JONES WALKER

E*ZINES
October 2001 Vol. 10

Labor Relations and Employment
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WHISTLEBLOWERS, RETALIATION, AND "EMPLOYMENT TORTS"

By Sidney F. Lewis IV and H. Mark Adams,
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In our June/July issue, we began a two-part series on the major federal and state laws that impact everyday workplace decisions. Due to the events of September 11th and America's new war on terrorism, we interrupted the series in our August/September issue to bring you a timely summary of federal and state laws dealing with military leave and the expected call-up of military reservists and the National Guard. This month, we resume and complete our "everyday" employment law series with summaries of the major issues arising under the Family and Medical Leave Act (FMLA), Fair Credit Reporting Act (FCRA) (yes, it applies to you), National Labor Relations Act (NLRA), workers' compensation, and state whistleblower protection laws.

Family and Medical Leave Act

- If you have 50 or more employees, you're covered.

- If you're covered, your eligible employees are entitled to 12 weeks of FMLA leave in a 12-month period (your choice—calendar year, fiscal year, or 12-month rolling year) for any of the following: their own serious health condition, an immediate family member's serious health condition, birth of a child, adoption, or placement of a foster child.

- To be eligible, your employees must have been employed for 12 months and worked at least 1,250 hours prior to taking leave (exempt employees are presumed to meet the 1,250-hour requirement). They also must work at a site where you have 50 or more employees within 75 miles.

- Employees do not have to ask for FMLA leave by name. It's up to you to determine the reason for your employee's absence and, if covered, to designate the leave as FMLA in writing to your employee.

- You can't count FMLA leave in deciding whether to discipline an employee for excessive absenteeism. You also can't count FMLA leave against an employee in an attendance bonus program unless you discount all absences, regardless of the reason.

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Fair Credit Reporting Act

- If you do background checks or seek information about applicants or employees from investigative agencies, this law applies.
- If you're covered, the FCRA requires you to inform employees and applicants in writing and obtain their written authorization on a special form for the procurement of an investigative report. A release contained in your employment application won't cut it.
- If the report play any part in your decision to reject an applicant or to take adverse action against an employee, you must give the applicant/employee specific written notice concerning the reason(s) for your decision and a summary of the applicant/employee's FCRA rights.

National Labor Relations Act

- Employees are protected from discrimination or retaliation for engaging in "protected concerted activities."
- The trickiest part of this law is the term "protected concerted activity." The term doesn't just cover union organizing.
- When two or more employees (or one employee acting on behalf of others) refuse to work because of, or even complain about, terms and conditions of employment, their actions are "protected." That means you can't fire them, take disciplinary action against them, or permanently replace them if they go on "strike."

Workers' Compensation Retaliation Laws

- Your employees are protected against retaliation for filing or pursuing workers' compensation claims.
- Timing is everything.
- So if you plan to terminate an employee who recently suffered an on-the-job injury or filed a workers' compensation claim, make sure your documentation is in line, your reasoning is solid, and your past practice in similar circumstances is consistent.

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Whistleblower Protection Laws

- So-called "whistleblower" claims have become popular in recent years.
- Employees who complain about environmental or safety violations or who accuse you of or threaten to expose you for violating any federal or state law are protected against adverse treatment.

- Again, timing is everything.

So when you're about to terminate an employee, it's prudent to check his recent history to make sure there's nothing that may give rise to a colorful claim of whistleblower retaliation.

RETIREMENT PLAN AMENDMENT DEADLINES

By Timothy P. Brechtel, Employee Benefits, ERISA & Executive Compensation Associate and Edward F. Martin, Employee Benefits, ERISA & Executive Compensation Partner

This year is the deadline for qualified retirement plans to comply with the so-called "GUST" amendments. To ensure continued qualification, individually designed plans based on the calendar year should be amended *and* submitted to the IRS no later than December 31, 2001. Fiscal-year plans should be submitted to the IRS by the end of the plan year that starts in the year 2001.

If you use a prototype plan (including a master or volume submitter specimen plan), instead of an individually designed plan, you can comply by adopting the updated prototype plan before the end of the current plan year. Or, by the end of the current plan year, you can execute a written certification of intent to amend or restate your plan by adopting a GUST-approved prototype plan, *provided* you actually adopt the prototype plan within 12 months after a GUST determination letter on your plan is issued by the IRS. If you have a nonstandardized prototype plan, you should apply for a determination letter from the IRS within the same 12-month period.

Even as the GUST remedial amendment period ends, the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) presents the prospect of another rounds of require and permitted amendments. The changes under EGTRRA are not effective until next year or thereafter; therefore, plan amendments can wait until after this year. However, the "tax relief" portion

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of EGTRRA's name is real: the Act makes many beneficial changes, especially by substantially increasing some important limits. You should consider *now* whether to adopt amendments making use of these opportunities, effective starting at the beginning of next year. The IRS has issued sample amendments for EGTRRA that can be used for this purpose (IRS Notice 2001-57).
If you haven't already done so, now is the time to consult with your plan advisors regarding both the GUST amendments required for 2001 and the EGTRRA opportunities that open up starting next year.

DISASTER RELIEF COLLECTIONS AND YOUR NO-SOLICIATION RULE

By Clyde H. Jacob and H. Mark Adams,
Labor Relations and Employment Partners

Many of you no doubt have authorized employees to solicit money from other employees to aid the victims of the New York and Washington, D.C. terrorist attacks. Have you violated your no-solicitation policy and put your company at risk for having to permit employees to pass out union cards and literature on the job? The NLRB's General Counsel has just issued guidance, stating that you can allow up to three charitable solicitations a year and still enforce your no-solicitation/distribution policy against union solicitations by employees. While not legally binding, the General Counsel's guidance at least indicates how the NLRB currently interprets the law concerning solicitation policies.

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact::

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