Employment Law Matters

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A Newsletter from the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

Hot Topic

Same-Sex Marriage Law Presents Challenges for Employers Complying with Federal and State Laws

On June 24, 2011, the New York State Legislature passed -- and the Governor approved -- the Marriage Equality Act, authorizing same-sex marriage. The passage of this law extends certain rights to employees and places certain obligations on employers throughout the State. It also requires consideration of how certain federal laws may impact on those same rights and obligations.

The Marriage Equality Act provides that in all New York marriages each partner, regardless of sex, must be accorded the full rights and privileges of New York law. Specifically, the law provides:

> No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex. (Domestic Relations Law § 10-a.2.)

Prior to the passage of the Marriage Equality Act, New York had recognized same sex marriages for the application of certain benefits, provided that the marriage was legal in the location where it took place. In other words, if a same-sex couple married in Ontario, Canada, or in Massachusetts where same-sex marriages are legal, such marriage was considered a valid marriage for certain purposes in New York, *e.g.* health insurance. See *Martinez v. County of Monroe*, 50 A.D.3d 180 (4th Dept. 2008). The Marriage Equality Act now makes clear that any right or privilege created by New York law that is dependent upon marital status is applicable to all marital partners regardless of the sex of the spouse.

While benefits such as health insurance and New York state pension rights are now clearly available to a spouse, regardless of whether the spouse is the same or different sex, there are still significant differences in treatment when federal statutes are reviewed. For example, while a New York employer must offer health insurance on the same basis to same sex marriage partners as is offered to different sex marriage partners, the federal tax treatment accorded will differ.

This is because of a federal statute entitled the Defense of Marriage Act (DOMA) which explicitly defines marriage as between partners of different sexes. Even though state law may authorize or recognize same sex marriage for state based benefits, DOMA prevents recognition of such benefits when based upon the interpretation of a federal

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Attorney Spotlight

Christopher M. Militello is a graduate of St. Bonaventure University (B.A. 1990), Canisius College (M.S. 1992) and Syracuse University College of Law (J.D. 2000). While at Syracuse, Mr. Militello was the Notes & Comments Editor for the *Syracuse Law Review*. Prior to joining Ferrara, Fiorenza Law Firm, Mr. Militello was the Principal Law Clerk to a New York State Supreme Court Justice and a Support Magistrate for the 6th Judicial District. Mr. Militello has also served as a staff attorney for the Utica National Insurance Group. His current practice includes representing public and private employers in labor relations, construction, real property tax and general litigation matters.

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Hot Topic

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statute. Thus, the health insurance contribution made for the spousal coverage for employer-provided health insurance is not subject to federal tax if made on behalf of a different sex spouse, but it is taxable if made on behalf of a same sex spouse. For New York state tax purposes, on the other hand, payment of such benefit by an employer is not subject to taxation under either scenario.

Under a strict statutory interpretation, the benefits afforded by the Family Medical Leave Act (FMLA) are federally-mandated benefits. Therefore, a spouse under FMLA, as defined by DOMA, does not include a same sex marriage partner. Accordingly, any FMLA benefit granted based upon a spousal relation is not available to same-sex spouses. It is important to remember, however, that while FMLA benefits are not mandated for same-sex spouses, there is nothing precluding an employer from making such benefits available through policy or negotiations.

In implementing the benefits that must be accorded to participants in a same-sex marriage, employers must be careful to make sure that eligibility for such benefits is determined by the same criteria that are utilized when determining eligibility for benefits in a heterosexual marriage. If an employer has never required a participant in a heterosexual marriage to produce a marriage certificate as proof of entitlement to enroll a spouse in a health insurance plan, it would be discriminatory to now ask a same sex spouse to provide proof of marriage. An employer can request proof of marriage, but if it does, such proof must be required for both same sex and different sex marriages.

A number of employers also have either collective bargaining agreements or policies that provide certain benefits for domestic partners. Such benefits were often extended in recognition that some relationships warranted the extension of some benefits to same sex partners, and that such benefits were not otherwise available since same sex partners could not marry. With the passage of the Marriage Equality Act, employers may want to consider whether such benefits should be continued since the legal impediment to extending such benefits to same sex partners no longer exists.

Finally, an employer may want to review its collective bargaining agreements to make sure that any contractual benefits accorded to spouses are made available to same sex marriage partners as well. For example if a labor contract has a provision allowing the use of sick leave for the illness or death of a spouse, that same benefit must be provided to the same sex spouse.

An employer must implement the benefits provided under the Marriage Equality Act. Failure to do so could result in a charge of discrimination based on marital status or sexual orientation. Policies should be reviewed and training implemented to make sure that the mandates of the statute are fulfilled.

If you have any questions or need assistance in reviewing or revising your policies, please feel free to contact us.

Employee Invention Ownership

Think You Own Your Employee's Inventions? Think Again, Says U.S. Supreme Court

The U.S. Supreme Court recently issued a decision in a case which involved the question of whether an employee inventor or his employer owned the patent rights for inventions developed during the inventor's employment. (*See Stanford Univ. v. Roche Molecular Sys., Inc.*, No. 09-1159.) Despite the existence of an agreement to assign all right, title and interest in the inventions developed to the employer, the Court held that the language of the contract was not precise enough to prevent the inventor from actually assigning his rights to another company.

In 1985, a small research company called Cetus began to develop methods for quantifying blood-borne levels of human immunodeficiency virus (HIV), the virus that causes AIDS. A Nobel Prize winning technique developed at Cetus known as PCR was an integral part of these efforts. In 1988, Cetus began to collaborate with scientists at Stanford University.

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Dr. Mark Holodniy joined Stanford as a research fellow around that time. When he did so, he signed an agreement stating that he "agree[d] to assign" to Stanford his "right, title and interest in" inventions resulting from his employment there.

Holodniy's supervisor arranged for him to conduct research at Cetus to learn about PCR. As a condition of gaining access to Cetus, Holodniy was required to sign an agreement stating that he "will assign and do[es] hereby assign" to Cetus his "right, title and interest in . . . the ideas, inventions, and improvements" made "as a consequence of [his] access" to Cetus. Working with Cetus employees, Holodniy devised a PCR-based procedure for measuring the amount of HIV in a patient's blood.

Upon returning to Stanford, he and other Stanford employees tested the procedure. Stanford secured three patents to the measurement process. Roche Molecular Systems later acquired Cetus's PCR-related assets. After conducting clinical trials on the HIV quantification method developed at Cetus, Roche commercialized the procedure. Today, its HIV test kits are used worldwide. Stanford sued Roche claiming an infringement on its patent rights. The Supreme Court disagreed.

While the assignment language in both agreements signed by Dr. Holodniy seem almost identical, the Court focused on the difference between the contract language "agree to assign" and "will assign and do hereby assign" as being the deciding factor. The Court interpreted "agree to assign" as a promise to assign rights in the future, but held that "will assign and do hereby assign" was a present assignment of Holodniy's future rights. For that reason, the Court concluded that Holodniy's agreement with Cetus gave them (and later Roche), co-ownership of Holodniy's newly-developed procedure.

This case emphasizes the fact that employers must be extremely precise with their invention assignment language in their employment agreements. Should you need assistance in reviewing your current agreements or drafting new ones in light of this new decision, please feel free to contact us.

Unemployment Insurance News

Employers Paying the Interest on New York State's Unemployment Insurance Loan

The recent national recession led to record high levels of unemployed workers receiving unemployment insurance benefits. As a result, since 2009 New York State has borrowed over $3 billion from the federal Unemployment Insurance (UI) Trust Fund. The American Recovery and Reinvestment Act provided interest-free loans to New York and other states with insolvent Trust Funds during calendar years 2009 and 2010. However, Congress did not extend the interest-free loan provisions into 2011. Consequently, New York must pay approximately $95 million in interest on these loans to the federal government by September 30, 2011.

In order to pay the interest due for 2011 on these federal loans, New York State is assessing a charge on employers, called an Interest Assessment Surcharge (IAS). All employers who pay UI tax to the State are liable for the IAS. However, state and local government and not-for-profit employers who self-insure for UI purposes are not liable for the IAS.

New York's IAS rate for 2011 is 0.25%. Each employer's surcharge amount is determined by multiplying the total taxable wages in the most recently completed payroll year (October 1, 2009 through September 30, 2010) by the IAS rate of 0.25 percent. Therefore, the maximum amount that most employers will be assessed is $21.25 per employee.

Employers subject to the IAS should have already received a bill from New York State. Payment of the IAS was due by August 15, 2011.

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Employment Discrimination

Retaliation for Bringing Discrimination Claims Also Applies to Former Employees

A prospective employer for one of your former employees calls you for a reference. Is it ok to tell the prospective employer that your former employee sued you for discrimination?

Case law and current administrative guidelines suggests that disclosing that information under these circumstances could be a form of unlawful retaliation under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Equal Pay Act (EPA), Family Medical Leave Act (FMLA), or other federal laws with similarly-worded anti-retaliation provisions.

These laws prohibit retaliation by an employer because an individual has engaged in "protected activity." "Protected activity" includes filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the applicable statute.

In *Robinson v. Shell Oil Company*, the U.S. Supreme Court unanimously held that Title VII prohibits employers from retaliating against former employees as well as current employees for participating in any proceeding under Title VII or opposing any practice made unlawful by that Act. The plaintiff in *Robinson* alleged that his former employer gave him a negative job reference in retaliation for his having filed an Equal Employment Opportunity Commission (EEOC) charge against it. Some courts previously had held that former employees could not challenge retaliation that occurred after their employment had ended because Title VII, the ADEA, the EPA, etc. prohibit retaliation against "any employee." However, the Supreme Court stated that coverage of post-employment retaliation is more consistent with the intent of the anti-retaliation measures contained in the statute (i.e., to prevent a "chilling effect" on the willingness of individuals to speak out against employment discrimination or to participate in the EEOC's administrative process or other employment discrimination proceedings.) The Court's holding applies to each of the statutes enforced by the EEOC because of the similar language and common purpose of the anti-retaliation provisions.

Moreover, the EEOC, in its Compliance Manual, cites numerous examples of unlawful post-employment retaliation including "informing an individual's prospective employer about the individual's protected activity." While the fact that an employee has filed a claim or commenced an action under one of these laws is public information, having a practice of informing prospective employers of these facts would likely be considered unlawful by the EEOC.

If you have any questions regarding the foregoing, please feel free to contact us.