



Labor & Employment Law Section

Summer 2010 Newsletter

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Section Co-Chairs' Corner



Jay Shepherd



Leigh Panettiere

It is hard to believe we are writing the last Co-Chair letter of the year. This year has flown. It seems like only yesterday we held our wildly successful fall kick-off program, and we hope our final reception of the year, scheduled for June 17, 2010 at 5:00 at the BBA, will be just as well-attended. Much has happened in the past few months.

Our section presented several well-attended CLEs this spring, including the Public Sector Labor Law conference at Harvard Law School on May 1; Employment Law Basics on May 21; and a June 7 Spotlight program dealing with the various new challenges facing employees and employers as a result of the increasingly “plugged-in” nature of the workplace, such as laptops, home computers and iPhones, as well as the pitfalls of social networking. We have decided to expand our popular “Labor Basics” CLE to a two-part series offered in alternating years. “Labor Basics – Arbitration” will take place in December 2010, and “Labor Basics – Unfair Labor Practices” will be presented in the fall of 2011, and so on as long as the course remains well-attended. As always, we are deeply grateful to the Co-Chairs of the Brown Bag Committee and CLE Committee for putting together terrific education programs all year.

We continue to invite members of the Section to contact us and volunteer to serve on subcommittees. Working on a subcommittee provides an opportunity to contribute to the Section’s educational efforts and collaborate with fellow labor and employment attorneys. Members interested in serving on subcommit-

tees should e-mail the Co-Chairs of the subcommittee which they are interested in serving, or the Section Co-Chairs.

The Public Service subcommittee is off and running with the Section Blog project. The subcommittee has met several times to work out issues on how best to deliver timely and useful content to the members, the bar, and the community at large. The goal is to create an easy-to-use place for lawyers to find information on developments in the law, announcements about upcoming programs and activities, job openings, and other helpful information. By subscribing to the blog’s free RSS feed (which automatically notifies people when content is added), readers will be kept up to date on the things that matter to them and their practices. Because of the interactive nature of blogs, people will be free to engage in dialogue through comments. This will create a true community forum and will be a resource for our members. Some of the issues that we’ll be working on include how to get a steady stream of content and how to make uploading the content simple and efficient. We’ll be relying on all of you to help with this project by submitting items to be posted. It will be a great way to broaden the reach of the marketing that you and your firms already do. Look for more details to come in the next few months.

We are also embarking on an initiative to encourage and enable L&E members to volunteer their time to the men and women who so bravely serve this country in the military, by advising military service personnel on their rights under the labor and employment laws. This can be accomplished either by working for a legal services agency devoted to this purpose, or by attending pre- or post-deployment events at which veterans will be able to ask questions about their rights. We are working in conjunction with the Committee on Legal Services for Military Personnel, Veterans and Families to coordinate lawyers who want to volunteer. We urge all L&E Section members to consider joining us in this effort.

Again, we want to thank you for your interest, and we invite you to continue getting involved in the efforts of your BBA Labor & Employment Section.

Leigh and Jay

Judicial Update

Christopher Powell, Ropes & Gray LLP

First Circuit

Lopez v. Commonwealth of Massachusetts, 588 F.3d 69 (1st Cir. 2009).

In this Title VII lawsuit, minority police officers employed by the MBTA and several Massachusetts towns and cities alleged that police promotional exams designed by the Commonwealth's Human Resources Division ("HRD") had a disparate impact on the basis of race. Ruling on the Commonwealth's motion to dismiss, the First Circuit held that neither Massachusetts nor the HRD were the officers' "employers" within the meaning of Title VII.

The plaintiffs alleged that by preparing the promotional examinations, the HRD became an employer of the police officers. Under the Commonwealth's civil service laws (Mass. Gen. L. ch 31), however, the police officers were appointed by and subject to the control of the MBTA or the city or town that appointed the officer, not the HRD. Further, the appointing authorities were not obliged to use examinations prepared by HRD. Rather they were free to develop their own exams within certain guidelines contained in Chapter 31. If they chose to use the HRD exams, the appointing agencies could also apply the results to hiring decisions in varying ways. Applying the common law test for the existence of an employer-employee relationship, (a multi-factor test focusing on the alleged employer's ability to control the conduct of the alleged employee in the course of providing services), the First Circuit held that these facts precluded a finding that the HRD was the officers' employer.

In so holding, the court explicitly rejected the "interference theory" advanced by the plaintiffs. Under that theory, a party that

participates significantly in and interferes in the employment relationship may be subject to employer liability. The court deemed the theory inconsistent with Supreme Court precedent establishing the common law test for use in Title VII.

Rederford v. US Airways, Inc., 589 F.3d 30 (1st Cir. 2009).

This case vividly shows the need for diligence in pursuing claims brought against an entity that goes into bankruptcy.

In the spring of 2002, the plaintiff filed a charge of discrimination against U.S. Airways alleging violations of the Americans With Disabilities Act and Rhode Island law. A few months later, the airline filed for bankruptcy. The plaintiff received a proof of claim form from the Bankruptcy Court, which she timely returned. In January of 2003, the plaintiff was served with an Objection to her claim by US Airways. If allowed, the Objection would have the effect of excluding from the bankruptcy plan any claims that would be covered by the airline's insurance. The Objection listed coverage for "personal injury tort claims" as a form of insurance carried by US Airways. The Objection informed the plaintiff that she must request a hearing by February 28, 2003 or her claim would be disallowed. The plaintiff did not timely request a hearing. As a result, her claim was disallowed by the Bankruptcy Court.

The plaintiff filed a lawsuit in 2008. In an attempt to avoid the effect of her failure to respond to the Objection, she argued that because she could seek reinstatement rather than money damages, her suit was not a "claim" subject to the Bankruptcy Court's disallowance and, in the alternative, that

she should be able to proceed based on the doctrines of judicial estoppel and unclean hands.

The court made short work of all these arguments. With respect to the reinstatement argument, the First Circuit relied on Section 101(5) of the Bankruptcy Code which defines a “claim” to include a right to an “equitable remedy for breach of performance if such breach gives right to a right to payment.” That statute had been previously interpreted to cover any equitable remedy to which there is an alternative right to monetary payment. Because the ADA would permit damages in lieu of reinstatement, the court held that the plaintiff’s claim was within the definition of a “claim” for bankruptcy purposes.

With respect to the judicial estoppel and unclean hands claims, the plaintiff argued that she had understood the Objection’s reference to insurance to mean that her claim would be covered by insurance and had therefore not sought a hearing on the Objection. But that reference was plainly to insurance for “personal injury tort claims,” not employment practices. Because her mistake in no way caused the Bankruptcy Court to be misled when it disallowed her claim, and US Airways had done nothing to mislead the plaintiff, the court rejected both arguments.

Bukuras v. Mueller Group, LLC, 592 F.3d 255 (1st Cir. 2010).

In this contract dispute between a company and its former general counsel, the First Circuit held that the employer had not breached the plaintiff’s employment contract when it failed to include a one-time transaction bonus when it calculated the plaintiff’s contractual severance payment upon the termination of his employment.

The contract, which was signed in 2003, provided that the value of the plaintiff’s

severance benefits would include 150% of “bonus [sic] paid or payable...for the fiscal year immediately preceding the fiscal year in which termination occurs.” The contract also specifically provided for payment of an annual bonus. In 2005, in contemplation of an attempt to sell the Company, the board of directors created a transaction bonus pool in which the plaintiff would participate. As the Company moved forward with the transaction, its legal department (supervised by the plaintiff as General Counsel) prepared a document illustrating possible severance payments that might be payable in connection with that transaction. In them, the plaintiff’s possible severance was calculated with reference only to his annual bonus, not the contemplated transaction bonus. The transaction occurred in October, 2005, shortly after the beginning of the Company’s 2006 fiscal year and the plaintiff’s transaction bonus was paid. Shortly thereafter, his employment was terminated and the Company paid him severance calculated with reference only to his annual bonus and not the termination bonus.

The plaintiff argued that the transaction bonus fell within the contractual language because it was payable as a result of the work he had done in FY ‘05 which led to the transaction in FY ‘06. Further, he argued that because the annual bonus provision of the contract referred specifically to an “annual bonus” while the severance provision referenced only “bonus,” the parties had clearly intended the severance provision’s reference to the bonus to encompass any bonus, not just the annual bonus provided for in the contract.

The court carefully examined both the agreement itself and the surrounding circumstances and concluded that the Company had not breached the contract. The court reasoned that because the transaction bonus had not become payable until the closing of the sale of the Company, which occurred in the same fiscal year in which the

plaintiff's employment was terminated, it was not encompassed within the severance provision's description of a bonus "paid or payable...for the fiscal year immediately preceding the fiscal year in which termination occurred." Further, the court held that a reading of the entire agreement, which provided only for the annual bonus and not for the transaction bonus, supported the conclusion that the parties had intended the severance obligation to encompass only the annual bonus described in the contract itself, and not any bonus the plaintiff might receive during his employment with the Company.

Ramirez-Lebron v. International Shipping Agency, Inc., 593 F.3d 124 (1st Cir. 2010)

In this action under Section 301 of the Labor Management Relations Act, the court denied a motion to dismiss a claim brought by a group of seven employees ("G7"), who sought to challenge an arbitration award that granted a separate group of three employees ("G3") superior seniority rights under a collective bargaining agreement. The court held that the G7 had plead sufficient facts that, if proved, would demonstrate that the employer had repudiated the grievance and arbitration mechanisms of the collective bargaining agreement and that the employer therefore could not rely on the G7's alleged failure to exhaust the grievance and arbitration process as a defense to the lawsuit.

The G7 alleged that in April of 2002, the Company had agreed with the union that G7 employees would have seniority rights over the G3 employees, who were not then members of the union. After the G3 employees joined the union, it filed a grievance on their behalf challenging the seniority rights of the G7. The union then agreed to let the G7 employees intervene in the grievance procedure. The union took the position that it would not support any resolution of the issue prior to a full hearing and decision by an arbitrator.

Three days before the scheduled hearing, the Company and the G3 employees allegedly reached a secret agreement by which the G3 employees would receive more favorable seniority treatment than the G7 employees. They submitted the agreement to the arbitrator, who incorporated it into a final award. The G7 employees then filed this lawsuit for breach of the collective bargaining agreement.

The district court dismissed the complaint by the G7 employees. It read the complaint as calling for the setting aside of the arbitration award. Relying on Section 5 of the Federal Arbitration Act ("FAA"), which permits such setting aside only on application of a party to the arbitration in the event an award is procured by "fraud, corruption or undue means," the district court held that the G7 employees lacked standing because they were not parties to the award and they did not allege that the union had breached its duty of fair representation.

The First Circuit reversed, determining that the district court had erred in treating the complaint as one for relief pursuant to the FAA. Rather, it held, the G7 employees had raised a Section 301 claim, seeking a declaration of their rights under the collective bargaining agreement, vacatur of the award and damages. The court framed the issue as whether the G7 employees had alleged circumstances sufficient to sustain a cause of action for breach of the collective bargaining agreement against the Company.

The Company argued, as it had below, that the complaint had to be dismissed because the G7 employees had not exhausted the grievance and arbitration process. The court rejected this argument, reasoning that the facts alleged by the G7 employees impugned the fairness of that very process. If the G7 employees could prove that the Company had entered into a secret agreement with the G3 employees and then used that agreement

to obtain an arbitration award outside the normal functioning of the contractual arbitration process, then the Company would be estopped from using the collective bargaining agreement (and the improperly issued award) as a shield against the merits of the G7 employees' claims.

Richardson v. Friendly Ice Cream, Corp., 594 F.3d 69 (1st Cir. 2010).

The court upheld summary judgment for Friendly's in this disability discrimination lawsuit brought under the ADA and the Maine Human Rights Act. The plaintiff, an assistant manager at a Friendly's restaurant, developed severe shoulder pain as a result of manual tasks she performed in the course of her employment. Although she was able to continue to work for some months by limiting her activities, she eventually took time off to have shoulder surgery. Due to the continued pain, she was unable to return to work at the expiration of her 12-week FMLA leave. The Company subsequently terminated her employment.

The First Circuit agreed with the district court that the plaintiff could not prove that she was a qualified person with a disability, because she was unable to perform the manual functions required of the assistant manager position, which were essential functions of that job. The written job description for the position specified that the primary functions of the assistant manager were to "assist in kitchen, dining and take-out operations to facilitate production and customer service." It also included a listing of various manual tasks required of assistant managers—from unloading delivered product and transporting it to restaurant storage areas to cooking food items in the kitchen—tasks she conceded she had done prior to her injury. While the plaintiff argued that, as an assistant manager, her only essential function was to manage the operation, the court rejected this position as

inconsistent with the job description. Further, the court reasoned that managers of small operations are often called upon to perform numerous operational tasks in addition to their supervisory responsibilities, and that the levels of staffing in the restaurant at issue indicated that her performance of such manual tasks would be required.

Foley v. Town of Randolph, 598 F.3d 1 (1st Cir. 2010).

The First Circuit upheld summary judgment in favor of the Town on its fire chief's First Amendment retaliation claim arising out of a fifteen-day suspension imposed on the chief as a result of certain public statements he made and actions he took at the scene of a tragic house fire in which two children died.

The chief participated in a press conference convened by the State Fire Marshal at the site of the fire. He was in uniform and firefighters were still working to bring the fire completely under control. After commenting on the details of the fire, the chief shared with reporters his view about what he considered to be inadequate funding of the fire department by the Town and related staffing cuts. In response to reporters' questions, he went on to lament the failure of two consecutive Proposition 2 1/2 overrides. Subsequently, the plaintiff allegedly shoved a newspaper reporter's draft article at a Town Selectman at the scene of the fire, and also spoke inappropriately to a Town Selectwoman. The Town brought disciplinary charges against the chief, alleging that his statements to the media "demonstrated a lack of sound judgment and of accuracy" and undermined "the Town's mission of providing effective fire protection services." In addition, it was alleged that he had initiated "inappropriate physical contact" with the Selectman and demonstrated "a lack of the demeanor, ability and independent judgment required for competent command and control" with the Selectwoman. After a

hearing, the Town imposed the fifteen-day suspension.

The First Circuit analyzed the plaintiff's claim to determine whether his comments to the press were entitled to First Amendment protection by looking to whether he was speaking (a) on a matter of public concern and (b) as a citizen and not an employee. The court easily determined that the budget and effectiveness of the Town's fire department were matters of public concern. As to whether the chief had been speaking as a citizen or as an employee, the court looked to the fact that the chief addressed the media as part of a press conference called by the Fire Marshal, in uniform at the scene of the fire. Based on these specific circumstances, the court held that the chief was speaking in his public capacity and not as a citizen, and therefore his speech had no First Amendment protection.

Lockridge v. University of Maine System, 597 F.3d 464 (1st Cir. 2010)

In this sex discrimination case brought under Title VII, the court affirmed summary judgment for the University on the plaintiff professor's discrimination, retaliation and hostile work environment claims.

The plaintiff, a professor in the University's communications department, alleged that she had suffered from discrimination (been denied a pay raise because of her gender), retaliated against and that the University had allowed other members of the communication department to create a hostile work environment.

She alleged a series of events starting shortly after she began working at the University in 1984, as follows.

- In 1985, a male professor allegedly made sexually inappropriate overtures to her, which she rejected.

- In 1989, the same male professor opposed her receiving tenure (though it was granted to her).
- Later, the same male professor lobbied the Dean for the plaintiff's removal as Chair of the department; she was subsequently removed by a faculty vote. Shortly thereafter, a copy of an article written by the male professor entitled "Accused of Sexual Harassment" was left in the plaintiff's mailbox.
- In 2006, during a post-tenure review, the plaintiff's scholarship was rated "unsatisfactory." The plaintiff complained to the Dean, who conducted an independent review, and sustained the "unsatisfactory" finding, due to the plaintiffs' limited scholarly production, finding that she had not published a book or a peer-reviewed article during the four-year review period. As a result, the plaintiff was denied a pay raise. At this point, she filed an administrative charge with the Maine Human Rights Commission.
- In 2007, another tenured male professor in the department received a "satisfactory" scholarship rating, despite that he had published less than the plaintiff during the review period.
- in early 2008, the plaintiff requested, and was denied, relocation of her office from a satellite office building to a vacant office in the department's main building. Many other members of the department also had offices in the satellite building.

With respect to the denied pay raise, the court held that the plaintiff had failed to adduce evidence to demonstrate that the University's proffered legitimate reason—her unsatisfactory scholarship rating—was pretextual. The plaintiff pointed to the other male professor who had published less than her but who received a satisfactory rating as an example of disparate treatment. The court rejected this argument, because the male professor was, by the plaintiff's own admission,

on a “non-scholarly” track during the relevant review period, and therefore was not expected to produce as much scholarly work as was the plaintiff, who was on a “scholarly” track.

The plaintiff’s claim that she was denied the use of the office in the main building in retaliation for filing her charge with the agency failed because the court held that such a denial did not rise to the level of a material adverse employment action under the Supreme Court’s decision in Burlington Northern. The court reasoned that under the circumstances here, where numerous professors in the department had their offices in the satellite building and therefore suffered the same inconvenience the plaintiff claimed to suffer, the University’s denial of her requested move to the main building could not be understood to be an action that could “dissuade a reasonable worker from making or supporting a charge of discrimination”.

Finally, the court held that the hostile work environment claim must fail because it relied heavily on acts occurring in the 80’s and 90’s, years before she filed her charge of discrimination in 2006. Because it had previously determined that the pay raise and the denial of the office transfer were not discriminatory, the court held that they could not be anchoring acts that would allow those earlier acts to be considered under the continuing violation doctrine.

District of Massachusetts

Awuah v. Coverall North America, Inc., 2010 WL 1257980 (D. Mass. Mar. 23, 2010).

The court granted partial summary judgment to a group of plaintiffs on their claim that Coverall, a cleaning service company, violated G.L.c. 149, §148B when it misclassified them as independent contractors. Coverall had engaged the individuals as franchisees

pursuant to a franchise agreement that required them to attend mandatory training sessions and to wear approved uniforms and identification badges while on client premises. Moreover, Coverall provided all of the supplies, contracted with the customers directly and handled all billing.

The court held that the individuals were employees and not independent contractors because the company could not satisfy the second element of the three-part test articulated in §148B, which requires that an independent contractor be performing a service that is outside the usual course of business of the service recipient. Coverall argued that it was not in the business of providing cleaning services; instead, the company claimed that it was in the business of “franchising,” but the Court did not find this argument persuasive. In the alternative, Coverall argued that summary judgment was inappropriate because the court could not find a misclassification without also finding that the misclassification specifically harmed the plaintiffs. The court likewise found little merit to this argument, noting that the Supreme Judicial Court had recently rejected the same reasoning in *Somers v. Converged Access Inc.*, 454 Mass. 582, 911 NE 739 (2009).

Agency Update

Christopher Powell
Ropes & Gray LLP

EEOC Now at Full Complement of Five Members

With the swearing in of Victoria A. Lipnic on April 20, 2010 following a recess appointment to the position by President Obama, the Equal Employment Opportunity Commission now has a full complement of five members. Lipnic joined Chair Jacqueline A. Berrien and Commissioner Chai Feldblum, who also came to EEOC by recess appointment and were sworn in on April 7, and continuing Commissioners Stuart J. Ishimaru and Constance S. Barker.

Lipnic previously served as Assistant Secretary of Labor for Employment Standards from 2002 to 2009, overseeing the Wage and Hour Division, the Office of Federal Contract Compliance Programs, the Office of Labor Management Standards, and the Office of Workers Compensation Programs. Berrien came to the chairmanship from five years at the NAACP Legal Defense Fund. Feldblum has been a professor of law at Georgetown University Law center since 2005, where she founded the Federal Legislation and Administrative Clinic, a program designed to train students to become legislative lawyers.

Internal Revenue Service Releases HIRE Act Payroll Tax Exemption Form

On April 7, 2010, the IRS released a new form intended to help employers claim the special payroll tax exemption that applies to certain workers hired in 2010 under the Hiring Incentives to Restore Employment (“HIRE”) Act which was signed by President Obama on March 18.

This new Form W-11, Hiring Incentives to Restore Employment (HIRE) Act Employee Affidavit, is now posted at the IRS’ website: www.irs.gov. The HIRE Act requires that employers get a statement from each eligible new hire, certifying under penalties of perjury, that he or she was unemployed during the 60 days before beginning work or, alternatively, worked fewer than a total of 40 hours for anyone during the 60-day period. The IRS has indicated that employers can use Form W-11 to meet this requirement.

Legislative Update

Massachusetts Inches Towards Statutory Limitations on Noncompetition Agreements

By H. Andrew Matzkin, Esq. and Paula Lyons, Esq., Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

Representatives in the Massachusetts legislature are continuing their attempt to codify requirements for enforceable noncompetition agreements in the Commonwealth.

Representatives Will Brownsberger (D-Belmont) and Lori Ehrlich (D-Marblehead) submitted a compromise bill (redraft of H1794 & H1799) last summer, entitled “An Act Relative to Noncompetition Agreements,” which attempted to impose specific requirements for valid non-compete agreements under Massachusetts law. Despite strong objections from certain state representatives and a number of private businesses and related business organizations, the bill was recently reported out of the Legislature’s Joint Committee on Labor and Workforce Development with a favorable recommendation.

The prior version of the bill had allowed noncompetition agreements to extend beyond one year if a “garden leave” provision was added to compensate the employee during the extended period. The two main changes in the current version of the bill from October’s original draft are that the garden leave provision has been eliminated, and the length of permissible noncompetition restrictions has been capped at one year following cessation of the employment relationship. The current version of the bill is notable, however, not only because it incorporates these additional revisions, but also because it signifies yet another concrete step toward codifying requirements for enforceable noncompetition agreements in Massachusetts.

Highlights of the current version of the bill include the following:

- **Existing noncompetition agreements not**

affected: The bill’s requirements for enforceability will be applied prospectively;

- **Threshold compensation:** Noncompetition agreements can apply only to employees with minimum total compensation of \$75,000;
- **Separate Document:** The noncompetition agreement must be a distinct document signed by both the employer and the employee;
- **Advance notice:** If a noncompetition agreement is a required condition of employment, then at least seven days notice must be given before employment commences;
- **Consideration:** If the noncompetition agreement is entered into after the start of employment, additional consideration is required, with 10% of employee’s current annual compensation presumptively adequate;
- **Capped non-competition length:** A restricted period of six months is presumptively reasonable, and in no event may a noncompetition period exceed one year from the date of cessation of employment;
- **Attorneys’ fees:** A court shall award attorneys’ fees to an employee if the court declines to enforce a material restriction, and may award attorneys’ fees to an employer if a court enforces agreement and finds that the employee acted in bad faith;
- **Choice of Law:** Parties cannot avoid Massachusetts law via a choice of law provision, and Massachusetts law automatically will apply to a noncompetition agreement if an employee was, at minimum, a 30-day resident of or working in Massachusetts at the time of termination.

The bill, House 4607, currently is in the House Committee on Steering, Policy and Scheduling, the last stop before floor consideration of the bill.

There are bound to be further revisions as the bill continues through the legislative process, and the bill ultimately may not become law. If the bill does become law, however, then the requirements for enforceable noncompetition agreements in Massachusetts will become more predictable – and an employer’s need for robust and enforceable non-solicitation, non-interference, and non-disclosure restrictions will become even greater.

Action Items for Employers

In light of the above, employers who do business in Massachusetts or who may employ residents of Massachusetts need to pay close attention to this legislation. If adopted, a full review of employer’s standard noncompetition agreements and goals regarding the same is required. Although the law will not be retrospective, it will be important to know and to plan for the new statutory restraints. Actions to consider include a new emphasis on non-solicitation and non-disclosure agreements and a reevaluation of business practices involving employees under the \$75,000 earnings threshold who may still have access to proprietary information.

The COBRA Subsidy Extensions

By Patricia Moran, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.

The American Recovery and Reinvestment Act of 2009 (“ARRA”), signed February 17, 2010, makes COBRA continuation coverage more affordable and accessible by offering a 65% COBRA premium subsidy to workers involuntarily terminated on or after September 1, 2008 and (originally) on or before December 31, 2009.

ARRA has been extended three times since it was enacted. As part of the 2010 Defense Appropriations Act, signed December 19, 2009, the maximum duration of the subsidy was extended from 9 to 15 months, and the subsidy was made available to workers involuntarily terminated before February 28, 2010. The Temporary Extension Act of 2010 (“TEA”), signed March 2, 2010, then extended the subsidy to workers involun-

tarily terminated on or before March 31, 2010. The Continuing Extension Act of 2010, signed April 15, 2010, further extended the subsidy to workers who are involuntarily terminated on or before May 31, 2010.

In addition to the time extensions, TEA makes the following notable substantive changes to ARRA.

- TEA opens the subsidy program to employees who experience a reduction of hours during the period beginning September 1, 2008 and ending May 31, 2010 followed by a subsequent involuntary termination of employment on or after March 2, 2010 and before May 31, 2010. The subsequent involuntary termination of employment is treated as a COBRA qualifying event, and serves as the start date for the 15-month subsidy clock; however, the maximum COBRA coverage period (generally 18 months) will run from the date of the original reduction in hours. No COBRA payments are required during the period between the reduction of hours and the involuntary termination of employment.
- TEA assures employers that a COBRA qualifying event shall be deemed to be a subsidy-eligible “involuntary termination of employment” provided that (1) the employer’s decision that the termination is “involuntary” is based upon a reasonable interpretation of ARRA and (2) the employer maintains supporting documentation, including an employer attestation, of its decision.
- Effective March 2, 2010, the subsidy clock runs for 15 months following the first day that the subsidy is available. Prior to TEA, the 15 month clock ran from the first day of the first month for which the subsidy was available.
- TEA provides that, if the Department of Labor determines that an employee was improperly denied a subsidy, and an employer refuses to honor the determination, the Department (or the aggrieved employee) may bring a civil action against the employer, and the Department may fine the employer up to \$110 per day.

Section Programs

Upcoming Program

The Past, the Present and the Future: What the Supreme Court's decision in *New Process Steel v. NLRB* really means

Monday, June 28, 2010 12:30 PM
Boston Bar Association - 16 Beacon Street, Boston, MA

Please join Joseph W. Ambash, Greenberg Traurig, LLP, and Justin F. Keith, Greenberg Traurig, LLP, for a discussion of the Supreme Court's recent decision in *New Process Steel v. NLRB* which held that the National Labor Relations Board lacked authority to issue decisions with only 2 Members over a period of 2+ years. The case has the potential to impact approximately 600 NLRB decisions. Although the Court resolved the issue of whether the Board can issue decisions without a quorum of three Members, many questions remain, such as:

- Does the Board have to re-decide every case on a case-by-case basis?
- If a party did not seek review of a 2-Member Board decision in the Courts of Appeals, has it waived the right to do so?
- Can a party seek to void a 2-Member decision issued in an R case, which is typically not reviewable in the Courts of Appeals?
- Are the decisions issued by the 2-Member Board of any precedential value? What weight, if any, should ALJs and Regional Offices place on 2-Member Board decisions.

Past Program

Employment Law Basics Seminar, May 21, 2010.

On May 21, 2010, Justine Brousseau and David Henderson co-chaired a seminar on Employment Law Basics, featuring the Employment Law Guide that the Labor & Employment Section published in 2008. The panelists were Nina Kimball, Mark Burak, Andy Pickett, Valerie Samuels, and Jody Newman. All attendees received a copy of the Guide, which was used as the basis for teaching both the basics of employment law and explaining the employment cycle from hiring, through employment, to termination and beyond. We had a full house with about 35 attendees, drawn from employment lawyers, in-house counsel, Human Resources representatives, and both the private and public sector. The program was very interactive, with the audience asking a lot of questions, and providing very positive feedback.

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