



September 2009

LABOR & EMPLOYMENT LAW WATCH

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EMPLOYMENT LAW UPDATE:

Pennsylvania Enacts “Mini-COBRA” Law for Smaller Employers

By Eric N. Athey

Background. The Consolidated Omnibus Budget Reconciliation Act (“COBRA”) was signed by President Reagan in 1985 and extends health coverage to employees who lose their employer-provided coverage due to a “qualifying event.” This federal law does not apply to “small employer plans;” i.e. group health plans maintained by employers that normally employ

fewer than 20 employees. On June 10, 2009, Governor Rendell signed Act 2 of 2009 to extend some of COBRA’s protections to the employees of smaller Pennsylvania employers. This new state law, known as mini-COBRA, will now require Pennsylvania employers who have at least two and not more than nineteen employees to offer continuation coverage. Although mini-COBRA is similar to its federal counterpart in some respects, there are many key differences.

Mini-COBRA: The Basics. Pennsylvania’s new “mini-COBRA” law became effective on July 10, 2009 and gives employees of small employers (2-19 employees) who receive health insurance from their employers the right to purchase continuation health insurance for themselves and their covered dependents for up to *nine months* after they lose coverage due to a “qualifying event.” Under federal law, larger employers may be required to extend continuation coverage for up to 36 months in some cases.

Who is eligible for mini-COBRA coverage? In order to be eligible for continuation coverage under mini-COBRA, an employee and his or her covered dependents must have been continuously insured under an employer’s insured group major medical, hospital or surgical group policy (or a similar predecessor policy) for three consecutive months ending with a qualifying event. Anyone who is covered by or eligible for Medicare is not entitled to continuation coverage under mini-COBRA. In addition, an individual who is or could be covered by any other insured or uninsured group health coverage arrangement is not eligible for mini-COBRA coverage if the person was not already receiving this alternative coverage prior to the qualifying event (Medical Assistance, CHIP and adultBasic are excluded). Likewise, an individual who fails to verify that he is not eligible for employer-based group health insurance as a dependent is ineligible. These conditions are much more restrictive than federal COBRA law.



Qualifying Events. In order to be eligible for continuation coverage under mini-COBRA, an employee and eligible dependents must lose coverage on or after July 10, 2009 due to a “qualifying event.” A qualifying event which occurred prior to July 10, 2009 will trigger continuation coverage if the employee (or dependent) lost his or her employer-provided coverage after that date. Much like the federal law, mini-COBRA recognizes the following qualifying events: (a) death of the covered employee (resulting in loss of coverage for dependents); (b) termination of employment (voluntary or involuntary, but must not be for gross misconduct); (c) reduction in hours; (d) divorce or legal separation; (e) eligibility for Medicare (resulting in loss of coverage for dependents); (f) dependent child ceasing to be a dependent; and (f) bankruptcy of the employer. Unlike federal law, the duration of mini-COBRA benefits is the same (9 months) regardless of the type of qualifying event an employee experiences.

Notice Requirements. The new law requires insurance companies to notify employers of the new law by August 24, 2009. Eligible employees who experience a qualifying event must be provided with a written notice of their rights and the opportunity to elect mini-COBRA benefits no later than 30 days after the event. The Pennsylvania Insurance Department (“PID”) has published a model election notice for employers to use which is available on the PID website at: <http://www.ins.state.pa.us/ins/cwp/view.asp?a=1274&Q=550035&PM=1>. It is recommended that these notices be sent via certified mail or any other means of delivery which ensures proof of mailing. Employers must also give notice of any “qualifying event” to the plan administrator (if different than the employer) and the insurance company within 30 days of the qualifying event. An employee who wishes to purchase continuation coverage under mini-COBRA must notify the plan administrator of his or her election within 30 days of receiving the election notice. The plan administrator must then notify the insurer of the employee’s election within 14 days. If an employee elects mini-COBRA coverage in a

timely manner, the coverage is retroactive to the date he or she lost employer-provided coverage due to a qualifying event.

Cost of Coverage and Premium Assistance: As a general rule, employees and their covered dependents may be required to pay 105% of the applicable premium in order to continue coverage under mini-COBRA. However, special rules apply to employees who are terminated by their employers on or after July 10, 2009 and before January 1, 2010 and who lose coverage due to their termination. Employees who are terminated during this time frame need only pay 35% of the applicable premium in order to continue coverage under mini-COBRA; the remainder of the premium will be the responsibility of the insurance company (which will receive a federal tax credit for the portion of the premium which is not collected). Employees earning over \$125,000 (\$250,000 for a married couple filing jointly) in a calendar year will be taxed for any premium assistance received. Information regarding premium assistance is included on the PID’s model notice.

It is expected that additional guidance will be issued by PID concerning issues that will inevitably arise from the administration of mini-COBRA. In the meantime, if you have any questions regarding this new law, please contact any attorney in our Labor and Employment Practice Group.

Supreme Court’s Employer-Friendly Ruling on ADEA Burden of Proof May be Short Lived

by Denise E. Elliott

Employers defending claims brought under the Age Discrimination in Employment Act (ADEA) earned a substantial victory in the Supreme Court in June. The U.S. Supreme Court recently ruled in Gross v. FBL Financial Services, Inc. that the burden of proof in an ADEA claim is always with the plaintiff. In a 5 to 4 decision, the Court held that the statutory text of the ADEA does not, under any circumstances, contemplate that the burden of proof should shift to the employer and



that the employee must prove that discrimination was the cause of an adverse employment action.

The plaintiff in Gross alleged that he was demoted due to both permissible (corporate restructuring) and impermissible (advanced age) considerations. At the close of testimony, the jury was instructed: (1) it should return a verdict for Gross if he proved that his age was a motivating factor in FBL's decision to demote him; and (2) it should return a verdict for FBL if it proved that it would have demoted Gross regardless of his age. After the jury returned a verdict for Gross, FBL appealed, challenging the jury instructions.

The 8th Circuit Court of Appeals held that the jury instruction should have conformed to the U.S. Supreme Court's holding in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In Price Waterhouse, the Supreme Court addressed the proper burden of persuasion for Title VII "mixed-motive" discrimination cases. Six justices agreed that "if a Title VII plaintiff shows that discrimination was a motivating or substantial factor in the employer's action, the burden of persuasion should shift to the employer to show that it would have taken the same action regardless of the impermissible consideration." The 8th Circuit found that a similar burden shifting framework should apply to mixed motive ADEA cases and, therefore, reversed the lower Court.

The Supreme Court granted certiorari and identified the issue of the case as follows: "whether the burden of persuasion ever shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA?" The Court explicitly held that it does not.

In reaching its decision, the Supreme Court noted that neither Price Waterhouse nor any other Title VII case controlled its analysis because the statutory language of Title VII is different from the ADEA. The Court noted that the ADEA's text, unlike Title VII, does not allow an employee to prove discrimination by establishing that "age was simply a motivating factor." In fact, when Congress contemporaneously amended the text of

Title VII and the ADEA, it included a motivating factor provision in Title VII but not in the ADEA. Accordingly, the Court held that the plain language of the ADEA never authorizes a shift in the burden of persuasion for an age discrimination claim. To succeed under the ADEA, an employee must show that he or she suffered an adverse employment action because of his or her age. Regardless of whether mixed-motives are present, the employee must prove by a preponderance of the evidence that his or her age was the "but for cause of the employer's adverse decision."

Going forward, the holding of Gross will make it more difficult for employees to win age discrimination cases. Without a smoking gun, an employee will be hard pressed to show that his or her age was the cause of an adverse employment decision. However, this employer victory may be short lived. Several congressmen have already expressed interest in holding hearings to explore whether the ADEA should be amended to conform to the Price Waterhouse standard, and effectively nullify the Gross decision. We will keep you informed of further developments.

Webb v. City of Philadelphia:
Third Circuit Rules No Need to Accommodate
Muslim Police Officer's Request to Wear
Religious Garb

by Amy G. Macinanti

In April 2009, the United States Court of Appeals for the Third Circuit affirmed a District Court ruling that the Philadelphia Police Department was not required to accommodate a Muslim police officer's request to wear a head scarf with her uniform, because to do so would place an undue burden on the Police Department by requiring it to deviate from its long-standing strict uniform code directive.

In Webb, the Plaintiff, Kimberlie Webb, was employed as a uniformed police officer with the City of Philadelphia. Officer Webb was also a practicing Muslim. In February 2003, Ms. Webb requested permission to wear a traditional Muslim



religious head scarf, a khimar, with her uniform. The Police Department denied her request because, according to the Department, wearing the head scarf would violate a thirty-year directive regarding uniform standards. The Police Department did not offer or discuss any possible accommodation for Officer Webb. Officer Webb filed a charge with the Equal Employment Opportunity Commission alleging, among other things, that the City of Philadelphia Police Department discriminated against her because of her religion in violation of Title VII. While the EEOC charge was pending, Officer Webb, on two occasions, reported to work wearing the khimar. On both occasions, her superior officer directed her to remove the khimar, and on each occasion, Officer Webb refused to do so. On both occasions, she was sent home. Subsequently, she was disciplined and suspended for thirteen days for insubordination. Thereafter, Officer Webb amended her EEOC charge to include a claim for unlawful retaliation based on the discipline she received for refusing to remove the khimar.

Once the case proceeded to court, the Philadelphia Police Department sought dismissal of Webb's claims based on the uncontradicted deposition testimony of the Police Commissioner, who also was a Muslim, that the interest of uniformity, impartiality, and religious neutrality, would be severely damaged if individual officers were permitted to wear religious garb – that the public confidence in an impartial police force would be undermined. The District Court, and ultimately the Third Circuit, agreed. The Webb court reasoned that the purpose of the uniform directive was to maintain religious neutrality which, in the context of a paramilitary organization, is necessary to prevent internal dissention and to promote the public confidence in the police force. Therefore, allowing officer Webb to violate the directive would be an undue burden to the Department.

Officer Webb's argument that she was disciplined because she engaged in protected activity, i.e., refusing to remove her khimar in protest of the City's refusal to allow her to wear the khimar was

also dismissed. The court reasoned that Officer Webb was disciplined because she refused the direct order of her superior to remove the khimar.

Whether courts will consider extending the importance of religious neutrality to private sector employers remains to be seen. In the meantime, while not all employers will be able to argue that they have as compelling an interest in a dress code policy as did the Philadelphia Police Department, the Webb case reiterates that an employer's ability to defend a religious discrimination claim or to maintain a dress code policy, or for that matter, any policy in the face of a religious discrimination claim, may turn on the employer's ability to demonstrate that:

1. The employer has a clear, well-articulated policy;
2. The policy clearly states a compelling reason for the importance of the policy;
3. The employer does not deviate from the policy; and
4. Discipline is applied consistently for policy violations.

Pennsylvania Human Relations Act Not Applicable to Small Employers

by W. Ryan Neumyer

The Pennsylvania Human Relations Act ("PHRA") prohibits discrimination on the basis of gender, among other protected classifications. The PHRA's prohibition against discrimination only applies, by definition, to employers with four or more employees. Despite this fact, a question has persisted under Pennsylvania law as to whether an employer with fewer than four employees could still be held liable for discrimination on the basis of a claim for wrongful termination in violation of public policy. On July 28, 2009, the Pennsylvania Supreme Court determined in Weaver v. Harpster that the PHRA reflects the unambiguous policy determination by the legislature that employers with fewer than four employees may not be held liable for sex discrimination in Pennsylvania.



In August 2001, John Shipman and Walter Harpster hired Malissa Weaver as an administrative assistant and office manager at their small financial planning office. Ms. Weaver alleged that during the year of her employment, she was subjected to continual sexual harassment by her employer, including an invitation to engage in a sexual relationship and inappropriate sexual comments and physical contact (rubbing, touching and hugging, comments about her appearance, attire, and sexual proclivities, etc.). She allegedly rejected these unwelcomed advances, and demanded that the behavior cease. After rejecting the advances, her working conditions allegedly became intolerable and Ms. Weaver resigned on June 24, 2002.

Ms. Weaver filed an administrative charge under the PHRA which was ultimately dismissed because her former employer had fewer than four employees. She then proceeded to court, arguing, among other things, that she had been wrongfully terminated in violation of Pennsylvania's "public policy" against sex discrimination. The trial court dismissed this claim, since her employer had fewer than four employees. However, the Superior Court reversed and her employer, therefore, appealed to the Pennsylvania Supreme Court.

On appeal, the Supreme Court concluded that there is no basis to create an independent cause of action for termination of an at-will employee outside of the remedies established by the legislature through the PHRA. The Court noted that although the legislature had articulated a public policy to eliminate all forms of invidious discrimination, including sex discrimination in the workplace, it chose to define the right to freedom from discrimination in terms of the number of individuals employed by the employer. By defining "employer" in terms of the number of individuals it employs, the legislature declined to make sex discrimination actionable against employers of fewer than four employees. The Court also noted that the likely explanation regarding the legislature's decision to exempt small firms from complying with anti-

discrimination laws was that the legislature sought to protect the smallest employers from the burdens associated with complying with the law and defending against discrimination claims. The Court concluded that extending the protections afforded by a statute beyond its explicit limitations would require the courts to act as a super-legislature, and found that the legislative process was the appropriate forum to achieve a change in the parameters of at-will employment.

ADR Agreements: Recent Cases Affirm Their Enforceability

by W. Ryan Neumyer

As the number of discrimination and other employment related complaint against employers continues to rise, employers are increasingly evaluating the feasibility of alternative dispute resolution ("ADR") agreements. Such agreements generally require employees to utilize arbitration or mediation for resolving employment disputes rather than filing an administrative or court complaint.

Pennsylvania courts have generally found ADR agreements to be valid and enforceable in the employment context so long as the employee's agreement to arbitrate was clear and made knowingly. However, ADR agreements will be held unenforceable if applicable contract defenses apply, such as fraud, coercion or unconscionability.

By way of example, the Third Circuit Court of Appeals recently upheld an employer's ADR agreement with employees in Brennan v. CIGNA Corporation (2008). In Brennan, the employer, CIGNA, adopted a policy that mandated arbitration of all employment disputes. The policy was distributed to all employees via inter-office mail, as were subsequent amendments to the policy. Years after the policy was originally adopted, CIGNA distributed an employee handbook which again made clear that binding arbitration was a term and condition of employment and employees were also given a form to sign acknowledging that they received



and reviewed the handbook. While this form initially tied an employee's signature to eligibility for future pay raises and benefits, it was later amended to delete this link and merely required an acknowledgment that the handbook had been received and reviewed.

The plaintiffs (former employees) filed suit in federal court against CIGNA alleging race discrimination. The District Court granted CIGNA's motion to compel arbitration based on CIGNA's ADR agreement. On appeal to the Third Circuit, plaintiffs argued that CIGNA's ADR agreement was invalid, and alleged that their signatures on the receipt forms were "coerced" due to "severe economic distress" arising from a disparity in bargaining power. The court found that more than a disparity in bargaining power was needed to show that an arbitration agreement between and employer and its employees was not entered into willingly, and plaintiffs failed to show fraud or such overwhelming economic disparity in bargaining power that would allow for non-enforcement of a contract.

Agreements requiring arbitration of EEO claims have also recently been upheld in unionized work environments. In 14 Penn Plaza LLC, et al. v. Pyett, the U.S. Supreme Court recently held that a provision in the parties' collective bargaining agreement which clearly and unmistakably required union members to arbitrate claims under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act ("ADEA") was enforceable as a matter of federal law. The parties' collective bargaining agreement provided: "All such [discrimination] claims shall be subject to the grievance and arbitration procedures...as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination."

After several senior union employees were reassigned from positions as night watchmen to less desirable positions as night porters and light duty cleaners, the affected employees demanded that the union file a grievance alleging that their

reassignment was based on their age in violation of the ADEA. The union refused to pursue the grievance because it previously consented to certain personnel moves that resulted in the reassignment. The affected employees then filed charges with the Equal Employment Opportunity Commission ("EEOC"). The EEOC subsequently issued a right to sue notice and the affected employees brought suit under the ADEA and certain state and local discrimination laws.

In its April 2009 decision, the Supreme Court determined that the union and the employer collectively bargained in good faith and determined that employment related discrimination claims, including claims under the ADEA, would be resolved in arbitration. The Court also noted that the decision to resolve ADEA claims through arbitration instead of litigation did not amount to a waiver of the right to be free from workplace age discrimination; rather, it waived only the right to seek relief in court.

The Brennan and 14 Penn Plaza LLC decisions reaffirm that ADR agreements are enforceable in union and non-union settings. Employers must be sure, however, that their ADR agreements are entered into knowingly and that the language in the agreement clearly and unmistakably notifies the employee of the requirement (as a condition of employment) to utilize ADR to address discrimination complaints. Information concerning an agreement to arbitrate should be readily available (such as in an employee handbook) and an employee should be required to sign an acknowledgment evidencing his/her agreement in writing. Utilizing these "best practices" will increase the likelihood that a reviewing court will uphold the validity of such agreements.



WORKERS' COMPENSATION UPDATE:

Update on Recent Court Decisions

by Paul D. Clouser, Esquire

The Commonwealth Court recently issued several decisions on topics that should be of interest to both employers and insurance carriers:

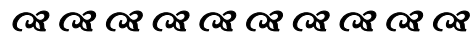
1. Labor Market Surveys - - In Rebeor v. WCAB (July 9, 2009), the Court confirmed that for claimants who have relocated out of state, a labor market survey may be conducted in the employment area where the injury occurred, as an alternative to establishing work availability at claimant's new locale. Claimant in this case was injured in Lawrence County, Pennsylvania in 2002. He was laid off from a light duty position and reinstated to total disability in 2005. A vocational interview took place in July 2006, at which time claimant announced that he would be relocating to South Carolina in September 2006. The labor market survey, completed in December 2006, included a number of jobs, identified in Lawrence County, but no positions in South Carolina. The Court held that although the employer could have chosen to establish work availability in South Carolina, consistent with past case precedent, there was no requirement that it do so. To the contrary, Section 306(b)(2) of the Act describes the "usual employment area" for out-of-state claimants as "the usual employment area where the injury occurred."

2. Relocation Abroad - - In Braz v. WCAB (March 31, 2009), the Commonwealth Court granted a suspension petition based on claimant's withdrawal from the workforce, where claimant had relocated to Portugal and was living there for more than a decade. A similar result had been reached in Blong v. WCAB (2006), where claimant had been receiving total disability after relocating to New Zealand, and in Smith v. WCAB (1999), where claimant had joined the Peace Corps and had moved to Africa. In all such circumstances, there is no burden of showing either a change in medical condition, or the

existence of available work (either with the "time of injury" employer or elsewhere). Rather, a simple showing that claimant has permanently moved abroad is enough to establish a suspension.

3. Lunch Breaks - - In DOL v. WCAB (March 10, 2009), the Commonwealth Court issued a decision which may be helpful to employers, by finding that a claimant who was injured off premises but while on the clock during lunch break, was not acting in the course and scope of her employment. The claimant was injured after falling on a street located in the Stauffer Park Industrial Complex, near the employer's plant. The injury did not occur on the employer's property and, although she was "on the clock," claimant was not furthering the affairs of her employer at the time of the injury. The employee was also a "stationery" (as opposed to a "traveling") employee, so the scope of workers' compensation coverage was more restricted. The Court rejected the employee's contention that an off premises lunch break injury should fall within the "personal comfort" doctrine, under which minor deviations from work for personal comfort or leisure can be found to be "in the course and scope of employment."

4. Notice - - The claimant in a workers' compensation proceeding has the burden of establishing that the specific work injury in question was reported to the employer within 120 days of the injury date. In another helpful case to employers, Genex v. WCAB (June 4, 2009), the Commonwealth Court held that a voicemail message to an HR Manager from a claimant who had previously filed a claim for short term disability benefits for arthritic hand and wrist complaints, stating that "I believe my problems are work-related," was insufficient to establish statutory notice. Even though it may have been inferred that the message related to the hand and wrist problems, it was claimant's burden to show that the specific injury at issue had been timely reported as being work-related. This was not done and the Court therefore reversed the Judge's award and denied benefits.



If you have any questions regarding any labor or employment law matter, including the issues discussed in this newsletter, please do not hesitate to contact us at (717) 392-1100, or e-mail us at the following addresses:

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