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EMPLOYMENT, LABOR & BENEFITS QUARTERLY

Foster Swift Employment, Labor & Benefits Group

WHAT'S INSIDE:

NEWS:

Foster Swift attorney Amanda Garcia-Williams was recently named Secretary of the Board of Directors for the Big Brothers Big Sisters Michigan Capital Region.

The Plan Administrator's Selection of Investment Options is a Fiduciary Concern

by: Sherry A. Stein

One of the ongoing obligations of the Plan Administrator (usually the employer) is to select the investment options that will be offered under a qualified retirement plan. Many plans, in particular 401(k) plans, allow the participants to direct the investment of the amounts allocated to their respective accounts. Plan Administrators often believe that by allowing participants to direct the investment of their account balances, the Plan Administrator is relieved from fiduciary liability under ERISA Sec. 404(c), because the participant is making the investment choice. The U.S. Department of Labor (DOL), however, has taken the position that the Plan Administrator's selection of the investment funds is not protected by ERISA Sec. 404(c). Several Circuit Courts have rejected the DOL's position, concluding that a fiduciary that has committed a breach of its duty in the selection of an investment option may not be held liable because the loss resulted from the participant's decision to select the option.

Recently, the Seventh Circuit followed the DOL's position and denied a Plan Administrator protection under ERISA Sec. 404(c) for its selection of investment options offered to the plan participants. The Court held that the selection of plan investment options and the decision to continue offering a particular investment option are fiduciary duties that are not protected by ERISA Sec. 404(c). The Court noted that the purpose of ERISA Sec. 404(c) is to relieve fiduciaries of liability for decisions made where the fiduciary has no control, such as the participant choosing how to allocate his account balance among the investment options offered by the Plan Administrator. The Court continued to state that the selection of investment options is not within the participant's control. This selection is a decision of the Plan Administrator and may subject the fiduciary to a breach of its duty if the investment options offered result in a loss to the participant.

While Michigan's Sixth Circuit has not ruled on this issue, it would be prudent for a Plan Administrator to carefully exercise its fiduciary duty when selecting investment options for a participant directed qualified retirement plan.

If you have any questions, please contact Sherry Stein at 517.371.8269.

$4.3 Million Civil Monetary Penalty Imposed for HIPAA Privacy Violation

by: Johanna M. Novak

The U.S. Department of Health and Human Services' Office for Civil Rights (OCR) recently imposed a civil monetary penalty of just over $4.3 million against Cignet Health of Prince George's County in Maryland (Cignet). Forty-one patients had filed complaints with OCR after being denied access to their medical records by Cignet. OCR investigated the matter and determined that Cignet had indeed violated the patients' rights by denying them access to their medical records. The penalty for these violations was $1.3 million.

During the investigation, Cignet failed to respond to repeated informal demands from OCR to produce the records at issue. Cignet also failed to produce the records in response to an OCR subpoena. OCR eventually filed a petition to enforce its subpoena in federal

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court and obtained a default judgment against Cignet. Cignet then produced the records, but the damage had already been done. The OCR determined that Cignet's failure to cooperate was due to willful neglect and fined Cignet an additional $3 million.

This was the first civil monetary penalty issued by OCR for a violation of the HIPAA privacy rule. Mere weeks after this penalty was issued, Massachusetts General Hospital (Mass General) signed a Resolution Agreement with OCR pursuant to which Mass General agreed to pay the federal government $1 million to settle potential HIPAA violations. These potential violations stemmed from the loss of protected health information when an employee, who was commuting to work, left 192 patient records that were never recovered on a train.

The government is clearly increasing its enforcement of the HIPAA privacy and security rules. Those organizations that are required to comply with HIPAA should review their policies and procedures to ensure that patient information is being adequately protected.

If you would like assistance in developing or updating your HIPAA policies and procedures, please contact Johanna Novak at 517.371.8231.

Employee of Private Company Cannot Be a "Public Body" Pursuant to Whistleblowers' Protection Act

by: Timothy P. Burkhard

In a recent unpublished decision, the Michigan Court of Appeals upheld a decision of a trial court which found that a plaintiff's claim that she was demoted in violation of the Whisteblowers' Protection Act (WPA) failed because she did not make any complaints or reports to a government agency, nor did she tell her employer she was about to make a complaint to a government agency.

The WPA makes it illegal for an employer to discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee reports or is about to report a violation or a suspected violation of a law or regulation to a public body. (See MCL 15.362.) Plaintiff claimed that her demotion, that ultimately led her to resign, was in retaliation for her reporting her concerns about data validation for information which ultimately was provided to the Michigan Department of Environmental Quality.

In order to succeed on her WPA claim, plaintiff was required to prove she reported a violation or suspected a violation of a law or regulation to a public body. Although admitting she never complained to a government agency or told anyone at her employer she was about to complain to a government agency, plaintiff alleged that her reports within her company to an individual she described as her employer's "compliance officer" were tantamount to reporting to a "public body" under the WPA. The trial court granted judgment in favor of the employer, and the Court of Appeals affirmed the trial court's decision.

In affirming the trial court's decision, the Court of Appeals expressly noted that "[t]here is no provision within the plain language of the statutory definition of 'public body' that includes employees of private companies." Although this decision is not a major surprise given the plain language of the statute, it is important that the Court of Appeals was unwilling to allow the expansive interpretation advanced by the plaintiff. If such an expansive interpretation had been allowed, it would have opened the door for employees to advance WPA claims for internal complaints.

If you have any questions, please contact Timothy Burkhard at 248.785.4729.

IRS Guidance on Terminating 403(b) Plans

by: Stephen I. Jurmu

Many governmental and nongovernmental nonprofit employers maintain retirement plans that are described as "403(b) Plans." The legal compliance burdens associated with maintaining a 403(b) Plan have grown dramatically in recent years as the Internal Revenue Service (the "IRS") has increased its level of 403(b) Plan scrutiny. This growing compliance burden has prompted some 403(b) Plan sponsors to evaluate whether to terminate their 403(b) Plans. Initial IRS guidance left many questions unanswered concerning the steps that an employer must take to properly terminate a 403(b) Plan.

The IRS has recently published additional guidance (in the form of Revenue Ruling 2011-7) regarding the steps that an employer must take to properly terminate a 403(b) Plan. The guidance applies to both governmental 403(b) Plans (which are exempt from ERISA) and non-governmental nonprofit 403(b) Plans (which are subject to ERISA). It also discusses both 403(b)(1) Plans (which are funded with annuity contracts) and 403(b)(7) Plans (which are funded with mutual funds through custodial accounts). This new guidance will provide clearer guidelines for an employer that wants to consider terminating its 403(b) Plan now.

If you have any questions regarding these new rules, please contact Stephen Jurmu at 517.371.8260.

Reconsider Use of Credit Histories to Screen Job Applicants

by: Sheralee S. Hurwitz

Most employers now recognize that once an employee is hired, there are many factors to consider before terminating even an at-will employee. The decision to terminate employment is rarely risk-free. Increasingly, hiring managers have returned to various applicant screening devices at their disposal to select applicants they believe will result in the hire of productive, successful employees. Not all screening tools, however, are appropriate in all circumstances or for all employers.

In late December, the EEOC issued a news release confirming that it has filed a nationwide suit against Kaplan Higher Education Corporation. The EEOC claims that Kaplan's use of applicant credit history is unlawfully discriminatory based on race. The key allegation states:

> Since at least 2008, Kaplan Higher Education has rejected job applicants based on their credit history. This practice has an unlawful discriminatory impact because of race and is neither job-related nor justified by business necessity.

According to the EEOC, the company used credit history checks as a selection tool in making hiring decisions in a way that had a significant *disparate impact* on black job applicants. Rejecting applicants on the basis of financial criteria such as poor credit ratings has been found in the past to disproportionately exclude minority groups.

Financial problems may be used as a basis to argue that an applicant is financially irresponsible, reflecting poorly on character or reliability. But, financial problems may be caused by circumstances beyond the applicant's control, like uninsured, unexpected medical bills. Because the reason for a poor credit check result may not have a direct correlation to the employee's skills or reliability, rejecting every applicant with a poor credit history, while appearing to be "objective" may in fact (1) disproportionately affect certain groups (2) for reasons that are not directly related to the particular job for which they applied.

Whether the EEOC's current case will be proven remains to be seen, but the EEOC's warning from the December press release is clear: "Employers need to be mindful that any hiring practice be job-related and not screen out groups of people, even if it does so unintentionally." Employers should be aware that using credit checks as a screening tool may increase the risk of a discrimination claim. Therefore, employers must be able to show that hiring criteria used to evaluate and screen applicants must be necessary for the job in question. For example, credit checks may be consistent with business necessity for bank employees, in general, but may not be relevant screening tools for every employee of a medical practice or manufacturing operation. Given the EEOC's recent action, employers are well-advised to carefully consider their use of credit history checks as a screening tool, whether for an individual position or as a baseline screening tool for all applicants for employment.

If you have any questions, please contact Sheralee Hurwitz at 616.726.2239.

Beneficiary Designations Under Qualified Plans

by: Stephen J. Lowney

Qualified retirement plans, such as 401(k) Plans, ESOPs, Profit Sharing Plans and other retirement plans ("Plans"), virtually always provide a benefit payable to a beneficiary following the participant's death. Accordingly, the designation of beneficiaries under such Plans, both a primary beneficiary and a secondary beneficiary, is an important part of a participant's retirement planning and estate planning. The rules relating to beneficiary designations for Plans are often complicated and confusing. Employers sponsoring such Plans should ensure that each participant has a current executed beneficiary form on file.

A fundamental question for any Plan's beneficiary designation form relates to whether spousal consent must be obtained for a participant to name a nonspouse beneficiary. If either the Plan or the law requires spousal consent to name a nonspouse beneficiary and spouse consent is not obtained or is defective, a Plan Administrator must carefully determine the correct payee to avoid paying the death benefit twice, once to the beneficiary pursuant to the beneficiary designation and again to the spouse pursuant to applicable law. Many plans have an exception to the spouse consent rules, but often the spouse consent rules are imposed by the Plan even if the law does not require spouse consent to a nonspouse beneficiary.

There have been many changes in federal pension law that have an impact on a participant's beneficiary designation form. Beneficiary forms drafted even a few years ago may be outdated and not compliant with current law. Accordingly, a Plan Administrator should, at a minimum, confirm that a beneficiary designation form is in fact on file for each participant. The Plan Administrator should also confirm whether spouse consent is necessary in any event where the primary beneficiary is someone other than the participant's spouse. In addition, a notary signature and other legal requirements may be necessary in order to create a valid beneficiary designation.

If no beneficiary designation is on file, the Plan document usually contains a default provision. The Plan's default provision may be contrary to a participant's wishes. Plan Administrators have found themselves having to pay a beneficiary pursuant to the Plan's default provisions notwithstanding the assumption of the parties that a designated beneficiary has been properly named.

Careful review of the beneficiary designation forms on file with the Plan could eliminate significant problems in the future.

If you have questions regarding beneficiary designations in qualified retirement plans, please contact Stephen Lowney at 517.371.8272.

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Supervisors' Discriminatory Animus Equals Liability under USERRA

by: Sheralee S. Hurwitz

The U.S. Supreme Court's March 1, 2011 decision in *Staub v Proctor Hospital*, 562 U.S. ____ (2011) reminds us that job protections for military personnel are not limited to leave issues or re-employment rights under the Uniformed Services Employment and Reemployment Rights Act of 1994. USERRA is similar to Title VII, in that it prohibits discrimination in employment decisions generally against members of the military based on their status or service obligations.

Staub was an angiography technician and a member of the United States Army Reserve. Staub's status required him to attend drill one weekend per month and to train full time for two to three weeks per year. Staub was fired in April 2004. He had been disciplined for violation of a work rule in January 2004, and was terminated for violating the terms of the "Corrective Action" warning.

Staub claimed that the "Corrective Action" was based on a non-existent work rule, and that he did not violate the "Corrective Action." Staub also claimed that his immediate supervisor ("J.M."), *and* her supervisor ("M.K."), were hostile to Staub's military obligations. Unfortunately for the employer, the record was replete with remarks confirming both of Staub's supervisors' negativity about his military duties, and their perception that these military reserve duties detrimentally affected the departmental work schedule.

The court considered various arguments that the anti-military animus was not a "motivating factor" in the decision to terminate Staub's employment and so no unlawful discrimination occurred:

- Another senior manager ("L.B.") in the chain of command made the ultimate decision to terminate, and she had no "discriminatory animus" towards military personnel.
- L.B. "investigated" Staub's complaint that his discharge was based on discriminatory animus from the lower level supervisors, and rejected the complaint.
- Any "animus" by the immediate supervisors was "superseded" in the process by the senior manager's (L.B.'s) ultimate decision, and so their unlawful military animus was not the "proximate cause" of Staub's termination and "injury."

The Supreme Court ruled that "if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA." In this case, the senior manager (L.B.) was necessarily relying on information and recommendations of the lower level supervisors in making the termination decision. The pervasive animus could not be clearly separated from the termination decision, and the employer ultimately was held responsible for the supervisors' discriminatory animus. This Supreme Court decision confirms that inadequate management knowledge of employment law obligations, and inadequate enforcement of them, can prove very costly.

If you have any questions, please contact Sheralee Hurwitz at 616.726.2239.