Law of the Workplace

SIEGEL, O'CONNOR, O'DONNELL & BECK, P.C.

A Quarterly Newsletter for Connecticut Employers
Fall 2009
Edward "Bud" F. O'Donnell, Jr., Co-Managing Editor
Nick Grello, Co-Managing Editor

EMPLOYMENT LAW

WHAT HAPPENS AT THE HOLIDAY PARTY STAYS AT THE HOLIDAY PARTY…OR MAYBE NOT!

BY ASHLEY E. BARON

Ahhh, the holidays. A time for joy, happiness, celebration and potential legal troubles. If that last item does not make your list of desired "gifts," the information below will help you prevent workplace holiday party liabilities.

1. **Do Not Insist on Having a "Christmas" Party.** Naming your company party after a holiday only recognized by one religious group demonstrates your company's lack of sensitivity. More importantly, such a practice could lead to, and support, a claim of religious discrimination. Instead, pick a name such as "Holiday Party" or "Annual Celebration."

2. **Ensure Invitations Include Everyone.** Inviting employees to bring "husbands and wives" to your holiday

Continued on page 2

IN THIS ISSUE

EMPLOYMENT LAW

LABOR LAW

UPCOMING SEMINARS

SEXUAL HARASSMENT PREVENTION TRAINING FOR SUPERVISORS
NOVEMBER 18, 2009

Attorneys Meredith G. Diette and Ashley E. Baron will present a seminar meeting the Connecticut state requirements for supervisor sexual harassment prevention training at the Mystic Marriot in Groton, Connecticut from 9:00-11:00 a.m. For more information please contact Ashley E. Baron at abaron@siegeloconnor.com or Meredith G. Diette at mdiette@siegeloconnor.com.

SHARED SERVICES BETWEEN BOARDS OF EDUCATION AND MUNICIPALITIES: PEACEFUL COEXISTENCE OR WOLF IN SHEEP'S CLOTHING?
NOVEMBER 21, 2009

Attorney Fred Dorsey will conduct this workshop on Saturday, November 21, 2009 form 9:35-10:45 a.m. at the Mystic Marriott in Groton, Connecticut, as part of the Annual Convention of the Connecticut Association of Boards of Education and Connecticut Association of Public School Superintendents.

WHY IS THE STATE MEDDLING IN PRIVATE SECTOR LABOR MATTERS?
DECEMBER 8, 2009

Attorney Don Strickland will speak before the Connecticut Chapter of Labor and Employee Relations Association December meeting on the subject "Why is the State Meddling in Private Sector Labor Matters?".

WEBINAR: HIRING DO'S AND DON'T'S
DECEMBER 17, 2009

Attorney Meredith G. Diette will present a webinar covering legal considerations during the hiring process at 12:00 p.m. For more visit the Chamber's website at http://www.chamberect.com/chamber-activities.

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

150 TRUMBULL STREET
HARTFORD, CT 06103
(860) 727-8900

SIEGEL, O'CONNOR, O'DONNELL & BECK, P.C.
www.siegeloconnor.com

14 EUGENE O'NEILL DRIVE
NEW LONDON, CT 06320
(860) 442-4747

(Continued from page 1)

party raises several discrimination issues. First, you alienate unmarried employees. Secondly, gay, bisexual and transgender employees may feel excluded or discriminated against where they do not refer to their partner as a "husband or wife." If you intend to allow employees to bring a "plus-one," simply inform employees that they may bring a "guest" or "significant other."

3. **Pay Non-Exempt Employees for Time Spent Party Planning.** If non-exempt members of your staff work evenings or weekends to plan the holiday party, you must pay them for their time. It is not a valid defense to a wage and hour complaint to say that those employees were "volunteering" or that arranging the holiday party "is not really work." To avoid the issue entirely, instruct these employees to plan the party during working time only.

4. **Use Caution When Calling the Party "Voluntary."** If you hold your holiday party off company time and do not pay employees to attend, inform employees that attendance is entirely voluntary and will not help or hurt their standing with the company. Under wage and hour laws, employees required to attend company parties (either directly or indirectly), due to pressure from a supervisor or other circumstances that make the party seem mandatory to employees, must be paid regular or overtime wages for attending. Some companies avoid this potential pitfall by holding company parties during working hours or paying employees for attending an after-work event.

5. **Know the Implications of Serving Alcohol.** Providing alcohol at the party, while not illegal, certainly increases the risk of potential liabilities. Consider before-party considerations: 1) send a memo to employees before the event reminding them of the dangers of drinking and driving and laws prohibiting persons under 21 from drinking alcohol; 2) provide a cash bar or a daytime event which tends to reduce the number of drinks employees consume; 3) when offering an open bar, serve only beer and wine; 4) instruct servers to limit or cut-off drinks to anyone they feel has had too much to drink; and 5) offer taxi rides home to visibly inebriated employees.

6. **Avoid Sexual Harassment Issues.** The majority of issues created as a result of company holiday parties arise as sexual harassment complaints. Whether it was Jim from accounting who became too touchy after his third martini or Peggy from IT announcing the sexy holiday gift she bought her husband, employees need to be reminded that if their conduct would be inappropriate at work, it is also unacceptable at the holiday party. Inviting significant others or clients to the party may encourage employees to remain on their best behavior. Be certain to immediately confront any employee acting inappropriately. Most importantly, remember that any complaints of harassment, sexual or otherwise, made at or after the holiday party must be investigated promptly using the same procedures for complaints arising during a regular work day.

Remember, parties are still work events, even those occurring off-site and after hours, and all of your company's rules and policies still apply. Making this point clear to your employees will greatly increase your ability to enjoy your holiday party without incident.

EMPLOYERS MAY BE LIABLE UNDER ADEA FOR DISCRIMINATORY ACTS OF INDEPENDENT CONTRACTORS USED IN HIRING PROCESS

BY: MELANIE E. DUNN

Recently, the Second Circuit answered the question of whether an employer who uses an independent contractor to recruit and hire staff can be liable for the contractor's acts of discrimination. In *Halpert v. Manhattan Apartments Inc., No. 07-4074 (2d Cir. Sept. 10, 2009)*, the Court found that an employer can be held liable for discriminatory hiring decisions made by independent contractors with the apparent authority to hire on the employer's behalf.

In *Halpert*, an independent contractor, Robert Brooks, interviewed Michael Halpert for a position showing rental apartments managed by defendant Manhattan Apartments, Inc. ("MAI"). Brooks told Halpert he was "too old" for the position, and Halpert filed an action against MAI under the Age Discrimination in Employment Act ("ADEA"). The Second Circuit revered the District Court's entry of summary judgment for MAI. The *Halpert* court focused on whether the independent contractor acted as an agent of MAI in conducting the hiring. If so, MAI could be responsible for the independent contractor's discriminatory acts.

Further, the Court held that an employer may also be liable for the discriminatory acts of its independent contractor even if the latter had only apparent authority to act on the employer's behalf, i.e., if the employer led the job applicant to believe that he was applying for a position with the employer rather than with the independent contractor. Therefore, employers do not insulate themselves from liability under employment discrimination laws by delegating hiring decisions to intermediaries such as independent contractors.

Employers using hiring agencies or recruiters should include indemnity clauses and require certification that the individuals undertaking the hiring and interviewing have appropriate training.

EEOC Issues Notice of Proposed Rulemaking Concerning ADAAA Regulations

By: Melanie E. Dunn

In September, EEOC issued proposed regulations to incorporate the newly passed ADA Amendments Act of 2008 ("ADAAA"). These proposed regulations span over 90 pages. The EEOC is accepting comments on the proposed amendments until November 23, 2009, after which it will evaluate all of the comments and make responsive revisions where necessary. Below are some of the more significant aspects of the proposed regulations.

The ADA defines "disability" as an impairment that substantially limits one or more major life activities, a record of such impairment, or being regarded as having such an impairment. While the ADAAA does not change that definition, both the ADAAA and the proposed regulations expand its meaning and change how to interpret "substantially limits," "major life activities," and "regarded as" consistent with Congress' stated intent. In all, the new guidance and statute make it much easier for individuals seeking ADA protection to meet the definition of "disability".

First, the proposed regulations significantly expand the list of examples of "major life activities", incorporating the specific examples within the ADAAA and adding three new activities: sitting, reaching, and interacting with others. Although non-exhaustive, the list provides clear evidence of the wide-ranging nature of this requirement. The EEOC asserts, in a Question & Answer document issued to explain the proposed regulations, that the expanded list "make[s] it easier to find that individuals with certain types of impairments have a disability."

Equally broad, the proposed regulations define "substantially limited" in a way that compares the ability of the impaired individual with that of members of the general population. Specifically, contrary to holdings by the U.S. Supreme Court, the impairment "need not prevent, or significantly or severely restrict, the individual in performing a major life activity." However, the temporary, non-chronic impairments of short duration and with or no residual effects continue to fall outside of the ADA protections.

The ADAAA, as further explained in the proposed regulations, prevents employers from considering the positive effects of mitigating measures when determining whether an individual is disabled. In fact, employers may only acknowledge the negative effects of mitigating measures when determining the existence of a disability. The proposed regulations list the mitigating measures detailed in the ADAAA and add surgical interventions that do not permanently eliminate the impairment. However, as previously permitted, employers may continue considering the positive effects of "ordinary eyeglasses or contact lenses … [that] fully correct visual acuity or eliminate refractive error."

In a significant departure from previous practice, the ADAAA proposed regulations list numerous impairments deemed to meet the definition of disability "quickly and easily". These impairments include HIV/AIDS, deafness, cancer, autism, intellectual disability, major depression, and obsessive-compulsive disorder. The proposed regulations also recognize that some impairments may be substantially limiting for some but not for others, such as asthma, back and leg impairments, and learning disabilities. Moreover, the proposed regulations explain that some impairments will never meet the definition of disability including the common cold, seasonal or common influenza and non-chronic gastrointestinal disorders.

The proposed regulations also address the "record of" and "regarded as" disability criteria. The ADA protects individuals from employment discrimination based upon knowledge of the individual's past substantially limiting impairment, regardless of whether the employer actually relied upon a record that listed the individual as disabled. Under the ADAAA and proposed regulations, individuals may prevail in disability discrimination actions without showing that the employer believed that the impairment or perceived impairment substantially limited a major life activity.

EEOC Enforcement Guidances From 2009

By: Meredith G. Diette

Below is a list of each EEOC guidance and the internet address released during 2009. These documents provide guidance and are helpful in knowing what the EEOC expects from employers affected by the relevant information.

1. **Employer Best Practices for Workers with Caregiving Responsibilities**, eeoc.gov/policy/docs/caregiver-best-practices.html

2. **Understanding Waivers of Discrimination Claims in Employee Severance Agreements**, eeoc.gov/policy/docs/qanda_severance-agreements.html

3. **Pandemic Preparedness in the Workplace and the Americans with Disabilities Act**, www.eeoc.gov/facts/pandemic_flu.html

4. **Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008**, www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html

Employers and Human Resource professionals should check the EEOC's website regularly for information and updates regarding employment laws and significant court decisions. Moreover, the U.S. Department of Labor provides a website with helpful information and resources.

LABOR LAW

EEOC Revises Compliance Manual to Account for Ledbetter Act

By: Mattew K. Curtin

The EEOC recently revised its Compliance Manual to account for federal legislative changes implementing a greatly expanded statute of limitations during which a plaintiff may file a charge of pay discrimination. The Compliance Manual now provides guidance on the Lilly Ledbetter Fair Pay Act which reinstates what is commonly referred to as the "paycheck rule." Under the "paycheck rule" a court may consider each new paycheck in furtherance of an initial discriminatory pay decision as a separate and distinct action that essentially restarts the clock for purposes of the statute of limitations.

According to the EEOC's newly revised manual, if a charge alleges pay discrimination under Title VII, the ADA, the Rehabilitation Act, or the ADEA, the filing period begins when any of the following actions occur: (1) the employer adopts a discriminatory compensation decision or other discriminatory practice affecting compensation; (2) the charging party becomes subject to a discriminatory compensation decision or other discriminatory practice affecting compensation; or (3) the charging party's compensation is affected by application of a discriminatory compensation decision or other discriminatory practice, including each time wages, benefits, or other compensation is paid, resulting in whole or part from such discriminatory decision or practice.

Given the Ledbetter Act's expansive statute of limitations, employers must be proactive and conduct a thorough review of pay practices to ensure full compliance with all applicable law.

Workplace Considerations for Flu Preparedness

By: Meredith G. Diette

Many employers question what can be done regarding preparations for a flu or H1N1 breakout in their workplace. Below are some beginning suggestions.

- Consider providing a flu clinic in your workplace. Although an employer may not require its employees to get the flu shot, employers may encourage employees to do so.
- Clarify your company's leave of absence policies and consider providing flexibility to encourage employees to stay home when sick.
- Remember that you may send employees home who display flu-like symptoms to avoid a direct threat to other employees' health and safety.

Supreme Court To Decide Whether NLRB May Act With Only Two Of Five Members

By: Mattew K. Curtin

The Supreme Court will likely settle an important question of labor law this term when it decides whether, under the National Labor Relations Act ("Act"), the National Labor Relations Board ("Board") may issue decisions when there are only two members serving on the Board. The issue comes to the Supreme Court on appeal from *New Process Steel LP v. NLRB*, where the Seventh Circuit ruled that the Act does allow a two-member Board to issue decisions.

The question of whether a two-member Board may issue decisions has been argued in several Circuit courts, with varying results. For example, the same day the Seventh Circuit issued *New Process Steel*, the D.C. Circuit issued decided *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, holding the exact opposite of *New Process Steel*, i.e. the Act does not allow a two-member Board to issue decisions. In addition, the First Circuit issued a decision agreeing with the Seventh Circuit's holding in *New Process Steel*.

The Act states that "three members of the Board shall, at all times, constitute a quorum of the Board." The Act also allows the Board to delegate all of its powers to a group of three or more members. In late 2007, when there were four Board members, the Board delegated its powers to a group of three Board members right before two members' terms expired. The assumption was the Board could operate with only two members because two members constituted a quorum of the three member panel. Given the apparent conflict in the Act's statutory language, however, there is widespread disagreement as to whether the Act requires three members at a minimum, or whether two members may legitimately act as a quorum of a three member panel.

Resolution of the Circuit Courts' split decisions are of major importance because the Board has consisted of only two members since the beginning of 2008 and in that time the Board issued over 400 decisions. Literally hundreds of cases that were presumed to be finally decided could be nullified depending on the Supreme Court's decision. Now that the Supreme Court has granted certiorari to New Process Steel, it will likely resolve the matter and rule on the legitimacy of the Board's decisions dating back to the beginning of 2008.