2013 Annual
Employment Law Seminar

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Wilmington, DE

YC S&T
YOUNG CONAWAY STARGATT & TAYLOR, LLP

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Affordable Care Act

Timothy J. Snyder, Esq.

Timeline of Health Care Reform Effective Dates

Provision	Effective Date
2010	
Annual limits on essential health benefits restricted	Plan years beginning on or after September 23, 2010 (full prohibition in 2014, see below)
Appeals process and external review requirements	Plan years beginning on or after September 23, 2010 (exception for grandfathered plans)
Dependent coverage for children under age 26	Plan years beginning on or after September 23, 2010 (limited exception for grandfathered plans prior to January 1, 2014)
Early retiree reinsurance program (ERRP)	Opened on June 1, 2010 and no reimbursement for claims incurred after December 31, 2011
Lifetime limits on essential health benefits prohibited	Plan years beginning on or after September 23, 2010
MEWAs (special enforcement rules)]	March 23, 2010
Nondiscrimination by health program or activity	March 23, 2010
Nondiscrimination rules for insured plans	Plan years beginning on or after September 23, 2010, but compliance delayed until regulations are issued (exception for insured grandfathered plans)
Patient protections (primary care provider designations, ER services, etc.)	Plan years beginning on or after September 23, 2010 (exception for grandfathered plans)
PCE prohibition for those under age 19	Plan years beginning on or after September 23, 2010 (full prohibition in 2014, see below)
Preventive health services	Plan years beginning on or after September 23, 2010 (exception for grandfathered plans)
Protection against retaliation (whistle-blower)	March 23, 2010
Quality of care reporting	Plan years beginning on or after September 23, 2010, but pending guidance—regulations were due by March 23, 2010 (exception for grandfathered plans)
Rescission prohibition	Plan years beginning on or after September 23, 2010
Small business health care tax credit	2010 taxable year

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Tax-free coverage to children under age 27	March 30, 2010
Temporary high risk pool: PCIP program	Established on July 1, 2010
Transparency in Coverage Reporting and Cost-Sharing Disclosure	Plan years beginning on or after September 23, 2010, but related to Exchanges (see 2014) and likely subject to issuance of guidance
Wellness programs (technical assistance)	None specified (but related national study was required by March 23, 2010)

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Provision	Effective Date
2011	
HSA/Archer MSA penalty tax increase	Distributions after December 31, 2010
Medical loss ratio (MLR) requirements	Beginning with 2011 calendar year (report due by June 1 of following year; rebates by August 1 of following year)
OTC drug restrictions	Taxable years on or after January 1, 2011
Rate increases (review and disclosure rules)	September 1, 2011
Simple cafeteria plans	Years beginning on or after January 1, 2011
Wellness programs (small business grants)	2011
2012	
CO-OPs	February 13, 2012
Patient-Centered Outcomes Research (PCOR) Fees	Policy/plan years ending after September 30, 2012 until September 30, 2019 (payable by July 31 of following year)
Summary of benefits and coverage (SBC)	Earlier of a plan's first open enrollment period or first plan year beginning on or after September 23, 2012
W-2 reporting: cost of employer-sponsored health coverage	2012 taxable year (W-2s sent no later than January 31, 2013)
2013	
Code § 213 medical deduction threshold increase	Taxable years beginning on or after January 1, 2013
Exchange notice	Upon issuance of guidance (requirements expected to be issued in late summer/fall 2013)
Health FSA $2,500 cap	Cafeteria plan years beginning after December 31, 2012
HIPAA electronic transactions and operating rules	Staggered from January 2013 to January 2016

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Provision	Effective Date
2014	
Annual fee on health insurers	Beginning in 2014
Annual limits prohibited on essential health benefits	Plan years beginning on or after January 1, 2014 (previously restricted, see above)
Automatic enrollment	Subject to issuance of regulations (after 2014)
Clinical trial coverage	Plan years beginning on or after January 1, 2014 (exception for grandfathered plans)
Comprehensive health insurance coverage (essential health benefits package)	Plan years beginning on or after January 1, 2014 (exception for grandfathered plans)
Cost-sharing limitations	Plan years beginning on or after January 1, 2014 (exception for grandfathered plans)
Excessive waiting periods prohibited	Plan years beginning on or after January 1, 2014
Exchanges	Beginning in 2014
Fair health insurance premiums [PHSA § 2701]	Plan years beginning on or after January 1, 2014 (exception for grandfathered plans)
Guaranteed availability of coverage	Plan years beginning on or after January 1, 2014 (exception for grandfathered plans)
Guaranteed renewability of coverage	Plan years beginning on or after January 1, 2014 (exception for grandfathered plans)
Nondiscrimination against health care providers	Plan years beginning on or after January 1, 2014 (exception for grandfathered plans)
Nondiscrimination based on health status	Plan years beginning on or after January 1, 2014 (limited exception for grandfathered plans)
Pre- Existing Condition Exclusion prohibition (for all)	Plan years beginning on or after January 1, 2014
Reinsurance payments	Beginning in 2014 through 2016
Reporting of health insurance coverage	Beginning in 2014
Shared responsibility for employers (play or pay penalty tax)	Beginning in 2014
Shared responsibility for individuals (individual mandate)	Beginning in 2014

Provision	Effective Date
2018	
Tax on high-cost health coverage (“Cadillac tax”)	January 1, 2018

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Model COBRA Continuation Coverage Election Notice
(For use by single-employer group health plans)

[*Enter date of notice*]

Dear: [*Identify the qualified beneficiary(ies), by name or status*]

This notice contains important information about your right to continue your health care coverage in the [*enter name of group health plan*] (the Plan), as well as other health coverage alternatives that may be available to you through the Health Insurance Marketplace. Please read the information contained in this notice very carefully.

To elect COBRA continuation coverage, follow the instructions on the next page to complete the enclosed Election Form and submit it to us.

If you do not elect COBRA continuation coverage, your coverage under the Plan will end on [*enter date*] due to [*check appropriate box*]:

☐ End of employment
☐ Death of employee
☐ Entitlement to Medicare
☐ Reduction in hours of employment
☐ Divorce or legal separation
☐ Loss of dependent child status

Each person ("qualified beneficiary") in the category(ies) checked below is entitled to elect COBRA continuation coverage, which will continue group health care coverage under the Plan for up to ___ months [*enter* 18 *or* 36*, as appropriate and check appropriate box or boxes; names may be added*]:

☐ Employee or former employee
☐ Spouse or former spouse
☐ Dependent child(ren) covered under the Plan on the day before the event that caused the loss of coverage
☐ Child who is losing coverage under the Plan because he or she is no longer a dependent under the Plan

If elected, COBRA continuation coverage will begin on [*enter date*] and can last until [*enter date*]. [*Add, if appropriate:* You may elect any of the following options for COBRA continuation coverage: [*list available coverage options*].

COBRA continuation coverage will cost: [*enter amount each qualified beneficiary will be required to pay for each option per month of coverage and any other permitted coverage periods.*] You do not have to send any payment with the Election Form. Important additional information about payment for COBRA continuation coverage is included in the pages following the Election Form.

There may be other coverage options for you and your family. When key parts of the health care law take effect, you'll be able to buy coverage through the Health Insurance Marketplace. In the Marketplace, you could be eligible for a new kind of tax credit that lowers your monthly premiums

right away, and you can see what your premium, deductibles, and out-of-pocket costs will be before you make a decision to enroll. Being eligible for COBRA does not limit your eligibility for coverage for a tax credit through the Marketplace. Additionally, you may qualify for a special enrollment opportunity for another group health plan for which you are eligible (such as a spouse's plan), even if the plan generally does not accept late enrollees, if you request enrollment within 30 days.

If you have any questions about your rights to COBRA continuation coverage, you should contact [*enter name of party responsible for COBRA administration for the Plan, with telephone number and address*].

COBRA Continuation Coverage Election Form

Instructions: To elect COBRA continuation coverage, complete this Election Form and return it to us. Under federal law, you must have 60 days after the date of this notice to decide whether you want to elect COBRA continuation coverage under the Plan.

Send completed Election Form to: [*Enter Name and Address*]

This Election Form must be completed and returned by mail [*or describe other means of submission and due date*]. If mailed, it must be post-marked no later than [*enter date*].

If you do not submit a completed Election Form by the due date shown above, you will lose your right to elect COBRA continuation coverage. If you reject COBRA continuation coverage before the due date, you may change your mind as long as you furnish a completed Election Form before the due date. However, if you change your mind after first rejecting COBRA continuation coverage, your COBRA continuation coverage will begin on the date you furnish the completed Election Form.

Read the important information about your rights included in the pages after the Election Form.

I (We) elect COBRA continuation coverage in the [*enter name of plan*] (the Plan) as indicated below:

Name Date of Birth Relationship to Employee SSN (or other identifier)

a. _____

[*Add if appropriate:* Coverage option elected: _____]

b. _____

[*Add if appropriate:* Coverage option elected: _____]

c. _____

[*Add if appropriate:* Coverage option elected: _____]

_____ _____

Signature Date

_____ _____

Print Name Relationship to individual(s) listed above

_____

_____

_____ _____

Print Address Telephone number

Important Information
About Your COBRA Continuation Coverage Rights

What is continuation coverage?

Federal law requires that most group health plans (including this Plan) give employees and their families the opportunity to continue their health care coverage when there is a "qualifying event" that would result in a loss of coverage under an employer's plan. Depending on the type of qualifying event, "qualified beneficiaries" can include the employee (or retired employee) covered under the group health plan, the covered employee's spouse, and the dependent children of the covered employee.

Continuation coverage is the same coverage that the Plan gives to other participants or beneficiaries under the Plan who are not receiving continuation coverage. Each qualified beneficiary who elects continuation coverage will have the same rights under the Plan as other participants or beneficiaries covered under the Plan, including [*add if applicable:* open enrollment and] special enrollment rights.

How long will continuation coverage last?

In the case of a loss of coverage due to end of employment or reduction in hours of employment, coverage generally may be continued for up to a total of 18 months. In the case of losses of coverage due to an employee's death, divorce or legal separation, the employee's becoming entitled to Medicare benefits or a dependent child ceasing to be a dependent under the terms of the plan, coverage may be continued for up to a total of 36 months. When the qualifying event is the end of employment or reduction of the employee's hours of employment, and the employee became entitled to Medicare benefits less than 18 months before the qualifying event, COBRA continuation coverage for qualified beneficiaries other than the employee lasts until 36 months after the date of Medicare entitlement. This notice shows the maximum period of continuation coverage available to the qualified beneficiaries.

Continuation coverage will be terminated before the end of the maximum period if:

- any required premium is not paid in full on time,
- a qualified beneficiary becomes covered, after electing continuation coverage, under another group health plan that does not impose any pre-existing condition exclusion for a pre-existing condition of the qualified beneficiary (note: there are limitations on plans' imposing a preexisting condition exclusion and such exclusions will become prohibited beginning in 2014 under the Affordable Care Act),
- a qualified beneficiary becomes entitled to Medicare benefits (under Part A, Part B, or both) after electing continuation coverage, or
- the employer ceases to provide any group health plan for its employees.

Continuation coverage may also be terminated for any reason the Plan would terminate coverage of a participant or beneficiary not receiving continuation coverage (such as fraud).

[*If the maximum period shown on page 1 of this notice is less than 36 months, add the following three paragraphs:*]

How can you extend the length of COBRA continuation coverage?

If you elect continuation coverage, an extension of the maximum period of coverage may be available if a qualified beneficiary is disabled or a second qualifying event occurs. You must notify [*enter name of party responsible for COBRA administration*] of a disability or a second qualifying event in order to extend the period of continuation coverage. Failure to provide notice of a disability or second qualifying event may affect the right to extend the period of continuation coverage.

Disability

An 11-month extension of coverage may be available if any of the qualified beneficiaries is determined by the Social Security Administration (SSA) to be disabled. The disability has to have started at some time before the 60th day of COBRA continuation coverage and must last at least until the end of the 18-month period of continuation coverage. [*Describe Plan provisions for requiring notice of disability determination, including time frames and procedures.*] Each qualified beneficiary who has elected continuation coverage will be entitled to the 11-month disability extension if one of them qualifies. If the qualified beneficiary is determined by SSA to no longer be disabled, you must notify the Plan of that fact within 30 days after SSA's determination.

Second Qualifying Event

An 18-month extension of coverage will be available to spouses and dependent children who elect continuation coverage if a second qualifying event occurs during the first 18 months of continuation coverage. The maximum amount of continuation coverage available when a second qualifying event occurs is 36 months. Such second qualifying events may include the death of a covered employee, divorce or separation from the covered employee, the covered employee's becoming entitled to Medicare benefits (under Part A, Part B, or both), or a dependent child's ceasing to be eligible for coverage as a dependent under the Plan. These events can be a second qualifying event only if they would have caused the qualified beneficiary to lose coverage under the Plan if the first qualifying event had not occurred. You must notify the Plan within 60 days after a second qualifying event occurs if you want to extend your continuation coverage.

How can you elect COBRA continuation coverage?

To elect continuation coverage, you must complete the Election Form and furnish it according to the directions on the form. Each qualified beneficiary has a separate right to elect continuation coverage. For example, the employee's spouse may elect continuation coverage even if the employee does not. Continuation coverage may be elected for only one, several, or for all dependent children who are qualified beneficiaries. A parent may elect to continue coverage on

behalf of any dependent children. The employee or the employee's spouse can elect continuation coverage on behalf of all of the qualified beneficiaries.

In considering whether to elect continuation coverage, you should take into account that you have special enrollment rights under federal law. You have the right to request special enrollment in another group health plan for which you are otherwise eligible (such as a plan sponsored by your spouse's employer) within 30 days after your group health coverage ends because of the qualifying event listed above. You will also have the same special enrollment right at the end of continuation coverage if you get continuation coverage for the maximum time available to you.

How much does COBRA continuation coverage cost?

Generally, each qualified beneficiary may be required to pay the entire cost of continuation coverage. The amount a qualified beneficiary may be required to pay may not exceed 102 percent (or, in the case of an extension of continuation coverage due to a disability, 150 percent) of the cost to the group health plan (including both employer and employee contributions) for coverage of a similarly situated plan participant or beneficiary who is not receiving continuation coverage. The required payment for each continuation coverage period for each option is described in this notice.

When and how must payment for COBRA continuation coverage be made?

First payment for continuation coverage

If you elect continuation coverage, you do not have to send any payment with the Election Form. However, you must make your first payment for continuation coverage not later than 45 days after the date of your election. (This is the date the Election Notice is post-marked, if mailed.) If you do not make your first payment for continuation coverage in full not later than 45 days after the date of your election, you will lose all continuation coverage rights under the Plan. You are responsible for making sure that the amount of your first payment is correct. You may contact [*enter appropriate contact information, e.g., the Plan Administrator or other party responsible for COBRA administration under the Plan*] to confirm the correct amount of your first payment.

Periodic payments for continuation coverage

After you make your first payment for continuation coverage, you will be required to make periodic payments for each subsequent coverage period. The amount due for each coverage period for each qualified beneficiary is shown in this notice. The periodic payments can be made on a monthly basis. Under the Plan, each of these periodic payments for continuation coverage is due on the [*enter due day for each monthly payment*] for that coverage period. [*If Plan offers other payment schedules, enter with appropriate dates:* You may instead make payments for continuation coverage for the following coverage periods, due on the following dates:]. If you make a periodic payment on or before the first day of the coverage period to which it applies, your coverage under the Plan will continue for that coverage period without any break. The Plan [*select one:* will *or* will not] send periodic notices of payments due for these coverage periods.

Grace periods for periodic payments

Although periodic payments are due on the dates shown above, you will be given a grace period of 30 days after the first day of the coverage period [*or enter longer period permitted by Plan*] to make each periodic payment. Your continuation coverage will be provided for each coverage period as long as payment for that coverage period is made before the end of the grace period for that payment. [*If Plan suspends coverage during grace period for nonpayment, enter and modify as necessary:* However, if you pay a periodic payment later than the first day of the coverage period to which it applies, but before the end of the grace period for the coverage period, your coverage under the Plan will be suspended as of the first day of the coverage period and then retroactively reinstated (going back to the first day of the coverage period) when the periodic payment is received. This means that any claim you submit for benefits while your coverage is suspended may be denied and may have to be resubmitted once your coverage is reinstated.]

If you fail to make a periodic payment before the end of the grace period for that coverage period, you will lose all rights to continuation coverage under the Plan.

Your first payment and all periodic payments for continuation coverage should be sent to:

[*enter appropriate payment address*]

For more information

This notice does not fully describe continuation coverage or other rights under the Plan. More information about continuation coverage and your rights under the Plan is available in your summary plan description or from the Plan Administrator.

If you have any questions concerning the information in this notice, your rights to coverage, or if you want a copy of your summary plan description, you should contact [*enter name of party responsible for COBRA administration for the Plan, with telephone number and address*].

For more information about your rights under ERISA, including COBRA, the Health Insurance Portability and Accountability Act (HIPAA), and other laws affecting group health plans, visit the U.S. Department of Labor's Employee Benefits Security Administration (EBSA) website at www.dol.gov/ebsa or call their toll-free number at 1-866-444-3272 For more information about health insurance options available through a Health Insurance Marketplace, visit www.healthcare.gov.

Keep Your Plan Informed of Address Changes

In order to protect your and your family's rights, you should keep the Plan Administrator informed of any changes in your address and the addresses of family members. You should also keep a copy, for your records, of any notices you send to the Plan Administrator.

Paperwork Reduction Act Statement

According to the Paperwork Reduction Act of 1995 (Pub. L. 104-13) (PRA), no persons are required to respond to a collection of information unless such collection displays a valid Office of Management and Budget (OMB) control number. The Department notes that a Federal agency cannot conduct or sponsor a collection of information unless it is approved by OMB under the PRA, and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless it displays a currently valid OMB control number. See 44 U.S.C. 3507. Also, notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. See 44 U.S.C. 3512.

The public reporting burden for this collection of information is estimated to average approximately four minutes per respondent. Interested parties are encouraged to send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S. Department of Labor, Office of the Chief Information Officer, Attention: Departmental Clearance Officer, 200 Constitution Avenue, N.W., Room N-1301, Washington, DC 20210 or email DOL_PRA_PUBLIC@dol.gov and reference the OMB Control Number 1210-0123.

OMB Control Number 1210-0123 (expires 09/30/2013)

New Health Insurance Marketplace Coverage Options and Your Health Coverage

Form Approved
OMB No. 1210-0149
(expires 11-30-2013)

PART A: General Information

When key parts of the health care law take effect in 2014, there will be a new way to buy health insurance: the Health Insurance Marketplace. To assist you as you evaluate options for you and your family, this notice provides some basic information about the new Marketplace.

What is the Health Insurance Marketplace?

The Marketplace is designed to help you find health insurance that meets your needs and fits your budget. The Marketplace offers "one-stop shopping" to find and compare private health insurance options. You may also be eligible for a new kind of tax credit that lowers your monthly premium right away. Open enrollment for health insurance coverage through the Marketplace begins in October 2013 for coverage starting as early as January 1, 2014.

Can I Save Money on my Health Insurance Premiums in the Marketplace?

You may qualify to save money and lower your monthly premium, but only if your employer does not offer coverage, or offers coverage that doesn't meet certain standards. The savings on your premium that you're eligible for depends on your household income.

Does Employer Health Coverage Affect Eligibility for Premium Savings through the Marketplace?

Yes. If you have an offer of health coverage from your employer that meets certain standards, you will not be eligible for a tax credit through the Marketplace and may wish to enroll in your employer's health plan. However, you may be eligible for a tax credit that lowers your monthly premium, or a reduction in certain cost-sharing if your employer does not offer coverage to you at all or does not offer coverage that meets certain standards. If the cost of a plan from your employer that would cover you (and not any other members of your family) is more than 9.5% of your household income for the year, or if the coverage your employer provides does not meet the "minimum value" standard set by the Affordable Care Act, you may be eligible for a tax credit.[1]

Note: If you purchase a health plan through the Marketplace instead of accepting health coverage offered by your employer, then you may lose the employer contribution (if any) to the employer-offered coverage. Also, this employer contribution -as well as your employee contribution to employer-offered coverage- is often excluded from income for Federal and State income tax purposes. Your payments for coverage through the Marketplace are made on an after-tax basis.

How Can I Get More Information?

The Marketplace can help you evaluate your coverage options, including your eligibility for coverage through the Marketplace and its cost. Please visit HealthCare.gov for more information, including an online application for health insurance coverage and contact information for a Health Insurance Marketplace in your area.

[1] An employer-sponsored health plan meets the "minimum value standard" if the plan's share of the total allowed benefit costs covered by the plan is no less than 60 percent of such costs.

PART B: Information About Health Coverage Offered by Your Employer

This section contains information about any health coverage offered by your employer. If you decide to complete an application for coverage in the Marketplace, you will be asked to provide this information. This information is numbered to correspond to the Marketplace application.

3. Employer name		4. Employer Identification Number (EIN)
5. Employer address		6. Employer phone number
7. City	8. State	9. ZIP code
10. Who can we contact at this job?		
11. Phone number (if different from above)	12. Email address	

You are not eligible for health insurance coverage through this employer. You and your family may be able to obtain health coverage through the Marketplace, with a new kind of tax credit that lowers your monthly premiums and with assistance for out-of-pocket costs.

Social Media Update

Molly DiBianca, Esq.

THE Delaware Employment Law BLOG

PUBLISHED BY YOUNG CONAWAY STARGATT & TAYLOR, LLP

Boss Gets Fired After She Busts Employees on Facebook

Posted by Molly DiBianca**On** January 22, 2013**In:** Social Media in the Workplace

Employees getting terminated for negative comments posted on Facebook about their supervisors. This, I predict, will be the #1 issue facing employers in 2013. But here's an unusal twist on that story. What about the *manager* who rants about *employees* on Facebook? And not a petty rant or a profanity-laden post, either. Just a post that says something to the effect of, "Why'd you call in sick today if you're at a picnic?" A district court in Texas didn't have a problem with it.

Plaintiff Virginia Rodriquez was a manager at a Sam's Club store in Texas when she was put on a performance-improvement plan so that any subsequent violation would result in her termination. Approximately 9 months after being placed on disciplinary status, Plaintiff viewed pictures of co-workers at a July 4th holiday party. Those same co-workers had called in sick to work that day. Apparently, Plaintiff was less than thrilled when she learned that her coworkers were out having fun while she was stuck at work or, perhaps, she was the only one not invited to the party. Either way, she wasn't happy about her discovery.

To express her displeasure, she posted on one of the employee's Facebook page, chastising the group for calling out. (The Court describes the comments as "public" but it is not clear whether they were actually public for all the world to see or only viewable by the user's Facebook friends.) The employee reported the incident to HR. Following an investigation, HR determined that Rodriquez had violated the company's Social-Media policy by "publicly chastising employees under her supervision, rather than waiting for the associates to return to work to discuss her attendance concerns." Because she was on probationary status, Rodriquez was terminated.

Sure enough, Rodriquez subsequently filed a charge of discrimination, alleging age and national-origin discrimination and retaliation. The state agency determined the Charge to be without merit but she filed suit anyway. On summary judgment, the court dismissed the plaintiff's claims, though, finding that the employer had demonstrated that its decision to terminate was based on her violation of the social-media policy. Specifically, the court held, the employer's decision to fire the plaintiff after she elected to publicly chastise her direct reports via Facebook instead of in person was legitimate and non-discriminatory.

I think most rational minded employment lawyers would agree that the court's decision was right. There was no evidence that the plaintiff was fired for anything other than her comments on Facebook, which violated the company's policy. That said, the facts of this case are reflective of the myriad of variations on the same problem--use of social-media to discuss work and co-workers. My prediction stands--this issue is not likely to go away any time soon.

Rodriquez v. Wal-Mart Stores, Inc., No. 3:11-2129-B (N.D. Tex. Jan. 9, 2013).

THE Delaware Employment Law BLOG

PUBLISHED BY YOUNG CONAWAY STARGATT & TAYLOR, LLP

Instagram Post Lands Delaware Restaurant Manager In Hot Water

Posted by Molly DiBianca**On** April 15, 2013**In:** Social Media in the Workplace

I've posted before about restaurant employees' Facebook posts that caused big headaches for their employers. I've also posted about trouble-causing Facebook posts by a saloon manager and by a tavern owner. Well, it seems that the trend has made it way to Delaware.

As reported by Patty Talorico on her Second Helpings blog, a Thai restaurant in Hockessin has landed itself in hot water as a result of unappetizing posts made to its social-networking sites. Photographs of customers' receipts and of restaurant patrons were posted to the Instagram account of the restaurant's manager. According to Talorico, racial slurs and derogatory comments were posted with the photos.

The manager reportedly told The News Journal that other employees have access to the accounts and that he didn't post the controversial comments, "probably."

One of the controversial posts read: "Cheap ass, order takeout and eat it at the bar #monday #cheap #trash." At around the same time, a photo of a receipt was posted, which showed that the customer left no tip on a $42.55 bill.

So far, I'm on the manager's side—who orders takeout, only to eat it at the bar so he can avoid having tip?! For *real*? But my sympathy for the slighted restaurant worker ends there.

The manager is alleged to have then posted: "#cheapass … #jews #disrespect #jerk … #hillbillies #cheap Didn't tip a single dollar."

At the risk of stating the obvious, these comments are totally out of line. There's no time or place—and certainly no Facebook page—where such comments would be anything close to appropriate.

And it apparently gets worse. According to Talorico, a photograph of a customer's receipt, which showed that the customer, who had an Indian surname, had left less than 10 percent for a tip. The comment posted with the photo read, "What do you expect from a last name like that?"

Again, there's nothing entertaining or funny about the manager's commentary. Racist and other derogatory slurs about customers cannot be tolerated in any business but, when they're coming from management, the potential repercussions are tremendous.

If you are an employer with a public Facebook page or other social-media account, it's time to make sure you know who has access to post to the accounts and communicate the bounds of appropriate conduct apply both inside and outside of the workplace when it affects the business and its reputation.

THE Delaware Employment Law BLOG

PUBLISHED BY YOUNG CONAWAY STARGATT & TAYLOR, LLP

Manager's Drunk Facebook Post Leads to Retaliation Claim

Posted by Molly DiBiancaOn February 18, 2013In: Retaliation, Social Media in the Workplace

Readers may recall the case, *Stewart v. CUS Nashville, LLC*, which is one of the few opinions on the discoverability of a party's social-media account. There were at least a couple of interesting issues in that decision but the most interesting part may be that the defendant is the entity that owns and operates Coyote Ugly Saloons. That's right--the one from the movie, where hot bartenders dance on the bar.

The case was initiated by two of those (presumably hot) bartenders, Misty Blu Stewart and Samantha Thomas. They originally brought claims under the FLSA, alleging an unlawful tip-pooling policy. Those claims are quite interesting--so much so that I'm going to write a separate post about them later in the week. So stay tuned for the FLSA angle.

In the meantime, I have to write about the retaliation claims that the named plaintiffs added to their complaint.

The Allegations
First, Ms. Misty Blue Stewart (yes, really). Ms. Stewart worked at the Coyote Ugly saloon in Nashville until she was fired for giving away free drinks (a/k/a stealing), in December 2009.
Ms. Stewart claims that, one month after she initiated her FLSA claim in April 2011, the founder and president of the franchise, Liliana Lovell, wrote a post on her blog, which is hosted on the Coyote Ugly website about the lawsuit: "This particular case will end up pissing me off[,] cause it is coming from someone we terminated for theft."

[Side Note: The rest of the post is pretty hilarious. You can read it on the Technology & Marketing Blog, where Venkat Balasubramani wrote about the case.]

Ms. Stewart had already found a new job, so she had no economic damages. Instead, she claimed that was "humiliated and embarrassed by the blog entry."

Second, Ms. Stone. Stone worked at the saloon in Oklahoma City. Her retaliation claim was based on two comments made by the Director of Operations, Mr. Huckaby. Huckaby was in town for a party that was being held at the saloon and, like all good Directors of Operations tend to do, apparently found himself two sheets to the wind before the night was over.

While under the influence, Huckaby posted on his Facebook page, "Dear God, please don't let me kill the girl that is suing me . . . that is all. . ." Stone, who was (of course), Facebook friends with Huckaby, saw the post about an hour later. The post was gone by the next day. Huckaby does not remember making the post or removing it.

The second comment occurred the next night. Ms. Stone testified that Huckaby learned that a customer had fallen down the stairs in the saloon and had threatened to sue. In response, Huckaby yelled out, "Why does everyone sue? I'm tired of all these bi***es taking their issues out on our company. They're f***ing idiots."

Ms. Stone testified that, although Huckaby was looking at the saloon manager, Amber Almond (yes, really, again), he *sort of* looked towards Ms. Stone as he yelled. Stone quit the next day and alleged constructive discharge. Huckaby does not remember making the statement.

The Decision

I'll start with my conclusions because, heaven knows, I hate to bury the lead. I think the court got this one wrong. As in *wrong*. So, there, I said it. I think this was a bad decision. You can decide for yourself.

With respect to Misty Blu, the court found that there was sufficient evidence of retaliation to survive the employer's motion for summary judgment. The employer argued that there was no evidence of an adverse employment action--a necessary component of a retaliation claim (i.e., an adverse action must be taken because of protected activity). The court disagreed and found that the comment in the founder's blog post about being fired for theft was, if false, enough to constitute an adverse action.

Here's the main problem I have with that decision--the employee had not been an employee for about 16 months at the time of the blog post. Not to mention that the employee was not referenced by name. And not to mention that there was no evidence that the employee hadn't been terminated for theft. The court seems to confuse a statement that the employee *committed* theft with a statement that she was *fired* for theft. They're not the same thing, are they?

Okay, moving on to Ms. Stewart. The court held that Stewart's claim of constructive discharge also could survive summary judgment. The sum total of the evidence that Stewart presented in support of this claim was as follows, assuming everything in her favor:

1. A manager from Corporate made a snarky comment--without naming any names or even job titles--apparently while in the bag, which Stone viewed for all of two seconds and which was taken down a few hours later.

2. The same manager, who, let us not forget, was in town only for this party, made a comment about "bi***es" who sued the company upon learning that the company was being sued by someone other than the plaintiff.

Folks, if this constitutes a constructive discharge, well, color me confused. How the court concluded that these two incidents could lead to the type of intolerable conditions that are required to warrant a constructive discharge is beyond me. Maybe the standard is significantly different in the 6th Circuit. Because here, in the 3d Circuit, the standard requires far more dire conditions. Thankfully.

After all of that has been said, though, where are we? What are the lessons of today's post? Well, try these on for size:

1. Please, please, please, discourage your supervisors from being Facebook friends with employees. It's a bad idea. Particularly if your supervisors have a tendency to "drunk post" from the workplace.

2. Don't let employees check Facebook while they're on the clock. Yeah, yeah, I know. You disagree. But if Stewart hadn't been permitted to check Facebook from her phone *while on the clock*, she wouldn't have seen Huckaby's post, which was gone a few hours later.

3. If you're the owner, founder, senior executive, etc., don't comment about confidential matters--including lawsuits and employee issues--on the company's publicly available blog. (Interestingly, the only other time I've seen this was also with a female bar owner, who made a similar comment on her Facebook comment and was sued for retaliation, which leads me to the next and final lesson for today. . .)

4. Read this blog. Had Ms. Lovell read the post I mention above about how social-media rules also apply to supervisors, maybe she would have avoided the whole mess.

Stewart v. CUS Nashville, LLC, No. 3:11-cv-0342, 2013 U.S. Dist. LEXIS 16035 (M.D. Tenn. Feb. 6, 2013).

THE Delaware Employment Law BLOG

PUBLISHED BY YOUNG CONAWAY STARGATT & TAYLOR, LLP

Social-Media Guidelines Apply to Supervisors, Too

Posted by Molly DiBianca**On** January 18, 2011**In:** Social Media in the Workplace

Is it legal to fire an employee for things he posts on his Facebook page? That's the most common question that I am asked by employers in the context of social media. And no wonder; the stories of employees who disclose confidential company information, rant about coworkers or customers, and disparage supervisors make news headlines more often than I can post about them. Although the general answer is that an employer can terminate an employee for his or her Facebook posting, there are exceptions to that general rule. And the NLRB recently called this general answer into question when it filed a complaint against an employer who, the NLRB claims, enforced an overly broad social-media policy by unlawfully terminating an employee for her Facebook posts, thereby violating the National Labor Relations Act.

But a recent story from Pittsburgh, Pennsylvania gives employers yet another reason to worry. As reported by the Pittsburgh Tribune-Review, one small-business owner may have pushed the ball across the line from the *other* side when she (allegedly) made comments on her Facebook page targeting an employee who'd complained that she'd been harassed by her supervisor.

A former waitress at the tavern claims that she complained to Human Resources that a supervisor had made an inappropriate sexual comment to her. A week later, she claims, she read comments on the tavern owner's Facebook page that the employee believes were targeted at her. The waitress quit the next day and shortly thereafter, filed suit. The alleged comment did not mention the waitress by name: "Why do people think and believe it is OK to lie and hurt people that have never hurt or lied to them!" The employee felt that this comment and the reactions of coworkers were also directed towards her.

So, what are the take-aways for employers? There are several.

First, **get an effective social-media policy.** Yes, I know, I've said it before. But when I hear a story like this, I can't help but repeat myself. Not only should employers have policies that address what is and is not appropriate use of social-networking sites such as Facebook. But it's not enough to simply *have* a policy--employees *and* supervisors (and, in this case, owners) need to be trained on the policy and should be well informed of the potential problems that poor online judgment can cause. (*See* Sample Social-Media Policy pdf).

Second, this story supports my belief that employers should discourage supervisors from being Facebook friends with their direct reports. If this story is true, it could have been prevented had the employee not had access to the bar owner's Facebook page. Similarly, other employees would not have been able to fuel the fire with their own comments if they had not been friends with the boss.

Third, this story is an excellent reminder about the critically important role of Human Resources when an employee makes a complaint of inappropriate conduct in the workplace. This role cannot be overestimated. Whenever an employee makes a complaint about what he or she believes is discriminatory or harassing behavior at work--*especially* by a supervisor--HR *must* jump into action by promptly launching a thorough investigation and then taking effective corrective action.

THE Delaware Employment Law BLOG

PUBLISHED BY
YOUNG CONAWAY STARGATT & TAYLOR, LLP

They Like Me! They Really Like Me! . . . But So What?

Posted by Molly DiBianca**On** September 23, 2012**In:** Social Media in the Workplace

What is the value of a Facebook Like? A federal court in Virginia recently held that a Like does not have constitutional value, insofar as it is not speech for the purposes of the 1st Amendment. Many commentators disagree with that decision, which, not surprisingly, has since been appealed.

But what about the *commercial* value of a Facebook Like? Last month, a federal court in Michigan weighed in on this question. The case involved two nail-polish vendors, Lown Cos., LLC, and the unfortunately named Piggy Paint, LLC. Piggy Paint had 19,000 Likes on its Facebook page when it was taken down as a result of a trademark-infringement complaint that Lown filed with Facebook.

Piggy Paint was peeved.

Piggy Paint sued Lown, alleging a claim of tortious interference with business expectancy. The court, however, did not recognize the power of the Like and concluded that there was no immediate way for Piggy Paint to convert its Fans into customers. Particularly, the court noted that the page "did not offer any means of placing orders or doing business." As a result, the court found, Piggy Paint had not shown that it had lost any business and the alleged business expectancy was "too indefinite to form the basis of an actual expectation of business."

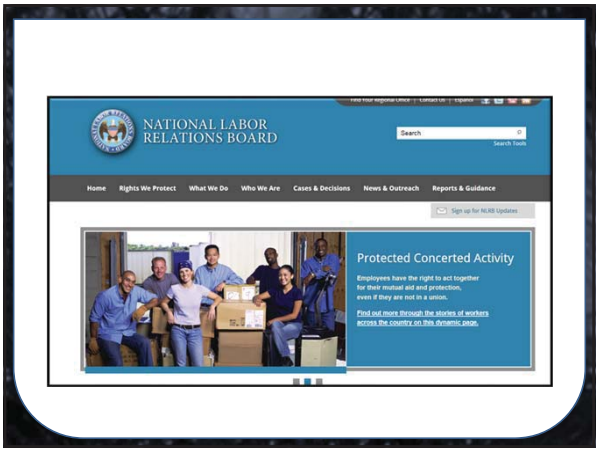
So, what say you, dear readers? Do Facebook fans have "real" commercial value? Or is it too difficult to estimate what value, if any, our Likes actually have?

Lown Companies LLC v. Piggy Paint LLC, No. 11-cv-911 (W.D. Mich., Aug. 9, 2012).

NLRB in Union and Non-Union Workplaces

Barry M. Willoughby*
Michael P. Stafford

***With special thanks to Jeff Wray at Fulbright & Jaworski, LLP, for sharing his materials.**



Rights of All Employees

- **Section 7 of the National Labor Relations Act provides that all covered employees (union and non-union) have the right to engage in "concerted activities for…mutual aid or protection"**
- **Activities are "concerted" if "with or on the authority of" their co-workers**

Rights of All Employees

- **Policies which prohibit or discourage protected concerted activity have long been held to be unlawful**

General Rule for Policies

- **The Board currently applies the standard articulated in *Lafayette Park Hotel,* 326 NLRB 824 (1998), that the appropriate inquiry is "whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights"**
- **Improper rule is a violation even if never enforced**

General Rule for Policies

- **A violation may be found if:**
  - **Employees could reasonably construe the language to prohibit Section 7 activity, or**
  - **The rule was promulgated in response to union activity, or**
  - **The rule has been applied to restrict the exercise of Section 7 rights**

***Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004)**

Consequences of Unlawful Rules

- If an employer has an unlawful rule, it may be ordered to rescind it and post a notice at all locations where the rule was in effect. Electronic posting, e.g., to an intranet, may also be required
- Employees disciplined or discharged for violation of the rule are entitled to be made whole (back pay for lost wages) and have records expunged

Consequences of Unlawful Rules

- If rule exists during period after election petition filed, rerun election may be ordered if union loses

Confidentiality Rules

- Rules which prohibit employees from discussing wages or working conditions with each other are unlawful
- The Board recently ordered a Houston company to pay $107,000 in back pay to an employee allegedly discharged for discussing salaries with other workers

Confidentiality Rules

- In *DirecTV U.S. DirecTV Holdings, LLC*, 359 NLRB No. 54 (2013), the Board found that a rule which instructed employees not to discuss "details about your job, company business, or work projects with anyone outside the company" and which instructed employees not to give out information about fellow employees, including employee records, was unlawful

Confidentiality Rules

- NLRB said rule could reasonably be understood by employees to restrict discussion of their wages and other terms and conditions of employment

Confidentiality Rules

- The Board also wrote that because the rule does not exempt "communications with third parties such as union representatives, Board agents, or other governmental agencies" employees would "reasonably interpret the rule as prohibiting such communications"

Confidentiality Rules

- The Board also invalidated a policy prohibiting employees from blogging, entering a chat room, or posting messages about "company information that is not already disclosed as a public record," in part because of its ambiguity

Confidentiality Policies

- A "do not contact the media" instruction "to ensure that the company presents a united, consistent voice" was found unlawful because employees could reasonably interpret it to prohibit discussions of, for example, a labor dispute

Practical Suggestions

- Decide if you need a confidentiality policy
- If so, do not include "employee information" unless you define it, and define it narrowly, such as employee medical information and Social Security numbers
- Consider a broad disclaimer of intent to infringe on any rights

Investigations

- **Instructions to maintain confidentiality during an ongoing investigation were found unlawful in *Banner Estrella Medical Center***
- **Board wrote that a "generalized concern" for integrity of the investigation was insufficient**

Witness Statements

- **For 35 years, the Board found it proper for an employer to withhold witness statements from union to prevent witness intimidation and other ills which the Board fears with respect to its own investigations**

***Anheuser-Busch, Inc.* (1978).**

Witness Statements

- **In *Piedmont Gardens* (2012) the Board announced that there will no longer be a blanket exclusion of witness statements**
- ***Detroit Edison* will apply - employer must show legitimate and substantial interest**
- **Accommodation must be sought**

Practical Suggestions

- Have no written rule regarding witness confidentiality
- Where it is warranted, tell employee witnesses it is your intent to keep matter confidential, adding a "suggestion" that they do so as well
- If you are going to refuse to produce statements to union, include a promise of confidentiality in the statement

Courtesy

- In *Knaus BMW* (2012), the Board found a rule requiring employees not to "be disrespectful or use profanity or other language which injures the image of the Dealership" overly broad
- Majority noted the absence of a disclaimer of intent to abridge statutory rights

Blogs and Social Media

- Same analysis applies
- General Counsel has faulted confidentiality and privacy demands, bans on derogatory remarks
- If you feel you need a policy, consider use of one the same as or very similar to one approved in GC Advice Memo

Off-Duty Access

- In *Tri-County Medical Center* (1976), the Board approved a rule restricting access of off-duty employees to an employer's workplace. Rule will only be valid:
  - If it limits access solely with respect to the interior of the plant and other working areas;
  - Is clearly disseminated to all employees, and

Off-Duty Access

  - Applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity
- Board has made exception for treatment, visiting patients in hospital, but has rejected any interpretation which allows management to exercise discretion

"At Will" Policies

- Acting General Counsel, ALJ have faulted an "at will" policy which required employees to agree, as part of an Agreement and Acknowledgement of Employee Handbook, that the at will relationship "cannot be amended, modified, or altered in any way" on the ground that employees are asked to give up Section 7 rights

"At Will" Policies

- In Advice Memoranda, the Office of the General Counsel has stated that "at will" policies which limit only the authority of managers to agree to change the status are permissible

Mandatory Arbitration

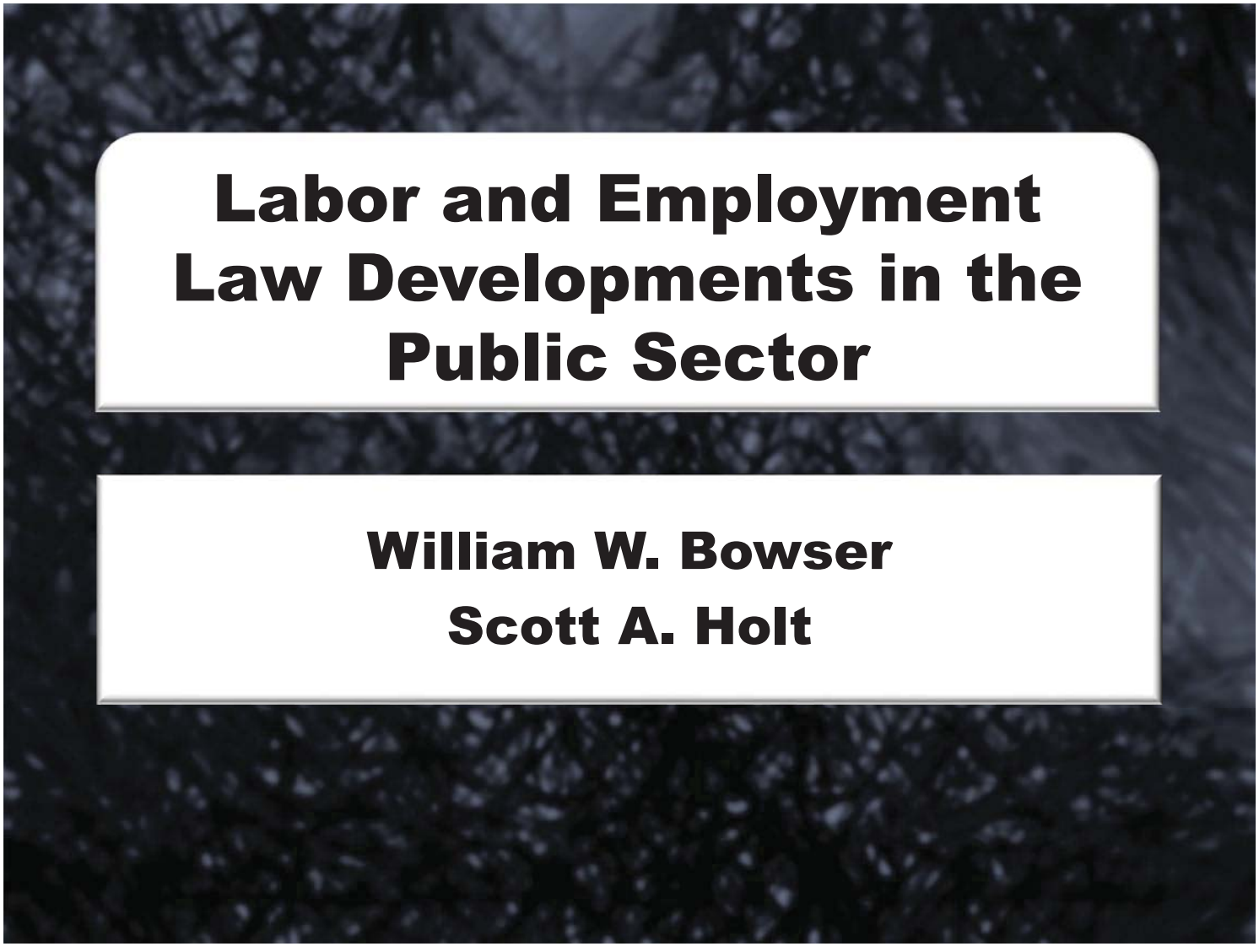
- The Board has long held that arbitration clauses which foreclose access to the Board are unlawful
- In ***Supply Technologies*** (2012), the Board found ambiguous and therefore unlawful a policy which stated that the employee had the right to file charges with a government agency

Mandatory Arbitration

- In ***D. R. Horton*** (2012), the Board found that requiring employees to submit all disputes to arbitration, and precluding the arbitrator from considering class claims, unlawfully infringed upon the right of employees to act collectively
- Board claims it does not mandate class arbitration, so long as class relief may be pursued in court

Conclusion

- Don't feel the need for a written policy for everything
- Draft carefully
- Include a statement that nothing in the policy is intended to infringe legal rights
- Stay tuned to more from the Board.....


Labor and Employment Law Developments in the Public Sector
William W. Bowser
Scott A. Holt

Agenda

- Overview of the law
- Binding interest arbitration update

Overview of Law

- Three separate statutes
  - Police and Fire ("POFERA")
  - Public School Employees ("PSERA")
  - Other Public Employees ("PERA")

Overview of the Law

- Grants certain employees right to organize
- Requires public employers to bargain
- Prohibits strikes

Overview of the Law

- Creates unfair labor practices
- Creates impasse resolution process
- PERB administers and enforces

What Public Employers Are Covered?

- Police and Fire
  - The State and any state agency
  - Any county or county agency
  - Any county or town which elects coverage
  - Any city or town with 25 or more full-time employees
    - Not 25 police or fire

What Public Employers Are Covered?

- Public Employees (other than school, police or fire)
  - The State and any state agency
  - Any county or county agency
  - Any city or town which elects coverage
  - Any city or town with 100 or more full-time employees

What Public Employers Are Covered?

- Public Schools
  - School districts, charters

What Employees Can Organize?

- Public Schools
  - No school administrators
  - No “confidential employees”
  - Supervisors can organize, but not in the same unit as non-supervisors

What Employees Can Organize?

- Police and Fire
  - Supervisors may organize and be in same unit

What Employees Can Organize?

- Other Public Employees
  - No supervisors (after 1994)
  - No "confidential employees"

Duty to Bargain

- Employers are required to "confer and negotiate in good faith with respect to terms and conditions of employment...."
- "Obligation does not compel either party to agree to a proposal or require the making of a concession."

Duty to Bargain

- Each statute defines "terms and conditions of employment" slightly differently but all include:
  - wages, salaries, hours, working conditions, grievance proceedings, etc.

Duty to Bargain

- **Management Rights**
  - **Not required to bargain on matters of "inherent managerial policy"**
    - **Functions and programs**
    - **Standards of services**
    - **Overall budget**
    - **Utilization of technology**
    - **Staffing (organizational structure)***

Duty to Bargain

- **Three categories of bargaining subjects**
  - **Mandatory**
  - **Permissive**
  - **Illegal**

Duty to Bargain

- **Employer is generally prohibited from making "unilateral changes" to mandatory subjects of bargaining.**
- **Cannot stop or alter perks and benefits simply because money is short**
  - **No "distressed" employer statute**
  - **Must present problem to union for negotiations**
    - **Concessions vs. RIF's**

Collective Bargaining Process

- Must commence at least 90 days prior to expiration of existing agreement
- Negotiation process generally exempt from FOIA

Negotiation and Impasse Resolution Process

- Negotiation
- Mediation
- Facilitation*
- Arbitration

Arbitration Process – Factors Considered

- Interests and welfare of public
- Comparison with other employees in same or comparable communities
- Overall present compensation
- Stipulations of parties

Arbitration Process – Factors Considered

- Lawful authority of employer
- Ability to pay based on existing revenues – most important
- Other traditional considerations

Ability to Pay

- "Existing Revenues" do not include any accumulated surplus
- Need not raise taxes to pay for increases

Arbitration Process

- Arbitrator chooses one Party's "Last, Best, Final Offer"

Arbitration Process

- Decision becomes Board Order
- Can be appealed to Court of Chancery

Recent PERB Decisions

- Town of Smyrna (12/02/11)
  - Issues = pension, healthcare premiums
  - Town raised ability to pay defense
  - PERB
    - Criticized parties for cursory record
    - Witnesses could not validate data or methodology
    - Rejected ability to pay defense, but ultimately awarded Town's LBFO

Recent PERB Decisions

- FOP / City of Dover (1/16/12)
  - Issues = reopener on wages
  - 2% (FOP) vs. 1% (City)
  - PERB
    - Newark is closest comparable
    - Other two unions in Dover received 2%
    - FOP's LBFO awarded

Recent PERB Decisions

- FOP / New Castle County (3/05/12)
  - Issues = pay concessions, ability to pay
  - FOP LBFO
    - 0% increase
  - NCC LBFO
    - Healthcare surcharge, floating holiday
    - Equivalent of 2.5% reduction in pay

New Castle County

- BIA Hearing
  - NCC Case
    - Evidence of "structural deficit"
    - County budget
      - Projected deficit if FOP's LBFO implemented
      - County reserves should not be considered
    - External comparators
      - Expert witness
    - Internal comparators
      - All other unions, employees made concessions

New Castle County

- PERB Decision
- Awarded NCC's LBFO
  - NCC could not afford to pay FOP's LBFO without going into deficit spending
    - Reserves off-limits
  - External and Internal Comparators

Planning for BIA

- Ability to pay defense
- Use of experts
- Planning for the hearing

Ability to Pay Defense

- Start the process early
  - Budget planning
- Projected revenues / expenses
- Address reserves

Use of Experts

- Pros
  - Helps organize case
  - Reliability of data / analysis
  - Experience providing testimony
- Cons
  - Can be expensive

Planning for the Hearing

- What BIA factors you will rely on?
- Address BIA evidentiary burden
- Budget / projections
- Validate data
- Consider an expert


ADA &FMLA
Update
William W. Bowser
Molly DiBianca

Agenda

- FMLA
  - 20th anniversary
  - Expansion of military FMLA leave
  - New poster and forms
  - New cases

20th Anniversary

- 57% of employees qualify for FMLA leave
- 13% of all employees took FMLA leave in 2012
- 57% took FMLA leave for their own illness
- 22% took FMLA leave for birth or adoption
- 19% took FMLA leave to care for family member
- 48% received full pay during leave

Expansion of Military FMLA Leaves

- Two brand new types of FMLA leave created in 2008
- "Qualifying Exigency" (QE) Leave
- "Military Caregiver" Leave

Expansion of QE Leave

- Up to 12 weeks of leave when family member is called to duty
  - Note: this is for family members, not the servicemember

Expansion of QE Leave

- Examples of "qualifying exigency"
  - Short notice deployment
  - Military events and related activities
  - Childcare and school activities
  - Financial and legal agreements
  - Rest and recuperation
  - Parental care
  - Additional activities agreed to by employer

Expansion of QE Leave

- Rest and Recuperation
  - Expanded from 5 to 15 days

Expansion of QE Leave

- Parental Care
  - Eligible employees may take QE leave to care for military members' parent who is incapable of self-care
    - Arranging alternative care
    - Providing care on immediate basis
    - Admitting parent to care facility
    - Attending meetings at care facility

Expansion of QE Leave

- Covered service members now include active members of the Armed Forces
- Call to active duty need not be in support of a "war"
  - deployed to a foreign country

Expansion of Military Caregiver Leave

- Up to 26 weeks of leave in a "single 12-month period" to care for an ill or injured servicemember
- Can be taken by son, daughter, spouse, or "next of kin" of covered servicemember

Expansion of Military Caregiver Leave

- Expands military caregiver leave to care for veterans if:
  - Veteran was a member of armed forces within five years of FMLA leave

Expansion of Military Caregiver Leave

- Service member must be recovering from a serious illness or injury:
  - sustained in the line of duty on active duty
  - one which was aggravated by service in the line of duty

New Poster and Forms

- Poster required on March 8, 2013
- New forms on DOL website
  - Dropped from regulations

New Cases

- **Individual liability**
  - **Private sector – yes**
  - **Public sector – 3rd Circuit says yes**

New Cases

- **Pre-eligibility requests are protected**
  - **Termination 1 week before eligibility**
  - ***Morkoetter v. Sonoco Prod.,* Mar. 29, 2013**

ADA Update

Agenda

- ADA
  - Wellness Programs
  - Leave-of-Absence Accommodation
  - Attendance as Essential Function

ADA Update

1. Wellness Programs

Wellness Programs

- Examples
  - Nutrition counseling
  - Cholesterol screening
  - Flu shots
  - Smoking cessation

Wellness Programs

- ADA Issues
  - Medical Exam or inquiry;
  - Regarding an individual's disability

Wellness Programs

- ADA Safe Harbor
  - Employers may administer "the terms of a bona fide benefit plan"

Wellness Programs

- EEOC Interpretation Letter
  - Employers must provide a reasonable accommodation to employees participating in wellness programs.

Wellness Programs

- EEOC Interpretation Letter
  - Employers must provide a reasonable accommodation to employees participating in wellness programs.

ADA Update

2. Leave as an Accommodation

Unpaid Leave

- Unpaid leave as a reasonable accommodation

Unpaid Leave

- Unpaid leave as a reasonable accommodation
- But for how long?

Unpaid Leave

- Unpaid leave as a reasonable accommodation
- But for how long?
- Request for “one more day”

EEOC Settlement

- Employee worked for a medical practice
- Need 2 weeks unpaid leave for medical treatment for disability

EEOC Settlement

- Employee asked for an additional day of leave
- Terminated instead

EEOC Settlement

- Employer's policy did not provide for exceptions or modifications.
- "No-exception" policy

ADA Update

3. Attendance as Essential Function

"Essential Function"

- Written job description
- Consequences
- Comparators

McMillian (2d Cir.)

- Case Manager for NYC
- Flex-time policy re: tardy / late
- 10 yrs. without consequence

McMillian (2d Cir.)

- Dismissed by trial court
- On appeal:
  - Needed to determine whether on-time arrival was essential function

McMillian (2d Cir.)

- Factors:
  - 10 year history
  - Flex-time policy

Samper (9th Cir.)

- NICU nurse
- 5 unplanned absences / yr.
- Exceeded for 8 yrs.
- Accommodations

Samper (9th Cir.)

- Highly specialized
- PT-family interaction
- Consequences


Employers' Top 10 Mistakes at Unemployment Insurance Hearings
Adria B. Martinelli, Esq.
Lauren E.M. Russell, Esq.

Number 10: Make Sure You Have a Case!

- Understand the burdens
  - Purpose of the law
  - Liberally construed *in favor of the employee*
- "Just cause" = wanton and willful misconduct
  - E.g.: insubordination, foul language, fighting, absences and lateness, intoxication, dishonesty, gross negligence, significant violation of company rules

Number 10: Make Sure You Have a Case!

- Importance of warning (esp. in less severe violations)
- Don't acquiesce in misconduct

Number 9: Know the Claims Procedure

- Initial forms (UC-119)
- Process for appeal
  - Claims Deputy
  - Appeals Referee
  - Unemployment Insurance Appeals Board
  - Superior Court

Number 8: Meet Your Deadlines

- Strictly construed
- Harsh penalties
- Good cause
- USPS is not an excuse
- 15-minute rule
- Communicate with the Department of Labor

Number 7: Educate the Factfinder

- Tell a story
  - Background
  - Keep it simple
- Remember the record
- Don't assume knowledge
- Explain the law

Number 6: Know Thy Enemy

- Be prepared
- You know your employees

Number 5:
Know Your Audience

- Short and sweet
- Don't get discouraged
- Listen to what they are saying

Number 4:
Know When to Hire a Lawyer

- Lawyers not required
- What are the issues
- Can you consult?
- Who is on the other side?

Number 3 :
Have the Basic Information

- Dates of hire, termination
- Title
- Rate of pay

Number 2: Present Key Documents

- Handbooks/Rules/Policies
- Signed acknowledgements
- Written warnings
- Written statements or complaints
- Written resignations

Number 1: Avoid Hearsay

- Admissible
- Requires additional support
- Avoidable through preparation!