

THE BOTTOM LINE

EMPLOYMENT LAW UPDATE

↑ COBRA subsidy under the American Recovery and Reinvestment Act

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA). This new law includes provisions for a nine-month subsidy of COBRA premiums for employees who are involuntarily terminated. The law also imposes additional administrative and notice requirements on employers that require immediate attention.

The COBRA Subsidy

ARRA provides that beginning March 1, 2009, the federal government will subsidize 65% of the COBRA premium for an "assistance eligible individual," provided that individual pays the remaining 35% of the COBRA premium. The 65% portion will be reimbursed by means of a payroll tax credit to the employer, or in the case of an insured plan subject to state continuation coverage laws, but not COBRA, the insurer. The Secretary of the Treasury will issue guidance on how a claim for the tax credit is to be filed.

Assistance Eligible Individual

An "assistance eligible individual" is any person who becomes eligible for COBRA between September 1, 2008, and December 31, 2009, due to the employee's involuntary termination of employment. However, the full subsidy is not available for individuals with adjusted gross income that exceeds \$250,000 (for joint filers) or \$125,000 (for all other filers). Any portion of the subsidy that an individual receives but is not eligible for will need to be reported on the individual's annual income tax return. As a result, employers will not need to determine whether an individual's income makes him ineligible for the subsidy.

Special Election Notice to Previously Terminated Employees

ARRA requires that any individual who would have qualified for the subsidy except that they did not elect COBRA as of February 17, 2009, must be provided a 60-day period to elect the subsidized COBRA continuation coverage. Consequently, employers must send a notice to such individuals informing them of their election rights. If the individual elects coverage, coverage would begin March 1, 2009.

Electing a Different Coverage Option

The new law provides that an employer may, but is not required, to allow an individual who is eligible for COBRA premium assistance to change his health insurance coverage option when making a COBRA election under the employer's plan.

Notice Requirements

ARRA requires plan administrators to modify COBRA election notices to describe the new premium subsidy. The Departments of Labor, Treasury and Health and Human Services will develop a model notice for this purpose within 30 days of the enactment of the new law.

Action Items

While we certainly hope that additional guidance will be forthcoming from the government regarding the implications of the new law, the following are some suggested initial steps that should be undertaken by employers:

- Compile a listing of all assistance eligible individuals who must be notified of the availability of COBRA with the subsidy.
- Update COBRA forms and notices or contact your third party administrators to ensure compliance with the new law.
- Revise COBRA billing systems.
- Have your payroll department or vendor prepared to be able to claim the payroll tax credit to recoup the COBRA premium subsidy.
- Review severance plans and arrangements to determine how they will be affected by ARRA.

2 Appellate court reinstates employee gun rights

On February 18, 2009, the United States Court of Appeals for the Tenth Circuit issued a long-awaited decision regarding the right of Oklahoma employers to ban firearms from their property. Reversing a lower federal court decision in favor of employers, the appellate ruling reinstates a controversial Oklahoma statute that prohibits Oklahoma employers from maintaining certain anti-firearms policies. Employees are once again protected by Oklahoma law from any policy that “has the effect of” prohibiting the transport or storage of firearms in locked vehicles, even on private company property.

Background

In March of 2004, the Oklahoma legislature enacted a series of laws limiting an employer’s ability to prohibit firearm possession by employees on company property. For example, the Oklahoma Firearms Act of 1971 was amended to provide, in relevant part, as follows:

No ... employer ... shall maintain, establish, or enforce any policy or rule that has the effect of prohibiting any person, except a convicted felon, from transporting and storing firearms in a locked motor vehicle, or from transporting and storing firearms locked in or locked to a motor vehicle on any property set aside for any motor vehicle.

21 Okla. Stat. §1289.7a(A)

At the same time, the Oklahoma Self-Defense Act of 1995 was amended in a similar manner, using nearly identical language. 21 Okla. Stat. §1290.22.

In their original form, these amendments established standards of criminal conduct, and a violation could result in a misdemeanor criminal conviction. *Whirlpool Corp. v. Henry*, 110 P.3d 83 (Okla. 2005). However, the laws were subsequently further amended to provide an aggrieved employee with a right to pursue a civil action in court to obtain actual damages, injunctive relief and attorney’s fees. 21 Okla. Stat. §1289.7a(C).

Critics of the amendments argued that the presence of firearms on company property could contribute to workplace violence, as well as increased employer liability for accidental and intentional gun-related injuries. Furthermore, employers argued that the amendments invaded upon a private property owner’s right to prohibit firearms from his or her private property. Proponents of the laws, on the other hand, argued that these amendments merely protected employees’ Constitutional rights to bear arms.

Legal Challenge to the Amendments

In October of 2004, a group of Oklahoma employers filed suit in federal court challenging the validity of the referenced amendments under a variety of legal theories. In October of 2007, after rejecting several of those theories, the court issued a permanent injunction prohibiting the enforcement of the new Oklahoma laws, finding them to be preempted by federal law. More specifically, the Court concluded that the Oklahoma amendments served as a “serious obstacle” to employers attempting to meet their obligations under the “general duty” clause of the federal Occupational Safety and Health Act (the “OSH Act”).¹ Therefore, according to the lower court, the Oklahoma amendments were preempted by federal law and unenforceable.

This week, the United States Court of Appeals for the Tenth Circuit issued its opinion on the resulting appeal and reversed the district court. Specifically, the appellate court concluded that the presence of firearms on company property did not trigger a violation of the OSH Act “general duty” clause, and therefore, no “serious obstacle” was presented by the Oklahoma amendments. The court also rejected the employers’ contention that these laws improperly interfered with the rights of private property owners. And finally, the appellate court concluded that the district court’s injunction was an improper interference by federal courts with Oklahoma’s inherent right to police the conduct of its citizens.

The Bottom Line

This week’s opinion by the appellate court reinstates the amendments to full force. Thus, it is once again a violation of Oklahoma law to “maintain, establish or enforce” any policy that “has the effect of” prohibiting the transport or storage of firearms in locked vehicles in designated vehicle areas, even on private company property.

Although this matter may certainly be further appealed, the likelihood of such action is not yet clear. Therefore, effective immediately, Oklahoma employers should examine their existing policies to ensure conformity with these provisions, and refrain from any efforts to enforce a prohibited policy.

Of course, going forward, it is important to keep in mind the limited scope of these laws. Employers may not prohibit an employee from storing or transporting a firearm in a locked vehicle on property designated for vehicles. However, nothing in the relevant amendments or the resulting court opinions prevents an employer from prohibiting firearms in its buildings, on sidewalks, or otherwise outside of a locked vehicle in a designated vehicle parking area.

¹ The “general duty” clause under the OSH Act requires that “[e]ach employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”

3 The New I-9

In December 2008, U.S. Citizenship and Immigration Services (USCIS) published an interim final rule that revised the Lists of Acceptable Documents for Form I-9, Employment Eligibility Verification, as well as publishing a new Form I-9, dated 02/02/09. The Obama Administration delayed the implementation of the new Form I-9 to allow additional public comment, but the new Form I-9 became official on Friday, April 3, 2009. Employers are now required to use the revised Form I-9 for all new hires and to re-verify any current employee whose employment authorization expires on or after April 3, 2009. An employer may not re-verify a current employee by completing “Section 3 – Updating and Reverification” on a previous version of Form I-9.

The former edition of Form I-9, dated 06/05/2007, is no longer acceptable on or after April 3, 2009. Employers who continue to use the 06/05/2007 edition of Form I-9 on and after April 3 may be subject to civil money penalties. The revised Form I-9 and the updated Handbook for Employers, Instructions for Completing the Form I-9 (M-274), are available at www.uscis.gov.

The new Form I-9 makes changes to the acceptable List A documents offered to prove the employee's identity and authorization to work. Three documents have been added to List A (Documents that Establish Both Identity and Employment Authorization) on the Lists of Acceptable Documents:

- A temporary I-551 printed notation on a machine-readable immigrant visa in addition to the foreign passport with a temporary I-551 stamp;
- A passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with a valid Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI; and
- A U.S. Passport Card.

Three documents were removed from List A on the Lists of Acceptable Documents:

- Form I-688, Temporary Resident Card;
- Form I-688A, Employment Authorization Card; and
- Form I-688B, Employment Authorization Card.

Another significant change is that employees must now present only unexpired documents for Form I-9. Previously, USCIS had authorized employers to accept certain expired documents as evidence of an employee's identity. There are no changes in the procedure by which Form I-9 is completed by the employer and the employee.

4 Oklahoma Supreme Court puts public policy tort claims back on the table

In a critical follow-up to *Kruchowski, et al. v. The Weyerhaeuser Company*, a case we first brought to your attention in December, the Oklahoma Supreme Court has again expanded the scope of damages available to employees asserting certain discrimination claims against Oklahoma employers.

On February 24, 2009, the State's highest court issued its opinion in *Shirazi v. Childtime Learning Center, Inc.*, casting additional light on the so-called "public policy" wrongful discharge claim under Oklahoma law. Reversing a litany of cases extending nearly 20 years, the current court has declared that "public policy" tort claims should be available to plaintiffs alleging wrongful discharge based upon race, color, religion, sex, national origin, or handicap. This ruling expands upon the holding of *Kruchowski*, which provided the same "public policy" claim to purported victims of age-based wrongful termination.

This ruling will undoubtedly usher in a significant change in the litigation of wrongful discharge claims in Oklahoma. Most importantly, the broad availability of this cause of action will expose Oklahoma employers to nearly unlimited damages in routine discrimination cases — effectively eliminating the well-known damage caps provided under federal employment laws.

Background

Since 1989, the Oklahoma Supreme Court has recognized a cause of action for at-will employees that claim to have been terminated in violation of the expressed "public policy" of Oklahoma. These "public policy" claims are also known as "Burk tort" claims, after the 1989 case that first recognized the legal theory.

However, almost immediately following *Burk*, courts refused to allow a "public policy" claim in cases of traditional

discrimination, even though the public policy expressed in the Oklahoma Anti-Discrimination Act (“OADA”) clearly prohibited such discrimination. The courts routinely concluded that no state law cause of action was necessary in such cases because federal anti-discrimination laws provided adequate remedies for victims of illegal discrimination.

This distinction has always been of critical importance. Federal anti-discrimination laws generally provide caps on certain forms of damages. For example, a successful race discrimination plaintiff suing under Title VII of the Civil Rights Act of 1964, a federal law, cannot recover more than \$300,000 in punitive and emotional distress damages — even against a very large employer. Although back pay, front pay and attorney’s fees may be added to this sum, Title VII claims are typically susceptible to a reasonable calculation of maximum exposure to the employer. And, multi-million dollar verdicts from emotional juries are routinely reduced pursuant to the caps provided by federal law.

Oklahoma’s “public policy” tort claim carries no such damage caps. Thus, the courts’ initial refusal to apply the *Burk* legal theory to ordinary discrimination claims kept the maximum exposure calculation available to employers.

A New Trend

Consistent efforts by the plaintiff’s bar in Oklahoma have now resulted in the reversal of this long-held precedent. In *Kruchowski*, the Oklahoma Supreme Court held that the Oklahoma Constitution requires uniform remedies be made available to all members of a given class. Specifically, the Court concluded that victims of age discrimination are not provided the same remedies as those available to victims of other forms of discrimination, and therefore, a “public policy” claim should be available to those plaintiffs. Thus, after *Kruchowski*, a purported victim of age discrimination is no longer limited to the recovery of back pay and “liquidated” damages under the federal Age Discrimination in Employment Act (“ADEA”). Rather, he could now recover essentially unlimited damages under the “public policy” framework.

The *Kruchowski* Court left open the possibility, however, that such a ruling would only apply to age discrimination plaintiffs. The *Shirazi* opinion, issued on February 24, 2009, forecloses that hope. The Court has now made clear that:

[A] plaintiff may pursue a state law *Burk* tort claim for wrongful discharge in violation of public policy when the available remedies to the same class of employment discrimination victims are not the same — regardless of whether the remedies originate under federal or state law. Lest there be any mistake, pursuant to the Oklahoma Anti-Discrimination Act, 25 O.S. 2001 §1302, race, color, religion, sex, national origin, age, and handicap are the types of discrimination within the same employment class to which we refer.

It is beyond dispute that, when examining both federal and state laws, the remedies available to these groups of individuals are not “the same.” Thus, the Oklahoma Supreme Court has now, in direct contradiction to its prior pronouncements, expressly provided a state law “public policy” cause of action for victims of discrimination. Without the damage caps provided by federal law, maximum exposure for an employer in a discriminatory discharge case is simply no longer quantifiable. That is exposure is, for the most part, now unlimited.

Another significant result of this ruling will be a change in the venue of most wrongful discharge cases. Because discriminatory discharge cases have, until now, been decided under federal law, employers have insisted upon trial in federal, rather than state, courts. These federal venues have traditionally provided several advantages to employers over state courts, including stricter adherence to procedural and discovery rules, as well as more favorable jury pools and better results with summary judgment motions. Now that employees are able to file a state law “public policy” claim, employers will most often be precluded from seeking trial in federal court. Simply put, better plaintiffs’ lawyers will likely file solely state law claims — with no federal law at issue, the federal courts will have no jurisdiction over the case.

The Bottom Line

While the December *Kruchowski* decision hinted at a sea-change in Oklahoma employment litigation, the text of the opinion left some doubt as to its full effects. The *Shirazi* decision erases all such doubt. Absent immediate intervention by the Oklahoma legislature to significantly amend or repeal the OADA, which forms the basis of both decisions, litigation of wrongful discharge claims in Oklahoma will be significantly changed by the *Shirazi* decision. Employers now face unlimited financial exposure in more hostile court rooms, where their termination decisions will be increasingly scrutinized.

Now, more than ever, employers must ensure that termination decisions are based upon legitimate, non-discriminatory and non-retaliatory justifications, and that underlying documentation supports those justifications. Employers should further consider implementing a mandatory arbitration program to limit the effect of potential runaway juries.

As always, should you have any questions about this change in Oklahoma law, or possible ways to minimize its impact, please contact any of McAfee & Taft's labor and employment attorneys.

5 Clear and compelling waiver of right to seek judicial relief for discrimination in collective bargaining agreement upheld by U.S. Supreme Court

On April 1, 2009, the United States Supreme Court released its opinion in *14 Penn Plaza LLC v. Pyett*, a case involving the enforceability of an arbitration provision contained in a collective bargaining agreement. In *Pyett*, a group of employees brought suit in federal court alleging age-based discrimination in violation of the ADEA. However, the employees were members of an organized bargaining unit, and their union had previously entered into a collective bargaining agreement that contemplated arbitration of any such discrimination claims. More specifically, the collective bargaining agreement between the union and the employer expressly required employees to submit all claims of employment discrimination to arbitration, in lieu of pursuing such claims in jury trials. The employer sought to dismiss the federal court action in favor of the arbitration proceeding, and the district court refused to compel arbitration.

The United States Supreme Court reversed the decisions of the underlying courts and held that such a collectively bargained agreement must be enforced. According to the Court, a provision in a collective bargaining agreement that "clearly and unmistakably requires union members to arbitrate ADEA claims" is enforceable pursuant to the Federal Arbitration Act. This opinion reverses a long-standing line of cases that had previously been interpreted as preventing collectively bargained waivers of a jury trial forum for statutory claims, and is a significant victory for employers. More importantly, this case signals a continuing attitude by the judiciary favoring the informal arbitration of employment discrimination claims.