Workplace Notes

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Certain Connecticut Employees Now Entitled to Military Caregiver Leave Under Connecticut's Family Medical Leave Act

Effective May 21, 2009, Connecticut employers subject to Connecticut's Family Medical Leave Act are now required to offer military caregiver leave to all eligible employees under a new law approved by the General Assembly and signed by Governor M. Jodi Rell. Employers who are already subject to the federal FMLA provisions may recognize some of the provisions, though there are some differences between state and federal law.

Under the new Connecticut law, Military Caregiver Leave is a one time leave for any eligible employee to care for an immediate family member or next of kin who is a current member of the armed forces (i.e. the Army, Navy, Marine Corps, Coast Guard, Air Force, National Guard or the Reserves), sustained an injury or illness in the line of duty and either (1) is undergoing medical treatment, recuperation, or therapy; (2) is an outpatient; or (3) is on the temporary disability retired list for their serious injury or illness.

Any employee who is a spouse, son or daughter, parent or next of kin of a service member is permitted to take military caregiver leave. "Next of kin" includes siblings, grandparents, aunts or uncles, cousins or family members who have been granted legal custody of the service member.

Under the private sector law, an employee is entitled to 26 weeks of leave within a 12-month period. The employer can start counting the 12-month period on the first day the employee takes leave. State employees are entitled to 26 weeks of leave within a more generous two-year period.

An employee taking military caregiver leave is for all intents and purposes treated like any employee taking unpaid medical leave under Connecticut's Family Medical Leave Act. Therefore, in the private sector, an employer can request medical certification from the service member's health care provider. Additionally, husbands and wives who work for the same employer are only entitled to a ***total*** of 26 weeks in a 12-month period. Finally, as is always the case, the employee must be reinstated to his or her original position or an equivalent position after returning from leave.

Employers should immediately incorporate military caregiver leave in their FMLA policies and update their forms accordingly to ensure compliance.

For more information, please contact Christine Collyer at 860-424-4329 or by email at ccollyer@pullcom.com.

A New Wrinkle in Dress Codes

Dress code issues have certainly evolved since the days when the controversy was whether women could be required to wear dresses instead of pants or pant suits. Today's issues involving body piercing and tattoos are for the most part settled in a common-sense way. Employers may impose a

Inside this issue: New Rules for Federal Government Contractors and Stimulus Fund Recipients – page 2

professional appearance standard on employees who deal with the public, so that visible body piercings must be removed and visible tattoos must be covered up while at work.

But recently the Equal Employment Opportunity Commission has supported employees who claim that such body decoration has a religious significance. In *EEOC v. Papin Enterprises*, 2009 WL 961108 (M.D. Fla), the employee, a clerk in a sandwich shop, claimed that wearing a nose ring was a practice of her religion. Although the concept that an employer has the right to control its public image is usually sufficient to sustain the dress code requirement, the court noted that the shop manager simply told the employee to remove the nose ring when they were visited by a senior official from the franchise headquarters, an approach which contradicted the "public image" argument and resulted in denial of the employer's motion for summary judgment.

In *EEOC v. Red Robin Gourmet Burgers*, 2005 WL 2090677 (W.D. Wash.), the employee was a server in a restaurant who had tattoos encircling his wrists. He received the tattoos during a religious ceremony after undergoing a rite of passage in "Kemetecism," a religion with roots in ancient Egypt. In this belief system, intentionally covering the tattoos is a sin. This court also denied summary judgment for the employer, ruling that because of the relatively insignificant appearance of the tattoos, the question of whether it was an undue hardship for the employer to allow the "display" of the tattoos was an issue for a trial.

Employers should note that a ban on facial piercings and visible tattoos remains legally permissible; these are unusual cases which do not require that employers change their dress codes for employees who deal with the public. However, these cases reinforce the importance of the basic advice that dress codes, and work rules generally, should be enforced consistently and equally, and that unusual situations call for measured consideration rather than abrupt (and possibly illegal) decision making.

For more information, please contact Michael N. LaVelle at 203-330-2112 or by email at mlavelle@pullcom.com.

New Rules for Federal Government Contractors and Stimulus Fund Recipients

In the first weeks of the Obama administration, much changed for companies that do business with the federal government.

Three new executive orders (E.O.) signed by the new president on January 30 change the way these companies must deal with their employees and prospective employees.

First, no federal government funds may be used by management to persuade employees to organize or not to organize. The management activities included in this prohibition include preparing materials, consulting with legal counsel, business-hours meetings, planning and conducting activities. A contractor that engages in this activity must be prepared to prove that no federal funds were expended in doing so. The practical effect will likely be to gag management in any union organizing initiative, leaving only the union side to be heard by the employees. E.O. 13494.

Second, when a federal services contract changes hands in the same location, the new contractor must give preference to the preceding contractor's non-managerial, non-supervisory workforce before taking any other hiring actions. The rank and file employees have a "right of first refusal" to jobs with the successor for which they are qualified. The practical effect here will be to make it very likely that the successor contractor will be required to recognize any union that represented these workers with their former employer. E.O. 13495.

Third, federal contractors now must post notices informing employees of their rights under federal labor laws. E.O. 13496. Notably, President Obama also rescinded a Bush-era executive order that had required contractors to advise employees of their "Beck" rights to pay only service fees to unions representing them if they prefer not to join as members.

A further sign of the climate for employment law under the new administration is one of the "strings" attached to funds distributed under the new economic recovery legislation.

Private companies awarded contracts using (and state and local governments receiving) federal stimulus funds are prohibited from taking any action against a whistleblower that would dissuade a reasonable person from whistle-blowing activity under the "McCaskill Amendment" of the economic stimulus legislation President Obama signed on February 17. The whistleblower must have a reasonable belief that the reported activity is one of five different violations all pertaining to use of stimulus funds: gross mismanagement; gross waste; abuse of authority; violation of related law; rule or regulation; or, substantial and specific danger to public health or safety. The report must be made to one of nine specified recipients, both internal and external, including the employee's supervisor, and may be made in the course of the employee's normal duties. Retaliation for whistle-blowing may be supported by evidence of mere knowledge of the report having been made and temporal proximity of the dissuading action. The employer will be in violation if the whistle-blowing is a contributing factor in the challenged action. There is an administrative procedure vested in the inspector general with responsibility for the stimulus project involved that must be exhausted to preserve a whistleblower's right to proceed with a federal court claim. Employers subject to this part of the law are required to post notice of employees' rights.

Employers battling the worst economic downturn of their professional lives may feel overwhelmed by the challenges they face. Paying attention to the new rules imposed on them seemingly at every turn, however, is not a luxury as the potential liability for noncompliance is simply not affordable.

For more information, please contact Margaret M. Sheahan at 203-330-2138 or by email at msheahan@pullcom.com.

Pullman & Comley Introduces Monthly Webinar Series

Pullman & Comley, LLC is pleased to announce its new Labor & Employment monthly webinar series. These 30 to 60 minute programs are designed for the busy professional to stay up to date on the latest developments in this ever-changing area.

The webinars are also designed to be current and address topics that are on the top of everyone's agenda. And you can learn directly from Pullman & Comley attorneys who practice in this important area.

We kicked off our first session on June 10, 2009, with "Connecticut Legislative Wrapup and What Employers Need to Know."

In that webinar session, we discussed changes to the state FMLA laws that require, among other things, military caregiver leave; new requirements and penalties regarding personnel files; and widespread revisions to gender discrimination laws, including compensation.

The series continued July 8, 2009, covering the landmark case, *Ricci v. Stefano*, and its impact on employers in Connecticut and beyond.

For more information or to receive e-mail notifications of future webinars, please contact bsforza@pullcom.com.

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Attorney Notes

Attorney Joshua A. Hawks-Ladds, who currently serves as vice chair of the Connecticut Bar Association's Labor and Employment Law Section's Executive Committee, was recently elected to chair the Executive Committee for the 2009-2010 term. Attorney Hawk-Ladds has extensive experience litigating labor and employment matters, including recent arguments before the Second Circuit Court of Appeals, the Connecticut Supreme and Appellate Courts, significant Superior Court trials and several arbitrations before the State of Connecticut Board of Mediation and Arbitration. He is a member of the firm and can be reached in the Hartford office at 860-541-3306 and at jhawks-ladds@pullcom.com.

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