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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.

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.

Court Dismisses Claims by Married Co-Workers Challenging Employer’s Anti-Nepotism Policy

Lawrenceburg Power System, a public employer, had a policy allowing employment for only “one member of a family.” The policy mandated that, if two employees married, “one must terminate employment.” Co-workers Keith Vaughn and Jennifer Paige were married and LPS refused to grant them an exception to the policy. LPS forced the couple to choose which one of them would resign. Ultimately, each was discharged due to their refusal to abide by the policy. The Vaughns sued LPS, challenging the policy and their terminations.

In Vaughn v. Lawrenceburg Power System (10/19/2001), the U.S. Court of Appeals for the Sixth Circuit found that the policy at issue was not unconstitutional and that the Vaughns had not been unlawfully discharged in retaliation for opposing practices forbidden by the state human rights act. However, the appeals court refused to dismiss Keith Vaughn’s First Amendment retaliation claim because an issue of fact remained as to whether he had been

terminated for his protected “mental dissent” and “unwillingness to agree fully with the policy.” Keith Vaughn had initially been allowed to continue working, but was fired following a heated discussion with his supervisor concerning the policy.

Massachusetts Court Dismisses Sexual Harassment Claim based on Romantic Relationship between Plaintiff’s Supervisor and Co-Worker

In Ritchie v. Massachusetts State Police (10/29/2001), the court dismissed Mary Ritchie’s sexual harassment claim finding that the conduct alleged did not rise to the level of a hostile work environment. Ritchie sued her employer, the Massachusetts State Police, and her supervisor and a co-worker who were involved in a romantic relationship at work. Ritchie alleged that the romantic relationship between her supervisor and a co-worker posed a risk of favoritism and created an offensive office environment. However, in dismissing the complaint the court noted that although the relationship may have been unprofessional or inappropriate there was no offensive conduct directed towards Ritchie. The court further noted that the office environment was not so sexually charged that it would have interfered with Ritchie’s work performance by creating a hostile environment.

IRS Issues Proposed Regulations regarding Stock Plans

On November 13, 2001, the U.S. Internal Revenue Service issued proposed regulations that would subject stock options (incentive and non-qualified) and stock purchase plans to social security and federal unemployment taxes beginning in 2003. The proposed regulations provide that an employee awarded stock options receives wages upon the exercise of the option or the purchase of the stock. These rules will be costly to administer and may cause employers to reconsider how these programs are offered. We are reviewing these proposed regulations and intend to provide additional information in a future issue of e-News.

EEOC Issues Fact Sheet on Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures

In the wake of the September 11 attacks, the U.S. Equal Employment Opportunity Commission has issued a Fact Sheet designed to help employers that are struggling with the development or re-evaluation of emergency evacuation procedures. The Fact Sheet provides guidance to employers requesting medical information to help identify individuals who might need assistance in an emergency evacuation and to what extent they can share this information with others in the workplace. The Fact Sheet, drafted in a question and answer format, confirms that federal disability discrimination laws do not prevent employers from obtaining and appropriately using information necessary for a comprehensive emergency evacuation plan.

IRS Extends Deadline for Obtaining Determination Letter

Qualified plan sponsors have been amending plans to comply with current pension laws and have been working toward a year-end deadline for submitting plans to the IRS for favorable determination letters. On November 14, 2001, the U.S. Internal Revenue Service extended this year-end deadline. Under the extension, plan sponsors have until February 28, 2002 to amend their plans to comply with current pension plan laws and to submit their plans to the IRS. An extension to June 30, 2002 is provided for plan sponsors directly affected by the September 11 terrorist attacks and an additional extension to December 31, 2002 may be granted by the IRS for substantial hardship resulting from the terrorist attacks.

IRS Clarifies Rules for New "Catch-Up Contributions"

The U.S. Internal Revenue Service just issued proposed regulations that provide guidance on administering "catch-up contributions." The 2001 Tax Act allows 401(k) plan sponsors, starting in 2002, to permit participants who have reached age 50 to make additional pre-tax catch-up contributions. For 2002, the maximum additional contribution will be $1,000 and it will increase annually. Plan sponsors have questioned how these contributions should be administered. The proposed regulations clarify that pre-tax deferrals will not be considered catch-up contributions until a participant has reached the IRS's contribution limit or the plan's contribution limit. These proposed regulations also contain an unusual provision that requires catch-up contributions to be offered in all plans of a controlled group if any plan of the controlled group offers such contributions. They also provide guidance on determining eligibility for catch-up contributions, as well as how such contributions impact testing. The proposed regulation can be relied upon until the IRS issues final regulations.

Appeals Court Upholds NLRB Decision Granting Weingarten Rights to Non-Union Workers

In Epilepsy Foundation of Northeast Ohio v. NLRB (11/02/2001), the U.S. Court of Appeals for the District of Columbia affirmed an NLRB decision (reported in our 7/31/2000 issue of e-News) extending Weingarten rights to non-union workers. "Weingarten" refers to a 1975 U.S. Supreme Court case ruling that Section 7 of the National Labor Relations Act grants a union employee the right to refuse to submit to an interview without union representation where the employee reasonably fears the interview may result in discipline. Extending Weingarten rights to the non-union workplace means that a non-union employee may lawfully request to have a co-worker present at a disciplinary meeting and, because the employee's request is protected concerted activity under the NLRA, the employee cannot be disciplined for making the request.

Although the appeals court affirmed the NLRB's interpretation of the law extending Weingarten rights to non-union employees, it rejected the NLRB's retroactive application of the change. The appeals court found that Epilepsy Foundation, under the law as it existed at the time, did not engage in illegal activity by terminating an employee who refused to attend a disciplinary meeting unless a co-worker was present.

Massachusetts Court Upholds Noncompetition Agreement despite Company's Prior Breach of Separate Employment Contract

Intertek Testing Services sued a former employee alleging that he breached a noncompetition agreement. The former employee countersued, alleging that Intertek had breached a compensation provision in his separate employment contract. After a trial, a jury agreed that both parties breached their agreements. The former employee argued that Intertek's breach, which occurred first, should relieve him of his obligations under the noncompetition agreement. In Intertek Testing Services NA, Inc. v. Dash (7/20/2001), the court disagreed, finding that although an employer's material breach of an employment agreement may relieve an employee from further obligations under a noncompetition provision of the same agreement, any obligations under a separate agreement remain intact. As a result, the court upheld a total award of $520,000 in favor of Intertek.

Court Upholds FMLA Regulation Requiring Prospective Leave Designation

In Nusbaum v. CB Richard Ellis Inc. (10/26/2001), the U.S. District Court in New Jersey allowed a secretary to proceed with a claim that her employer violated the Family and Medical Leave Act by failing to prospectively inform her that her absences would count against her FMLA allotment. The employer had argued that the regulation requiring such prospective designation was invalid because it exceeds the scope of the FMLA statute. However the court disagreed.

This decision is at odds with three federal court decisions on the same issue: Ragsdale v. Wolverine Worldwide, Inc. (reported in our 7/31/2000 issue of e-News), Brungart v. Bellsouth Telecommunications, Inc. (reported in our 11/6/2000 issue), and Twyman v. Dilks (reported in our 10/9/2000 issue). The U.S. Supreme Court this year agreed to review the *Ragsdale* decision and hopefully will resolve this apparent split among the courts.

IRS Issues Saver's Credit Notice

The U.S. Internal Revenue Service recently released a Saver's Credit Notice related to the Saver's Credit changes that were enacted by the IRS this past June. Under the "Saver's Credit," employees with adjusted gross income up to $50,000 may be eligible for a maximum $2,000 income tax credit based on a percentage of the employee's contributions to an employer's 401(k) plan. An employee who files a joint tax return reflecting income not exceeding $30,000 ($15,000 for single) would be eligible for the maximum credit equal to 50% of his or her contribution. The credit is phased out rapidly, so an employee who files a joint return with income of just less than $50,000 ($25,000 for single) would only receive a 10% credit. The newly issued sample notice to employees is designed for employers to distribute to employees during the upcoming open enrollment periods. However, employers

are not under any obligation to provide the notice.

EEOC Stopped from Obtaining Information not Relevant to Present Charge

In EEOC v. Southern Farm Bureau Casualty (11/5/2001), the U.S. Court of Appeals for the Seventh Circuit ruled in a race discrimination case that the U.S. Equal Employment Opportunity Commission could not demand information related to sex discrimination. The appeals court upheld the lower court's refusal to enforce the EEOC's subpoena. The appeals court noted that, even though the EEOC is charged with the responsibility for enforcing federal anti-discrimination laws, it could not simply demand information that it considers relevant to all of its areas of jurisdiction. Rather, the information requested must be based on a valid pending charge.

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