Date Issued: 07/02/2001

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.

U.S. Supreme Court to Hear Three Employment Cases

The U.S. Supreme Court agreed to review three employment cases: two involving the limitations period for filing discrimination claims under Title VII and the third involving the validity of an FMLA regulation. The three lower court decisions are summarized below.

In Edelman v. Lynchburg College, the U.S. Court of Appeals for the Fourth Circuit invalidated an EEOC regulation that allows a claimant to verify a complaint after the statutory filing deadline has passed, so long as the claimant had previously submitted a timely, though unsworn, charge. A claimant must submit a sworn charge under Title VII within 300 days after the alleged incident of discrimination. Leonard Edelman filed a charge with the EEOC within the 300-day period, but it was not sworn to under oath. After the 300-day period passed, Mr. Edelman filed a sworn complaint. The Fourth Circuit dismissed Edelman's charge as untimely, finding that the statutory language was clear and that the EEOC regulation was invalid.

In National Railroad Passenger Corp. v. Morgan, the U.S. Court of Appeals for the Ninth Circuit ordered a new trial because the trial court found that incidents of allegedly discriminatory conduct occurring more than 300 days before the complaint was filed were time-barred. Generally, the limitation period for bringing claims under Title VII is 300 days, but under a continuing violation theory, conduct that would ordinarily be time barred may be considered if the untimely incidents demonstrate an ongoing pattern or practice of unlawful conduct. The court rejected the continuing violation theory and did not allow the jury to consider the untimely incidents.

In Ragsdale v. Wolverine Worldwide Inc., reported in our 7/31/2000 issue of e-News, an employee who was on leave for seven months requested an additional 12 weeks of FMLA leave because her employer had failed to formally designate any of her leave as FMLA leave. Department of Labor regulations require companies to notify employees in advance when leave will be counted towards FMLA leave. Under the regulations, leave cannot be designated retroactively, so a failure to designate would mean that an employee still retains the full FMLA allotment. The Eighth Circuit, however, held that the regulations exceeded the underlying statute, noting that the FMLA was not intended to require an employer to grant more than 12 weeks of leave.

Arbitration Fee-Splitting Provision Ruled Illegal in Title VII Case

In Perez v. Globe Airport Security Services, Inc. (6/12/2001), the U.S. Circuit Court of Appeals for the Eleventh Circuit ruled that an arbitration agreement requiring the parties to split costs and expenses violated the provisions of Title VII because it prevented the employee from recovering fees and costs if she prevailed. Damiana Perez worked as a security agent for Globe. At the time of hire, Perez signed an arbitration agreement providing that all costs and fees would be shared equally between her and Globe. Perez filed a claim of sex discrimination under Title VII and Globe sought to compel arbitration. The court noted that because Title VII allows a prevailing employee to recover attorney's fees, expert witness fees, and costs, an arbitration agreement that mandates an equal sharing of fees and costs of arbitration violates Title VII. Accordingly, the court refused to compel arbitration.

Court Recognizes Claim for Wrongful Termination in Retaliation for Reporting Employment of Illegal Aliens

Lou Yu Jie and Fu E. Min came to the United States from China in 1992. They began working for Liang Tai Knitwear Company, which provided them with illegal work papers. Jie and Min reported the company to the U.S. Immigration and Naturalization Service. Two months later, the INS raided the company and found 36 undocumented workers. A few months later, the company laid off Jie and Min claiming a slowdown in business. However, Jie and Min were the only employees laid off and, following their layoff, the company hired more employees. Jie and Min sued the company for wrongful termination in violation of

public policy. After a jury trial, Jie was awarded $170,500 damages, Min was awarded $221,000, and they were jointly awarded $80,000 in punitive damages. The company appealed arguing that there is no private action for violation of the immigration laws. In Jie v. Liang Tai Knitwear Company (5/30/2001) the California Appellate Court affirmed the jury award, ruling that California recognized a tort of wrongful discharge in violation of the public policy favoring the reporting illegal workers.

Request for Unlimited Sick Days Not a Reasonable Accommodation under the ADA

Michael Nicosia, a dockworker, sued Yellow Freight System alleging that he was terminated because of his AIDS-related cancer and in retaliation for filing a complaint with the EEOC. At issue was Nicosia's poor attendance record, including one year in which he was absent more than half of the time. Nicosia's absences, which grew more frequent and culminated in his termination, apparently stemmed from his medical condition.

The only specific request for an accommodation made by Nicosia prior to his termination was that he be allowed to take sick days, if needed, without being penalized. Yellow Freight denied this request.

In EEOC v. Yellow Freight System, Inc. (6/12/2001), the U.S. Court of Appeals for the Seventh Circuit upheld dismissal of Nicosia's claims, noting that regular attendance is usually an essential function in most every employment setting. The court also noted that Nicosia had been unable to meet this essential function of his job and that his requested accommodation -– an open-ended, unlimited amount of sick days -- was unreasonable. The court found it significant that Nicosia had rejected Yellow Freight's offer of 90 days of unpaid leave, that Nicosia had been disciplined for unsatisfactory attendance long before he was diagnosed with AIDS, and that the individual who discharged Nicosia was unaware that Nicosia had recently filed a charge with the EEOC.

Paid Annual Leave is a Social Right Benefiting All European Community Workers

For employers with workers in European Community member countries, in The Queen and Secretary of State for Trade and Industry, Ex Parte: Broadcasting, Entertainment, Cinematographic and Theatre Union (6/26/2001) the International Court of Justice ruled that workers are not required to complete a minimum period of uninterrupted employment with the same employer in order to accrue rights to paid annual leave. Most of the union workers work on short-term contracts that do not permit workers to accrue, as required by United Kingdom law, a period of thirteen weeks of uninterrupted employment with the same employer. The court concluded that the right to four weeks of paid annual leave is an important European Community social law that cannot be abrogated by member countries.

IRS Issues Guidance on Compliance with New Tax Laws

On June 29, 2001, the U.S. Internal Revenue Service issued Notice 2001-42 that specifically states that the deadline for plan amendments is not being extended due to the enactment of the new tax laws, including the Economic Growth and Tax Relief Reconciliation Act of 2001 reported in our 6/8/2001 Special Benefits Issue. However, the IRS also indicated that model amendments for the new tax laws will be issued by the end of August and that plan sponsors will have at least until the end of the 2005 plan year to comply in form with the new laws. Adoption of the model amendments or other similar amendments by the end of the plan year in which a sponsor wishes to make the changes effective will generally be considered good faith amendments and may be relied upon at least through the 2005 plan year.

Connecticut Department of Labor Replaces "Pink Slip" with New Forms

The Connecticut Department of Labor announced that, effective June 2001, workers who are laid off indefinitely or terminated must file for unemployment compensation benefits by telephone. This process replaces the in-person reporting system that has existed for over 60 years. As part of the new system, the CT DOL replaced the Form UC-61 pink slip with a new separation packet. The new packet, UC-62T/UC-61, replaces only the pink slip. Employers should still use the UC-62V, Vacation Shutdown Claim for Unemployment, for temporary layoffs of six weeks or less.

For more information, please contact us

Stephen W. Aronson	Andrew S. Golden	Peter J. Moser
860-275-8281	860-275-8309	617-557-5923

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

Visit our Labor, Employment and Benefits Practice website at www.rc.com