Legal Advisory

IDEAS AND STRATEGIES FOR YOU AND YOUR BUSINESS / SECOND QUARTER 2009

inside

Law Provides "Warn"ing

Employers are required to notify workers before mass layoffs

Leave Security to The Experts

New Pension Law Affects Retirement Planning

Reduce Estate-tax Burden

Legal Briefs

New Family Leave Rules Take Shape

The Family and Medical Leave Act of 1993 (FMLA) has been an important piece of legislation for employers and employees since it was enacted. Now the first regulatory changes to the act have been implemented, effective January 16, 2009.

Background: Under the FMLA, an employee is allowed to take up to 12 weeks of unpaid leave from work for the birth or adoption of a child, for reasons relating to a personal medical condition or to care for another family member. The employee can keep benefits during the leave period, but he or she must continue to pay the required employee portion for those benefits. The employee also has the right to return to the same or equivalent position, pay and benefits at the end of the leave.

The new regulations include several key changes and clarifications. The following is a brief summary.

Military personnel: An employee on active military duty can now take up to 26 weeks of unpaid FMLA leave in each 12-month period to care for a family member. The new regulations also define qualifying events that count as "military duty." Similarly, families of National Guard and Reserve members are allowed to take up to 12 weeks of job-protected leave per year to manage their affairs.

Serious conditions: The new regulations refine the definition of a "serious health condition" for FMLA purposes. It now requires two visits to a health care provider within 30 days of the period of incapacity.

Direct contacts: An employer may directly contact the employee's physician or other health care provider regarding health details on the employee's FMLA certification form. Note: The employee's "direct supervisor" is prohibited from making such inquiries. Also, the employer cannot request information beyond what is required by the certification form.

(see *New Family Leave Rules* on next page)

Following the Signs for WARN

In this uncertain economy, many employers have been forced to reduce the size of their workforce. The federal law controlling notification is known, appropriately enough, as WARN (Worker Adjustment and Retraining Notification Act). Here are the answers to several common questions about WARN.

Q. Does WARN apply to every employer?

A. No. It only applies to employers with 100 or more employees (excluding part-time employees and those who have worked less than six months during the past 12-month period). Both private and non-profit entities are covered.

Q. What are the main rules?

A. WARN prohibits large employers from closing a worksite or implementing a mass layoff at an employment site without proper notice. Notice must be given at least 60 days in advance to a union representative or employees.

Q. What constitutes a mass layoff?

A. A mass layoff is defined as a reduction in workforce (other than a plant closing) resulting in the loss of employment at a single site during any 30-day period for either of the following groups:

- At least 33% of the company's employees (excluding any part-time employees) with a minimum of 50 employees laid off or
- At least 500 employees (excluding part-time employees), regardless of the total workforce at the employment site.

Q. What is covered in the notice?

A. The notice should state the name and address of the facility; the expected date the closing or layoff will begin; the individual's date of termination or layoff; whether a layoff is permanent or temporary and, if temporary, the expected duration; any bumping rights; and information on any available dislocated worker assistance. Note: There are certain exceptions (e.g., strikes or lockouts that occur in the normal course of collective bargaining).

Q. What is the penalty for failure to comply?

A. The employer may be liable for back pay and benefits to employees, as well as a daily fine of up to $500. The law also provides for enforcement in federal court by the employees, their union or the local government, with the right for the prevailing party to recover attorney's fees.

Do you need more information about WARN? Contact your professional advisers. ✍

New Family Leave Rules Take Shape *(continued from front page)*

Employer notice obligations: Besides posting a notice about FMLA procedures in a prominent place at work, an employer must provide the same notice in its employee manual or distribute a copy of the FMLA policy to new hires. Employers now have five business days (increased from two days) to send out FMLA eligibility and designation notices to employees.

Employee notice obligations: Prior to the new regulations, an employee could give notice of the need for an FMLA leave for up to two business days after being out on the leave, even if he or she could have provided notice earlier. But the new rules require employees to follow the employer's general call-in procedures unless unusual circumstances exist.

Note that the individual states may also impose rules relating to employee family and medical leaves. For example, a new law in New Jersey taking effect on July 1, 2009, entitles most employees in the state to take up to six weeks of paid family leave.

This is a complex area of employment law. If you have questions concerning your situation as an employer or employee, seek expert legal guidance. ✍

Be on Guard for Security Issues

If you hire an outside firm to handle security at your workplace, you should generally leave the details to the security experts. This may absolve your company of liability if a claim ever arises.

New case: A hotel in upstate New York (part of a national chain) hired an independent firm to provide in-house security. After a guest had an altercation with one of the guards, the guest sued the hotel. He claimed that the hotel was negligent in hiring a quick-tempered guard.

But a Federal District Court dismissed the case. **Reason**: The hotel was not responsible for the hiring because it did not control how the outside firm handled security measures. This was the domain of the independent contractor.

FOUR KEY CHANGES IN NEW PENSION LAW

The new Worker, Retiree, and Employer Recovery Act of 2008—which was signed into law late last year—includes several important changes affecting qualified retirement plans and IRAs. It also clarifies certain issues raised by the massive Pension Protection Act of 2006 (PPA). Here is a summary of four significant provisions.

1. Required minimum distributions: As a general rule, you must begin taking a required minimum distribution (RMD) from your qualified retirement plans, including 401(k) plans and traditional IRAs, by April 1 of the year after the year in which you turn age 70½. If you do not make the RMD, you are liable for a penalty tax equal to 50% of the required amount.

The amount of the RMD is based on your life expectancy and, significantly, the value of your accounts on the last day of the previous year (e.g., December 31, 2007, for 2008 distributions). The new law suspends the RMD rule, but only for the 2009 tax year. Despite public calls for retroactive tax relief, there is no such waiver for the 2008 tax year.

2. Nonspouse rollovers: Prior to the PPA, only a surviving spouse was able to roll over proceeds tax-free from a qualified plan to a traditional IRA. A nonspouse beneficiary—such as a child or grandchild—could not use this technique. But the PPA permits tax-free rollovers for plan distributions after 2006 as long as they are made directly from one trustee to another. It was not clear at the outset if the administrators of qualified plans were required to provide this ability to nonspouse beneficiaries. Under the new law, the option is mandatory, effective for distributions after 2009.

3. Single-employer plans: The PPA set transitional funding requirements for pension plans, but some employers may have difficulty meeting the targets under current economic conditions. For instance, the target percentage for 2009 is 94%. The PPA requires employers that do not meet this target to subsequently provide 100% funding. Under the new law, this rule is relaxed so the employer can limit subsequent funding to the target percentage.

4. Multiemployer plans: The new law also liberalizes several special PPA funding rules for multiemployer plans in endangered or "critical" status. For example, effective for plan years beginning after September 30, 2008, and before October 1, 2009, the current funding status of multiemployer plans may be frozen, based on the prior year's status. Also, the rehabilitation period is extended from ten to 13 years for plans in endangered or critical status in 2009 (from 15 to 18 years for plans in "seriously endangered" condition).

Finally, the new pension law contains numerous technical corrections to the PPA. Consult with your professional tax advisers concerning your plans. ✍

Estate-tax Election to the Rescue

Due to recent stock market volatility, the assets in a family member's estate might have dropped in value since the relative's death. Unfortunately, this could saddle the family with a disproportionately high estate-tax bill. However, if a special election is made by the deceased's executor, the estate tax may be reduced—or even eliminated completely.

Background: Under current law, the federal estate-tax exemption can effectively shelter up to $3.5 million from estate tax for a person dying in 2009 (up from $2 million for 2008). Any excess amount is subject to the top estate-tax rate of 45%. The estate tax is scheduled to be repealed for 2010. But then it will be revived in 2011 with an exemption equivalent of only $1 million and a top tax rate of 55%, unless subsequent legislation is enacted.

Because the date of death controls the valuation of assets in a taxable estate, that value may be considerably higher than the current value following the recent stock market decline. But a special election can provide a way out.

How it works: Instead of using the date of death for estate-tax valuation, the executor can choose the "alternate valuation date" of six months after the date of death. This tax break originated back in the days of the Great Depression, but it is just as relevant today.

For example, if a family member died on October 1, 2008, when the estate was worth $3 million, the estate-tax exemption for 2008 covers $2 million. The resulting estate-tax bill comes to $450,000 (45% × $1 million). However, if the alternate valuation date is elected and the estate is worth $2 million or less on April 1, 2009, there is no estate tax due at all.

Caveat: The alternate valuation date applies to all the assets in the estate—not just a select few. In some cases, an asset's value may be greater than the asset's value on the date of death. Furthermore, any assets that have been distributed or sold must be valued as of the date of the event.

Finally, the alternate valuation election is available only if it decreases the gross estate and the resulting estate-tax bill. So it cannot be used if all assets pass to a surviving spouse under the marital deduction.

Of course, every situation is different. Consult with an estate-planning expert with regards to your personal circumstances. ✍

BRIEFS

Misconduct on the Job—A trucker who knew his company had a zero-tolerance policy for alcohol drank a beer before his shift. He was stopped by the police, but was not charged with any offense. Still, the company fired him. **Result**: The Minnesota Court of Appeals said unemployment benefits were rightfully denied because the company's policy was clear.

The Complete Picture—In a new case, a pharmaceuticals sales rep in Illinois alleged her company favored young "cheerleader" types when giving out pay raises. Her attorney discovered that each personnel file contained a photo. But the company was able to establish a valid reason for keeping the photographs on file. It needed to verify licenses of employees who had to drive for the company.

Gift-tax Exclusion—The annual gift-tax exclusion has been increased from $12,000 per recipient for 2008 to $13,000 for 2009. Therefore, a married couple can jointly give gifts of up to $26,000 free of gift tax this year. For example, by giving the maximum gifts to ten family members for five consecutive years, you can reduce your taxable estate by $1.3 million. This increase should be coordinated with other estate-planning aspects.

Gender Bender—Jobs should no longer be classified by gender. **Latest example**: A substitute worker at a school cafeteria applied for a full-time position when it became available. But she was turned down by the supervisor because it was "a man's job." A Federal District Court in Alabama has allowed the case to proceed to trial because the comment provides direct evidence of sexual discrimination.

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