Law of the Workplace

SIEGEL, O'CONNOR, O'DONNELL & BECK, P.C. **Winter 2008-2009**

A Quarterly Newsletter for Connecticut Employers
Edward "Bud" F. O'Donnell, Jr., Co-Managing Editor
Nick Grello, Co-Managing Editor

LABOR LAW

THE EMPLOYEE FREE CHOICE ACT - WHAT ALL EMPLOYERS MUST KNOW

BY MATTHEW K. CURTIN

The Employee Free Choice Act ("EFCA") aims to drastically revise the National Labor Relations Act ("NLRA"), so that organizing workers will be much easier for unions. Although Congress first considered the EFCA in 2007, it failed to make it out of the Senate during that time. Today, however, the EFCA remains organized labor's top legislative priority; and with Barack Obama assuming the role as President and a Democratic Congressional majority to boot, the EFCA appears likely to come up for consideration with renewed strength in the 111th Congress, which begins in January 2009. So, what should employers know?

(Continued on page 2)

IN THIS ISSUE

LABOR LAW

EMPLOYMENT LAW

SEMINARS

For more information on seminars featuring our Firm's attorneys, please visit our website at **www.siegeloconnor.com.**

UPCOMING SEMINARS

REMAINING UNION FREE IN THE EMPLOYEE FREE CHOICE ACT ERA
JANUARY 13, 2008

Attorney Edward ("Bud") F. O'Donnell, Jr. is presenting a seminar regarding the impact of the EFCA on employers in Connecticut at the Hawthorne Inn in Berlin.

SURVIVING A SOFT ECONOMY: LEGAL CONSIDERATIONS FOR MANAGEMENT
JANUARY 22, 2008

Attorney Edward ("Bud") F. O'Donnell, Jr. will present a seminar in connection with the Middlesex County Chamber of Commerce Hotel/Restaurant Council on how to cut costs during economic downturns. The seminar will begin at 3 PM at 393 Main Street, Middletown.

CONDUCTING EFFECTIVE MUNICIPAL MEETINGS
JANUARY 22 & 29, 2008

Attorneys Daniel P. Murphy and Ashley E. Baron will present a two-day course for board and commission chairs and members focused on conducting municipal meetings. For more information, contact Marie Peterson at Naugatuck Valley Community College at 203-596-8712.

SEXUAL HARASSMENT EDUCATION AND TRAINING
FEBRUARY 6, 2008

Attorneys Meredith G. Diette and Ashley E. Baron will present a seminar that will satisfy the supervisory training requirements for the State of Connecticut at the Hartford Marriott Downtown from 9-11 AM.

WINNING YOUR FIRST CIVIL TRIAL
FEBRUARY 10, 2008

Attorney Glenn A. Duhl will present a full day seminar aimed at providing practical trial techniques at the Sheraton Hartford Hotel, 100 East River Drive, East Hartford, CT, in connection with the National Business Institute.

NEW REALITIES IN EMPLOYMENT LAW
MARCH 3, 2009

Attorney Daniel P. Murphy will present a seminar on Immigration Compliance in the Workplace in connection with Sterling Education Services, Inc. at the Sheraton Hartford Hotel, 100 East River, East Hartford, CT.

(Continued from page 1)

As drafted in 2007, the EFCA will significantly amend the NLRA to virtually eliminate the secret-ballot election as a union's primary organizing tool. In fact, the EFCA directs the National Labor Relations Board ("Board") to immediately certify as bargaining representative any union that collects a simple majority, or 51%, of employee signatures on authorization cards.

The EFCA will also require mediation and mandatory interest arbitration on initial collective bargaining agreements if parties cannot reach agreement within 90 days of bargaining – a radical departure from current law. Under current law, the NLRA only requires that parties negotiating an initial labor contract bargain in good faith. The EFCA, however, will impose harsh deadlines on the parties to negotiate an initial contract. If the parties cannot reach agreement within those stringent deadlines, an arbitrator will impose an initial contract which will bind the parties for two years.

The EFCA will also increase civil penalties on employers found to have willfully or repeatedly violated employees' rights in either an organizing campaign or negotiating an initial contract. The EFCA will not, however, increase civil penalties on unions for engaging in similar behavior.

Given the current political climate, the EFCA will likely soon become the law of the land, but in what form remains to be seen. Members of Congress proposed numerous amendments to the EFCA the last time it was up for consideration. Regardless of the form the EFCA eventually takes, employers should start preparing for the EFCA today by developing proactive strategies to implement a union-free culture.

Employment Law

Failure to Submit to Return to Work Medical Examination Supports Termination

By Paul A. Testa

Recently, the Connecticut Appellate Court held that an employer did not wrongfully discharge an employee who refused to undergo a return to work medical examination and affirmed the employer's ability to enforce its own established employment policies.

In *Joyner v. Simkins Industries, Inc.,* 111 Conn. App. 93 (2008), Nethia Joyner, an at-will employee, brought a wrongful discharge suit alleging that her former employer, Simkins Industries, terminated her in violation of an important public policy underlying the Americans with Disabilities Act ("ADA") "by requiring her to undergo a return to work medical examination." Simkins maintained that it terminated Joyner "for insubordina-

(Continued on page 4)

FAQs: ADA Amendments Act Effective January 1, 2009

By Melanie E. Dunn

Beginning in 2009, employers will be required to use more liberal standards to determine whether their employees are considered disabled under the Americans with Disabilities Act ("ADA"). The ADA generally considers an individual to be "disabled" if he or she has a physical or mental impairment substantially limiting a major life activity. The newly effective ADA Amendments Act ("ADAAA") does not alter this definition, but changes the way it is applied to employees in two major ways. Specifically, the ADAAA eliminates mitigating measures and expands the categories of major life activities.

Mitigating Measures. Historically, when evaluating whether an employee met the definition of "disabled," employers took into account whether the employee could control the impairment in question using mitigating measures, such as medication or prosthetics. Effective January 1st, however, employers must now evaluate an employee's physical or mental impairment in its unmitigated state when determining ADA eligibility. The amendments do permit one exception - eyeglasses and contact lenses may still be considered as mitigating measures.

Major Life Activities. The ADAAA also expands the recognized categories of "major life activities" to specifically include eating, sleeping, bending, reading, concentrating, thinking, communicating, and operating a major bodily function. This adds to the categories previously listed in the statute, which included seeing, breathing, hearing, walking, standing, lifting, performing manual tasks, caring for oneself, and working. Furthermore, an entire paragraph of the ADAAA focuses on describing examples of major bodily functions, impairment of which may constitute a disability under ADA. These include functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

In addition to broadening the scope of who qualifies as disabled under the ADA, the amendments clarify that employees regarded as having a disability, regardless of whether the perceived impairment actually limits a major life activity, may also bring disability discrimination claims under the statute. However, employers need not reasonably accommodate such individuals. Moreover, while an employee cannot prevail on a discrimination claim based upon a "minor or transitory" impairment, an employee with an impairment that is merely episodic or in remission could meet the definition of disabled under the statute if the impairment would substantially limit a major life activity when active. Finally, Connecticut employers are reminded that Connecticut's disability discrimination provisions are far more broad and encompassing than the ADA and must be read in conjunction with their federal counterpart.

FAQs: New FMLA Regulations

By Melanie E. Dunn

The U.S. Department of Labor released final regulations regarding the Family and Medical Leave Act ("FMLA") that are effective January 16, 2009. Generally, the FMLA requires certain employers to provide eligible employees up to 12 weeks of unpaid leave during any 12-month period for certain qualifying reasons. This article addresses some of the more significant portions of the new regulations.

• ***Military Leaves*** – In an earlier issue of *Law of the Workplace*, we reported on a new law extending FMLA leave to military families in certain situations. The new regulations officially implement the law and provide greater clarity for employers regarding this new type of leave. One significant definition is that of "qualifying exigency", which includes: (1) short-notice deployment; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) additional activities to address other events arising out of the covered military member's active duty or call to active duty status, provided the employer and employee agree that such leave shall qualify as an exigency, and to the timing and duration of the leave. The 12-month period for purposes of military family leave begins on the first day the employee takes leave to care for the service member.

• ***New Notice Requirements –*** The regulations impose new and expanded requirements on both employees and employers. Employees are now required to follow their employers' call-in policies regarding absences. Employers must now follow new notice requirements. First, within 5 days of an employee's leave request, or of the employer's first becoming aware that a leave may qualify under the FMLA, the employer must inform the employee whether the leave meets the statutory requirements of the FMLA. During the same 5 day period, the employer must notify the employee of his or her rights and responsibilities under the FMLA. Finally, within 5 business days of its obtaining sufficient information to make the determination, the employer must notify the employee whether it will designate the leave as FMLA leave. As discussed in the article below, the DOL has developed recommended forms for providing these notices. Finally, the regulations clarify that employers may provide retroactive notice as long as the delayed notice did not cause any harm to the employee.

• ***12 Months of Service*** – Although the regulations do not change the requirement that employees must have been employed for at least 12 months by the employer prior to being eligible, the regulations limit breaks in service to 7 years or less. As such, for purposes of calculating the 12 months of employment, employers must count any service during the 7 years preceding the leave request.

• ***"Serious Health Condition" Clarified –*** Although the qualifying reasons for taking FMLA leave remain unchanged, the regulations clarify the requirements for leave due to a serious health condition. For conditions that incapacitate the individual for more than 3 consecutive, full calendar days and require two or more treatment visits to a healthcare provider, the two visits must occur in person and within 30 days of the first day of incapacity, with the first visit taking place within 7 days of incapacity. Similarly, for conditions that incapacitate the individual for 3 consecutive, full calendar days and require a regimen of continuing treatment, the first doctor's visit must take place in person within 7 days of becoming incapacitated. Chronic conditions must require at least 2 treatment visits per year.

• ***Medical Certification –*** The regulations provide different medical certifications for employees and for family member leave, and extend the now 2-day time to request certification to 5 days. Where an employer finds the certification deficient, employers must notify the employee in writing and allow 7 calendar days to fix the errors before denying the leave request. The regulations also permit an appropriate employer representative to contact the employee's healthcare provider directly to clarify and authenticate the medical certification. Finally, employers may now require "fitness for duty" certifications addressing the functional abilities of employees returning from leave.

New FMLA Posters and Forms

By Ashley E. Baron

With the new Family and Medical Leave Act ("FMLA") rules going into effect on January 16, 2009, employers should be aware of several new forms relevant to the changes. While the forms are not mandatory, the Department of Labor ("DOL") highly recommends their use. The new poster and forms can all be downloaded from the DOL website at http://www.dol.gov/esa/whd/fmla/finalrule.htm.

New FMLA Poster: Every FMLA covered employer must post, and keep posted, a notice explaining FMLA rights to employees and procedures for filing complaints.

New FMLA Forms: The DOL has also created new FMLA forms and/or revised existing forms for employers' use. The DOL has now divided the "Certification of Health Care Provider" form (WH-380) into two separate forms: (1) "Employee's Serious Health Condition" (WH-380E) and (2) "Family Member's Serious Health Condition" (WH-380F). Moreover, a new "Notice of Eligibility and Rights and Responsibilities" form (WH-381) now exists. Other new forms include: "Designation Notice to Employee of FMLA Leave" (WH-382); "Certification of Qualifying Exigency for Military Family Leave" (WH-384); and "Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave" (WH-385).

(Continued from page 2)

tion for failing to comply with a request to submit to a return to work medical examination as required by [its] employee handbook." Specifically, Simkins had reason to question Joyner's medical documentation and scheduled an examination for Joyner at its expense. To support its argument, Simkins relied on its employee handbook, which provided details regarding when it might require employees to submit to physical examinations. Joyner failed to show up for the examination and never notified Simkins that she would not "undergo the examination." Three days later, Simkins terminated Joyner for insubordination.

Agreeing with *Simkins*, the Appellate Court reiterated Second Circuit precedent that no violation of the ADA occurs if an employer requests a physical examination "shown to be job-related and consistent with business necessity." The court noted that under certain situations, requiring employees to "undergo a return to work medical examination may constitute a violation of the ADA."

Simkins reminds employers of the importance of having documented and consistently applied employment policies in place.

CONNECTICUT SUPREME COURT INTERPRETS THE FLSA'S FLUCTUATING WORKWEEK METHOD

BY MICHAEL J. SPAGNOLA

The Connecticut Supreme Court recently interpreted the "fluctuating workweek" method ("FWW") of calculating overtime under the federal Fair Labor Standards Act ("FLSA"), the statute requiring employers to pay certain employees time and a half for hours worked over 40 in a work week.

In *Stokes v. Norwich Taxi, LLC,* 289 Conn. 465 (2008), Jeffory Stokes brought a claim against Norwich Taxi for unpaid overtime under the FLSA. Norwich Taxi originally hired Stokes as a mechanic, and paid him on an hourly basis. Subsequently, Norwich Taxi changed Stokes' job title from "mechanic" to "manager of the garage" and began classifying Stokes as a salary exempt employee. Under the FLSA, Stokes did not meet the requirements of a salary exempt employee. Further, despite paying Stokes as a salaried employee, Norwich Taxi continued making deductions from Stokes' salary when he did not work 40 hours in a week.

Generally, under the FLSA, employers must pay overtime to non-exempt employees who work in excess of 40 hours per week at the rate of 1½ times the employee's regular rate of pay. Although not required by the FLSA, employers typically pay non-exempt employees an hourly wage. However, employers may pay non-exempt employees a salary so long as those employees receive overtime following 40 hours of work in any given work week. Under the FWW method, employees receive a fixed salary for all hours worked, whether they work less than 40 hours or more than 40 hours; but in weeks in which the employees work more than 40 hours, they are paid an overtime premium for the extra hours. As the *Stokes* Court explained, the FWW method applies "when an employee is paid a fixed weekly salary regardless of how many hours the employee may work in a given week."

In Stokes, the Court adopted a four-part test utilized by many federal courts for determining whether the FWW method applies: (1) the employee's hours must fluctuate from week to week; (2) the employee must receive a fixed salary that does not vary with the number of hours worked during the week (excluding overtime premiums); (3) the fixed amount must be sufficient to provide compensation every week at a regular rate not less than minimum wage; and (4) the employer and employee must share a clear mutual understanding of the arrangement. In addition, the employer, not the employee, bears the burden of proving that the FWW method applies.

Because Stokes was not an exempt employee, the FLSA required Norwich Taxi to pay him overtime. Norwich Taxi argued that the Court should apply the FWW method for calculating any overtime it owed to Stokes, which would have significantly limited its back wage liability. The Court applied the four-part FWW test and found that because Norwich Taxi failed to pay Stokes a fixed salary that did not vary with the number of hours worked during the week, the FWW method of calculating overtime did not apply.

The *Stokes* case serves as a reminder that although the FWW method may in certain instances be a more favorable method of calculating overtime, each of its requirements must be strictly adhered to. If the FWW method is not implemented correctly, the employee could be transformed from a salaried employee to an hourly employee, with potentially significant back wage liability for the employer.