AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

GALLATIN VALLEY HUMAN RESOURCES ASSOCIATION
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Legislative Information Update: April 2012

Here are a few of articles that I pulled from the SHRM website:

FMLA: Serious Health Condition: How do I know if an employee's medical absence qualifies for FMLA leave? What is considered a serious health condition?

2/24/2012

Many employers struggle with the question of whether an employee's request for medical leave is covered by the FMLA.

Under the FMLA, a **serious health condition** is an illness, injury, impairment or physical or mental condition that involves *inpatient care* (defined as an overnight stay in a hospital, hospice or residential medical care facility; any overnight admission to such facilities is an automatic trigger for FMLA eligibility) or *continuing treatment* by a health care provider. Examples include the following:

- Continuing treatment by a health care provider that results in an incapacity (inability to work, attend school or participate in other daily activities) of more than three consecutive calendar days with either two or more in-person visits to the health care provider within 30 days of the date of incapacity OR one in-person visit to the health care provider with a regimen of continuing treatment, such as prescription medication, physical therapy, etc. In either situation, the first visit to the health care provider must occur within seven days of the first date of incapacity. Examples include pneumonia, surgery or broken/fractured bones.
- Chronic conditions that require periodic visits to a health care provider, continue over an extended period of time and may cause episodic rather than continuing periods of incapacity of more than three days. Examples of chronic conditions include asthma, diabetes and epilepsy.
- Incapacity for pregnancy or prenatal care (any such incapacity is FMLA-protected regardless of the period of incapacity). For example, a pregnant employee may be unable to report to work due to severe morning sickness.
- Permanent or long-term conditions such as Alzheimer's, severe stroke or terminal disease.
- Conditions requiring multiple treatments and recovery from treatments, such as cancer, severe arthritis and kidney disease.

- Treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider.

Leave due to the birth, adoption or placement for foster care of a child does not require medical necessity or any period of incapacity. FMLA leave is available for bonding with the baby/child.

Employees may take FMLA leave for themselves or to care for their parent, spouse, son or daughter whose medical condition meets the above criteria. The FMLA regulations specifically exclude the following conditions, unless inpatient care or complications develop that would meet the above criteria: cosmetic treatments, common colds, flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, and periodontal disease.

If there is any chance that an employee's medical condition might meet the definition of a serious health condition under the FMLA, it is important to issue the notification and certification forms to the employee and let the health care provider make the determination whether a serious health condition exists.

For more information, see the following FMLA regulations:

825.113 Serious Health Condition

825.114 Inpatient Care

825.115 Continuing Treatment

825.119 Leave for Treatment of Substance Abuse

825.120 Leave for Pregnancy or Birth

825.121 Leave for Adoption or Foster Care

Montana High Court Affirms Use of Video in Workers' Compensation Fraud Case

3/29/2012 By Susan R. Heylman

Videos taken of a workers' compensation claimant while he was in public places may be used in the re-evaluation of his total and permanent disability claim, the Montana Supreme Court has ruled.

The claimant, Randall Simms, was injured in the course and scope of his employment in 1999. The Montana State Fund (MSF) provided workers' compensation insurance to the employer and accepted his claim. The claimant's condition deteriorated over time and he was found to be permanently and totally disabled and unable to return to work. His diagnosis, complex regional pain syndrome, restricted his ability to move and use his extremities, confined him to a wheelchair, required domiciliary care, and prevented him from driving. Believing the claimant's ongoing disability was a continuation of the compensable industrial injury, MSF continued to pay him benefits.

MSF subsequently decided to perform a routine verification of the claimant's disability. MSF's fraud unit had a special investigative unit (SIU) to conduct such investigations. The SIU filmed Simms in public settings, looking for evidence of his physical activities and his possible ability to return to work.

MSF sent the videos to Simms' attorney and to his treating physician, who found the activity on the videos inconsistent with the disability information provided by the claimant. As a result, MSF decided that his disability status required re-evaluation, and that probable cause existed for further investigation. From that point on, MSF considered the videos to be confidential criminal justice information (CCJI) under the Montana Criminal Justice Information Act, and it sought a court order authorizing it to receive the CCJI from the SIU.

The district court granted MSF's petition, releasing the videos and authorizing their use in the workers' compensation proceeding. Simms appealed, arguing that MSF did not have standing to seek release of the CCJI and that the district court inadequately balanced the demands of individual privacy against the merits of disclosure.

The Montana Supreme Court affirmed. It held that, because the MSF fraud unit was a confidential criminal justice agency as defined by the statute, MSF had standing to file an action for the dissemination of information it believed to be appropriate and permissible.

The court then ruled that the district court adequately balanced the right to know and the right to privacy in authorizing the dissemination of the CCJI. This balancing involved a two-part test: (1) whether Simms had a subjective or actual expectation of privacy and (2) whether that expectation was reasonable.

The videos were taken in public locations, the court noted, and Simms did not in any way attempt to conceal his identity or act so as to assert a privacy interest in his actions. Moreover, an assertion of privacy in certain activities performed on public roads and sidewalks was not reasonable. Consequently, Simms did not have a subjective or actual expectation of privacy, nor was his expectation of privacy reasonable.

Because the proper operation of the workers' compensation system was a substantial societal interest,

and the videos might bear on a determination of whether Simms engaged in fraud, the merits of disclosure were substantial. The demands of Simms' individual privacy did not clearly exceed the merits of public disclosure, the court said.

Montana State Fund v. Simms, Mont., No. DA 11-0342 (Feb. 1, 2012).

Consideration of Employees' Projected Retirement Dates Was Evidence of Age Bias

By Edwin A. Keller, Jr.

An employer's promotion process that weeded out an older, well-qualified applicant and resulted in the selection of the youngest applicant was possibly influenced by information concerning employees' projected retirement dates and ages, warranting a jury trial on the issue of age discrimination, the 9th U.S. Circuit Court of Appeals held.

In 2005, Devon Scott Shelly, a 54-year-old assistant chief of contracting for the Army Corps of Engineers, sought a promotion to a chief of contracting position at the corps' Kansas City district office. The corps appointed a five-member panel to select a 120-day temporary chief who would be replaced by the "permanent" chief of contracting at the end of a more formal review process. Shelly applied for both the temporary and permanent positions without success.

During the selection process, two panel members requested and received information regarding the projected retirement dates for employees in the corps' various districts and divisions.

With a master's degree in business, 29 years of experience in contracting (26 of which were with the corps) and numerous awards for his work, Shelly was well-qualified. Yet, he was not granted an interview for the permanent position. Ultimately, the permanent chief position was awarded to the youngest of the six finalists, 42-year-old Vince Marsh, who had 20 years of experience in contracting, but less than two years of employment with the corps.

The court found that the two panel members' receipt of information about retirement dates constituted direct evidence of age discrimination. It suggested that they knew the candidates' ages, considered the ages when making their decisions and could have influenced the other three panel members. In addition, the court found indirect evidence of age discrimination given Shelly's superior qualifications as compared to Marsh. It also gave no weight to the fact that the other finalists were close in age to Shelly as the court said those finalists could have been stacked by the panel in an attempt to partially mask their selection of the significantly younger applicant. Thus, the court concluded that the issue of age discrimination should proceed to a jury trial.

Shelley v. Geren, 9th Cir., No. 10-35014 (Jan. 12, 2012).

Professional Pointer: Employers should avoid asking questions, making comments, writing notes or otherwise using information concerning workers' ages or proximity to retirement when making personnel decisions.

Is this good news on the horizon?

Congress Gives Final Approval to JOBS Act

3/26/2012 By Bill Leonard

After a few starts and stops, the Jumpstart Our Business Startups (JOBS) Act cleared its final hurdle in Congress when the U.S. House of Representatives voted on March 27, 2012, to approve the bill. The legislation (**H.R. 3606**) is an effort to boost the job market by easing some investment regulations for startup businesses.

According to its supporters, the JOBS Act could usher in a new era of investment regulation and will help small startup businesses raise more capital through loans and initial stock offerings. The increased flow of investment capital is designed to allow start-up companies to grow faster and hire more people.

"Every large and successful company was once a small, struggling business that began with an idea," Sen. Mike Enzi, R-Wyo., ranking member of the Health, Education, Pensions and Labor Committee, said in a written statement. "Entrepreneurs are the backbone of our economy. Regulation and red tape shouldn't hinder their ability to grow and create jobs."

The House passed the final version of the bill with a strong bipartisan vote of 380-41. The vote marked the second time that the House passed H.R. 3606. The House first approved the bill on March 8, 2012, and the legislation then moved to the Senate. The Senate approved the measure on March 22, 2012, by a vote of 76-23, but Senate Democrats attached an amendment that would create several protections for investors.

The House then moved quickly to pass the Senate-approved version and avoided further delays by approving the legislation before Congress adjourns for a two-week Easter recess on April 2, 2012.

The JOBS Act was sent to the White House for the president's signature. President Barack Obama signed it into law on April 5, 2012.

Congressional leaders from the two parties have praised the bipartisan effort to get the legislation passed—particularly in the politically charged atmosphere of a presidential election year.

"The House voted to send the bipartisan JOBS Act to the president for his signature and deliver real results for our nation's small business owners, entrepreneurs and innovators," said House Majority Leader Eric Cantor, R-Va., in a written statement. "This legislation represents an increasingly rare legislative victory in Washington where both sides seized the opportunity to work together and improve the bill. We should build on this momentum going forward."

'Emerging Growth Companies'

The JOBS Act is designed to boost investment in startups by removing some limitations on Internet-based or "crowd-funded" investments. It would ease restrictions on public stock offerings by creating a

category for “emerging growth companies.” Such firms with less than $1 billion in annual revenue would be exempt from several Securities and Exchange Commission regulations.

But as the legislation received its final approval from Congress, another jobs-related bill has stalled. Federal funding for transportation-related projects was set to expire on March 31, 2012, and the House and Senate have proposed differing versions of the bill. An agreement on a final resolution for the issue was far from certain.

If the federal funding is not extended, some experts estimate, more than 1.8 million jobs could be lost. Neither Democrats nor Republicans want a shutdown. However, conservative leaders in the House have declared that the Senate proposal to extend funding for two years is too expensive. Instead, they are looking to fund all federal transportation projects through current federal taxes on gasoline and diesel fuel. However, some experts estimate that the proposal could cut spending on federal transportation projects by 40 percent because of reduced consumption in the United States and dwindling revenues from those taxes.

Conservative leaders have balked at a proposal to extend the funding supported by House Speaker John Boehner, R-Ohio, which would allocate $260 billion for transportation over five years. With the House proposal stalled, Boehner had pushed to extend the funding for 90 days but then withdrew the extension proposal on March 26, 2012. Instead, House GOP leaders were attempting to enact a shorter 60-day extension—hoping to appease Democrats opposed to the 90-day proposal. If the two-month proposal passes, it would be the ninth short-term extension of legislation authorizing federal spending for transportation projects since the last long-term bill expired at the end of 2009.

Senate Majority Leader Harry Reid, D-Nev., has rejected the notion of another short-term extension of the funding authorization and has stated that the $109 billion, two-year deal offered by Senate Democrats is the best solution to the standoff. The Senate passed its version of the bill on March 14, 2012, with a strong bipartisan vote of 74-22.