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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U.S. Supreme Court Rules that ERISA Does Not Preempt Illinois HMO Law Providing for Second Opinion on Medical Necessity

Debra Moran was a covered beneficiary under a medical benefits plan provided by Rush Prudential HMO, Inc., sponsored by her husband's employer and governed by the Employee Retirement Income Security Act. Moran suffered from pain and numbness in her shoulder that her primary care physician was unable to successfully treat through conservative treatments. Moran's physician recommended surgery by an unaffiliated specialist who developed an unconventional treatment for her condition. Rush Prudential denied her request and Moran followed the plan's internal appeals process. Rush Prudential decided that the proposed procedure was not medically necessary and instead proposed that she undergo standard surgery. Rather than appeal under ERISA, Moran sought an independent medical review of her claim under the Illinois HMO Act. The act requires each HMO to permit a review of a claim by an independent physician to resolve a dispute between a beneficiary's physician and the HMO regarding the medical necessity of a

covered treatment. If the independent physician determines that the covered treatment is medically necessary, the HMO must provide that treatment. A reviewing physician found the procedure sought by Moran to be medically necessary. Rush Prudential still refused to permit the surgery, and Moran sued Rush Prudential in Illinois state court. Rush Prudential removed the lawsuit to federal court, arguing that the Illinois HMO Act was preempted by ERISA.

In Rush Prudential HMO, Inc. v. Moran (6/20/02), the U.S. Supreme Court in a 5-4 decision ruled that the Illinois HMO Act did not preempt ERISA. The court explained that the act did not provide any new claim under state law nor did it authorize any new remedies. The court rejected Rush Prudential's argument that the Illinois HMO Act imposed a mandatory arbitration provision that might lead to differences among the states, contrary to ERISA's goal of encouraging national uniform health plans. In a dissent, four justices argued that the Illinois HMO Act's independent review provisions and any similar acts adopted by other states would create a disincentive to the formation of employee health benefit plans because of increased costs imposed by a patchwork of state laws.

U.S. Supreme Court Invalidates NLRB Standard for Retaliatory Lawsuits

BE&K Construction Company, an industrial general contractor, was hired to modernize a California steel mill. BE&K filed a federal lawsuit against several unions claiming that they violated the federal Labor Management Relations Act by illegally lobbying for an emissions standard without any real concern that the project would harm the environment, hand-billing and picketing the worksite and encouraging strikes among the subcontractors, filing state court litigation to delay the construction project and raise costs, and filing grievance proceedings against joint venture partners for the project. The court dismissed BE&K's lawsuit.

In response to charges filed by two unions against BE&K, the National Labor Relations Board issued an administrative complaint against BE&K alleging it violated the National Labor Relations Act by filing and maintaining a baseless federal lawsuit. The NLRB argued that BE&K restrained, coerced or interfered with the exercise of rights related to union activities. The NLRB alleged that BE&K's lawsuit was baseless because all of the claims were dismissed by the court or withdrawn with prejudice. The NLRB ordered BE&K to cease and desist from prosecuting any lawsuits, to post a notice to employees admitting it violated the NLRA, and to pay the union's legal fees and expenses incurred in defending the lawsuit. BE&K appealed.

In BE&K Construction Company v. National Labor Relations Board (6/24/02) the U.S. Supreme Court ruled that the NLRB's enforcement of the NLRA's retaliation provision violated BE&K's first amendment constitutional right to file lawsuits. As explained by the Supreme Court, the NLRB's enforcement of the retaliation provision did not differentiate between legitimate lawsuits that failed on their merits and meritless lawsuits calculated to retaliate against unions. The court explained that filing a lawsuit to challenge union conduct

will not be retaliatory as long as the employer objectively and subjectively believed that the lawsuit was legal.

Small Employers Exempt from Connecticut Discrimination Statutes

In Thibodeau v. Design Group One Architects, LLC (7/2/02), the Connecticut Supreme Court in a 3-2 decision ruled that employers with fewer than three employees are exempt from liability under the Connecticut Fair Employment Practices Act. Nicole Ann Thibodeau sued her former employer, Design Group One Architects, claiming that she had been discharged because of her pregnancy. Design Group One had three principals but employed only two individuals. The CFEPA provides that its protections only apply to employers with three or more employees. Although the court recognized the broad array of state and federal statutes and constitutional provisions evidencing a general policy against sex discrimination, the court upheld the public policy expressed in the CFEPA that excluded small employers. The court explained that the legislature did not wish to subject Connecticut's smallest employers to the significant burdens associated with a defense of employment discrimination claims.

In a dissenting opinion, two justices challenged whether the CFEPA's statutory exclusion of small employers was intended by the legislature to override the state's clear public policy against sex discrimination. The dissent pointed out that, if employers with fewer than three employees were exempt from the sex discrimination provisions of CFEPA, then those small employers also would be exempt from the other protected categories under CFEPA.

Information Disqualifying Applicant for Employment Did Not Bar Race Discrimination Claim

Kenneth O'Neal, who is African-American, had been trying to become a New Albany, Indiana police officer for nearly 20 years. After New Albany twice rejected O'Neal's application, he filed a race discrimination claim that ultimately settled. O'Neal then applied for a third time and, after passing a written examination and an interview process, was placed on a list for available positions. Two years later, O'Neal was directed to take a medical examination, a condition of becoming a police officer. He was told that he failed the medical examination because of heart problems. O'Neal saw a cardiologist who opined that his heart was in good condition. However, New Albany's physician refused to certify O'Neal as having passed the examination without additional medical tests. O'Neal did not have these additional tests performed and was not hired as a police officer. He sued New Albany for race discrimination in violation of Title VII and Section 1981. New Albany defended on the basis that an Indiana statute prohibited anyone from becoming a police officer who was over 36 years old. O'Neal was 38 years old at the time. The trial court dismissed O'Neal's claims and he appealed.

In O'Neal v. City of New Albany (6/14/02) the U.S. Court of Appeals for the Seventh Circuit ruled that O'Neal offered enough evidence to show that, despite the Indiana statute

imposing a maximum age for hiring police officers that would have disqualified him from employment, New Albany never considered his age to be a disqualifying factor when it decided not to hire him. The appeals court noted that New Albany's defense that the statute rendered O'Neal unqualified to work as a police officer was pretextual because that differed from the explanation given to O'Neal for failing to hire him. In addition, the court pointed out that the only reason given for not hiring him was his medical condition and the additional medical tests imposed by New Albany were a ruse. The additional testing was merely to inquire about earwax, gingivitis, possible urinary infection, and a lesion, none of which had anything to do with his ability to perform the duties of a police officer. Finally, the appeals court noted that O'Neal was the only applicant ever to have failed a medical examination.

Blanket Policy Barring Rehire of Employee who Completed Drug Rehabilitation Violated ADA

Joel Hernandez worked for Hughes Missile Systems Company as a service technician. After 25 years of work, Hernandez tested positive for cocaine. He opted to resign rather than face termination. His file noted that he "quit in lieu of termination." Two years later, Hernandez applied for a position with Hughes. Hughes rejected his application. Hernandez claimed that Hughes failed to hire him due to his record of a disability or because it regarded him as having a disability in violation of the Americans with Disabilities Act. A lower court dismissed Hernandez's claims, finding that Hughes had a blanket policy of not rehiring former employees whose employment ended due to termination. Hernandez appealed.

In Hernandez v. Hughes Missile Systems Company (6/11/02) the U.S. Court of Appeals for the Ninth Circuit ruled that Hughes's unwritten blanket policy against rehiring former employees who were terminated, although not unlawful on its face, violated the ADA as applied to former drug addicts whose only work-related offense was testing positive because of their addition. The appeals court explained that, if Hernandez was in fact no longer using drugs and had been successfully rehabilitated, then he may not be denied reemployment simply because of his past record of drug addiction. The appeals court also pointed out that a company may not shield itself from liability by creating a blanket policy against rehiring former employees that would induce employees who make hiring decisions to avoid their responsibility under the ADA to ensure that they do not commit unlawful acts.

New Connecticut Law Requires Revised Employment Applications to Protect Applicants with Expunged Criminal Records

Connecticut enacted a new law, effective October 1, 2002, that prohibits an employer or an employer's agent, representative or designee from requiring an employee or applicant to disclose the existence of any arrest, criminal charge or conviction, the records of which have been erased pursuant to Connecticut law. Any employment application form that contains any question concerning the criminal history of the applicant must contain a notice,

in clear and conspicuous language, (1) that the applicant is not required to disclose the existence of any arrest, criminal charge or conviction, the records of which have been erased, (2) that lists the crimes subject to erasure, and (3) that any person whose criminal records have been erased is deemed to have never been arrested and may so swear under oath. The law also prohibits an employer or an employer's agent, representative or designee from denying employment to a prospective employee or from discharging or discriminating against an employee because of a prior arrest, criminal charge or conviction that has been erased.

Invasion of Medical Privacy Claims Not Preempted under ERISA

Frances Darcangelo sued her employer, Verizon Communications, Inc., and an administrator of a disability benefits plan that Verizon sponsored for its employees. Darcangelo alleged that Verizon and the plan administrator solicited and disseminated her private medical information in order to assist Verizon in declaring her a threat to her co-workers to avoid anticipated claims under the Americans with Disabilities Act. Darcangelo claimed violation of Maryland's medical record confidentiality statute and its unfair and deceptive trade practices statute, and invasion of privacy, negligence, and breach of the disability plan contract. Verizon and the plan administrator removed to federal court and sought to dismiss all claims because they were preempted by the Employment Retirement Income Security Act. The trial court dismissed all of the claims. Darcangelo appealed.

In Darcangelo v. Verizon Communications, Inc. (5/28/02) U.S. Court of Appeals for the Fourth Circuit reinstated Darcangelo's claims for breach of confidentiality of medical records, unfair trade practices, invasion of privacy, and negligence but affirmed dismissal of her claim for breach of the disability plan. The appeals court, crediting the allegations of Darcangelo's complaint, determined that Verizon and the plan administrator acted outside the bounds of the plan if they solicited and disseminated her private medical information for the sole purpose of helping Verizon establish that she posed a sufficient threat to her coworkers to warrant her discharge. The appeals court explained that their conduct was not preempted because it did not relate to the administration of the disability plan, fiduciary duties under the disability plan, or the disability plan itself. However, the appeals court noted that Darcangelo's claim that Verizon and the plan administrator breached the disability plan was a claim to enforce the terms of a contract, which was an ERISA plan, and accordingly that claim was preempted under ERISA.

Four LEB Attorneys Join Robinson & Cole

We are pleased to announce that Ursula L. Haerter, Anne Noble Walker, Michele L. Strickland, and M. Catherine Healy have joined R&C's Labor, Employment and Benefits practice group. Please "click" on their names to send them an e-mail message.

Ursula represents private and public sector employers in labor and employment matters,

litigation and counseling. She joins us after more than seven years in private practice and eight years with the Hartford region of the National Labor Relations Board. Ursula works with clients to implement effective preventive strategies to minimize the potential for labor and employment issues, including the use of alternative dispute resolution options.

Anne represents employers in labor and employment matters, including employment litigation. She also regularly defends plan administrators, plan sponsors and other fiduciaries in employee benefits litigation. Anne also represents municipalities in employment and labor relations and related litigation. She joins us after more than ten years in private practice.

Michele focuses on immigration law. She obtains all types of immigrant and nonimmigrant visas in all employment-based categories. She is a member of the Executive Committee of the Connecticut Chapter of the American Immigration Lawyers Association and is currently its Chair.

Cathy practices primarily in the area of business immigration law. She counsels human resources personnel, executives and managers on how to obtain all types of immigrant and nonimmigrant visas for employees. She also counsels physicians and researchers on how to obtain both temporary and permanent immigration status based upon their abilities and talents.

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