ROBINSON & COLE LLP
LABOR, EMPLOYMENT AND BENEFITS
eNews
E-news is an electronic newsletter reporting recent developments in labor, employment and benefits law.

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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. To view back issues, click on the "e-News Archives" link on the masthead.

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President Bush's Executive Order Regarding Notice of Rights Not to Join Union Struck Down by District Court

In UAW-Labor Employment and Training Corp. v. Chao (1/2/02), the U.S. District Court for the District of Columbia ruled that President Bush's Executive Order 13201, which took effect on April 18, 2001, is invalid because it is preempted by the National Labor Relations Act. The Executive Order required federal contractors to notify their employees of their rights under the U.S. Supreme Court's decision in Communication Workers v. Beck, which held that workers covered by a union security clause who declined to join the union could not be required to contribute dues for nonrepresentational activities. In striking down the Executive Order, which provided for the cancellation of contracts with contractors that violated the notice requirement and debarment from obtaining future contracts, the Court stated that such a policy was preempted because it would regulate in a core labor-management area regulated by the NLRA.

EGTRRA Changes Create State Income Tax Problems in Some States

The June edition of E-News set forth the changes made to retirement plans by the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). EGTRRA significantly increased the amount that employees can contribute to qualified plans. Some of these liberalized employee contribution rules are in jeopardy in states with income tax laws that do not conform to the Federal Tax Code as amended by EGTRRA. This results in inconsistent federal and state income tax treatment of certain employee contributions. In addition to the personal income tax impact for employees, employers in these states face administrative and compliance burdens as a result of the income tax deviations.

The following are the most significant areas of inconsistency:

- Under federal law, an employee can make a pre-tax contribution up to $11,000 in 2002. In most non-conforming states, the 2001 limit of $10,500 will continue to apply in 2002.
- The amended Federal Tax Code permits catch-up pre-tax contributions for individuals age 50 or over ($1,000 in 2002). This new provision is not included in the current law of any non-conforming state.
- If an employer adopts the new, more expansive definition of permissible rollovers, and such rollovers are not permitted under state law, the funds would be subject to state income tax when they are distributed from the first plan.

The following states have a personal income tax that is not based on the current Federal Tax Code: Alabama, Arizona, California, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, North Carolina, South Carolina, Wisconsin, Arkansas, Mississippi, New Jersey and Pennsylvania. California is considering adopting the EGTRRA changes, and Massachusetts is considering adopting the $11,000 limit and the catch-up contribution rules, but not permitting liberalized rollovers.

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U.S. Supreme Court Rules that Private Arbitration Agreement Does Not Bar EEOC from Pursuing Victim Specific Relief

As a condition of employment, Waffle House, Inc., a South Carolina restaurant, required all of its employees to sign agreements stating that employment disputes would be settled by binding arbitration. Eric Baker, a grill operator, signed the agreement and was subsequently fired after he suffered a seizure. In the seven years following his termination, Baker did not seek arbitration. Instead, he filed a discrimination claim with the U.S. Equal Employment Opportunities Commission, alleging that his discharge violated the Americans with Disabilities Act. The EEOC, on behalf of Baker, sought numerous remedies, including specific relief designed to make Baker whole, such as back pay, reinstatement and compensatory damages. Waffle House argued that the arbitration agreement it had with Baker barred the EEOC from seeking such remedies. This issue made its way all the way to the U.S. Supreme Court. In EEOC v. Waffle House, Inc. (1/15/02), the U.S. Supreme Court ruled that the arbitration agreement did not bar the EEOC from pursuing victim-specific judicial relief. The court stated that despite the preference for arbitration, once a charge is filed with the EEOC, the EEOC is in command of the process and is not bound by private agreements to which it was not a party.

Professional Overtime Exemption Not Applicable to Nurse who Was Not Paid on a Salary or Fee Basis

Wendy Elwell, a home health care nurse, was employed by University Hospitals Home Care Services to drive to patients' homes, provide nursing services, and complete documentation related to her visits. Elwell was compensated through per-visit fees and an hourly rate of pay. University did not pay Elwell overtime because it had classified her as a professional employee exempt from the Fair Labor Standards Act's overtime provisions. Elwell quit several months after University had changed its compensation scheme and sued University for failing to pay her overtime. Although Elwell agreed that her work required advanced knowledge in a field of science or learning, and that her work required the consistent exercise of discretion and judgment, she argued that her position was not exempt from overtime under the professional exemption because in order to qualify for that exemption an employee must be paid on a salary or fee basis. The trial court agreed, and Elwell was awarded $25,000 in owed overtime pay and nearly $50,000 in attorney's fees. University appealed.

In Elwell v. University Hospitals Home Care Services (1/11/02), the U.S. Court of Appeals for the Sixth Circuit upheld the awards to Elwell, holding that under FLSA regulations, fee arrangements are characterized by the payment of an agreed sum for a single job regardless of the time required for its completion, and that payments based on the numbers of hours or days worked and not on the accomplishment of a single task are not considered payments on a fee basis.

IRS Issues Final Intermediate Sanctions Regulations

The Internal Revenue Service issued final regulations on intermediate sanctions effective on January 23, 2002. The regulations govern the excise taxes imposed on excess benefit transactions between a tax-exempt organization and its disqualified persons including insiders, directors, officers, trustees, managers. A primary focus of the regulations is to establish a methodology for creating a rebuttable presumption that compensation paid to a disqualified person of an exempt organization is reasonable and not an excess benefit transaction. The final regulations contain only slight differences from the temporary regulations. The most notable change is an expanded exemption from the regulations for governmental entities.

Ex-employees Defamed Former Employer and Managers in Messages Posted on Internet

In Varian v. Delfino (December 13, 2001), a unanimous Santa Clara County California jury found that two disgruntled former employees, Michelangelo Delfino and Mary Day, had acted with malice, fraud and oppression when they posted 14,000 notices on 100 Internet message boards accusing company managers of being homophobic, discriminating against pregnant women, having sexual affairs, and secretly videotaping employees while they were in office restrooms. In many of the messages, Delfino and Day had identified themselves as managers of the company. Rejecting their defense that they were exercising their Constitutional rights to free speech, the jury found Delfino and Day guilty of defamation, misappropriation of names, conspiracy, and breach of implied contract, and ordered them to pay the company and two managers $775,000 in compensatory and punitive damages.

President Bush Signs Spousal Work Authorization Measures into Law

President Bush has recently signed into law two bills allowing the foreign national spouses of international transferees, treaty traders and treaty investors to work in the U.S. Prior to the enactment of these bills, such spouses could not work in the U.S. without obtaining their own independent work-authorized status. Guidance on how spouses can take advantage of this new benefit has not yet been issued by the Immigration and Naturalization Service.

One bill provides work authorization to the spouses of E visa holders (treaty traders and investors). The other provides work authorization to the spouses of L visa holders (international transferees) and reduces the amount of time that an employee must be continuously employed by a company outside of the United States before being eligible for an L visa under an employer filed blanket petition. The “pre-employment blanket requirement” previously required a minimum of one year of continuous employment with the company during the three-year period preceding the application for admission, in order for an employee to be eligible for an L visa. Under the new law, the pre-employment blanket requirement is reduced to six months.