

THE BOTTOM LINE

Employment Law Update

Paul Ross and Natalie Ramsey

THE BOTTOM LINE

MCAFFEE & TAFT
ATTORNEYS & COUNSELORS

COBRA Subsidies Under the American Recovery and Reinvestment Act

The American Recovery and Reinvestment Act of 2009

- On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act of 2009 (the "ARRA"), more commonly referred to at the time as the economic "stimulus" bill
- The bill provided for significant investment of federal dollars with the goal of reinvigorating the economy

The American Recovery and Reinvestment Act of 2009

- Most of the provisions did not alter substantive law, but the ARRA imposed one significant burden upon employers
- The ARRA provides that employers must subsidize the COBRA continuation premiums for certain eligible individuals after termination

COBRA Premium Subsidies

- The subsidy – Employers must bear the initial cost of 65% of COBRA premiums for a period of nine (9) months following the COBRA qualifying event
- Employers may later recover the costs of these premium subsidies from the federal government through a credit to payroll taxes as a part of the ARRA

Who is Eligible for a COBRA Premium Subsidy?

- “Assistance Eligible Individuals” as that term is defined in the ARRA, means any person who becomes eligible for COBRA between September 1, 2008, and December 31, 2009, due to the employee’s involuntary termination of employment

What About 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 were required to send a notice to such individuals informing them of their election rights

Model Notices from the DOL

- ARRA requires plan administrators to modify COBRA election notices to describe the new premium subsidy. The Department of Labor has issued model notices for this purpose

COBRA-Related Action Items

- Update COBRA forms
- Be sure your payroll department is prepared to claim the payroll tax credit
- Review severance plans and arrangements
- Consider an update to employees terminated since September 1, 2008

THE BOTTOM LINE

McAFEE & TAFT
ATTORNEYS & COUNSELORS

New I-9 Forms

The New I-9

- Effective date for new form April 3, 2009
- Cannot re-verify current employees under Section 3 of the old I-9 Form
- Penalties – civil fines for non-compliance

New I-9 – Notable Changes

- Additions to A List Documents
(List of documents that can be used to establish identity and employment authorization)
- Deletions from A List
- No expired documents!
- DOL Model Form

THE BOTTOM LINE

McAFEE & TAFT
ATTORNEYS & COUNSELORS

Update on “Public Policy” Claims in Oklahoma

Wrongful Discharge Against Oklahoma's "Public Policy"

- In the absence of a contract for a specific period of time, employment in Oklahoma is "at-will" in nature
- Under Oklahoma law, an employer may terminate an "at-will" employee at any time for any reason, or for no reason, even an illogical or unfair reason (as long as it's not an illegal reason)

Wrongful Discharge Against Oklahoma's "Public Policy"

- In an at-will environment, there is no requirement for "just cause" and there is no requirement to provide notice
- In exchange, an "at-will" employee may leave his or her employment at any time, for any reason, or for no reason

Wrongful Discharge Against Oklahoma's "Public Policy"

- In 1989, however, Oklahoma Courts recognized a significant limitation on an employer's right to terminate an "at-will" employee
- Where an employer's termination of an "at-will" employee violates a clear expression of Oklahoma's "public policy," the employee may sue for wrongful termination

Wrongful Discharge Against Oklahoma's "Public Policy"

- These claims are called *Burk* tort claims, or "public policy" claims
- Subsequent to the *Burk* decision, plaintiff's attorneys began arguing that a termination motivated by discrimination should be considered a termination that violated Oklahoma's public policy as stated in the Oklahoma Anti-Discrimination Act ("OADA")

Wrongful Discharge Against Oklahoma's "Public Policy"

- For nearly twenty years, employer's lawyers were successful in defeating these attempts to create a state-law claim for discriminatory discharge
- Employers argued that there was no need for a state law claim because employees had "adequate remedies" under federal law (Title VII, ADA, ADEA, etc.)

Wrongful Discharge Against Oklahoma's "Public Policy"

- Two new cases from the Oklahoma Supreme Court have abruptly reversed that rule, and a state law "public policy" claim is now undoubtedly available to plaintiff's alleging discrimination

Wrongful Discharge Against Oklahoma's "Public Policy"

- Kruchowski, et al. v. The Weyerhaeuser Company, 2008 OK 105 (Dec. 16, 2008): Victims of Age Discrimination may bring a public policy tort along with federal claims
- Shirazi v. Childtime Learning Center, Inc., 2009 OK 13 (February 24, 2009): Expanding Kruchowski to victims of race, color, religion, sex, national origin, age, or handicap discrimination

Wrongful Discharge Against Oklahoma's "Public Policy"

What does this mean for employers?

- Greater financial exposure – No caps on damages!
- More hostile courtrooms – State Court
- Employment decisions facing more scrutiny
- More cases ending up before juries

Update on Employee Gun Rights in Oklahoma

Employer Prohibitions of Gun Possession on Employer Property

- Common provision in employee handbooks or policies and procedures manuals
- Typically a safety concern to reduce the risk of workplace violence incidents
- Sometimes required by insurance policies
- Often a “no-tolerance” policy resulting in immediate termination

Oklahoma Firearms Act of 1971

In 2004, the Oklahoma Firearms Act of 1971 was amended to provide 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.

Oklahoma Firearms Act of 2004

- In October of 2004, a group of Oklahoma employers filed suit in federal court challenging the validity of the amendment under a variety of legal theories
- The Court rejected several of those theories, but still issued a permanent injunction prohibiting the enforcement of the new law, finding it to be a “serious obstacle” to employers attempting to meet their obligations under the “general duty” clause of the federal Occupational Safety and Health Act

Tenth Circuit Overturns the Trial Court Ruling

- In February of 2009, the United States Court of Appeals for the Tenth Circuit reversed the district court.
- The appellate court concluded that:
 - (1) presence of firearms is not a violation of the "general duty" clause, and therefore, the amendments are no "serious obstacle" to employers;
 - (2) these laws do not interfere with the rights of private property owners; and
 - (3) the district court's injunction improperly interfered with Oklahoma's inherent right to police the conduct of its citizens.

Tenth Circuit Overturns the Trial Court Ruling

- 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

Limitations on Gun Possession

- 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

THE BOTTOM LINE

McAFEE & TAFT
ATTORNEYS & COUNSELORS

Arbitration and Waiver of Judicial Forums for Employment Disputes

Two New Employer-Friendly Cases Regarding Arbitration

- 14 Penn Plaza, LLC v. Pyett, No. 07-581 (April 1, 2009)
- Peel v. Nabors Drilling USA, Case No. 104580 (Okla. Ct. App. April 17, 2009)

14 Penn Plaza, LLC v. Pyett

- The United States Supreme Court held that a union may lawfully agree to the arbitration of statutory employment law claims on behalf of bargaining unit members
- Where a collective bargaining agreement “clearly and unmistakably” provides that a claim for age discrimination will be subject to collectively bargained arbitration provisions, instead of tried in court, that provisions is lawful and enforceable

Peel v. Nabors Drilling USA

- Oklahoma Court of Appeals enforced a pre-employment arbitration program
- Important issues decided there:
 - (1) A mutual, bi-lateral promise to arbitrate all claims is sufficient consideration to support a contract
 - (2) An employees signed statement that he “received and read” a copy of the arbitration agreement is conclusive as to that issue
 - (3) An express agreement in the program that the Federal Arbitration Act applies is controlling
 - (4) Oklahoma’s workers’ comp statute does not trump an enforceable arbitration agreement under the FAA

THE BOTTOM LINE

McAFEE & TAFT
ATTORNEYS & COUNSELORS

Questions??