Employment Law Update November 2010

PUBLISHED ON
November 1, 2010

TABLE OF CONTENTS

2009/2010 U.S. Supreme Court Roundup

By: David J. Freedman

For those of us hoping for stability-in the wake of several tumultuous years of change-the United States Supreme Court's recently-completed term thankfully brought about few major changes for employers. Summaries of the Court's labor and employment decisions from the 2009-2010 term can be found below.

Quon v. City of Ontario: Billed by many as the term's blockbuster employee privacy case, this case did not turn out as ground-breaking as some might have hoped. Quon worked as a police sergeant with the City of Ontario, California's SWAT team. To assit with their police duties, the City provided SWAT team members with text-messaging enabled pagers. Despite previously telling Quon that he was not interested in reading his personal messages, Quon's supervisor later audited transcripts of Quon's messages when Quon twice exceeded the City-imposed maximum monthly character limit. The supervisor apparently wanted to determine if the character limit was set too low. In any event, the audit revealed that Quon was sending sexually-explicit text messages and had used his City-issued pager to facilitate an extra-marital affair. The City disciplined Quon, who sued claiming that, as a government employee, the audit violated his Constitutional right to privacy. Many commentators hoped the Court would clarify whether employees have a reasonable expectation of privacy regarding personal communications sent on employer-owned equipment. The Court, however, refused to address that issue, noting that "it is uncertain how workplace norms, and the law's treatment of them, will evolve." Instead, the Court presumed that Quon had a reasonable expectation of privacy in the text messages, but nevertheless found the City's search reasonable because it was motivated by a legitimate work-related purpose and was not excessively intrusive. The Court noted that the City had a

written policy indicating that electronic communications sent using City equipment could be monitored, and Quon was warned that his text messages were subject to that policy. Moreover, as a police officer, Quon should have known that his on-the-job communications could be the subject of disclosure during legal proceedings. As a result, the Court upheld the City's search and dismissed Quon's claim. The case is a major victory for public employers, but should have little effect in the private sector.

New Process Steel v. National Labor Relations Board: This case will have far-reaching effects in the traditional labor area. In *New Process Steel*, the Court addressed the power of the National Labor Relations Board ("the Board") to issue decisions with less than three members. The statute empowering the Board states that the Board must have three members to act. In late 2007, the Board was down to three members, with the third member's term about to expire. To continue operations, the three-member Board delegated all Board authority to the two remaining Board members. Congress, however, did not fill any of the Board vacancies for a period of over two years, during which the two-member Board continued issuing decisions. The Supreme Court held that the Board had no authority to act absent the statutorily-required three members. Although the precise effect on decisions issued by the two-member Board is not exactly clear, the over 600 decisions issued by the two-member Board during the period from 2008 through early 2010 are now of very questionable precedential value. As a result, employers who have been relying upon those cases to guide their operations should re-evaluate those decisions.

In *Granite Rock Co. v. International Brotherhood of Teamsters*, the Court held that the Labor-Management Relations Act does not create a tort claim for tortious interference with contractual relations against an international labor union that interferes with a collective bargaining agreement between an employer and a local union.

In *Perdue v. Kenny A.*, the Supreme Court overturned a $4.5 million enhancement award of attorneys' fees in a civil rights case, finding no enhancement necessary, despite the impressive result achieved by the plaintiffs' attorneys. Although the Court stated that enhancements of attorneys' fees awards are permitted under federal fee-shifting statutes, such enhancements should be given rarely, perhaps never. As the Court made clear, civil rights cases are not intended to produce windfalls for attorneys. This case is good news for employers defending suits with significant attorneys' fees exposure, such as class or collective actions.

The Court in *Hardt v. Reliance Standard Life Insurance Company* held that a plaintiff does not have to be a prevailing party to recover attorney's fees in a claim brought under 502(g)(1) of the Employee Retirement Income Security Act ("ERISA"). In that case, the insurance company denied Hardt's claim for disability benefits. After exhausting her administrative remedies, Hardt brought suit in federal court, claiming that the insurance company failed to perform a complete claim review. The trial court stated that it found "compelling evidence" that Hardt was entitled to benefits. Instead of granting judgment to Hardt, however, the trial court remanded the case back to the plan administrator to undertake a full review. During that process, the insurance company found Hardt eligible. Hardt then petitioned for attorneys' fees and costs, which the trial court granted. The Court of Appeals, however, reversed, holding that because Hardt never obtained a court judgment in her favor, she could not be considered a prevailing party entitled to attorney's fees. The Supreme Court, though, reversed, re-instating the trial court's award of attorney's fees. According to the Supreme Court, unlike other employment law statutes, an ERISA plaintiff claiming wrongful denial of insurance benefits

need not be a prevailing party to obtain an award of attorneys' fees. Instead, 502(g)(1) of ERISA only requires that the party achieve "some success, even if not major success" to recover fees and costs. Because Hardt's filing of the lawsuit compelled the insurance company to provide benefits, she was entitled to an attorneys' fee award, despite not actually obtaining a court judgment.

Lewis v. City of Chicago: Federal anti-discrimination statutes prohibit not only intentional discrimination, but also facially-neutral policies that have a discriminatory effect. This second class of discrimination cases are referred to as "disparate impact" claims. The *Lewis* case addressed when the statute of limitations for such claims starts to run. In that case, the City of Chicago argued that claims against it for disparate impact race discrimination arising from a 1995 firefighters exam were time-barred. According to the City, the plaintiffs failed to file a challenge with the United States Equal Employment Opportunity Commission ("EEOC") within 300 days of the City's announcement of the exam results. The Supreme Court disagreed, holding that the statute of limitations on a disparate impact claim does not start until the employer *uses* the criteria that causes the disparate impact, not when it identifies that criteria.

In *Rent-a-Center West v. Jackson*, the Court upheld an employment contract containing a clause stating that an arbitrator, not a court, must determine the enforceability of the contract's arbitration requirement. While at first blush, this appears to be a victory for employers who use similar provisions, the Court's opinion left open the possibility that courts, not arbitrators, will still have the authority to decide certain threshold issues regarding arbitration-like limitations on discovery and fee-splitting provisions-even if an employment contract's terms prohibit a court from addressing those issues.

All in all, 2009-10 was a pretty dull term, at least regarding labor and employment matters. But don't count on more tranquility during the 2010-11 term. Already the Supreme Court has agreed to hear cases involving hot-button issues like whether an employee's oral complaints are protected from retaliation under the Fair Labor Standards Act ("FLSA") and when a supervisor's anti-military bias is relevant in a claim for violation of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Stay tuned to the Employment Law Newsletter; we will continue to update you as major developments occur.

Back To Top

The U.S. Department of Homeland Security finalizes rule on electronic signature and storage of Form I-9

By: Silas M. Ruiz-Steele

On July 22, 2010, the U.S. Department of Homeland Security (DHS) published its final rule on electronic signature and storage of Form I-9. The final rule provides employers with greater flexibility to electronically sign and store I-9 forms. Employers must complete Form I-9 to verify the work authorization of each new hire. The Form I-9 is not filed with the DHS, but is retained by the employer who must make it available for inspection upon request by Immigration and Customs Enforcement or other authorized federal officials. Employers are required to retain a Form I-9 in their own files for three years after the date of hire of the employee or one year of the date that employment is terminated, whichever is later. Failure to properly complete and retain each Form I-9 may subject the employer to civil monetary penalties.

The final regulation makes a few changes and minor amendments to DHS's June 2006 interim final regulation, which

provided the standard for data retention and retrieval, electronic signature authenticity, and data security and integrity. The new rule allows employers to complete, sign, scan, and store the Form I-9 electronically, as long as certain performance standards for the electronic filing system are met. The primary changes made by the final rule include:

- employers must complete a Form I-9 by the third business (not calendar) day after an employee started work for pay;
- employers may use paper, electronic systems, or a combination of paper and electronic systems;
- employers may change electronic storage systems as long as the systems meet the performance requirements of the regulations;
- employers need not retain audit trails of each time a Form I-9 is electronically viewed, but only when the Form I-9 is created, completed, updated, modified, altered, or corrected; and
- employers may provide or transmit a confirmation of a Form I-9 transaction, but are not required to do so unless the employee requests a copy.

The final rule does not include any substantive changes to the Form I-9 content or the list of acceptable verification documents that are currently in effect. If you have any questions on the final rule, please contact Silas M. Ruiz-Steele, Esq. at Barley Snyder LLC.

Back To Top

Is Your Website Accessible to the Disabled? Federal Government Moves to Ensure Website Compliance with ADA A

By: Jennifer Craighead Carey

On July 26, 2010, the Department of Justice, Civil Rights Division, (DOJ) issued an Advanced Notice of Proposed Rulemaking (Notice), seeking written comment from the public on its decision to consider revising the regulations implementing Titles II and III of the Americans With Disabilities Act (ADA) to provide that state and local governments as well as places of public accommodation make their websites accessible to the disabled. Places of public accommodation are those that affect commerce and generally include such places as restaurants; theaters; convention centers and other places of public gathering; grocery stores, shopping centers and other sales establishments; professional service establishments such as banks, accountants, lawyers, doctors offices, and hospitals; public transportation terminals; museums and libraries; places of recreation such as a zoo or amusement park, places of education such as private schools; day care centers; fitness centers, etc.

Under the Notice, DOJ announced its future intention to introduce proposed regulations mandating that public accommodations and state and local governments ensure that the disabled have access to their websites, citing the critical role the Web places in the daily personal, professional, civic and business life of Americans. The DOJ notes that many individuals with disabilities cannot access websites, putting them at a disadvantage in doing business, in learning and education, in obtaining healthcare information and in ecommerce. For example, a deaf person is unable to access information in Web videos that do not have captions. A person with low vision may be unable to read websites that do not allow the font size or the color contrast of the site's page to be modified. An individual with limited manual dexterity may be unable to use a portion of a website because the site does not support keyboard alternatives

for mouse commands. And, the DOJ notes the most common barrier to website accessibility is a photograph or image without corresponding text describing the image which puts an individual using a screen reader or other assistive device at a disadvantage.

The Notice cites two current potential resources to assist in designing future regulations. First, the Notice cites existing guidelines for voluntary compliance on website accessibility under the World Wide Web Consortium's Website Content Accessibility Guidelines 2.0 (WCAG2.0) available at http://www.w3.org/TR/WCAG20. The WCAG 2.0 contains twelve guidelines addressing Web accessibility. Among those guidelines are recommendations such as making text alternatives for non-text content so information could be changed into forms other people need such as large print and speech; making all functionality available from a keyboard; designing content in a way that does not cause seizures; making text content readable and understandable; and making sites compatible with assistive technologies. Second, the Notice cites website accessibility standards for Federal Government agencies under Section 508 of the Rehabilitation Act of 1973, available at www.access-board.gov/sec508/standards.htm

The notice provides that written comments may be submitted to the DOJ on or before January 24, 2011. In addition to general comments, the DOJ is soliciting comments on what standards, if any, it should adopt; whether certain entities such as small businesses should be exempted; the costs of making websites accessible; and whether there are effective and reasonable alternatives to make websites accessible. As many of our employer clients are local governmental bodies or places of public accommodation, our employment law group will continue to monitor developments in this area. Furthermore, as more employers move to recruit and solicit applications online, no doubt website accessibility will be a critical issue for compliance with the employment provision of the ADA under Title I. For further information please contact any member of the employment law group.

Back To Top

U.S. Citizenship and Immigration Services implements H-1B and L-1 Fee increase

By: Silas M. Ruiz-Steele

On Friday, August 13, 2010, President Barack Obama signed into law the Emergency Border Security Supplemental Appropriations Act of 2010 (Public Law 111-230), which contains provisions increasing certain H-1B and L-1 petition filing fees. According to U.S. Citizenship and Immigration Services (USCIS), "effective immediately, Public Law 111-230 requires the submission of an additional fee of $2,000 for certain H-1B petitions and $2,250 for certain L-1A and L-1B petitions postmarked on or after August 14, 2010, and will remain in effect through September 30, 2014." These additional fees apply to employers with more than 50 employees who have a U.S. workforce of more than fifty percent H-1B or L-1 (including L-1A, L-1B and L-2) nonimmigrant workers. Moreover, employers meeting these criteria must submit the fees with a petition filed to initially grant H-1B or L-1 nonimmigrant status or to obtain authorization for those having H-1B or L-1 status to change employers.

According to USCIS, the additional fee, if applicable, is in addition to the base processing fee, the existing Fraud Prevention and Detection Fee, and any applicable American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) fee, required to file a petition for a Nonimmigrant Worker (Form I-129), as well as any premium processing fees, if requested.

If you have any questions on the new fees, please contact Silas M. Ruiz-Steele, Esq. at Barley Snyder LLC.

Back To Top

Penalty-Free Correction of Certain Nonqualified Deferred Compensation Plan Document Failures May Still Be Possi

By: Mark A. Smith

Internal Revenue Code Section 409A, governing the taxation of so-called "nonqualified deferred compensation," has been in effect since January 1, 2005. Prior to January 1, 2009, plans, contracts and other arrangements that give an individual a currently legally binding right to receive a payment of income in a future year, e.g., deferred compensation plans and agreements, supplemental retirement plans and agreements, severance pay plans and agreements, and multi-year incentive bonus plans and agreements, had to be amended, where necessary, to comply with Section 409A's requirements. Failure of a plan or agreement to comply with Section 409A results in immediate income taxation of vested amounts that otherwise were intended to be deferred under the plan or agreement to a future year, plus an additional 20% penalty income tax and interest.

Despite fairly wide-spread publicity that surrounded the passage of these new Section 409A tax rules and the December 31, 2008 deadline for amending all covered compensation deferral plans and arrangements, most experts believe that there are still untold numbers of such plans and arrangements that defer compensation into future years and that have not as yet been reviewed and revised for 409A compliance. Earlier this year, with the publication of Notice 2010-6, the IRS instituted a program that gives the parties to such deferral arrangements--usually an employer and one or more highly paid employees--an opportunity to make some types of corrections to such documents at this late date, with in some cases a complete avoidance of 409A penalties and in others a reduction in 409A penalties.

The types of document failures that can potentially be corrected under Notice 2010-6 include, in part:

- plans with noncompliant definitions of key 409A terms like "change in control," "disability," or "separation from service"
- provisions that purport to allow the employer to accelerate the payments
- provisions that give the employer or employee discretion to change an otherwise fixed payment schedule following the occurrence of a payment event
- plans that permit payment on an event that is not a permitted 409A payment event
- plans that condition payments on signing a non-compete or a release
- plans that hold up payment for more than 90 days after a permitted 409A payment event
- public company plans that do not provide for six-month delay in separation-triggered payments to so-called "specified employees."

This Notice 2010-6 document correction opportunity is subject to conditions and limitations. For example, for it to be used neither the employer mor employee can currently under IRS examination with respect to the deferred compensation, the failure being corrected had to be inadvertent and unintentional, and all similar failures in other employer plans or agreements must also be corrected.

Employers and their highly compensated employees who are parties to agreements, plans and other arrangements

that create current legal rights to receive payment of income in future years, and who know or suspect that those agreements were never analyzed and amended for 409A compliance are strongly urged to take advantage of this document correction opportunity. At best it could fully eliminate the adverse tax consequences of 409A noncompliance; and at least it could materially reduce the tax cost of 409A noncompliance. In order to fully eliminate the 409A penalties, document corrections by December 31, 2010 are required.

Questions about this Notice 2010-06 document correction program, or about Section 409A in general, can be addressed to Mark Smith (msmith@barley.com; 717-399-1526) or Harry Booker (hbooker@barley.com; 717-399-1561).

Back To Top

Department of Labor Clarifies FMLA Definition of Son or Daughter, Broadens Definition of In Loco Parentis

By: Joshua L. Schwartz

The U.S. Department of Labor recently issued guidance that broadly defines who may be *in loco parentis* to a "son or daughter" for purposes of protected leave under the Family and Medical Leave Act ("FMLA"). The decision has been hailed as a victory for gay and lesbian families as well as grandparents and others taking day to day care of their children.

Under the FMLA, an employee may take up to twelve weeks of job-protected leave for the birth or placement of a child, to care for a newborn or newly placed child, to care for an immediate family member (spouse, child, or parent) with a serious health condition, or to take medical leave due to a serious health condition. The guidance clarifying the term "son or daughter" affects all but the last of these situations.

The regulations define a "son or daughter" as "a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability." The recent Department of Labor guidance emphasizes that the parental relationship need not be legal or biological. For example, FMLA-protected leave is now extended to domestic partners, grandparents, uncles, and other individuals, so long as they provide to the child (1) day-to-day care or (2) financial support. The guidance further notes that the existence of one or both biological parents does not prevent a finding that the child is the "son or daughter" of a third party so long as that party meets the *in loco parentis* requirements.

Several commentators have noted that the guidance explicitly changes the definition of *in loco parentis*. Existing regulations require that a person asserting *in loco parentis* status show that they provide *both* day-to-day care *and* financial support. The guidance, on the other hand, asserts that the Department of Labor will no longer require both. Nonetheless, none of the examples offered by the Department involve an employee who is solely providing financial support, so some day-to-day or ongoing relationship beyond a financial one appears to be required. The guidance further emphasizes that the *in loco parentis* relationship is heavily factual and depends on such factors as the age of the child, the degree to which the child is dependent on the employee, the amount of support provided, if any, and the extent to which duties commonly associated with parenthood are exercised.

Employers should review their FMLA policies to ensure that they reflect the Department's broader definition of *in*

loco parentis. Further, supervisors and human resources professionals should be trained that requests for leave require a case-by-case determination, examining the day-to-day parenting responsibilities of the employee requesting leave, where the employee has no legal or biological relationship to the child.

Back To Top