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

EMPLOYMENT LAW MATTERS

Latest legal developments and practical guidance for effective HR management December 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.

New York Court Reaffirms That Employee Bonuses Are Discretionary

Employee bonuses and incentive plans can be a good way of motivating employees to improve productivity and efficiency. However, human resource experts tell us that after a while such plans lose their motivational effectiveness. This is because employees come to view the bonus as a part of their regular compensation. They budget for the bonus and expect to receive it regardless of their efforts.

This "entitlement" attitude can also lead to lawsuits. Employees often mistakenly believe that simply because they have received bonuses in the past, they are legally entitled to a bonus every year. If they do not receive one, they will often bring a lawsuit to get it. A recent decision by a New York trial court illustrates such a situation and how an employer can defeat such claims. *See Brennan v. J.P. Morgan Securities, Inc*. (N.Y. Supreme Ct., N.Y. Co., August 31, 2004).

In *Brennan*, the plaintiff worked as a trader for J.P. Morgan Securities, Inc. (J.P. Morgan). Mr. Brennan claimed that J.P. Morgan agreed to pay him (in addition to his base salary) a year-end bonus, based upon his job performance, the performance of his division, and the performance of the company as a whole. He also claimed that his year-end bonus increased every year of his employment through 1999, as he gained experience and received promotions.

The bottom line is ...

If you decide to implement an employee bonus/ incentive plan, make sure that you have a policy that clearly states that the decision about whether an employee receives a bonus is entirely at the employer's discretion.

Mr. Brennan was promoted to the position of head trader of his division for 2000. For the year 1999, head traders who met their performance goals received bonuses of approximately $400,000, plus stock options. Under his guidance, his division met or exceeded all of the profit and performance goals set by the employer. For the year 2000, all of the other traders in his division received the same bonus or more than they had received for 1999. Brennan anticipated a substantial increase in his year-end bonus and stock options. Instead, he was given a bonus of $225,000, $60,000 less than he received for 1999.

J.P. Morgan then dismissed Brennan on January 17, 2001 as part of a firm-wide reduction in force. He thereafter sued asking for a greater bonus for 2000, and a bonus for 2001, prorated for the two weeks that he worked that year. J.P. Morgan argued that the bonuses were completely discretionary and therefore the company could choose to give him whatever bonus it deemed appropriate.

The court found in favor of J.P. Morgan, noting that:

> The rule with respect to bonuses is that an employee's entitlement to a bonus is governed by the terms of the employer's bonus plan.... An employer may agree to award a bonus to an employee, in which case the employee has a

Continued on next page

New York Court Reaffirms That Employee Bonuses Are Discretionary (continued)

> right to the bonus, or the bonus may be entirely up to the employer's discretion .... An employee has no enforceable right to compensation under a discretionary compensation or bonus plan.

Because the court found that J.P. Morgan's bonus/incentive plan "unambiguously" provided that it had "the discretionary authority to decide if and how much the employee is to be paid," the court concluded that "plaintiff's claims ... [were] not tenable." The court also held that "the fact that an employee receives bonuses throughout an employment relationship does not vitiate the employer's right to retain full discretion in determining the amount, if any, of an employee's bonus. . . . Nor does such a practice, by itself, create an implied contract."

The lesson employers can learn from this case is that if you decide to implement an employee bonus/incentive plan, make sure that you have a policy which clearly states that the decision about whether an employee receives a bonus is entirely at the employer's discretion. If you need assistance in drafting such a plan, please contact our office at 315-437-7600.

Did you know...?

Did you know that if an employee files a lawsuit against its employer for discrimination and loses, employers are generally **not** entitled attorneys' fees? Courts will only award attorneys' fees to employers where the lawsuit is "frivolous, unreasonable, or without foundation." This is an extremely difficult standard to meet. In contrast, federal anti-discrimination statutes (e.g., Title VII of the Civil Rights Act of 1964) permit an employee who is successful in his/her suit to be awarded attorneys' fees without any showing that the employer's defense was unreasonable or frivolous.

Light Duty, Workers' Comp and the FMLA: Finding Your Way Through The Legal Maze

It may surprise you to learn that there is no such thing as "workers' compensation leave" in New York State. If an employee is injured on-the-job, the employee may be entitled to wage replacement benefits (a/k/a Workers' Compensation benefits) if he/she is absent from work. However, the employer is not legally required to reinstate the employee to his/her original position after such a leave of absence. In other words, an employee who misses work because of an injury could legally be discharged; **that is, if the employer is NOT covered by the Family and Medical Leave Act (FMLA).**

If the employer IS covered by the FMLA (i.e., the employer has 50 or more workers in a 75-mile radius), then chances are the employee will be entitled to job-guaranteed leave to recuperate from the injury. An on-the-job injury which results in an employee going to the hospital typically creates a "serious health condition" qualifying the employee to take a leave of absence under the FMLA. In such a case, the employee would be entitled to receive workers' compensation benefits during that leave **and** the time off would count against the employee's 12-week, job-guaranteed leave entitlement under the FMLA. Since the employee will be receiving benefits, the FMLA treats this leave as paid leave. Accordingly, an employee cannot be required to substitute any of his/her other paid leaves (e.g., vacation, sick leave, etc.) for the otherwise unpaid FMLA leave.

Many times, when an employee is not physically able to return to his/her original position, the workers' compensation carrier will urge the employer to offer the injured employee "light duty" work. For our purposes, "light duty" work is a full-time alternative position with different duties than the employee's original position. This is designed to get the employee back to work quickly thereby reducing workers' compensation costs.

When an employee on FMLA leave is offered "light duty" work, the Federal FMLA and the State Workers' Compensation Law seem to work at cross purposes for the employee. Under the FMLA, the employee is legally entitled to refuse the work and continue on the leave for the remainder of his/her 12 weeks. However, under the State Workers' Compensation Law, such a refusal will likely disqualify the employee from receiving workers' compensation

Continued on next page

Light Duty, Workers' Comp and the FMLA: Finding Your Way Through The Legal Maze (continued)

benefits. In other words, the remainder of the employee's 12 weeks of FMLA leave will be unpaid. Since the leave is then treated as unpaid by the FMLA, an employer can then require the employee to substitute other paid leaves (e.g., vacation, sick leave, etc.) for the time off.

If the employee voluntarily accepts a light duty assignment while recovering from a serious health condition, the employee's right to restoration to the same or an equivalent position under the FMLA is available until 12 weeks have passed (during a 12-month period), including all FMLA leave taken and the period of light duty. For example, if an employee is out of work for 4 weeks and then accepts a light duty assignment, he/she will lose his/her right to be reinstated to his/her original or equivalent position after 8 weeks. If he/she is able to return to the original position within that remaining 8-week period, the law would require the employer to reinstate the employee to that job. The employee will also receive whatever pay and benefits come with the light duty assignment.

This should **NOT** be confused with a situation involving an employee who is transferred to another position while taking intermittent leave or leave on a reduced schedule under the FMLA. The FMLA permits an employer to transfer an employee who is taking intermittent leave or leave on a reduced schedule to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Unlike the light duty situation, the employee is entitled to the same pay and benefits in the alternative position that he/she received in the original position. In other words, the employer would have to pay the employee the same salary and benefits he/she was making before the transfer, regardless of what that alternative position would normally pay. In such cases, the employee is entitled to equivalent pay only until the FMLA leave is exhausted. For example, if an employee is taking 2 days off per week for treatment of cancer, and the employer transfers the employee to an alternative position, the employee will be entitled to equivalent pay and benefits until his/her 12-week entitlement is exhausted, or 30 weeks (2 days/week x 30 weeks = 60 days or 12 weeks).

If you have any questions about the interplay between light duty, workers' compensation and the FMLA, please contact Mike Dodd at 315-437-7600.

OSHA's New Regulations for "Whistleblower" Claims

Employers may not be aware that in late August, the Occupational Safety and Health Administration ("OSHA") published its final regulations for the handling of "whistleblower complaints" under the Corporate and Criminal Fraud Accountability Act of 2002, also known as the Sarbanes-Oxley Act.

The Sarbanes-Oxley Act is primarily designed to reform the practices of accounting firms and the financial reporting obligations of publicly-held companies, like Enron and Worldcom. However, the new law has other provisions that will likely have an impact on a much broader range of employers.

The Corporate Responsibility Act covers not only publicly-traded companies, but also their officers, employees, contractors, subcontractors and agents. This appears to make officers and employees individually liable for violations of the law, and may potentially cover companies who do business with publicly-traded companies.

Section 806 of the Act provides "whistleblower" protection for employees who provide information about actions they reasonably believe to be violations of securities law, Securities and Exchange Commission (SEC) rules, or other federal laws relating to fraud against shareholders.

Continued on next page

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OSHA's New Regulations for "Whistleblower" Claims (continued)

The report may be made to: a federal regulatory or law enforcement agency; any Member of Congress or any committee of Congress; or a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).

The new OSHA regulations establish procedures for handling of retaliation complaints made by employees. Included in the rule are procedures for submitting complaints, investigations and issuing findings and preliminary orders. The regulations also detail litigation procedures and how one can object to the findings and request a hearing.

OSHA also published a fact sheet (found at http://www.osha.gov/OshDoc/data_WhistleblowerFacts/whistleblowers_corporatefraud-factsheet.pdf) describing whistleblower protections for workers employed by publicly traded companies or their contractors, subcontractors or agents.

If you have any questions, please contact our office at 315-437-7600.

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.

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