Legislative Update
August 2014

Federal Contractors Changed Reporting Requirements

Executive order issued by President Obama on July 31. 2014 which declared that contractors which are bidding for federal contracts are required to disclose any labor violations including OSHA, Wage and Hour, and Fair Labor violations prior to awarding of the contract.

Potential Changes on W2 due to changes in the Equal Pay Report

An Office of Federal Contract Compliance Programs (OFCCP) proposed rule, issued Aug. 6, 2014, calls on federal contractors to report on employees' compensation by the information in their W-2 forms, a proposal that Alissa Horvitz, an attorney at Littler in Washington, D.C., said "makes no sense."

W-2 form compensation won't provide an apples-to-apples comparison among employees, she explained. For example, it is unhelpful to compare pay for an employee who started on Oct. 1 to someone in the same position who worked all year, she said.

The proposed rule is in response to a presidential memorandum on April 8 that instructed the secretary of labor to propose a rule on collecting summary compensation data from federal contractors and subcontractors.

Under the proposal, covered federal contractors and subcontractors—ones with more than 100 employees—would have to submit electronically the total:

- Number of workers within a specific EEO-1 job category by race, ethnicity and sex.
- W-2 wages defined as the total individual W-2 wages for all workers in the job category by race, ethnicity and sex.
- Hours worked, defined as the number of hours worked by all employees in the job category by race, ethnicity and sex.

“It’s very important that employers comment on this” proposed regulation, Horvitz said. “The more they identify what they are doing proactively to examine pay, the more helpful” their comments will be. The OFCCP is approaching this issue as though employers are not doing anything, she said. But in her experience, her clients are looking at pay by race and gender critically, examining the reasons for pay disparities.

To comment on the proposed rule, visit http://www.dol.gov/ofccp/EPR. Comments must be received by Nov. 6, 2014

Mont.: High Court Denies Workers’ Compensation to Two Convicts

By Rita Zeidner 6/16/2014

The Supreme Court of Montana denied disability and rehabilitation workers compensation benefits to two former employees who were injured on the job before they were convicted of crimes and sent to prison.

The two employees worked for different employers, suffered different injuries at work and were incarcerated for different crimes. However, their cases presented a common legal issue and the court dealt with that issue in a single opinion affirming the earlier ruling by Montana’s Workers’ Compensation Court.

The two plaintiffs received indemnity and medical benefits. However, they were denied disability and rehabilitation benefits for the periods during which they were incarcerated. The state statute provides that “a claimant is not eligible for disability or rehabilitation compensation benefits during the time when the claimant is incarcerated, provided the incarceration exceeds 30 days.” The two employees involved in this case were incarcerated for more than 30 days. Thus, under the statute, they were not entitled to the benefits, the court found,

The two employees then argued that the statutory provision was itself invalid as a denial of the equal protection guarantee of the U.S. Constitution. The court considered that the only difference between the two employees and other employees who have received such benefits was that they were incarcerated and the other employees were not. However, the court concluded that there was a rational basis for distinguishing between the two groups. The purpose of workers’ compensation is to provide wage-loss benefits that bare a reasonable relationship to actual wages lost as a result of a work-related injury. In the instant situation, the lost wages were attributable to the incarceration and not to the injury. Thus, it was not a denial of equal protection to deny the benefits.

The two employees also argued that the denial of benefits was a violation of their substantive due process rights under the Constitution. They contended that the denial was a “forfeiture” of the benefit

amounts and thus was a further punishment for their crimes. Under the due process clause of the Constitution, a governmental entity cannot take arbitrary actions against any person. However, the court concluded that the actions here were reasonable and not arbitrary. For essentially the same rational as underlay the equal protection discussion, the state here could reasonably conclude that the wages were lost because of incarceration and not because of injury.

The two employees further argued that they were denied procedural due process under the Constitution. They alleged that they were never advised in the criminal cases that a guilty plea would lead to a denial of workers' compensation benefits. The court rejected the contention. The employees were represented by counsel in the criminal proceeding and their ignorance of the relevant statutory provisions does not mean that procedural due process was violated, the court said.

In addition, the two employees argued that the denial of benefits was an excessive fine for their criminal misconduct. The court, however, concluded that the denial of benefits was not a fine; it was simply the denial of benefits because the wage loss was not attributable to the injury.

A dissenting opinion argued that the denial of benefits had an adverse impact on the innocent members of the employees' families. The court disagreed. While the denial of benefits has a negative impact of the families of the employees, the negative impact is due to the criminal conduct of the claimants, not to their work-related injuries, the court held.

Goble v. Montana State Fund, Mont., No. DA 13-0286

- See more at: http://www.shrm.org/legalissues/stateandlocalresources/pages/mont-high-court-denies-workers-compensation-to-two-convicts.aspx#sthash.LhDCq0EL.dpuf

FMLA Does Not Necessarily Require Disclosure of Return Date

By Colin Durham 7/24/2014

An employee did not fail to provide essential information regarding the duration of her leave under the Family and Medical Leave Act (FMLA), where the employee did not herself know how long the leave would be, the 7th U.S. Circuit Court of Appeals held.

In January of 2011, Suzan Gienapp, who worked for Harbor Crest Nursing Home in Fulton, Ill., informed her manager that she needed time off to care for her adult daughter who was undergoing treatment for thyroid cancer. Upon taking leave, Gienapp mailed in a FMLA form but failed to identify in the form when she expected to return to work. Harbor Crest did not ask Gienapp to fill in the blank answer on the form or otherwise pose written questions to her as the 12-week leave progressed.

A physician's statement on the FMLA form stated that the daughter's recovery was uncertain and, that if she did recover, she would require assistance through at least July 2011, well beyond the 12 weeks of leave provided for under the FMLA. Even though Gienapp periodically touched base with Harbor Crest during her leave, Harbor Crest assumed, based on the physician's statement, that Gienapp would not return by the end of her 12 weeks of FMLA leave and hired a replacement.

The trial court granted summary judgment in favor of Harbor Crest ruling that Gienapp had forfeited her FMLA rights by not stating exactly how much leave she would take. The 7th Circuit reversed the trial court's decision. The 7th Circuit distinguished between U.S. Department of Labor regulations pertaining to situations involving "foreseeable" leave and situations constituting "unforeseeable" leave. Because Gienapp's daughter could die soon, which would permit Gienapp to return to work early, or the daughter could live longer requiring additional care, Gienapp's situation was one constituting unforeseeable leave, which is governed by 29 U.S.C. Section 825.303. Unforeseeable leave "does not require employees to tell employers how much leave they need, if they do not know yet themselves."

Instead of requiring notice at the outset, employers such as Harbor Crest can insist upon their employees complying with company policies; including, for example, updated estimates to the employer about how long the leave will last. The 7th Circuit noted that while Harbor Crest told Gienapp to call in monthly, and it is conceded that she did, the information exchanged during those telephone calls is disputed, making summary judgment for Harbor Crest inappropriate.

Gienapp v. Harbor Crest, 7th Cir., No. 14-1053 (June 24, 2014).

- See more at: http://www.shrm.org/legalissues/federalresources/pages/fmla-disclosure-return-date-.aspx#sthash.8r6l4Y9r.dpuf

Equal Employment Opportunity Commission Issues New Pregnancy Discrimination Guidelines

Today, the Equal Employment Opportunity Commission (EEOC), issued new enforcement guidance on pregnancy discrimination. This guidance, which was not published for public comment prior to its release today, updates and replaces the commission's 1983 guidance. The guidance focuses on one of the priorities outlined in the EEOC's Strategic Enforcement Plan—addressing the interaction between the Pregnancy Discrimination Act (PDA) and the Americans with Disabilities Act (ADA), as amended in 2008. The biggest change in the guidance is an interpretation of the PDA that would require employers to provide reasonable accommodation to employees who have work restrictions because of pregnancy even if the employee does not qualify as disabled or is not regarded as disabled under the ADA. The issue of accommodation under the PDA is the subject of a case currently before the U.S. Supreme Court, *Young v. UPS.* The guidance was issued by the EEOC on a 3-2 vote.

Washington Update

High Court Rules President's 2012 Recess Appointments to the NLRB Invalid

7/1/2014

On June 26, the U.S. Supreme Court unanimously held in ***NLRB v. Noel Canning*** that President Obama's January 2012 recess appointments to the NLRB were unconstitutional.

In a 9-0 ruling, the Court held that President Obama's appointments were invalid because the U.S. Senate was not technically in recess when he made the appointments during a pro forma session. The Court concluded that the president lacked the authority to make those appointments.

In this case, the NLRB (which at the time was operating with three recess-appointed members) ruled against Noel Canning, a soft-drink bottling company, on an unfair labor practice case. Noel Canning challenged the NLRB's decision in the U.S. Court of Appeals for the D.C. Circuit on the grounds that the NLRB was improperly constituted at the time it ruled against the company.

At both the district and Supreme Court levels, SHRM submitted amicus briefs in this case supporting the employer, Noel Canning, and arguing that the president's recess appointments of three members to the NLRB without the advice and consent of the Senate was unconstitutional. To read SHRM's brief, click **HERE**.

While implications of the Court's ruling on previous NLRB decisions is not entirely clear, hundreds of reported and unreported NLRB decisions issued between January 2012 and August 2013 (the time frame during which the recess-appointed members served on the Board) could be found to be invalid. NLRB Chairman Mark Gaston Pearce issued a statement after the Supreme Court's announcement, indicating that the Board is "analyzing the impact that the Court's decision has on Board cases in which the January 2012 recess appointees participated." Please stay tuned as we learn more information about this important decision impacting employers across the country.

- See more at: http://www.shrm.org/advocacy/governmentaffairsnews/hrissuesupdatee-newsletter/pages/070114_1.aspx#sthash.TRqMQ2cB.dpuf