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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.

We hope you enjoy e-News. If you know of others who would enjoy receiving this online newsletter (or if you would like to discontinue receiving e-News), pleaseclick here and send us an e-mail message. If you would like certain information covered in future issues, please let us know. We welcome your feedback.

President Clinton Appoints Dennis Walsh to NLRB

In a recess appointment, President Clinton named Dennis Walsh to serve as a member of the National Labor Relations Board. Walsh is a former NLRB attorney and has served as Chief Counsel on the staffs of two different Board members. Walsh also worked as a union-side attorney in private practice. His appointment still leaves one seat vacant on the five-member Board.

Employer Did Not Violate FMLA by Terminating Employee for Abuse of Sick Leave

In LeBoeuf v. N.Y. University Medical Center, No. 98 Civ. 0973 (12/20/2000), the U.S. District Court for the Southern District of New York dismissed claims of an employee under the Family and Medical Leave Act who had been discharged after taking leave in connection with shoulder surgery. The employee was terminated for fraudulent use of sick time. He took off the week prior to surgery, but used the leave time to attend a traffic court

hearing, attend his daughter's christening, and pay bills. The pre-surgery leave was medically unnecessary. Consequently, the court dismissed the employee's claims, noting that "where an employee is terminated because the employer honestly believed that the employee was not using the leave period for its intended purpose, an FMLA claim will not lie."

Company Liable for Additional Insurance Premium Payments after Misclassifying Workers as Independent Contractors

In Eastern Casualty Insurance Co. v. EDJS Floor Covering, Inc., 12 Mass.L.Rptr. No. 10 (11/27/2000, Fahey, J.), the Massachusetts Superior Court considered whether certain workers were "employees" or "independent contractors." The plainitff insurance company discovered that its insured, EDJS Floor Covering, had failed to list many floor and carpeting installers as "employees" for purposes of workers' compensation coverage. The insurance company sought to recover the lost premium payments which it claimed should have been paid had the workers been properly classified.

The court ruled in favor of the insurance company, finding that EDJS exercised a high level of direction and control over the workers and that, therefore, the workers were employees. EDJS supplied materials, scheduled jobs, monitored the quality of work, and paid the workers on a weekly basis. Accordingly, EDJS had breached its contract with the insurance carrier and was liable for unpaid premiums. This case is a reminder of the importance of properly classifiying workers.

Company Did Not Violate ADA by Terminating Employee Prone to Violence

In Borgialli v. Thunder Basin Coal Co. (12/20/2000), the defendant company terminated Borgialli's employment as mine blaster after he began expressing suicidal thoughts. A mine blaster works with explosives. The U.S. Court of Appeals for the Tenth Circuit upheld the termination based on the safety threat posed by Borgialli.

Problems began after a former subordinate with whom Borgialli had a contentious relationship became Borgialli's supervisor and gave him a negative performance review. Borgialli informed the mine's nurse that he harbored suicidal thoughts, subseqently took leave for migraine headaches, and was ultimately evaluated by a psychiatrist. He was diagnosed with major depression and psychiatric disorders. The psychiatrist submitted a report to the company indicating that Borgialli's psychiatric disorders made it "impossible for him to perform his current job safely."

Ultimately, after a leave of absence, he sought a return to work based on the evaluation of a different psychiatrist, but he refused the company's request to be evaluted by a third psychiatrist, and was therefore terminated. Borgialli sued, alleging that his termination violated the Americans with Disabilities Act. However, because there is no duty under the ADA to accommodate an individual if that individual poses a "direct threat" to the health or

safety of other individuals in the workplace, the court upheld the termination. As explained by the court, "no reasonable jury could fault the Mine for its decision to preclude Plaintiff's return to work until it received assurances from a doctor that [he] no longer posed a safety risk."

Proof of Sexual Harassment Does not Require an Award of Damages for Emotional Distress

In Barber v. Mulrooney (12/12/2000), the Connecticut Appellate Court ruled that the plainitff, Melinda Barber, was not automatically entitled to an award of damages for infliction of emotional distress simply because she had proven sex discrimination. Barber sued her former employer, Michael Mulrooney, alleging sexual harassment in violation of Conencticut law and intentional infliction of emotional distress. At trial, Barber proved that Mulrooney discriminated against her on account of her sex and recovered lost wages for the time when she was unemployed. However, the court refused to award any damages for intentional infliction of emotional distress. The court found that Barber and Mulrooney had engaged in consensual sexual relations and that Mulrooney's conduct did not give rise to emotional distress.

On appeal, the appellate court considered whether the trial court properly refused to award punitive damages for intentional infliction of emotional distress after finding a pattern of sexual harassment committed by Mulrooney. The appellate court refused to adopt any rule that equates a finding of sex discrimination with intentional infliction of emotional distress. Instead, the appellate court ruled that the trial court, after hearing all of the evidence, had discretion to refuse to award damages for intentional infliction of emotional distress.

Court Determines When Constructive Discharge Claims are Time Barred

In Flaherty v. Metromail Corporation (12/19/2000), the plaintiff, Mary Flaherty, sued her former employer claiming constructive discharge from employment based on sex and age discrimination. She alleged that a company senior vice president engaged in a campaign to terminate her employment by pressuring her managers to create an intolerable work atmosphere. She alleged that her male supervisor in 1993 repeatedly told her that women did not belong in the workplace, women should be “barefoot and pregnant” and that he would never play golf with a woman. After that supervisor left the company, her new manager allegedly told her she was “too old and grandmotherly.” She further alleged that the senior vice president told her subsequent supervisors to work toward her termination, but two of them refused and left the company. In a meeting with a human resources representative, she claims that she was pressured to accept a demotion but she refused. She alleged that her manager told her peers “as soon as I can get rid of the old bag, you can have her accounts.” After feeling different treatment by a new manager, Flaherty requested formal retirement effective November 1, 1997.

The company filed a motion for summary judgment on the ground that Flaherty's action was barred for failure to timely file administrative charges with the U.S. Equal Employment Opportunity Commission. The court determined that her claims arose no later than the date when she first received notice of her impending termination. In dismissing her action, the court rejected her attempt to invoke the "continuing violation" exception to the EEOC's filing deadline. That exception may toll the deadline for filing administrative charges.

On appeal, the U.S. Court of Appeals for the Second Circuit ruled that, in all cases of constructive discharge, the employee's claim accrues on the date when the employee gives definitive notice of his or her intention to resign. The court reasoned that, "it is only the employee who can know when the atmosphere has been made so intolerable by the discrimination-motivated employer that the employee must leave."

IRS Issues Final Regulations Regarding COBRA, HIPAA and 125 Plans, and Issues Notice Adressing Split-Dollar Life Insurance

This week the Internal Revenue Service issued numerous releases affecting benefits provided by employers. Final COBRA regulations were issued, addressing some outstanding administrative issues encountered by employers in connection with the continuation coverage requirements applicable to group health plans. Final cafeteria plan regulations were issued, addressing the circumstances under which cafeteria plan participants are permitted to change elections during the plan year. The IRS also issued a new guidance on the taxation of split-dollar life insurance contracts, addressing many of the new types of split-dollar products currently used between employers and employees. HIPAA regulations were also issued, aimed at preventing discrimination based on a health factor for group health insurance plans. Lastly, the IRS issued proposed regulations simplifying the rules used by qualified plans to determine the minimum amount that must be distributed annually to retirees.

Future editions of e-News will provide more information about these new IRS releases.

President-Elect Bush Selects Elaine Chao as Second Labor Secretary Nominee

President-Elect George W. Bush has selected Elaine Chao, former head of the United Way of America and a fellow at the Heritage Foundation, to serve as Secretary of the U.S. Department of Labor. Mr. Bush's first choice, Linda Chavez, withdrew her name from consideration following reports that she housed an illegal immigrant. Unlike Linda Chavez, whose nomination drew sharp criticism from civil rights groups and organized labor, Ms. Chao seems to enjoy more widespread support. For example, AFL-CIO President John Sweeney had deemed the appointment of Chavez "an insult to American working men and women," but labor unions have thus far appeared cautiously optomistic about Ms. Chao.

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