



Employment Litigation in Review #4

March 14, 2012

It's been over a month since our last employment review, so here are some updates that have recently occurred in the employment and labor field.

U.S. District Court in the District of Columbia Upholds NLRB's Posting Rule

National Association of Manufacturers, et al. v. National Labor Relations Board, et al., 1:11-CV-01629 (U.S.D.C. March 2, 2012)

On March 2, 2012, a federal court in the District of Columbia upheld most of the National Labor Relations Board's ("NLRB") notice posting rule, which we have talked about multiple times on the blog.

When determining whether the NLRB has the authority under the National Labor Relations Act ("NLRA") to promulgate the rule, the Court analyzed the issue under the long standing two-step procedure set forth in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The NLRB argued, and the Court agreed, that the NLRB reasonably interpreted section 156 of the Act to authorize the rulemaking. Thus, the rule should be upheld under a *Chevron* analysis. The court agreed with the NLRB and ruled that the NLRA gives the NLRB the authority to make enforcement rules such as their new posting requirement. However, the Court also held that the NLRB exceeded the authority granted to it by Congress under the NLRA by promulgating the two provisions enforcement provisions that permit the NLRB to "deem failure to post an unfair labor practice and to toll the statute of limitations for claims brought by employees against employers who failed to post the notice."

The posting rule is scheduled to take effect on April 30, 2012. However, at least one of the parties that filed suit in the D.C. Circuit has already promised to appeal the district court's decision. There is also a similar challenge currently pending in federal district court in South Carolina. See *Chamber of Commerce of the United States, et al. v. National Labor Relations Board*, 2:11-CV-02516 (Dist. S. C.).

Department of Labor Issues Updated Family and Medical Leave Act Model Notices

The U.S. Department of Labor ("DOL") recently updated their Family and Medical Leave Act ("FMLA") model notices and medical certification forms due to the old notices containing an expiration date of December 31, 2011. The new forms, however, are pretty much the same as the existing form except they contain the new February 28, 2015 expiration date. Below are the links to the new forms:

- Certification of Health Care Provider for Employee's Serious Health Condition (WH-380-E);
- Certification of Health Care Provider for Family Member's Serious Health Condition (WH-380-F);
- Notice of Eligibility and Rights and Responsibilities (WH-381);
- Designation Notice (WH-382);
- Certification of Qualifying Exigency For Military Family Leave (WH-384);
- Certification for Serious Injury or Illness of Covered Servicemember — for Military Family Leave (WH-385).

Aside from the expiration date, the only major change we have noticed is that the updated forms leave out the “safe harbor” language under the Genetic Information Nondiscrimination Act, which advises employees and their medical providers that they should not provide “genetic information” when responding to requests for certification.

N.Y. Senate Passes Bill Eliminating the Annual Pay Notice Requirement Under the Wage Theft Prevention Act

On February 29, 2012, the New York State Senate passed bill no. S06063A in a 34-23 vote for the bill. The new bill eliminates the annual notice requirements of the Wage Theft Prevention Act, which currently requires, among other things, employers provide a detailed notice to all employees upon hire, on an annual basis, and upon any changes in the information contained in the notice. The legislation is now before the New York State Assembly.