



New Employment Laws To Worry About

It's Not Just About Card Check Anymore

By Kyle Frye (Atlanta)

Employers are rightfully concerned and even alarmed about what to expect from the new Congress and the Obama Administration. Democrats are firmly in control and owe much to organized labor and other constituencies that are not necessarily employer-friendly. So, what can healthcare expect in the new year and beyond?

Most employers are keenly aware of the Employee Free Choice Act – Labor's most important initiative. For details on EFCA please see our Fall 2008 Healthcare Update. If it passes in the 111th Congress, EFCA could dramatically degrade an employer's ability to fight off union organizing efforts. For over 50 years, a secret-ballot election, and the employee education that precedes it, has allowed many employers to remain union-free. With EFCA, intimidation, not education, will rule the day. But EFCA isn't the only scary legislation introduced in the 110th Congress and expected to have an encore in the 111th Congress. On the horizon are a number of bills which, if passed into law, could dramatically impact healthcare.

RESPECT

The Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers Act (RESPECT) is a key union initiative and is expected to make a reappearance in the 111th Congress. RESPECT, which many feel is largely healthcare driven, would greatly limit who is a supervisor for organizing and collective-bargaining purposes. It could make charge nurses and other types of "working" supervisors members of a bargaining unit and covered by a collective-bargaining agreement, making it much more difficult to resist organizing efforts and even to operate should an employer become unionized.

Paycheck Fairness

Although EFCA and RESPECT are key labor initiatives, bills relating to employment in other areas will also be re-introduced. There are at least two pieces of legislation which will dramatically effect equal pay issues.

The Paycheck Fairness Act would impose, in addition to backpay remedies already available, compensatory and punitive damages on employers who have violated the Equal Pay Act; expand the availability of class action status to lawsuits under the Equal Pay Act; and eliminate as an affirmative defense the argument that a pay differential exists due to a "factor other than sex."

Under the Paycheck Fairness Act employers would have to economically justify a difference in pay between men and women, rather than relying on evidence showing that the difference, for whatever reason, was not because of an employee's sex.

Lilly Ledbetter Fair Pay Act

Coupled with the Paycheck Fairness Act is the Lilly Ledbetter Fair Pay Act, which is named for a plaintiff whose sex discrimination claim was rejected by the U.S. Supreme Court in 2007. The Supreme Court reasoned that Ledbetter had not brought the claim within 180 days of the alleged discriminatory act. The Ledbetter Act would effectively eviscerate the current statute of limitations for pay discrimination claims, making each paycheck a separate discriminatory act. This would greatly expand an employee's opportunities to bring such a lawsuit and could make employers liable for pay decisions made years in the past.

WFFA

The Working Families Flexibility Act is another intrusion into the workplace. If enacted, it would provide employees with an annual right to apply for a modification of their work hours, schedule or work location. It requires an employer to meet with the employee to discuss the requested modification within 14 days; then within another 14 days the employer must provide a written decision and, if the request is denied, it must state the grounds for denial and propose an alternative modification.

If it becomes law, WFFA would also give employees the right to a representative of their choosing at any meeting. Further, it not only prohibits retaliation, but gives employees the ability to file a complaint with the Department of Labor if they feel their rights under the Act have been violated.

Changes To FMLA

Bills proposed in the 110th Congress and expected to reappear in the new Congress also concern the Family and Medical Leave Act. The Family Leave and Insurance Act amends the FMLA to provide workers with at least 8 weeks of *paid* FMLA leave, as opposed to the current standard of 12 weeks of *unpaid* leave. The payments would be made through an insurance program to which both employers and employees make contributions. Not only will this legislation burden businesses with the cost of contributions to the insurance fund – in a manner similar to unemployment compensation – but it will certainly encourage employees to take more FMLA leave ("Hey, I paid for it, didn't I?").

In addition, legislation will probably be re-introduced in the new Congress expanding the reach of FMLA leave. At present, the FMLA provides leave to employees to care for others only if they are the employee's spouse, child or parent. If the bill is re-introduced, FMLA leave would cover, in addition, care for a same-sex spouse, domestic partner, parent-in-law, adult child, sibling or grandparent.

Although not directly related to the FMLA, also expect legislation to be re-introduced requiring employers to provide at least 7 days of paid sick leave to full-time employees – defined as those working at least 30 hours per week. The bill further requires a pro-rata amount of paid sick leave days for part-time employees.

Title VII of the Civil Rights Act was not ignored in the 110th Congress, and will doubtless receive attention in 2009 and beyond. Employers should fully expect the re-introduction of an amendment, which passed the House in 2007, to extend Title VII's reach to prohibit employment discrimination on the basis of actual or perceived sexual orientation.

Hold On, There's More

These are by no means the only employment-related legislation that may be anticipated in the new Congress. While the economy may garner most of the attention, all of these bills were introduced in 2007 to 2008, and likely will be re-introduced in the near future. It is worth noting, too, that almost all of this legislation shares at least one common sponsor or co-sponsor: then Senator, now President, Barack Obama.

For more information contact the author at kfrye@laborlawyers.com or 404.231.1400.

Good Investigations Pay Great Dividends, Part 2

By Karen Gieselman (Columbia)

In the last issue of Healthcare Update, we discussed the recent decision of *Furline v. Morrison*. In that case the U.S. Court of Appeals for the District of Columbia Circuit overturned a jury award against Howard University Hospital. The fact that the hospital had conducted a thorough independent investigation into allegations of age bias weighed heavily in the Court's decision.

In the conclusion to that article, we'll set out some guidelines that can help protect your own healthcare institutions.

Conducting a Proper Investigation

The first step in conducting an investigation is to determine its scope. An investigation into suspected abuse of FMLA leave will be very different than an investigation of allegations of racial harassment. Therefore, it is important to outline the steps that you should take before beginning an investigation. Next, select an individual to conduct the investigation. The investigator should be impartial and uninvolved in the matter being investigated. Additionally, the investigator should not be closely associated with any of the key actors, but should be personable. Moreover, any investigator selected should have a working knowledge of

the relevant company policies or practices, and an ability to maintain confidentiality.

Prior to conducting any interviews, the investigator should protect the complainant and the integrity of the investigation. For example, if an employee has alleged sexual harassment by a supervisor, consider separating the two employees during the investigation by placing one or both on paid leave or temporarily reassigning one employee to another department or area. The investigator should also begin to gather documents that will assist in the investigation, including copies of personnel files, records of prior complaints, relevant company policies, business records such as time cards, and any other documentation needed to conduct an investigation.

After the investigator has completed these preliminary steps, the first person that should be interviewed is the complainant. The interview should be held in a private, secure location. Confidentiality should never be promised. Rather, the complainant should understand that information will be maintained on a "need to know" basis, but conducting a thorough investigation often requires an investigator to reveal information shared by the complainants with other company officials.

When conducting the interview, give the complainants an opportunity to tell his or her story by beginning the interview with open-ended questions, followed by specific questions aimed at understanding the details of the allegations. At the conclusion of the interview, obtain a detailed written statement from the complainants and explain the investigative process.

The next step is to interview the accused and any witnesses that have been identified during the course of the investigation. Thereafter, you should follow-up with the complainant and the accused before concluding the investigation to determine if there are any additional facts or witnesses that should be considered. Upon completion of the investigation, prepare a report summarizing the findings and to the extent necessary, consider appropriate corrective actions. To ensure consistency, always check your own disciplinary policies and procedures, in addition to past practice, to determine the appropriate level of discipline. If you're unsure, consult legal counsel.

Write it Down!

Remember, proper documentation of the investigative process and outcome are essential to avoiding or successfully defending against a future claim. But be mindful that the documentation will be carefully scrutinized by attorneys and could be Exhibit A in a trial should either the accused or the complainant opt to take legal action.

Day-to-day pressures often impede on an employer's ability to conduct effective and appropriate investigations. However, employers should train officers and managers about the value of a properly conducted investigation. Addressing and investigating complaints improves employee relations and can help insulate an employer, such as Howard University Hospital, from costly judgments. For assistance in developing policies and procedures for investigations, give us a call.

For more information contact the author at kgieselman@laborlawyers.com or 803. 255.0000.

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Office Locations

Atlanta
1500 Resurgens Plaza
945 East Paces Ferry Road
Atlanta, GA 30326
phone (404) 231-1400

Charlotte
Suite 2020
227 West Trade Street
Charlotte, NC 28202
phone (704) 334-4565

Chicago
1000 Marquette Building
140 South Dearborn Street
Chicago, IL 60603
phone (312) 346-8061

Columbia
Suite 1400
1901 Main Street
Columbia, SC 29201
phone (803) 255-0000

Dallas
Thanksgiving Tower
Suite 4343
1601 Elm Street
Dallas, TX 75201
phone (214) 220-9100

Denver
Suite 3300
1999 Broadway
Denver, CO 80202
phone (303) 218-3650

Fort Lauderdale
Suite 800
450 East Las Olas Boulevard
Fort Lauderdale, FL 33301
phone (954) 525-4800

Houston
Two Allen Center
Suite 620
1200 Smith Street
Houston, TX 77002
phone (713) 292-0150

Irvine
Suite 400
18400 Von Karman Avenue
Irvine, CA 92612
phone (949) 851-2424

Kansas City
Suite 400
104 West 9th Street
Kansas City, MO 64105
phone (816) 842-8770

Las Vegas
Suite 650
3993 Howard Hughes Parkway
Las Vegas, NV 89169
phone (702) 252-3131

Louisville
Suite 2000
220 West Main street
Louisville, KY 40202
phone (502) 561-3990

New Jersey
430 Mountain Avenue
Murray Hill, NJ 07974
phone (908) 516-1050

New Orleans
Suite 3710
201 St. Charles Avenue
New Orleans, LA 70170
phone (504) 522-3303

Orlando
1250 Lincoln Plaza
300 South Orange Avenue
Orlando, FL 32801
phone (407) 541-0888

Philadelphia
Radnor Financial Center
Suite 650
201 King of Prussia Road
Radnor, PA 19087
phone (610) 230-2150

Portland ME
400 Congress Street
4th Floor
Portland, ME 04101
phone (207) 774-6001

Portland OR
Suite 1250
111 SW Fifth Avenue
Portland, OR 97204
phone (503) 242-4262

San Diego
Suite 950
4225 Executive Square
La Jolla, CA 92037
phone (858) 597-9600

San Francisco
One Embarcadero Center
Suite 2340
San Francisco, CA 94111
phone (415) 490-9000

Tampa
SunTrust Financial Centre
Suite 2300
401 E. Jackson Street
Tampa, FL 33602
phone (813) 769-7500

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