Workplace Notes

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Connecticut FMLA Confusion

In a stunning decision, a Connecticut Superior Court judge has held that out-of-state employees must be counted in determining whether a Connecticut employer meets the 75 employee threshold for applicability of the Connecticut Family and Medical Leave Act (CFMLA). If the decision stands and is followed, an employer with, for example, five Connecticut employees and 70 employees outside of the state would have to give CFMLA benefits to its five Connecticut employees.

The case, *Joaquina Velez v. Patricia Mayfield, Commissioner of the Connecticut Department of Labor* (DOL), arose from Ms. Velez's complaint against her employer, Related Management Company. Ms. Velez was discharged after suffering an injury. She complained to the Connecticut DOL that Related had violated her rights under the Connecticut FMLA. The DOL advised her that it intended to dismiss her complaint because Related did not employ 75 employees in Connecticut. After a hearing at which Related did not appear, the DOL's hearing officer issued a decision dismissing the complaint for lack of jurisdiction because Related did not have 75 employees within Connecticut. The hearing officer's decision was approved by the commissioner of the DOL.

> **"... this interpretation of the Connecticut FMLA could be a powerful disincentive to multi-state employers to locate small offices or facilities in Connecticut."**

Velez appealed to the Superior Court, and after a hearing, Judge Henry S. Cohn issued an opinion on May 14, 2010, holding that the CFMLA definitions of "employer" and "employee" require the DOL to count all employees when determining whether an employer meets the 75 employee threshold for applicability of the CFMLA. The court found nothing in the language of the statute or regulations that excluded out-of-state employees from the count, and further found that the legislature's intent to exempt "small employers" from the statute will be served by its construction of the language, since any employer with fewer than 75 employees will be exempt, but larger employers will be subject to the statute even if they have only a few Connecticut employees.

This construction of the Connecticut FMLA is contrary to the DOL's interpretation and to the general understanding of the statute since it was enacted. It has obvious potential to cause significant headaches for multi-state employers with Connecticut employees. The Connecticut FMLA is different from the federal FMLA in significant ways. For example, under CFMLA an employee may be entitled to 16 weeks of leave in a two-year period, while under the federal law an employee may receive 12 weeks of leave in a year. The interaction between the statutes can be extremely confusing. Moreover, the federal statute specifically excludes from eligibility for benefits any employee employed at a worksite where the employer employs less than 50 employees, if the employer employs fewer than 50 employees within 75 miles of that worksite. The Connecticut FMLA has no similar limitation, so that an employer with, for example, 40 employees in Los Angeles, 30 employees in Chicago and five employees in Stamford would not be subject to the federal statute at all, but would be required to provide benefits under the Connecticut FMLA to its Connecticut employees.

It perhaps goes without saying that this interpretation of the Connecticut FMLA could be a powerful disincentive to multi-state employers to locate small offices or facilities in Connecticut.

We will continue to follow developments in this case, and report on them in future editions of *Workplace Notes*.

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Payroll Deductions Require Paperwork

Employers typically make a variety of payroll deductions for employees in addition to the income tax and FICA withholding required by law. Employees may contribute to group medical and other types of insurance, to retirement accounts, to savings accounts, or even to loans or other pay advances by their employer.

Pursuant to Connecticut General Statutes §31-71e, payroll deductions, which are described in the statute as withholding or diverting any portion of an employee's wages, must be authorized in writing, unless the employer is required to make the deduction by state or federal law. Deductions for medical, surgical or hospital care or service must be authorized by the employee in writing, but the employer may develop its own forms for payroll authorizations.

For all other deductions, the employer must not only have written authorization from the employee, but the authorization must be on a form approved by the Commissioner of Labor. The Department of Labor (DOL) reviews payroll authorization forms not only for the format, but for the reason for the payroll deduction itself. The purpose of this review is to ensure that the payroll deduction is for a bona fide purpose for the benefit of the employee.

For the convenience of employers, the DOL has posted sample forms on its website, www.ctdol.state.ct.us. These forms reference such common deductions as life insurance, loans, employee premiums, payroll savings plans, United Way contributions and credit unions. There are also forms for uniform rental and laundry service, and for repayment of an advance of vacation pay in the event the employee leaves employment before he has earned enough vacation time to cover the advance.

Repayment of advance vacation pay is an example of an arrangement whereby an employee is required to pay his employer a sum of money if the employee leaves employment before the passage of a stated period of time. Such an arrangement is known as an employment promissory note and has its own statute, Section 31-51r. The first version of this statute, passed by the legislature in 1985, in effect prohibited employment promissory notes and made any such note void and unenforceable. It seemed that the legislature was reacting to a perception that there were some unscrupulous employers who would require employees to sign an agreement to pay the employer, most likely by a deduction from final pay, in the event that the employee did not work for a set period of time after being hired, without any value accruing to the employee. This was seen as a form of illegal wage kickback.

But business organizations managed to persuade the legislature that employers often make genuine advances of funds to their employees, for personal loans, for tuition payments or, as in the DOL's sample form, for advanced vacation pay. Moreover, generous employers not only make these advances, but are willing to forgive the repayment obligations after a passage of time. For example, it is typical for nursing schools to make tuition loans which are forgiven if the graduate nurse agrees to work for the school's affiliated hospital.

The legislature amended Section 31-51r in 1987 to allow employers to obtain enforceable promissory notes for loans, purchases of property, educational grants and so on. However, the DOL has also been known to question the propriety of employment promissory notes, even though unlike payroll deduction authorizations, the DOL has no statutory authority to review promissory notes. The DOL has even expressed an opinion that a loan or advance to an employee should be forgiven pro rata over the period of time that the employee is required to work in order for the loan to be forgiven. There is no such requirement in the statute and the DOL has no authority to impose such a requirement.

Obtaining DOL approval of payroll deduction authorization forms is a simple matter and can be done over the DOL website. Employers are well advised to take the time to do so, so that authorizations will be in place in the event that the Wage and Workplace Standards Division audits payroll practices.

For more information, please contact Michael LaVelle 203.330.2112 or by email at mlavelle@pullcom.com.

New Bill For Family Violence Victims

Effective October 1, 2010, employers who have three or more employees will have to abide by a new law that requires employers to provide leave in certain instances to employees who are family violence victims. Unlike the Connecticut FMLA and federal FMLA, which only apply to employers of 50 (or 75) or more employees, this new law covers most employers in Connecticut.

The new law has several important features. First, the bill amends Conn. Gen. Stat. 54-85b, which already provided that the crime victims or witnesses could take time off to comply with a subpoena or police investigation or otherwise participate in a court proceeding.

The new law prohibits an employer from terminating, penalizing, threatening or otherwise coercing an employee with respect to his or her employment because the employee (1) is a family violence victim or (2) attends or participates in a civil court proceeding related to a case in which he or she is a family violence victim.

Second, the law requires employers to allow family violence victims to take paid or unpaid leave (including compensatory time, vacation time, personal days or other time off) during any calendar year in which the leave is reasonably necessary for the following reasons:

1. seek medical care or counseling for physical or psychological injury or disability;
2. obtain services from a victim services organization;
3. relocate due to the family violence; or
4. participate in any civil or criminal proceeding related to or resulting from such family violence.

The new law allows an employer to limit unpaid leave taken under the bill's provisions to 12 days per calendar year. However, it specifies that this leave does not affect any other leave provided under state or federal law.

It allows employers to require no more than seven days notice when the need to use leave is foreseeable and notice as soon as practicable when it is not. It also requires an employee who takes this leave, on request, to provide the employer with a signed written statement certifying that the leave is for a purpose authorized under the bill.

The new law allows an employer to request from the employee a (1) police or court record related to the family violence or (2) signed written statement that the employee is a victim of family violence from the employee or an agent of a victim services organization, an attorney, an employee of the Judicial Branch's Office of Victim Services or the Office of the Victim Advocate, licensed medical professional or other licensed professional from whom the employee has sought assistance with respect to the family violence. The law requires the employer to keep any written statement or police or court record provided confidential. The employer cannot further disclose the information except as required by law or as necessary to protect the employee's safety in the workplace, but in these situations the employee must be given notice before the disclosure.

Additionally, the law specifies that it cannot be construed to require an employer to provide paid leave if (1) the employee is not entitled to paid leave pursuant to the terms and conditions of the employee's employment or (2) the paid leave exceeds the maximum amount of leave due the employee during any calendar year. However, it requires the employer to provide unpaid leave if paid leave is exhausted or not provided.

The bill imposes the same penalty for violations as exists for violations of the laws protecting crime victims. That is, the employee has 180 days (the prior law was 90 days) from the occurrence to bring a civil action for damages and for an order requiring the employee's reinstatement or otherwise rescinding such action. If the employee prevails, the employee must be allowed a reasonable attorney's fee that is fixed by the court.

What should employers do now? You will certainly need to amend your policies and procedures by this fall to address this new law. You may want to seek legal counsel to ensure that your new policy complies with the provisions of this new law.

For more information, please contact Daniel Schwartz at 860.424.4359 or dschwartz@pullcom.com.

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