factor will determine whether an employer's on-call policy is so restrictive of the employee's time to require that the on-call time be paid. Barley Snyder's Employment Law attorneys can review your on-call policy and practices to assist you in this determination and can work with you to prepare an on-call policy that gives your organization the flexibility to respond to customer demands while at the same time avoiding the risk that on-call time is so restrictive that it must be paid.

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