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Welcome to e-News: From the Labor, Employment and Benefits Group of Robinson & Cole

e-News is a bi-weekly electronic newsletter reporting on recent court decisions, new statutes and other timely and topical information. Where appropriate, e-News provides web links to databases where recipients can easily access the actual decisions, statutes or other information. Navigating e-News is just like navigating the web. To access a web link, simply position your cursor on the link and click your mouse. To return to e-News, hit the back button on your browser.

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OSHA Issues Final Ergonomics Standard

On November 13, the U.S. Occupational Safety and Health Administration released its controversial and much-anticipated ergonomics regulations. The new rules -- known as the Erg Ergonomics Program standard -- are designed to prevent and manage employee injuries caused by repetitive physical tasks in the workplace. A Frequently Asked Question page contains helpful information.

Under the new standard, employers are initially required to provide information to employees about musculoskeletal disorders known as MSDs. If an “MSD Incident” occurs, the employer must “screen” the injured employee’s job to determine if risk factors are present which would warrant further action. The employer may ultimately be obligated to grant work restrictions to the injured employee, and may be obligated to implement an overall ergonomics program including employee training. One of the more controversial aspects of the new regulations is the requirement that an employer provide an injured employee who cannot work due to an MDS with 90% of wages and 100% of benefits for up

to 90 days.

The new standard becomes effective January 16, 2001 and covers all "general industry" employers, estimated to include 102 million workers at 6.1 million worksites. OSHA estimates that the cost to employers will be $4.5 billion annually, though some business groups, which vehemently oppose the new rules, calculate the costs to be many times higher. Industry representatives have vowed to file lawsuits to block the new ergonomics standard, and at least two lawsuits have already been filed.

Supreme Court to Rule on Enforceability of Mandatory Arbitration Clauses

On November 6, 2000, the U.S. Supreme Court heard oral arguments in a case involving the enforceability of a mandatory arbitration provision in a private employment contract. The case is an appeal from Circuit City Stores v. Adams, a case from the U.S. Court of Appeals for the Ninth Circuit.

At the time Adams applied for employment with Circuit City, he signed a document in which he agreed to settle any disputes with Circuit City through arbitration rather than through a lawsuit in the courts (a so-called "mandatory arbitration provision"). Adams later filed a lawsuit in California state court alleging discrimination and wrongful discharge. Relying on the document Adams signed, Circuit City filed an action in federal court seeking to compel arbitration on the ground that Adams had waived his right to sue in court. The Ninth Circuit disagreed, however, holding that the Federal Arbitration Act, which gives federal judges the authority to enforce arbitration agreements, does not apply to employment contracts. At issue on appeal before the Supreme Court is the precise meaning of the FAA's language exempting from coverage any employment contracts of "workers engaged in foreign or interstate commerce." The Supreme Court's ruling could have a far-reaching effect, as many private employers now utilize mandatory arbitration agreements as an inexpensive and efficient way to resolve employment disputes.

Federal Court Declares Massachusetts and Federal Standards on "Pretext" are Identical

Until recently, it was understood that there was a difference between the federal standard and the Massachusetts state standard concerning a plaintiff's burden of proof for establishing employment discrimination. The distinction hinged on whether the plaintiff was required to show only that the employer's proffered reason for its actions were a pretext, as in state court (known as "pretext only"), or whether the plaintiff was further required to prove, as in federal court, that the real reason for the employer's action was discrimination (known as "pretext-plus"). The distinction, however, may no longer be relevant. In Fite v. Digital Equipment Corp. the U.S. Court of Appeals for the First Circuit quoted recent pronouncements by both the U.S. Supreme Court and the Massachusetts Supreme Judicial Court and concluded: "In our view, federal and Massachusetts law are

how generally aligned on the pretext issue." The court explained that the falsity of the employer's explanation – that is, the proven pretext -- "may *permit* the jury to infer a discriminatory motive but does not *compel* such a finding." (emphasis added).

Arbitrator Orders Reinstatement of Father Who Killed Parent in Fight After Son's Hockey Game

Last summer, Thomas Junta, a Massachusetts father of a 10 year old youth hockey player, was charged with manslaughter for allegedly killing another parent during a fight after their sons' hockey game. Following the widely publicized incident, Junta was also suspended by his employer. Junta grieved his suspension, and now an arbitrator has ordered that he be reinstated with full back pay. The arbitrator found the suspension to be unjust, reasoning that although the hockey incident "led to a most serious result," and although the killing had received extensive news coverage, it was "not company related" and did not harm the company's reputation or business.

Company President Indicted Under OSHA for Chemical Plant Explosion that Killed Five

The president of a chemical manufacturing company was recently indicted by a federal grand jury in connection with a February 1999 plant explosion in Pennsylvania that killed five workers. The indictment alleges a willful violation of the U.S. Occupational Safety and Health Act's process safety standards. Specifically, the company president is accused of failing to perform an appropriate process safety analysis, failing to identify, evaluate and control the hazards involved in the process, failing to develop and implement clear operating procedures, and failing to properly train employees. The indictment also alleges that the company president ignored clear warnings from various sources about the safety of the operation. If convicted, he faces a maximum sentence of 24 months in prison, a $3 million fine, and one year of probation. In addition, the company was cited for 20 violations and issued proposed penalties of almost $650,000 by OSHA. The case is a reminder that, although infrequently invoked, the Occupational Safety and Health Act does carry criminal penalties which may be imposed in egregious circumstances.

NLRB Rules That Non-Union Company Committed Unfair Labor Practice by Disciplining Employee for Publicly Criticizing Terms and Conditions of Her Employment

In Allstate Insurance Company (9/29/2000), the National Labor Relations Board ruled that a non-union employer violated an employee's rights under the National Labor Relations Act by issuing the employee a disciplinary "job in jeopardy" notice for publicly criticizing the terms and conditions of her employment. The employee's complaints, along with those of other employees, appeared in an article published in Fortune Magazine. Although the company disciplined the employee for "unauthorized contact with the news media," the

NLRB found that the complaints constituted "protected concerted activity." The NLRB noted that other employees also had complained in the article, and also noted that the employee was motivated at least in part by a desire to alert other similarly situated employees to the pitfalls she perceived in her employment. Thus, the NLRB found that the employee was "initiating or inducing group action," and her conduct was protected. The NLRB ordered that the discipline be rescinded and that the company cease and desist from such conduct in the future.

Company Violated ERISA by not Informing Inquiring Employees that Early Retirement Incentive Plan was Under "Serious Consideration"

In Hudson v. General Dynamics Corp. (9/28/2000), the U.S. District Court in Connecticut ruled that a company violated its fiduciary duties under the Employee Retirement Income Security Act by failing to inform inquiring employees of possible plans for a retirement incentive program. Before retiring, some employees had repeatedly asked human resources personnel about the status of retirement incentive plans, but the company unlawfully failed to inform the employees that such plans were being given "serious consideration" at the time.

For more information, please contact us

Stephen W. Aronson	Lisa Gizzi	Peter J. Moser
860-275-8281	860-275-8244	617-557-5923

ROBINSON & COLE LLP
Boston - Hartford - Stamford - Greenwich - New York

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