Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

EMPLOYMENT LAW MATTERS

Latest legal developments and practical guidance for effective HR management April 2004

Route to: _____ _____ _____

In this issue …

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. provides comprehensive legal representation and counseling exclusively to public and private sector employers in the areas of employment law and labor relations.

Employee NOT Entitled to FMLA Leave Because of Inadequate Leave Request, Federal Court Says

A federal appellate court recently held that an employee who took two weeks of leave prior to the birth of his child did **NOT** provide his employer with adequate notice of his wife's "serious health condition." Accordingly, the employee was **NOT** entitled to leave under the Family and Medical Leave Act ("FMLA") (*Aubuchon v. Knauf Fiberglass*, ___ F.3d ___ (7th Cir., March 8, 2004).

In this case, the employee, Aubuchon, requested leave under the FMLA to care for his pregnant wife prior to her delivery. He failed, however, to notify his employer, Knauf Fiberglass, that his wife was experiencing serious medical complications associated with her pregnancy (e.g., false labor). Instead, he told his employer he "wanted to stay home with her." His employer denied the leave and later terminated the employee for excessive absenteeism.

The FMLA entitles an employee to 12 weeks of leave without pay during any 12-month period if he needs the leave in order to care for his spouse's "serious health condition." A "serious health condition" is defined by the Department of Labor as including "any period of incapacity due to pregnancy, or prenatal care." However, if the need for such leave is foreseeable at least 30 days in advance, the employee must notify his employer of that fact, so that the employer can minimize the disruptive effect of an unscheduled leave on its business. However, even if the leave is not foreseeable, the employee must still give the employer as much notice as is "practicable."

The bottom line is ...

While an employee does not have to mention the FMLA specifically, this new ruling indicates that the employee, at a minimum, must give the employer enough information to demonstrate a need for FMLA-qualifying leave.

The court in *Aubuchon* noted that "if the notice, whether 30 days or as soon as practicable, is not given, the employer can deny leave even if the spouse does have a serious health condition." The court explained that:

> ...conditioning the right to take FMLA leave on the employee's giving the required notice to his employer is the *quid pro quo* for the employer's partial surrender of control over his work force. Employers do not like to give their employees unscheduled leave even if it is without pay, because it means shifting workers around to fill the temporary vacancy and then shifting them around again when the absentee returns. The requirement of notice reduces the burden on the employer.

The court emphasized that the employee's duty is merely to place the employer on notice of a probable basis for FMLA leave. The employee must give the employer enough information to demonstrate the need for FMLA-qualifying leave. Failure to do so can result in the legitimate denial of the employee's request for leave. If the employee takes the time off regardless, the employer would be within its rights to apply its attendance policy to that employee, as Knauf did in this case.

Changes To Overtime Pay Exemption Rules Delayed, Again

As reported in earlier issues of *Employment Law Matters*, the Department of Labor ("DOL") was scheduled to issue its final regulatory changes to the federal overtime pay exemption rules on March 31, 2004. Instead, the DOL submitted the proposed regulatory changes to the federal Office of Management and Budget ("OMB") for further review. The OMB will review the regulations to ensure that the DOL sufficiently analyzed the costs and benefits associated with these regulatory changes and whether it considered possible alternatives. The OMB has up to 90 days to review the regulations. However, that time frame could be extended further by the Secretaries of either the OMB or the DOL.

If the OMB finds problems with the proposed changes, it could return the rules to the DOL for further review and rulemaking. Consequently, it is unclear at this point when – if ever – the new overtime exemption rules will take effect. Assuming that the rules are eventually finalized, it appears likely that they will not be identical to those that were scheduled to be issued on March 31.

We will keep you informed regarding the progress of the DOL proposed regulations.

"No Good Deed Goes Unpunished": Treating A Bad Employee Well Makes It More Difficult To Defend Subsequent Discrimination Claim

A recent case in federal district court illustrates the importance of employers treating employees consistent with their perception of the employees' work performance. *See Batka v. Prime Charter, Ltd.*, 2004 W.L. 213001 (S.D. N.Y., February 4, 2004). In other words, if an employer feels that an employee's performance is substandard, the employee should not receive merit pay increases or promotions. Otherwise, subsequent employee discipline for poor performance can be misinterpreted as being discriminatory.

In *Batka*, a terminated employee claimed that, after notifying her employer of her pregnancy and beginning her Family and Medical Leave Act ("FMLA") leave, her supervisor began unfairly criticizing her work and subsequently terminated her employment. She sued her employer, Prime Charter, under Title VII of the Civil Rights Act of 1964 and the FMLA.

Prime Charter argued that Ms. Batka was terminated as part of an overall reduction in force prompted by an economic downturn in its industry. Moreover, the employer claimed, she was selected to be a part of this reduction in force due to her poor performance relative to her co-workers.

The federal District Court for the Southern District of New York denied the employer's summary judgment motion stating that the circumstances of Ms. Batka's dismissal could lead a jury to infer that she was discriminated against. The Court noted the following facts which led it to this conclusion: "Batka received salary increases and a promotion during her tenure at Prime Charter; Prime Charter's hiring a full-time replacement during her absence; and the timing of her dismissal." All of these facts undermined Prime Charter's argument that she was laid off due to her poor performance.

Agreements to Release Employer From Discrimination Claims Backfire

A federal district court has ruled that Allstate Insurance Co. unlawfully retaliated against approximately 6,200 of its employees by requiring them to give up their workplace discrimination claims in order to continue to work as agents. The Equal Employment Opportunity Commission (EEOC) sued Allstate charging it with violating the non-retaliation requirements of several federal laws prohibiting employment discrimination, including Title VII of the Civil Rights Act, and the Age Discrimination in Employment Act. Specifically, the EEOC alleged that Allstate implemented a mandatory policy at all of its U.S. facilities requiring employees to sign a release waiving all workplace discrimination charges against the company in order to be retained as independent-contractor agents. The effect of the policy, the EEOC claimed, was to deprive Allstate employees of equal employment opportunities by attempting to prevent their participation in activity protected under federal anti-discrimination laws. In its ruling, the Court held: "It is illegal to either retaliate, or threaten to retaliate, against an employee to prevent him from exercising rights under the EEOC, Title VII, ADEA, ADA, etc. Those employees who did not sign releases were in fact treated less favorably than those who did sign, and the signers had all been threatened with such an outcome if they exercised their right to refuse to sign the proposed release." (*See Romero v. Allstate*, Case No. 01-3894, March 30, 2004).

Reminder: Federal Law Protects Employees Subject to Wage Garnishments

The Consumer Credit Protection Act (CCPA) prohibits employers from discharging an employee because his/her wages have been garnished, and it limits the amount of an employee's earnings that may be garnished in any one week.

Wage garnishment occurs when an employer withholds the earnings of an individual for the payment of a debt as the result of a court order or other similar procedure. Title III of the CCPA prohibits an employer from discharging an employee because his or her earnings have been subject to garnishment for any one debt, regardless of the number of levies made or proceedings brought to collect it. Title III does not, however, protect an employee from discharge if the employee's earnings have been subject to garnishment for a second or subsequent debt. However, state law may provide such protection.

Title III also protects employees by limiting the amount of earnings that may be garnished in any workweek or pay period to the lesser of 25 percent of disposable earnings or the amount by which disposable earnings are greater than 30 times the federal minimum hourly wage of $5.15 per hour. This limit applies regardless of how many garnishment orders an employer receives.

However, the rules are different with respect to orders for child support and alimony. Specifically, Title III allows up to 50 percent of an employee's disposable earnings to be garnished if the employee is supporting a current spouse or child, and up to 60 percent if the employee is not doing so. An additional five percent may be garnished for support payments over 12 weeks in arrears.

The term "disposable earnings" is the amount of earnings left after legally required deductions (e.g., federal, state and local taxes, Social Security, unemployment insurance and state employee retirement systems) have been made. Deductions not required by law (e.g., union dues, health and life insurance, and charitable contributions) are not subtracted from gross earnings when the amount of disposable earnings for garnishment purposes is calculated.

Title III specifies that garnishment restrictions do not apply to bankruptcy court orders and debts due for federal and state taxes. Nor do they affect voluntary wage assignments, i.e., situations where workers voluntarily agree that their employers may turn over a specified amount of their earnings to a creditor or creditors.

Violations of Title III may result in reinstatement of a discharged employee, payment of back wages, and restoration of improperly garnished amounts. The Department of Labor may also initiate court action to restrain violators and remedy violations. Employers who willfully violate the discharge provisions of the law may be prosecuted criminally and fined up to $1,000, or imprisoned for not more than one year, or both.

HIPAA Privacy Rule Now In Effect For Small Employers

1) Does your company offer employees a flexible spending account [FSA] or cafeteria plan that reimburses for medical (including prescriptions), dental or vision benefits?

2) Does your FSA or plan have more than 50 participants, *including dependents*? (Or, if it has fewer than 50 participants, do you contract with another organization to administer the plan?)

If you answered YES to Questions 1 and 2 above, you MUST be in compliance with the new Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule requirements on April 14, 2004! (If you are still not sure if your company is covered, check the following website and answer the questions provided: http://www.cms.hhs.gov/hipaa/hipaa2/support/tools/decisionsupport/xmldecision.asp?decision=D3 .)

The HIPAA Privacy Rule is a federal privacy standard designed to protect patients' medical records and other health information provided to health plans, doctors, hospitals and other health care providers. These new standards provide patients with access to their medical records and more control over how their personal health information is used and disclosed. While the rule went into effect for large employee health plans on April 14, 2003, it only recently went into effect for small health plans on April 14, 2004.

EMPLOYMENT LAW MATTERS is published monthly by **Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., 5010 Campuswood Drive, East Syracuse, New York, 13057, 315-437-7600, www.ferrarafirm.com.**

Ferrara-Fiorenza Law Firm's Breakfast Briefing Schedule

The following workshops, presented to the public at no charge, will be held from 7:45 AM to 9 AM at the Wyndham Hotel, 6301 Route 298, East Syracuse, New York (location subject to change). Call 315-437-7600 to make reservations today!

DATE	TOPIC
May 13, 2004	Do You Really Understand HIPAA?
June 10, 2004	Investigating Employee Misconduct: Hidden Trap Doors
July 8, 2004	Doctor's Notes, Work Restrictions and the Absent Employee: Know the Rules
September 9, 2004	"Red Flag Audit": Common Employment Law Mistakes. Are You Making Them?
October 14, 2004	What You Don't Know About Employee Documentation
December 9, 2004	Employment Law: The Year in Review

HR ADMINISTRATION AND TRAINING SERVICES

The Ferrara-Fiorenza Law Firm provides a full range of HR administration consulting services, including, in part:

- ❑ A comprehensive audit of your HR policies, practices and procedures.
- ❑ Advice for complying with employment laws.
- ❑ More effective, more efficient HR policies, practices and procedures, along with implementation strategies and assistance.

The Firm also works with employers to tailor training on a variety of personnel issues for managers/ supervisors, including:

- ❑ Minimizing the Risk of Employment Litigation
- ❑ Preventing Workplace Harassment
- ❑ Leadership and Influence
- ❑ Managing Non-Performing Employees

For more information on the services Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. can provide to you, contact us at 315-437-7600.

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.
5010 Campuswood Drive
East Syracuse, New York 13057

URGENT NOTICE TO ALL EMPLOYERS!

1. **Does your company offer employees a flexible spending account [FSA] or cafeteria plan that reimburses for medical (including prescriptions), dental or vision benefits?**

2. **Does your FSA or plan have more than 50 participants, *including dependents*? (Or, if it has fewer than 50 participants, do you contract with another organization to administer the plan?)**

If you answered YES to Questions 1 and 2 above, you MUST comply with the new HIPAA Privacy Rule requirements by April 14, 2004! (If you are still not sure if your company is covered, check the following website and answer the questions provided: http://www.cms.hhs.gov/hipaa/hipaa2/support/tools/decisionsupport/xmldecision.asp?decision=D3 .)

Delacroix Consulting Group, a leading HR Management consulting firm, is offering employers a HIPAA Compliance Packet for **$189 plus tax and shipping.** The Compliance Packet contains all of the necessary HIPAA forms and detailed instructions on how to use them, including:

Corporate Resolution Designating Your Company as a "Hybrid Entity" under HIPAA
Business Associate Contract Which Complies with HIPAA
Self-funded Benefit Plan Amendment Required by HIPAA
Certification of HIPAA Compliance
Notice of Privacy Practice

The forms will be provided to you on CD-ROM in Portable Document Format (.pdf) (also known as Adobe Acrobat format) and in hard copy. ***Orders received prior to April 12, 2004 will receive their HIPAA Compliance Packet on or before the compliance deadline of April 14, 2004.***

To order your HIPAA Compliance Packet complete the following form and return it to Delacroix Consulting Group at 5010 Campuswood Drive, East Syracuse, New York 13057 or fax it to 315-437-5617.

HIPAA Compliance Packet Order Form

Name: _____ Company Name: _____

Address: _____

City: _____ State: _____ Zip: _____ Telephone No.: _____ Fax: _____

Please select payment method: ❑ Check (Made payable to: Delacroix Consulting Group, LLC) ❑ Credit Card

Credit Card Information (please select one) ❑ Visa ❑ MasterCard ❑ American Express ❑ Discover

_____
Cardholder's Name (as it appears on the card)

_____ _____ _____
Credit Card Number Expiration Date (month/year)

_____ _____
Billing Address (exactly as it appears on cardholder's statement) E-mail Address (required for all credit card purchases)

Half-Day Workshop on Managing Chronically Absent Employees Effectively While Complying with Employment Laws

FMLA & ADA DILEMMA:

AN EMPLOYEE'S "BLANK CHECK" TO BE ABSENT FOREVER???

Employers are NOT powerless to combat excessive absenteeism associated with the FMLA and ADA! Come to this workshop and

Half-Day Workshop Presented by Delacroix Consulting Group, LLC

The Delacroix Consulting Group, LLC is the human resources management consulting arm of the Ferrara-Fiorenza Law Firm located in Syracuse, New York. Delacroix provides its clients with day-to-day management expertise and strategies in all HR-related matters. We specialize in training employers — and their supervisors/managers — about effective employment practices designed to minimize the risk of costly employment litigation.

Why this Workshop is Different?

Most FMLA/ADA workshops and seminars focus only what the laws say you can't do when an employee is out of work for health-related reasons. This workshop is different because our presenters will provide participants with a step-by-step strategy for getting employees back to work quickly … or replacing them, when necessary.

Who Should Attend?

All private and public sector employers, supervisors and managers (including business owners, human resources professionals, payroll professionals, accountants and supervisors).

Workshop Outline

A. Family and Medical Leave Act (FMLA)
1. Which employees are eligible for leave and which are not?
2. How much leave does an eligible employee get?
3. If an employee does not return after his/her FMLA leave has ended can he/she be terminated?

B. Americans with Disabilities Act (ADA)
1. What is a "disability"?
2. How does the New York State law definition of "disability" differ from the ADA?
3. How much leave can an employee take under ADA or New York State law?

C. Attendance and Work Standards Policies: Can They Be Enforced?
1. Are "No-Fault Attendance Policies" legal?
2. Can disabled employees be held to the same work standards applied to other employees?

D. Strategies for Minimizing an Employer's Pain Associated with an Employee's Medical Leave
1. Does creating light duty jobs help?
2. What information can I request from an employee while on leave?
3. Can I reassign an employee on leave?
4. What can I do if I think an employee is faking an illness?
5. Can I temporarily replace an employee on leave?
6. When can I permanently replace an employee on leave?

E. Practice Examples/Discussion and Your Questions

Dates, Times and Locations

Syracuse - May 27, 2004
8:30 AM — 12:30 PM
Wyndham Hotel
6301 Route 298, East Syracuse,
New York

Buffalo - June 3, 2004
8:30 AM — 12:30 PM
Buffalo Marriott Niagara
1340 Millersport Highway, Amherst, New York

Rochester - June 17, 2004
8:30 AM — 12:30 PM
Holiday Inn Rochester-South
1111 Jefferson Road
Rochester, New York

Tuition Fee

$125 Per Participant

REGISTRATION FORM

Please return to: Delacroix Consulting Group, LLC, 5010 Campuswood Drive, East Syracuse, New York 13057 or fax to (315) 437-5617 Questions? Call (315) 234-3800

Please Circle the Location of the Workshop You Wish to Attend: Syracuse Buffalo Rochester

Participant(s) Name(s): _____ Company Name: _____

Address: _____

City: _____ State: ____ Zip: _____ Telephone No.: _____ Fax: _____

Please select payment method: ❑ Check (Made payable to: Delacroix Consulting Group, LLC) ❑ Credit Card

Credit Card Information (please select one) ❑ Visa ❑ MasterCard ❑ American Express ❑ Discover

_____
Cardholder's Name (as it appears on the card)

_____ _____
Credit Card Number Expiration Date (month/year)

_____ _____
Billing Address (exactly as it appears on cardholder's statement) E-mail Address (required for all credit card purchases)