FENWICK & WEST LLP

Weekly Employment Brief

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An Employer Must Specify The Manner In Which It Calculates Family Leave

An employer must specify the manner in which it calculates the twelve weeks of family leave in order to avoid the problems experienced by the employer in *Bachelder v. America West Airlines*. There, the Ninth Circuit held that the employer's handbook which stated that employees are entitled to "up to twelve calendar weeks of unpaid leave within any twelve month period," did not adequately specify that the employer was utilizing the rolling method for calculating an employee's leave eligibility. Under the Family and Medical Leave Act, an employee is entitled to twelve weeks of unpaid leave during any twelve month period for illness, to care for family members that are ill, or to care for newly born or adopted children. There are four permissible ways in which an employer can specify the manner in which it calculates the twelve weeks of leave. The employer can use: (1) the calendar year; (2) the fiscal year or any other fixed twelve month period; (3) the twelve month period starting when an employee begins FMLA leave; or (4) a rolling twelve month period measured backwards from the date an employee uses FMLA leave (for example, on February 3, an employee that began his first FMLA leave on February 1 has used three days of leave based on a year rolling backwards to the previous February 3). Because the court found America West's handbook unclear, it applied the calendar method as the most beneficial to the employee. This case stresses the importance of clearly outlining FMLA and other leave policies in employee handbooks and elsewhere.

Employers Can Limit Time Employees Have To Bring Suits After Leaving Company

Employers can include, in employment contracts, the time that employees have to bring breach of contract claims after leaving the company. However, employers cannot include provisions that require employees to give the company notice before filing a lawsuit. In *Soltani v. Western & Southern Life Insurance Company*, the Ninth Circuit held that a provision allowing employees only six months to bring claims against the employer for breach of contract after leaving the company was valid. Employers may wish to consider including similar provisions to help prevent lawsuits for breach of contract arising several years after the employee has departed the company. However, such shortened time limits to bring suit are not enforceable with respect to statutory claims such as employment discrimination.

Will Employment Contracts Containing Arbitration Agreements Remain Enforceable?

The Supreme Court, in Circuit City Stores, Inc. v. Adams, held that employment contracts containing arbitration agreements are enforceable under the Federal Arbitration Act. The Court stated that Section 1 of the FAA excluding certain contracts from coverage applies only to transportation workers. United States Representative Dennis J. Kucinich has introduced a bill that would exclude all employment contracts from the FAA. If passed, the bill would render any employment contract requiring arbitration of claims arising under the Constitution or laws of the United States unenforceable, except in cases where both parties

voluntarily submit to arbitration after the claims arise. Employers should monitor the success of "The Preservation of Civil Rights Protections Act of 2001."

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