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Fenwick Employment Brief

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FEATURED ARTICLES

Fourth Circuit Ruling Requiring Court or DOL Approval for FMLA Releases Under Attack

The decision by a 3-judge panel of the Fourth Circuit Court of Appeals that FMLA releases must be approved by a court or the federal Department of Labor (*Taylor v. Progress Energy* - http://www.fenwick.com/docstore/publications/Employment/EB_09-26-05.pdf) is under attack. In July, the Fourth Circuit ruled that an employee, terminated in connection with a reduction in force, signed an invalid release of FMLA claims because neither the DOL nor a court approved the release. As a result, the Fourth Circuit allowed the former employee to pursue discrimination and retaliation claims against the employer.

Progress Energy sought *en banc* review from the full Fourth Circuit panel. And, its request has been joined by the DOL, which argued in an amicus brief that FMLA releases do not require such approval. Even if *en banc* review is not granted, the DOL's "on the record" position could very well be used by other courts as a basis not to follow the Taylor decision.

***Weyerhaeuser* Case Stirs Debate Over OWBPA Release Table**

Business and legal groups continue to debate the impact of the September 2005 Tenth Circuit Court of Appeals decision in *Kruchowski v. Weyerhaeuser*. The court held that releases signed by laid off Weyerhaeuser employees were not enforceable as to federal age discrimination claims because the releases did not identify **why** certain employees were laid off (*e.g.* poor performance).

The Older Worker Benefits Protection Act ("OWBPA") provides that, when employers terminate over 40 workers in connection with a reduction in force, and seek a release from those workers as part of an exit incentive or other termination program, the employer must disclose certain details about the program, including who is and is not "eligible." The dispute in *Kruchowski* centered around the meaning of "eligible." Weyerhaeuser argued that it required employers to merely identify those employees who are eligible for severance and/or other consideration in exchange for a release. The plaintiff argued that the term requires employers to identify the reasons why the employer selected certain employees for layoff.

The Tenth Circuit agreed with the plaintiff's interpretation. The court further inferred that employers can satisfy this obligation by identifying broad factors (*e.g.* skill sets, behavior, performance) used by the employer to select employees for layoff. However, the decision is unclear as to whether employers must identify in the OWBPA disclosure a specific reason for **each** laid off employee, or whether they can identify the factors in general terms.

We strongly encourage employers to consult with counsel about their options with respect to compliance with this decision, and the wording of their OWBPA disclosures.

NEWS BITES

Senate Committee Approves Increase in H-1B Visas

The Senate Judiciary Committee approved legislation that would increase by 30,000 the number of H-1B Visas available to U.S. employers over the next five fiscal years.

OFCCP Finalizes Internet Applicant Definition

The OFCCP recently finalized a 4-part test to define an Internet applicant for purposes of gender/race/ethnicity data gathering obligations imposed on federal contractors. An Internet Applicant is one who: (1) expresses interest in employment through the Internet or related electronic technologies; (2) is considered for a particular position; (3) possesses the basic qualifications for the position; and, (4) at no point in the selection process, prior to receiving an offer, removes himself or herself from further consideration. The OFCCP will begin enforcing this definition in February 2006.

Direct Deposit of Final Wages in 2006

Reminder: In 2006, California employers may pay final wages via direct deposit to employees' previously authorized accounts. The new law does not change employers' obligations to pay all final wages upon termination and to otherwise comply with Labor Code statutes and regulations. But it will minimize the burden of printing and distributing final payroll final checks.

San Diego Jury Hits Pharmco with Nearly $8 Million Sexual Harassment/Retaliation Verdict

A San Diego jury concluded that Acadia Pharmaceuticals and two of its male executives sexually harassed a female scientist and terminated her employment after she complained of the harassment, and awarded her nearly $8 million (half attributable to punitive damages). The scientist successfully argued that both an executive and HR manager discouraged her from complaining formally about the harassment, and did not conduct a proper investigation of the apparent misconduct.

State Labor Law Protections for Illegal Aliens in California Employers are not Preempted by Federal Immigration Laws

The federal Immigration Reform and Control Act, which makes it unlawful to hire illegal aliens, does not preempt or render invalid California's labor law protections (including workers comp protections) for illegal aliens, according to a recent California court of appeals decision (*Farmers Bros. Coffee v. WCAB & Ruiz*, Oct. 17, 2005)