Employment Law Update October 2011

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Workers' Compensation Round-Up

By: Joshua L. Schwartz

The past few months have seen a number of significant decisions in the Workers' Compensation field. This article will examine five recent cases and the lessons to be learned from them.

In *Gentex Corporation and Gallagher Bassett Services v. Workers' Compensation Appeal Board* (Morack) (July 20, 2011), the Supreme Court of Pennsylvania took up the question of what constitutes "notice" under the Workers' Compensation Act. The claimant, who worked for 45 years as an inspector, experienced hand pain and told her employer that she could not work. She indicated on a short-term disability form that her hand pain was not work-related, but a doctor subsequently diagnosed her with a number of work-related injuries. After the diagnosis, the claimant attempted several times to contact the employer's human resources manager and left at least one phone message indicating that she had "work-related problems." The employer argued that this was insufficient to provide notice under the Act, but the Court disagreed. The Court noted that an employee must provide a "reasonably precise description" and an indication that an injury is work-related. Here, the claimant's complaint to her supervisor of hand pain and follow-up phone call indicating work-relatedness were sufficient to provide notice under the Act. Given this liberal interpretation of the Act, employers cannot rely on an employee's initial denial that an injury is work-related and must consider a physician's later diagnosis. In addition, employers should be vigilant in training supervisors to recognize potential claims, particularly in cases where repetitive injury is feasible.

Habib v. Workers' Compensation Appeal Board (John Roth Paving Pavemasters) (August 12, 2011) refined the "course and scope of employment" inquiry for work-related injuries. The claimant, a member of a paving crew, was awaiting delivery of a truckload of asphalt when a bowling ball was found nearby. After a round of shot-put, someone issued a challenge to see if anyone could break the ball with a sledge hammer. When the claimant attempted it, a piece of the bowling ball broke off and struck him in the face, ultimately causing complete loss of his right eye. The employer presented testimony from the foreman that he had told the

claimant to "knock it off, or stop" immediately prior to the injury-causing blow and had informed the claimant that he would not take him to the hospital if he was injured. The Workers Compensation Judge concluded the warning had not occurred in time and granted the Claim Petition. On appeal, the Appeal Board and, ultimately, the Commonwealth Court disagreed, explaining that (1) violation of the order to "knock it off" caused the injury, (2) the claimant knew that the foreman wanted him to stop, and (3) the order to stop and activity causing the injury were "not connected with the employee's work duties." The case reaffirms the importance of a supervisor's affirmative duty to curb horseplay, and employers should ensure that their written policies regarding such activities are clear and adequately disseminated.

Another course and scope of employment issue centers on employees who work from home. In *Werner v. Workers' Compensation Appeal Board* (Greenleaf Service Corporation) (September 1, 2011), the Court examined the burden of a claimant who is injured while working at a home office. Werner was a fatal claim in which the individual suffered a brain hemorrhage resulting from a blow to the head. The injury took place between 11:00 a.m. and 2:00 p.m., but there was no evidence that the employee was actually working during that time. Given the dearth of any indication that the employee was working or merely on a quick break from work, the Court disallowed the petition. In doing so, the Court distinguished the case of *Verizon Pennsylvania, Inc. v. Workers' Compensation Appeal Board* (Alston), 900 A.2d 440, 444 (Pa. Cmwlth. 2006), in which an employee had taken a quick break to drink a glass of orange juice in her kitchen and had tripped going down the stairs to her home office. In that case, the Court had granted the claim because the kitchen run had merely been a brief departure to attend to her personal comforts. Because there were no witnesses to Werner's death, the case was distinguishable and the claim was denied. Though the facts of the Werner and Alston cases are somewhat unique, they illustrate the evidentiary issues surrounding employees who work from home. Employers need to be aware of these issues and put policies in place to control at-home work as much as possible.

In *Green v. Workers' Compensation Appeal Board* (US Airways) (August 22, 2011), the Commonwealth Court cautioned employers not to confuse the word "degenerative" with an indication that a condition was not work-related. The claimant's expert had opined that work-related trauma had set her degenerative condition in motion, and the Workers' Compensation Judge had interpreted this testimony to be that the injury was not traumatic but was, instead, a long-standing degenerative condition. In reversing, the Court noted that the word "degenerative" merely describes the condition itself and does not, in itself, address the issue of causation. Employers and insurers reviewing medical records or seeking the opinion of an independent medical examiner should be careful not to associate a "degenerative" condition automatically with a denial of causation.

Finally, here is a tragic but interesting case involving what constitutes "normal" working conditions for a particular industry. In *Pa Liquor Control Board v. Workers' Compensation Appeal Board* (Kochanowitz) (September 20, 2011), an employee claimed to have post-traumatic stress disorder caused by an armed robbery he experienced while working at a liquor store. In psychic injury cases where there is no physical harm, a claimant must prove "abnormal working conditions" to get relief. The employer presented testimony that claimant had been trained in how to deal with robberies and that 99 liquor stores in Bucks, Montgomery, Chester, Delaware, and Philadelphia counties had been robbed since 2002, which equated to more than one per month. The claimant further admitted that shoplifting was frequent at the store and that it was in a

high-risk area. Under these circumstances, the Court held that the armed robbery did not constitute "abnormal working conditions" and denied the Claim.

The Workers' Compensation attorneys at Barley Snyder are available to answer questions regarding these cases or any other employment-related matters.

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2010-2011 U.S. Supreme Court Update: A Whirlwind Year for Employment Law

By: David J. Freedman

The 2010/2011 U.S. Supreme Court docket featured a number of labor and employment law decisions warranting employers' attention. The term featured key victories for both employers (in the realm of class actions and background checks) and employees (relating to wrongful termination and retaliation claims). Summaries of the Court's labor and employment decisions from the 2010/2011 term can be found below.

In the unanimous decision *Thompson v. North American Stainless*, the Court ruled that Title VII allows third party retaliation claims for relatives of employees filing discrimination complaints. Employer North American Stainless (NAS) fired employee Thompson shortly after discovering that Thompson's fianc e, also a NAS employee, had filed a gender discrimination EEOC charge. Although Thompson never engaged in any protected activity, the Court held that he could still maintain a claim for retaliation. In doing so, the Court acknowledged that authorizing third-party retaliation claims might lead to difficult line-drawing concerning the types of relationships entitled to protection. Yet, the Court refused to impose a "categorical rule that third-party reprisals do not violate Title VII." Regarding the type of relationship required to assert a third-party retaliation claim, the Court stated only "that firing a close family member will almost always [constitute retaliation], and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize." Although the *Thompson* decision leaves many issues unresolved, it is clear the Court's holding is not limited to Title VII, but also covers retaliation claims authorized by other Federal anti-discrimination laws, like the Age Discrimination in Employment Act and the Americans with Disabilities Act.

Thompson wasn't the only case of the 2010/2011 term that affected retaliation claims. In *Kasten v. Saint-Gobain Performance Plastics Corp*., the Court ruled that the Fair Labor Standards Act (FLSA) prohibits retaliation against workers for complaining about wage and hour violations even if the complaint is oral rather than written. In a 6-2 vote, the Court found that the FLSA's reference to "any complaint" includes oral complaints as well as formal, written complaints. The decision, however, may not be as powerful for employees as it first appears. Due to a procedural defect, the Court refused to decide whether the FLSA's anti-retaliation provision applies at all to employees who only complain to their employer. In dissent, Justice Scalia adopted Saint Gobain's argument that the FLSA's anti-retaliation provision protects only those employees who complain to the U.S. Department of Labor. Thus, while *Kasten* decisively holds that oral complaints to the government fall under the FLSA provision and provides a strong argument that oral complaints to employers are also covered the Court left open, for now, the possibility for lower courts to find that complaints to employers (oral or written) are not covered under the FLSA.

Wal-Mart v. Dukes: In the blockbuster employment law case of the 2010/2011 term, the Court issued a major victory for large employers at risk of class action lawsuits. Specifically, the Court ruled that a group of 1.5 million current and former female Wal-Mart employees could not be certified as a class action because the employees had not all suffered the same injury. This decision negated the largest employment class action ever certified by any U.S. Court. The Court further ruled that a party seeking class certification must prove the necessary requirements before gaining certification, even if the requirements overlap with the merits of the case (and must be proven again at trial). This majority (5-4) decision applies with equal strength to other employment statutes outside of the Title VII context. Plaintiffs seeking to certify a class action must now define a common question - the "glue" - that holds together the alleged reason behind each of the challenged employment decisions.

In *Staub v. Proctor Hospital*, the Court found an employer liable for firing an employee (Staub) at the advice of two supervisors who allegedly exhibited anti-military bias. Staub, a military reservist, worked as angiography technician for Proctor Hospital until his 2004 termination. The trial court determined that both Staub's immediate supervisor (Mulally) and Mulally's supervisor (Korenchuk) were hostile to Staub's military involvement, and thus found the Hospital liable for wrongful termination under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The 7th Circuit Court of Appeals reversed, holding that the employer was not liable because Mulally and Korenchuk did not make the final decision to fire Staub, and the decision was based on more that their tainted advice. The Supreme Court reversed again in favor of Staub, ruling that when a supervisor performs an act motivated by anti-military animus that is intended by the supervisor to cause an adverse employment action (and that act is a proximate cause of the ultimate employment action), then the employer is liable for discrimination. Although this "cat's paw" case was decided under USERRA, its reasoning will apply to all Federal anti-discrimination cases, including Title VII, the ADEA and the ADA.

In *NASA v. Nelson*, the Court found constitutional NASA's background checks of contract employees at the Jet Propulsion Laboratory (JPL), a NASA facility operated under a government contract. NASA required JPL contract employees to fill out background-check forms asking for disclosures of drug use, treatment and counseling in addition to open-ended questions regarding "any adverse information" about financial and marital stability. The Supreme Court unanimously determined that these background checks did not violate any constitutional privacy right that might exist.

Chamber of Commerce v. Whiting involved a challenge to an Arizona law requiring that employers utilize the Federal Government's E-Verify program to confirm that their employees are authorized to work in the United States. The Federal law implementing the E-Verify program explicitly stated the program was voluntary. Yet, the challenged Arizona law required employers to utilize E-Verify. Failure to do so could result in suspension of an employer' license to conduct business in that state. A broad coalition, including both the United States Chamber of Commerce and the National Council of La Raza, sued claiming that the Federal immigration law making E-Verify voluntary preempted Arizona's law. The U.S. Supreme Court, however, sided with Arizona, finding that the Arizona law was simply a licensing regulation specifically authorized by the Federal Immigration Reform and Control Act ("IRCA"). The ramifications of this decision might be felt rather quickly. There are currently at least five bills pending before the Pennsylvania General Assembly that would implement requirements very similar to those found in the Arizona law. In other words, Pennsylvania

employers may soon face two different sets of immigration regulations: one from the Federal Government; and one from the Pennsylvania Government.

All in all, the 2010/2011 term proved quite eventful. Looking ahead, the 2011/2012 term should feature few groundbreaking labor and employment decisions, other than several issues related to public employers. Stay tuned to the Employment Law Newsletter; we will continue to update you as major developments occur.

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The NLRB's Agenda = Employers Under Attack

By: Richard L. Hackman

As indicated in our two recent client alerts, the National Labor Relations Board (NLRB) has been extremely activist in promoting a pro-Union agenda. In fact, it wouldn't be a stretch to refer to the agency as currently constituted as the "National Labor Relations Union." Prior to this most recent activism, the NLRB had two primary functions: (1) to prevent and remedy unfair labor practices, regardless of whether committed by labor unions or employers; and (2) to establish whether certain groups of employees wanted union representation for collective-bargaining purposes. However, the NLRB's recent measures indicate an intent to substantially deviate from its statutorily-mandated duties as an objective investigatory agency.

By way of reminder, when appointed to the NLRB by the Obama administration, Craig Becker made it quite clear that he intended to use the NLRB's rulemaking process to enact provisions and positions favorable to his labor unions.

Since his appointment, which gave the Board a 2-1 democratic majority, Becker has attempted to use his currently unchecked authority (he was a recess appointment by President Obama and, as such, was neither confirmed nor approved by either party) to propose rules undercutting an employer's ability to manage its workforce. The NLRB's proposed rules placing more obligations and expense on employers are particularly troubling in light of the current economy.

In an attempt to implement its agenda, the NLRB has proposed several recent rules and regulations of which employers must be aware. Specifically,

1. The NLRB issued a Final Rule that will require employers to notify employees of their rights under the National Labor Relations Act (NLRA) as of November 14, 2011. However, on October 5, 2011, the agengy agreed to postpone implementation of the posting requirement until January 31, 2012. Private-sector employers whose workplaces fall under the NLRA will be required to post the employee rights notice where other workplace notices are typically posted. Also, employers who customarily post notices to employees regarding personnel rules or policies on an internet or intranet site will be required to post the notice on those sites. The notice states, among other things, that employees have the right to act together to improve wages and working conditions, to form, join and assist a union, to bargain collectively with their employer, refrain from any of these activities, strike and picket or choose not to do any of these activities. It also informs employees of their right to solicit during their non-work time, to be free of interrogation and discrimination related to union activities, and to wear union hats, buttons, tee shirts, and pins.

Penalties for employers who fail to post the notice may be severe. First, failure to post the required notice is an unfair labor practice itself. The second sanction is the tolling of the statute of limitations for filing an unfair labor practice charge against employers who fail to post the notice. The normal statute of limitations is six months, but it may be extended when no notice has been posted. Finally, the Board will hold that knowingly and willfully failing to post notices may provide evidence of unlawful motive in unfair labor practice cases.

Although the NLRB did not directly address the issue of whether an employer may post a notice of the company's position at the same location, there appears to be nothing per se illegal about this practice; however, you should have legal counsel review such a notice prior to posting.

2. A proposed rule would significantly reduce the time period for a union election and impose substantially shortened timeframes for the production of documents. For example, employers would need to produce an electronic voter list within two days (as opposed to seven, under the current rules) after the filing of a petition. Employers would also be required to include in the voter list an employee's name, telephone number, email address, physical address, work location, shift, and classification. Moreover, the proposed rules would expedite the hearing process and a hearing officer would be required to close a hearing if he or she concludes that "the only issues remaining in dispute concern the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote." The cumulative effect of the changes has been predicted to take the average time between petition and election from its current 38 days to approximately 20-23 days. This will obviously give employers less time to communicate with employees about the negatives of unions after a petition is filed and presumably boost the likelihood that a union could win an NLRB election.

Ultimately, employers have a legitimate and substantial interest in NLRB rules and procedures which includes the right of the employer to communicate with its employees about unions. If this proposed rule becomes effective, a union may conduct an organizing campaign for weeks or months without an employer becoming aware of it, frame the election, communicate with employees and prepare for legal issues to the significant detriment of an employer.

Please be advised that if employers currently do not engage in ongoing communication about unions as part of their regular communications to employees -- DO IT NOW. Further, employers need to be prepared immediately at the commencement of union organizing to roll out a solid communications strategy.

3. Finally, the NLRB has proposed a drastic expansion of the definition of "persuasion" to include numerous common human resource and legal activities which would substantially impact current basic employer activities. With respect to restrictions regarding legal counsel, any involvement by the employer's attorney in suggesting or preparing campaign literature or other communications would make the attorney a "persuader" within the meaning of the law, and would require the attorney and his or her firm to file detailed reports, including reporting on their finances, to the DOL. If adopted, these regulations would require labor lawyers to determine whether to meet the burdensome requirements of the DOL in order to continue to assist their clients in organizing campaigns, or to abandon that type of work entirely.

Significantly, the proposed rule also requires employers subject to this requirement to report receipts and disbursements of any kind "on account of labor relations advice and services." Accordingly, there would be substantial new recordkeeping and reporting requirements for employers. To comply with these onerous

requirements, potentially on every occasion an employer engages an attorney or a consultant, reporting would be required. Accordingly, the costs associated with compliance could truly be staggering.

Please contact a member of Barley Snyder's employment group with any questions regarding this proposed legislation and for advice on a course of action to ensure legal compliance.

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Retirement Plan Sponsors Face Extensive New Participant Disclosures in 2012 New Retirement Rules

By: Harris T. Booker, Jr., David J. Ledermann and Mark A. Smith

Required disclosures of relevant employee benefit plan information to the plan's participants has been one of the major themes of ERISA -- the federal law regulating employee benefits -- since its enactment in 1974. Benefit plan sponsors and administrators have long been preparing and distributing to participants summary plan descriptions, summaries of material modifications, summary annual reports, annual benefit statements, periodic account statements, notices to interested parties, and black-out notices, in the seemingly unending effort to ensure that plan participants are kept adequately informed of their benefits and their benefit plan rights. Notwithstanding these many established ERISA disclosure requirements, a new set of ERISA participant disclosure regulations have now been promulgated by the Department of Labor and will become effective in 2012.

These new requirements are a specific reaction by the DOL to the increasing prevalence across the retirement plan landscape of so-called "participant-directed individual account plans." These are plans, including most current-day 401(k) and 403(b) plans, under which each plan participant can direct the investment of the participant's plan account among various investment alternatives. The new participant disclosure regulations summarized below apply only to plan administrators of such participant-directed retirement plans, not to those of traditional defined benefit pension plans or individual account plans without participant-directed investments.

What types of disclosures are required by the new rules?
The new regulations require written disclosure of two types of information: (1) plan-related information, and (2) investment-related information.

What is the required plan-related information?
First, general plan information must be provided to each participant or beneficiary before he or she can first direct plan investments, and at least annually thereafter, including:

- the circumstances under which investment instructions can be given;
- any plan limitations on investment instructions, including any restrictions on transfers in and out of an investment alternative;
- plan provisions relating to voting or tender or similar rights appurtenant to any investment alternative;
- an identification of all investment alternatives available under the plan;
- an identification of any investment managers designated under the plan and;

• a description of any plan provisions allowing investment outside of the menu of investments designated as available under the plan (e.g., "brokerage windows" or "separate brokerage accounts").

Second, before a participant or beneficiary can first direct investments, and at least annually thereafter, he or she must be given an explanation of plan administrative expenses (e.g., accounting, recordkeeping and legal expenses) that may be charged to an individual plan account, and how those expenses are allocated (e.g., pro rata or per capita). At least quarterly, the participant or beneficiary is to receive a specific statement that includes the dollar amount of such administrative fees charged to the individual's account in the prior quarter and the administrative services to which the charges relate.

And third, before a participant or beneficiary can first direct investments, and at least annually thereafter, he or she must be given an explanation of any individual fees and expenses (such as participant loan fees, QDRO processing fees, "brokerage window" fees and individual investment advisor fees) that may be charged against the individual account of a participant or beneficiary who incurs the fee rather than against all accounts. Here again, at least quarterly, the participant or beneficiary is to receive a specific statement that includes the dollar amount of such individual account expenses actually charged in the prior quarter and the types of individual account expenses incurred.

In the case of changes in any of the plan-related information summarized above after disclosures are provided, the participants and beneficiaries are to be given an advance description of the changes within the 30- to 90-day period preceding the effective date of the change.

What is the required investment-related information?

There are two sets of investment-related disclosures, one consisting of information to be distributed to participants automatically each year and the other of information to be provided upon participant request. The automatic disclosure includes historical investment performance data relating to each investment alternative available under the plan, which must be provided in a comparative, essentially side-by-side manner (the regulations include a suggested format for this presentation). The disclosure includes identifying information, such as fund name; its type or category; one, five and ten calendar years of investment performance results; one, five and ten calendar years of performance results for an appropriate benchmark; applicable fee and expense information; and any purchase, transfer or withdrawal restrictions or limitations that may be imposed. The plan administrator must also provide a website address that participants can access for additional details, and a glossary of investment-related terms (or internet access to such a glossary).

The investment-related information to be provided upon request includes copies of prospectuses, copies of any other materials relating to an investment alternative that may have been provided by the investment alternative to the plan, a statement of the value of a share or unit of each investment alternative, and a list of assets held in the portfolio of each investment alternative that meets the DOL's definition of a "plan asset," including their value.

When must these newly-required participant disclosures be made?

This new DOL participant disclosure regulation is effective for plan years that begin on and after November 1, 2011 (therefore, for calendar year plans, they are effective January 1, 2012, subject to the transition relief described below). The general rule regarding the plan-related and investment-related disclosures described above is that they are to be provided to participants on or before the date the participant can first direct his or

her investments, and then at least once per year thereafter. The individualized participant statements relating to fees charged to his or her account are required each quarter.

What are the transition deadlines for 2012 when the new disclosure requirements first become applicable?

The initial disclosures of the annually-required plan-related and investment-related information is required by the 61st day of the first plan year that begins on or after November 1, 2011 or, if later, by May 31, 2012. The initial quarterly disclosures of the fees charged to individual plan accounts are due 45 days after the end of the quarter when the plan first has to provide the annual plan-related and investment-related disclosures. Therefore, the typical calendar year plan will have until May 31, 2012 to make the initial annual disclosures, and the initial quarterly statement deadline for such a plan will be August 14, 2012.

What penalties apply if the new disclosure requirements are not met?

There is no defined and automatic monetary penalty payable to participants or the DOL if the new required disclosures are not timely or fully provided. However this disclosure obligation is a fiduciary duty imposed by the regulation on the plan administrator. A failure by the plan administrator to satisfy this obligation will open the door to legal claims by participants who suffer investment losses on grounds that the non-disclosure of the required information was a breach of a clearly-defined fiduciary duty which resulted in those losses.

What steps should retirement plan administrators take now to prepare for these new disclosure obligations? Confirm whether the plan is a participant-directed individual account plan and therefore subject to these new disclosure rules. Meet with the relevant plan vendors (trustees, record keepers and third party administrators) to establish who will bear responsibility for compiling and providing the new required disclosures, and to coordinate between the plan administrator and vendors the compilation of data that will go into the required disclosures. This may require renegotiation of service provider contracts, with one or more vendors taking on this disclosure responsibility.

Since employees who are eligible to participate must receive the disclosures, even if they have not as yet elected to participate, plan administrators must identify these eligible non-participants and ensure that any vendor sending disclosures has their information.

Consider and settle upon a distribution method or methods that will be used for disseminating disclosures, including such alternatives as hard-copy versus electronic distribution, mail versus workplace delivery, and coordination of delivery with other already-required disclosures such as annual or quarterly account statements or summary annual reports.

If the plan has any unique or plan-specific investment alternatives, such as an employer stock fund or a guaranteed investment contract, the plan administrator must pay particular attention to who will take the lead in compiling the data and preparing the disclosures related to that plan-specific investment alternative.

For more information, or if you have questions or require any assistance in connection with the new self-directed plan disclosure requirements, please contact a member of the Employee Benefits Group.

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