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LABOR & EMPLOYMENT
NEWSLETTER

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Hinckley, Allen & Snyder LLP, a regional law firm with offices in Boston, Providence, and Concord, NH, has been in New England since 1906.

APPEALS COURT RULES THAT EMPLOYERS MAY PRORATE AN EMPLOYEE'S PRODUCTION-BASED BONUS TO REFLECT FMLA LEAVE

The Third Circuit recently reached a decision of first impression, holding that an employer may prorate the annual bonus of an employee to reflect the employee's FMLA leave if the bonus is production-based. In qualifying its holding, the Third Circuit drew a sharp-line distinction between bonus programs: if the bonus program awards production, an employer may prorate the bonus to reflect the FMLA leave; if, however, the bonus program awards the absence of an occurrence (such as safety or perfect attendance bonuses), an employer may not prorate the bonus to reflect FMLA leave.

In Sommer v. The Vanguard Group, No. 05-4034 (3rd Cir. 2006), the plaintiff, Robert Sommer, was employed as a Financial Administrator with The Vanguard Group. Sommer took short-term disability leave under the FMLA for treatment of "major depression and generalized anxiety." When Sommer's bonus was determined at the end of the year, the bonus payment was reduced by approximately $1800 to reflect Sommer's absence while on FMLA leave.

The Vanguard Group offered a "partnership plan" annual bonus to eligible employees, the amount of which was determined by three factors: 1) job level; 2) length of service to the company; and 3) hours worked. If an employee did not meet the annual goal for the number of hours worked (which was 1,950 hours for The Vanguard Group), the company would prorate the bonus by the number of hours the employee was deficient. In accordance with its policy, The Vanguard Group prorated Sommer's bonus to account for the time he was on FMLA leave.

Sommer argued that the prorated bonus amounted to an "interference" with his rights under the FMLA. The FMLA expressly declares it unlawful for an employer to, "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided." 29 U.S.C. §2615(a)(1). If an employee is successful in bringing a so-called "interference claim," the employer may be liable for civil compensatory damages and liquidated damages. 29 U.S.C. §2617(a)(1)(A). Sommer also argued that prorating the bonus to account for FMLA leave amounted to disparate treatment because the bonuses of employees taking non-disability paid leave, such as vacation time and sick days, did not receive prorated bonuses.

Relying on regulations issued by the Department of Labor and related opinion

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letters, the Third Circuit first determined that production-based bonuses, as opposed to "absence of occurrence" bonuses, may be prorated to account for FMLA leave. The court then considered whether the bonus offered by The Vanguard Group was based on production, or on the "absence of an occurrence." In making its determination, the court relied on a Department of Labor's definition of "production bonuses," which is "one that requires some positive effort on the employee's part at the workplace," as opposed to bonuses there merely require "compliance with rules."

"Following the court's determination that the bonus was production-based, the Third Circuit concluded that The Vanguard Group permissibly prorated Sommer's bonus to account for his absence."

The court found that the bonus offered by The Vanguard Group was an incentive to employees to contribute to Vanguard's performance and production by meeting a predetermined hours goal. Therefore, it was a "production bonus" rather than a bonus given for "compliance with rules."

Following the court's determination that the bonus was production-based, the Third Circuit concluded that The Vanguard Group permissibly prorated Sommer's bonus to account for his absence. The court further rejected Sommer's claim that The Vanguard Group engaged in disparate treatment of employees by prorating the bonuses of employees taking disability leave, but not for employee's taking non-disability leave, such as vacation pay and sick days. The court noted that the FMLA "does not require the equal treatment of those who take unpaid forms of FMLA leave and those who take paid leave."

The Sommer decision appears to be the first decision addressing the issue of whether an employer may pro-rate an employee's bonus to account for FMLA leave. The precedent establishes an important distinction for employers in structuring bonus programs: If an employer's bonus program is based on production, an employer may prorate the bonus to reflect the FMLA leave; if, however, the bonus program awards the absence of an occurrence, an employer may not prorate the bonus to reflect FMLA leave (if the employee would have otherwise qualified for the bonus if not for the FMLA leave). Employers should carefully review their existing bonus programs to determine whether it is a "production bonus" or whether it is an "absence of occurrence" bonus. If the bonus is production-based, employers should clearly define the bases for awarding the bonus, including the number of hours the employee is required to work. In addition, if the employer intends to prorate the bonus to account for FMLA leave, the employer should clearly state this intention in the bonus policy. In addition, the plan should clearly exclude the categories of leave that will not result in a prorated bonus, such as vacation, sick days, and/or holidays.

FAILURE TO PROVIDE RELEVANT INFORMATION LEADS TO NEGLIGENT MISREPRESENTATION CLAIM

Last month, the United States Court of Appeals for the First Circuit ruled that a former employee could bring a claim of negligent misrepresentation for the company's failure to disclose that his incentive stock option ISO agreements had to be exercised within three months of his resignation from employment. The First Marblehead Corp. v. House, (First Cir. 2006). This case shows that an employer may be held liable for what it doesn't disclose to employees as well as affirmative misrepresentations.

When Gregory House was hired by First Marblehead, he was promised valuable stock options to compensate him for the salary cut he would take by leaving his previous employment. The stock option plan indicated that "options will remain exercisable by the grantee for a period not extending beyond three months. However, First Marblehead never provided a copy of the plan to House. On several occasions, executives from First Marblehead indicated to House that the ISO's had a ten year duration. In early 1998 House resigned his employment. In February 2004 – after a public offering of First Marblehead's stock led to a dramatic increase in the stock's value – House attempted to exercise his options. First Marblehead rejected his attempt to exercise his options stating that the plan required him to exercise his options within three months of his resigning from employment. House, who estimated that the options were worth $7 million, sued.

The lower court granted First Marblehead summary judgment on House's claims. However, the First Circuit of Appeals reversed that part of the summary judgment order that dismissed House's claim for negligent misrepresentation. The First Circuit found that the failure to provide important relevant information to the employee might well constitute negligent misrepresentation. The court quoted legal precedent that held that "one who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the non-existence of the matter that he had failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question." House's negligent misrepresentation claim relied on the allegation that the company failed to inform him of the three month expiration upon termination of employment while supplying him with incomplete materials suggestions that his options would be exercisable for ten years.

The First Circuit found that a reasonable jury could find that the company "failed to exercise reasonable care" when it failed to inform House of the three month exercise requirement.

The Court found that a jury could determine that House relied on the representations that the ISO's would be good for ten years. As the First Circuit, Massachusetts courts have expressed a strong preference that reliance, in the context of a negligent misrepresentation claim, is to be determined by a jury and not on summary judgment unless the facts are so clear as to permit only one conclusion.

Companies must be careful not to hide, intentionally or otherwise, key information on which employees need to make a decision relating to their benefits. Where the company has failed to provide information which it knows or should know would be important to the employee in making decision, the company may face a negligent misrepresentation claim. Given the ruling in First Marblehead, full disclosure would seem to be a good policy involving employee benefits.

WORKER ELIGIBLE FOR FMLA LEAVE DESPITE A FIVE YEAR BREAK IN EMPLOYMENT

The Family Medical and Leave Act of 1993 (FMLA) provides that an "eligible employee" shall be entitled to a total of twelve workweeks of leave during a twelve-month period for four specified reasons that are probably familiar to you by now.

The recent opinion of the First Circuit of Appeals in Rucker v. Lee Holding Co., d/b/a Lee Auto Malls, presented a case of first impression among the Courts of Appeals as to who is an "eligible employee."

The Court phrased the issue as "whether and under what circumstances an employee who has had a break in service may count previous periods of employment with the same employer toward satisfying this 12-month requirement." This issue was resolved favorably to Rucker by the Court. As a result of this decision, employers will have to calculate the 12-month service rule differently to include prior service with it.

An "eligible employee" is defined by FMLA as one "who has been employed (i) for at least 12 months by the employer with respect to whom leave is requested…; and (2) for at least 1,250 hours of service with such employer during the previous 12-month period." The Rucker case dealt with the first prong of this definition requiring a 12-month period of service with the employer. The interpretation of this definition is significant because an ineligible employee would not have a statutory right to a FMLA leave.

The facts were that Mr. Rucker worked as a car salesman for Lee Auto Malls for five years, left its employ and returned approximately five years later. After approximately seven and a half months of reemployment, Rucker ruptured a disc in his back and took medical leave at various times because pain prevented him from working. After thirteen days of absence and while still out on medical leave, Lee Auto terminated Rucker's employment.

Since Rucker did not have 12 months of employment with Lee Auto in his second tour of duty, the lower court held that Rucker did not meet this twelve-month service requirement. The lower court rejected Rucker's argument that his prior period of five years of service could be counted toward satisfying this requirement.

The First Circuit reversed the lower court though recognizing that FMLA's statutory language on this issue was ambiguous – 12-months could mean a period of continuous service or a cumulative period – as was the language of the U.S. Department of Labor's ("USDOL") Regulations.

Faced with this dual ambiguity, the First Circuit held that it must give substantial deference to the USDOL's own interpretation of its regulations. The USDOL's interpretation, as expressed in the preamble to its FMLA regulations and in its amicus brief in Rucker, was that the 12-month service requirement did not require a continuous period of service. Therefore, Rucker's five-year break in service with Lee Auto Malls did not prevent the employee from counting his earlier period of employment in calculating whether the 12-month service requirement was met. By including this prior period of service, Rucker clearly had 12 months of service with Lee Auto and met the test for an "eligible employee."

The First Court's decision in Rucker is binding precedent in this Circuit (Maine, Massachusetts, New Hampshire, Rhode Island) unless and until the U.S. Supreme Court reaches a contrary interpretation in a case before it. As a result of Rucker, an employer must include all periods of service with the employer, including periods of service prior to a termination in employment, in determining whether the employee meets the 12-month service requirement.

RHODE ISLAND LABOR AND EMPLOYMENT LAW UPDATE

The Rhode Island General Assembly did not enact many labor and employment laws during the 2006 session. Below are some of the enactments that may be of general interest.

A. CHAPTER 5 (2006 H-6718)

This Act increased the minimum wage from $6.75 per hour to $7.10 per hour effective March 1, 2006. On January 1, 2007, the Act will increase the minimum wage to $7.40 per hour.

The Act became effective February 24, 2006.

B. CHAPTER 316 (2006 S-2713)

This Act amended Section 28-48-1, which is the definition section of the Rhode Island Parental and Family Medical Leave Act ("RIPFMLA"), to provide that domestic partners of classified employees of the State of Rhode Island are covered by RIPFMLA. Other changes were made to provide COBRA coverage to a domestic partner by amending RIGL 36-12-2.4.

The Act was effective on July 4, 2006.

C. CHAPTER 360 (2006 S-2652)

This Act amends Section 28-26-1 of the law concerning Hoisting Engineers. Previously, the hoisting engineer member on the Board of Examiners of Hoisting Engineers was appointed by the Director of Labor and Training and became the Chairperson of the Board. Now, the Chairperson will be elected by the Members of the Board.

The Act was effective on June 7, 2006.

D. CHAPTER 610 (2006 S-2912)

This Act amends the workers' compensation law in two ways. First, Section 28-33-17, entitled "Weekly Compensation for Total Incapacity," was amended and effective September 1, 2007 that the maximum rate of weekly compensation for total disability cannot exceed 115% of the state average weekly wage. The maximum had been 110% of the state average weekly wage. The Department of Labor and Training has announced the new maximum for total disability is $845.00 for injuries occurring on or after September 1, 2006.

Section 28-33-18.3, entitled "Continuation of Benefits for Partial Incapacity," has been amended to move the gate out for injuries occurring after July 2007. The gate caps the maximum period of time most injured employees could collect indemnity benefits to 6 years.

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"The Department of Labor and Training has announced the new maximum for total disability is $845.00 for injuries occurring on or after September 1, 2006."

UNITED STATES SUPREME COURT RULES THAT TITLE VII ANTI-RETALIATION PROVISION IS VERY BROAD -- EMPLOYERS BEWARE

Claims of retaliation brought by persons protected by state fair employment practice laws and under the Federal anti-discrimination law, Title VII of 1964 Civil Rights Act, as amended, are the fastest growing discrimination suits brought by employees or former employees against their employer or co-workers.

In order to establish a claim of retaliation under federal law, a plaintiff must demonstrate the following: (1) the plaintiff engaged in protected conduct (whether the conduct was participating in a workplace investigation, filing a charge of discrimination, or raising an internal issue), (2) the plaintiff suffered an adverse employment action, and (3) the two were causally linked. Noviello v. City of Boston, 398 F.3d 76, 92 (1st Cir. 2005).

On June 22, 2006, the United States Supreme Court put its imprint on the law of retaliation by deciding Burlington Northern and Santa Fe Railway Company v. White, 548 U.S. ___, 126 S.Ct. 2405 (2006). Burlington Northern resolved a split between the United States Circuit Courts of Appeals regarding the scope of the anti-retaliation provision found in Title VII of the Civil Rights Act of 1964.

The Supreme Court ruled, in relevant part:
[T]he anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur outside the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination. (Emphasis supplied)

The facts in the Burlington Northern case are rather detailed, but, it is apparent that once a female unionized employee made certain complaints about sexual harassment, she was removed from her job. Later after making additional complaints she suffered further negative consequences on the job. She filed a grievance on both issues. An arbitrator ruled in her favor in each case. She also filed a complaint with the federal Equal Employment Opportunity Commission ("EEOC"). The U.S. Supreme Court held she stated a triable issue of retaliation.

The U.S. Supreme Court distinguishes the anti-discrimination provisions of Title VII from the anti-retaliation provisions of the act as follows:

As stated by the U.S. Supreme Court, the discrimination provision seeks to prevent injury to individuals based on who they are, i.e., their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, i.e., their conduct. The Supreme Court went on to say "An employer can effectively retaliate against an employee by taking actions not directly related to his own employment or by causing him harm outside the workplace. . . . A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence, such a limited construction would fail to fully achieve the anti-retaliation provision's "primary purpose" namely "maintaining unfettered access to the statutory remedial mechanisms."

Please note further that the U.S. Supreme Court's decision is broader than the scope of EEOC policy manual; although the EEOC manual also provides exceptionally broad protection from retaliation.

In conclusion the Supreme Court stated, "We conclude the Title VII Anti-Discrimination Provision and its Anti-Retaliation Provision are not coterminous. The scope of the Anti-Retaliation Provision extends beyond workplace-related or employment-related retaliatory acts and harms".

Although the anti-retaliation provision protects an individual from retaliation, nonetheless the retaliation must be "serious." – to dissuade a reasonable worker from making or supporting a charge of discrimination. The U.S.

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UNITED STATES SUPREME COURT RULES.. — CONTINUED FROM PAGE 6

Supreme Court recognizes that "significant" is separate from "trivial" harm. "An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." "Courts have held that personality conflicts at work that generate antipathy and "snubbing by supervisors and co-workers" are not actionable. The standard to judge whether the action is "retaliatory or not" must be "objective."

To protect your company, yourself and your employees, from discrimination, harassment or retaliation lawsuits, you should review and comply with the following steps:

1. Promulgate an anti-discrimination, and harassment policy, anti-retaliation policy and procedure.

2. Distribute it upon hire and annually.

3. Upon receipt of a complaint or constructive knowledge of wrongdoing, investigate promptly.

4. Conduct a thorough investigation.

5. Document your efforts.

6. Try to protect the privacy of individuals involved.

7. Warn the accused not to retaliate.

8. Prevent Supervisory misconduct – there is strict liability in Massachusetts.

9. Take action to halt any alleged discrimination, harassment, or retaliation.

10. Regardless of whether the investigation reveals discrimination, harassment or retaliation, at the end of your investigation you should re-affirm that discrimina tion, harassment and retaliation violate the law.

11. Continue to monitor the situation to prevent future acts of discrimination, harassment, or retaliation – whether it occurs at work OR outside of work.

12. Train your employees that discrimination, harassment, or retaliation is against federal and state law.

13. Make sure managers, supervisors and foremen know what to do when they identify or suspect discrimination, harassment or retaliation. Don't let them feel they must solve the problem themselves. Often times they are not good at it. Coordinate your response. Seek help from your attorney or HR consultant.

14. Try to keep the matter in-house. Don't discourage your complaining employee and encourage him or her to seek outside advice or sue. A prompt, effective investigation with a fair result solves most complaints.

By training your employees and having a simple but effective anti-discrimination, anti-harassment, anti-retaliation plan, you can avoid costly lawsuits.

Hinckley Allen Snyder has drafted effective plans and provides anti-discrimination/anti-harassment/anti-retaliation training. Draft plans are available upon request.

"An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience."

RHODE ISLAND LABOR & EMPLOYMENT UPDATE — CONTINUED FROM PAGE 5

Thus, the gate remains in the law, but not effective.

This Act was effective July 14, 2006.

E. CHAPTER 606 (2006 H-6759)

This Act amends section 28-3-14 of Chapter 28-3, entitled "Employment of Women and Children," to provide that all employees are entitled to a 20 minute mealtime within a six hour work shift and a 30 minute mealtime with an 8 hour shift. Employers are not required to compensate the employees for the mealtimes and the provisions of this section do not apply to: (a) employer of a health care facility licensed in accordance with 23-17 of the General Laws; or (b) an employer who employs less than three people on any shift at a worksite.

A note of caution, under the federal Fair Labor Standards Act, the federal Department of Labor takes the position that lunch breaks of less than 30 minutes must be paid.

This Act was effective July 14, 2006.

F. CHAPTER 637 (2006 S-2153)

This Act deletes section 28-30-19 of the Workers' Compensation law which required the Workers' Compensation Court to submit an annual report in March to the General Assembly on its activities for the previous year.

This Act was effective on July 14, 2006.

G. CHAPTER 359 (2006 S-2660)

This Act amended section 37-13-12.4 and 37-13-14.1 concerning violations of the Labor and Payment of Debts by Contractors Act. Specifically, fines were increased to between $500 and $1,000 a day for violating the Act. The fines had been $50 to $100. The prison time for violation remains at not less than ten (10) days nor more than ninety (90) days.

In addition, a person, firm, or corporation no longer has to be found in willful violation of this chapter before being barred from working on public work projects for between eighteen (18) and thirty-six (36) months.

This Act was effective July 7, 2006.

If you have any questions about these issues or any other labor and employment related issues please do not hesitate to contact:

Kathleen A. Collins, Associate
kcollins@haslaw.com ● ■

Richard L.E. Jocelyn, Partner
rjocelyn@haslaw.com ●

Michael F. Kraemer, Partner
mkraemer@haslaw.com ● ■ ▲ ❖

Willard Krasnow, Partner
wkrasnow@haslaw.com ■

Brian E. Lewis, Associate
blewis@haslaw.com ■ ▼

Christina L. Lewis, Associate
clewis@haslaw.com ■ ❋

Douglas F. Seaver, Partner
dseaver@haslaw.com ■ ◆

Richard D. Wayne, Partner
rwayne@haslaw.com ■

Joseph D. Whelan, Partner
jwhelan@haslaw.com ● ◆

■ Admitted in Massachusetts
● Admitted in Rhode Island
▲ Admitted in New Jersey
◆ Admitted in New York
❋ North Carolina
▼ Admitted in California
❖ Admitted in Pennslyvania

28 STATE STREET
BOSTON, MASSACHUSETTS
02109-1775
617.345.9000

50 KENNEDY PLAZA, SUITE 1500
PROVIDENCE, RHODE ISLAND
02903-2393
401.274.2000

43 NORTH MAIN STREET
CONCORD, NEW HAMPSHIRE
03301-4934
603.225.4334

www.haslaw.com