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News & Types: Employment, Labor & Benefits Update

Employment, Labor & Benefits Update - September 2016

9/8/2016

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Practices: Employment, Labor & Benefits

IMPORTANT DEVELOPMENTS IN ILLINOIS EMPLOYMENT, LABOR AND BENEFITS LAW
By Frank Del Barto

Illinois Employee Sick Leave Act Expands Usage of Sick Leave to Family Members

On August 19, 2016, Governor Rauner signed the Employee Sick Leave Act (the "Act") into law. The Act, which takes effect January 1, 2017, requires all Illinois employers that provide "personal sick leave benefits" to expand the permitted uses of such sick leave to extended family members.

In short, effective January 1, 2017, employees may use personal sick leave benefits for absences due to an illness, injury, or medical appointment of the employee's child, spouse, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or step-parent on the same terms upon which the employee is able to use sick leave benefits for his or her own illness or injury. Employers are permitted to limit the employee's use of personal sick leave benefits for these specified extended family members to an amount that would be accrued during 6 months at the employee's rate of entitlement.

Unlike its counterparts in other states, the Act does not require employers to provide "personal sick leave benefits." However, if sick leave benefits are provided, then the permitted usage must be expanded to cover the specified extended family members.

Employers may not deny an employee the right to use personal sick leave benefits for the specified family members, or discharge, threaten to discharge, demote, suspend, in any manner discriminate against an employee for using personal sick leave benefits, attempting to exercise the right to use personal sick leave benefits, filing a complaint with the Illinois Department of Labor alleging violations of the Act, cooperating in an investigation or prosecution of an alleged violation of the Act, or opposing any policy or practice or act that is prohibited by the Act.

Illinois Prohibits Non-Compete Agreements with Low-Wage Employees

Recently, Governor Rauner signed into law the Illinois Freedom to Work Act (the "Act'). Effective January 1, 2017, Illinois employers are prohibited from entering into "covenants not to compete" with "low-wage employees" of the employer. If a covenant not to compete is entered into in violation of the Act, it will be considered illegal and void.

In accordance with the Act, a "covenant not to compete" means an agreement: (1) between an employer and a low-wage employee that restricts the employee from performing (a) any work for another employer for a specified period of time; (b) any work in a specified geographical area; or (c) work for another employer that is similar to such low-wage employee's work for the employer; and (2) that is entered into after January 1, 2017. A "low-wage employee" means an employee who earns the greater of (1) the hourly rate equal to the minimum wage required by applicable federal ($7.25 per hour), state ($8.25 per hour) or local ($10.50 per hour Chicago Minimum Wage Ordinance) minimum wage law, or (2) $13.00 per hour.

Apparently, 403(b) Plans Are Not Install and Forget Plans Either

On Thursday, August 4, 2016, Frank Del Barto conducted a webinar on the current 401(k) excessive fee litigation environment. The webinar, which was intended for executives, H.R. and benefit professionals who have 401(k) plan responsibilities was very well attended both locally and nationally. Frank's purpose was to help clients and friends of the Firm understand their fiduciary duties and provide tangible steps to help reduce the risk of 401(k) litigation via the use of plan committees, investment policy statements, outside investment advisors, fiduciary liability insurance, and solid documentation of all plan-related actions and decisions.

One of Frank's webinar themes was that "401(k) plans are not install and forget plans." According to Frank, too many 401(k) plan sponsors have never benchmarked their investment mix, fees and/or plan expenses. Because 401(k) plans do not have annual rate increases or open enrollment periods similar to group medical plans, Frank noted that they have simply been treated "as install and forget" plans. Meanwhile, unchecked administrative and investment fees and expenses are eating-up employee retirement savings.

Before August ended, several well-known universities quickly learned that their 403(b) retirement plans are not "install and forget" plans either, as the plans also came under attack for various fiduciary breaches. In August alone, Yale University, New York University, Duke University, Vanderbilt University, Johns Hopkins University, Northwestern University, Columbia University, University of Southern California, Emory University, and Cornell University found themselves subject to a breach of fiduciary duty lawsuit in a federal district court.

The various lawsuits involved allegations that the plan fiduciaries had breached their duty to plan participants by using multiple record-keepers, offering too many fund choices (over 400 in one case), using an asset-based fee model versus a per participant fee model, utilizing retail class mutual funds versus institutional class mutual funds, failing to utilize plan size in negotiating fees, and failing to monitor fiduciaries.

Frank recommends that sponsors of 401(k) and 403(b) plans require their plan committees to obtain copies of two or three of these 403(b) class action complaints and two or three of the 401(k) class complaints and utilize them as educational and fiduciary risk reduction tools. In short, how would your company answer the allegations in these complaints? Are you prepared? Although the allegations may not be the same in these complaints as in a complaint later filed against a plan sponsor, plan committees, by utilizing these complaints, will be better prepared to spot potential issues within their own plans. Frank concludes that it is only matter of time before the 100 to 5,000 life participant plan becomes the main target of these fee litigation lawsuits as more and more plaintiff attorneys understand the potential liability.

THE NINTH CIRCUIT SPEAKS: CONCERTED ACTION WAIVER IN EMPLOYMENT AGREEMENT IS UNENFORCEABLE UNDER NLRA

By Jiwon Juliana Yhee

The Ninth Circuit recently decided where it would stand in the circuit split regarding the enforceability of concerted action waivers. In Morris v. Ernst & Young, LLP, No. 13-16599 (9th Cir. Aug. 22, 2016), the defendant, Ernst & Young, required its employees to sign agreements that contained a "concerted action waiver" as a condition of their employment. The waiver required employees to pursue legal claims against the Ernst & Young exclusively through arbitration and only as individuals in "separate proceedings." However, despite this provision, plaintiff employees brought a class and collective action against Ernst & Young in a federal court, and Ernst & Young moved to compel arbitration pursuant to the agreements signed by the plaintiffs. The district court ordered the plaintiffs to proceed to individual arbitration and dismissed the case, but the Ninth Circuit reversed and remanded the decision of the district court.

On appeal before the Ninth Circuit, the plaintiffs argued that Ernst & Young's concerted action waiver violated, amongst other federal statutes, the National Labor Relations Act ("NLRA"). The plaintiffs relied on determinations by the National Labor Relations Board ("NLRB") that concerted action waivers violate the NLRA. The Ninth Circuit agreed with the plaintiffs, stating that the NLRA protects concerted activity, which is the right of employees to act together with respect to work-related legal claims, and that Ernst & Young's concerted action waiver, by precluding employees from filing joint, class, or collective claims against their employer, interfered with that right. Ernst & Young's concerted action waiver was therefore illegal and unenforceable.

Ernst & Young argued that the Federal Arbitration Act ("FAA") trumped the NLRA and allowed it to enforce its concerted action waiver. The Ninth Circuit disagreed. First, the Court held that NLRA's ban on concerted action waivers did not conflict with the FAA. The Court stated that its decision in finding the concerted action waiver unenforceable had nothing to do with disfavoring arbitration as a forum for resolving disputes and everything to do with the simple fact that Ernst & Young's concerted action waiver, which forced employees to waive a substantive federal right under the NLRA, was illegal. In fact, Ernst & Young's concerted action waiver would still have violated the NLRA even if it had required employees to resolve all work-related disputes in court, but in separate proceedings. Second, the Court observed that the FAA did not mandate the enforcement of contract terms that waive substantive federal rights, such as the rights under the NLRA. To the contrary, the Court held that FAA's "saving" clause, which provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract," causes the FAA's enforcement mandate to yield where enforcing an arbitration agreement would implicate a substantive federal right.

In deciding Morris, the Ninth Circuit sided with the Seventh Circuit in striking down concerted or class action waivers as illegal. Prior to the Ninth Circuit's decision, the Seventh Circuit was the first court of appeals to strike down class waivers in Lewis v. Epic Systems, but, with the Second, Fifth, and the Eighth Circuits upholding class waivers and at least one district court issuing an opinion harshly criticizing the Seventh Circuit's decision, employers could potentially argue that the Seventh Circuit decision was an outlier. However,

after the Ninth Circuit's decision in Morris, the argument for enforcing class waivers has just become more difficult than before as the Ninth Circuit decision made it clear that there is a circuit split among the federal appeals courts on this issue. Hopefully, U.S. Supreme Court will be inclined to rule on the dispute now that the federal courts of appeal are divided.

In the meantime, employers in California should review and adjust their employment agreements in light of the Morris ruling. Additionally, employers operating across multiple jurisdictions would find it prudent to consider developing specific policies/practices regarding concerted/class action waivers based on location to reflect the relevant jurisdiction's views on enforcing concerted/class action waivers.

For more information about this or any other employment law topic, please contact Frank Del Barto, Chair of the Employment, Labor & Benefits Group, at 847.734.8811 or via email at fdelbarto@masudafunai.com.