THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER
HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES
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THE GREAT DEBATE: Use-It-Or-Lose-It Vacation Leave

Moderator: Welcome, ladies and gentlemen, to the Employer's Advisory first ever "Great Debate." Today's debate will concern the oft-debated issue whether Colorado employers can have a use-it-or-lose-it vacation policy. That is, can an organization tell their employees that they will lose their accrued vacation if they don't use it within a certain time period, for example, within a calendar year? Also, can employers tell employees that they won't receive compensation for their accrued, but unused, vacation leave when they leave employment?

Presenting the position that such a policy is unlawful under Colorado law is Laurie. And presenting the contrary position will be Dan. Laurie, you're up first:

Laurie: Thanks. Well, let's start with the basics: Colorado's Statute defining "wages," C.R.S. § 8-4-101, states that all vacation pay earned is to be considered "wages." And I'm sure we can all agree that an employer can't take away an employee's earned wages. Well, then, it stands to reason that employers can't take away vacation pay earned since it's also wages. Further, the Colorado Department of Labor's Advisory Bulletin and Resource Guide states, "if an employer provides paid vacation for an employee, the employer shall – which means it's required – pay upon separation from employment all vacation pay earned..." That seems pretty clear to me that an organization can't take away an employee's accrued vacation leave or refuse to pay the employee for accrued, but unused, vacation upon termination because it would equate to taking away an employee's wages. What's your response, Dan?

Dan: Oh, sure, you would quote the law that way. Suspiciously, you've left off the most critical part of the statute. So, let me correct that undoubted oversight. The statute states, in full, that "wages" includes "vacation pay earned in accordance with any agreement." So, clearly employers can have an agreement with their employees that when they earn vacation, the employer can take it away under certain conditions.

Laurie: So Dan, where is this "agreement" between the employees and the employer set forth?

Dan: Well, we put our policy, I mean the agreement, in the employee handbook.

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Laurie: That makes sense. Does your handbook say anything along the lines of, "This Handbook is not intended to create and shall not be construed to create an agreement between employees and the employer, either express or implied?"

Dan: Oh, I see where you're going. You're going to say that since our handbook states it's not an agreement, well, then an individual policy can't be considered an agreement.

Laurie: Yep, that's where I was going.

Dan: Well, that's easily corrected. We'll simply remove the agreement from the handbook and make it a separate agreement.

Laurie: So you're saying that you'll create a contract between your organization and its employees regarding the terms of a vacation policy.

Dan: Sure. Why not?

Laurie: Well, for starters, failing to comply with the terms of that agreement could provide the employee a basis for a breach of contract claim. And our organization would rather not face a breach of contract claim for an alleged improper action under a vacation policy. In short, we strive to reduce potential claims against us, not increase them. Also, by turning your vacation leave into a contract, your organization may not be able to alter it should it want to do that at some point. After all, contracts generally provide that they can't be modified without the consent of both parties.

Dan: Well, that's just nitpicking, isn't it?

Laurie: Perhaps. I will, though, grant you that there's no definitive case law in Colorado directly on point. But in saying that, my organization doesn't want to put itself in the position of being the test case in this matter, particularly considering that the claim could have a prevailing-party attorney fee award, which means that if we lost we'd have to pay the amount of the claim and the employee's reasonable attorney fees.

Dan: So, what do you plan to do instead?

Laurie: Our organization's vacation policy, which is not a contract, has a maximum-cap accrual. The policy states that once an employee reaches that maximum amount, they don't accrue any additional leave until they use some of their vacation leave. It works pretty well in keeping employees from accruing more leave than we're comfortable with. And we also are confident that such a policy ensures that we're not going to spend months litigating a claim for unpaid vacation leave.

Moderator: And on that note, we'll bring to a close the Great Debate. And much like the debate of who would win a fight between Batman and Superman or whether a tree that falls in the forest makes a sound, perhaps we may never know the answer. Well, that's until we see a court case on this issue.

Practical Tip. As the presenters identified during the debate, there is no definitive answer to whether an organization can have a use-it-or-lose-it vacation policy. But this issue can be avoided by adopting a maximum-accrual vacation policy instead of use-it-or-lose-it. For example, if you do not want employees to be able to carry over days from a 10 day/year vacation into the next calendar year, instead of saying unused vacation is forfeited without pay on January 1, state that the maximum accrual is 10 days of vacation. Thus, if you have 3 days of accrued leave left at the end of the year, you

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will only accrue an additional 7 days on January 1 to bring your total accrued leave to 10 days. Accordingly, we encourage organizations to develop maximum-accrual vacation policies, instead of a use-it-or-lose-it policies, to reduce potential claims against the organization.

NEW RULE FOR NON-COMPETES

In the 3rd Quarter 2010 Edition of the Employer's Advisory, we reported the Colorado Court of Appeals decision in the *Lucht's Concrete Plumbing ("LCP") v. Horner* case. As you recall, that case concerned Tracy Horner, a former at-will employee with LCP. During his employment with LCP, Horner signed a noncompetition agreement. The agreement stated, among other things, that in the event of Horner's termination, he agreed to return all company property and further agreed not to compete with LCP for a period of twelve months following his termination. A year later, Horner resigned and took a job with LCP's chief competitor. Immediately after starting that job, Horner began directly competing against LCP.

Upon learning of his conduct, LCP sued Horner for breach of the noncompete agreement. Horner argued that the Court should dismiss the claim because the agreement lacked consideration since there was no benefit to him for signing the agreement. That is, to enforce a contract, a party must first prove there was an offer, an acceptance, and consideration. "Consideration" requires that each party either get something of value or refrain from doing something the party was legally entitled to do (*i.e.*, a plus and a minus on both sides). LCP countered that Horner's continued employment was sufficient consideration.

The Colorado Court of Appeals disagreed with LCP and determined that "while an employer may agree to continue an at-will employee's employment if the employee agrees to sign the covenant, nothing prevents the employer from discharging the employee at any future date. Thus, the employer's promise requires something more than was already promised under the original at-will relationship." So, the Court dismissed LCP's breach of contract claim because it determined that the noncompete agreement lacked consideration. 224 P.3d 355. LCP was, obviously, less than thrilled with the decision and appealed it to the Colorado Supreme Court.

Last month, the Colorado Supreme Court issued its decision and reversed the Court of Appeals' ruling. In that decision, the Court determined that "an employer that forbears from terminating an existing at-will employee forbears from exercising a legal right, and that therefore such forbearance constitutes adequate consideration for a noncompetition agreement." The Supreme Court explained that "valuable consideration...may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Importantly, the Court explained that "consideration" was the basis for its decision, finding that "any benefit to a promisor or any detriment to a promisee at the time of the contract–no matter how slight–constitutes adequate consideration."

In applying this holding to Horner's employment situation, the Court explained that "in presenting the noncompetition agreement, Lucht's was offering to renegotiate the terms of Horner's employment. Lucht's had the legal right to discharge Horner; however, it chose not to exercise this right in exchange for Horner's acceptance of the noncompetition agreement. Horner had the option of either accepting the agreement and continuing his

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employment or rejecting the agreement and leaving Lucht's. By virtue of the nature of at-will employment itself, the presentation of the agreement was an offer to renegotiate the terms of Horner's at-will employment, which Horner accepted by continuing to work." That is, since each party either received a benefit or agreed not to take some action it was entitled to take, the non-compete agreement had valid consideration, and it is not the court's place to weigh the relative value of such consideration.

Practical Tip: This ruling is a major victory for Colorado employers because it requires one less hurdle for employers in establishing the validity of a noncompete agreement with its employees. And the ruling makes it substantially easier for Colorado employers to enter into noncompete agreements with their employees. Additionally, the ruling should also lay to rest the question of a Colorado organization's ability to alter its employee handbooks without providing employees sufficient consideration.

THE EMPLOYER'S ROLE IN DOCUMENTING EMPLOYEES

Under the Obama Administration, the Department of Homeland Security dramatically increased its investigations of employers suspected of hiring undocumented residents. Along with increased audits, the Social Security Administration announced this Spring that it was beginning to issue "No Match" letters after a brief suspension of that practice. In addition, the United States Citizenship and Immigration Services (USCIS) agency announced updates to the I-9 form in April and issued a revised handbook in June. With heightened scrutiny of the lawful status of employees combined with new regulations, it is important for employers to stay up-to-date with these changes. Knowing your obligations under the law will assist you if DHS or USCIS ever comes knocking. Here is a brief overview of what employers need to know to comply with the updated employment verification requirements.

Document, Document, Document!

The new updates to the I-9 process make it clear that employers should document the steps they take to verify employees' work authorization status. Employers now have the choice to verify employees' I-9 information online, which is a high-tech way to document verification procedures. Employers may voluntarily enroll in USCIS's E-Verify program. This program is mandatory for federal contractors and Colorado public contractors but voluntary for all other employers. If an employer chooses to sign up for E-Verify, that employer must run all of its new hires through the program. E-Verify compares the information that employers submit for a new hire against government records in order to certify that the new employee is authorized to work in the United States. But it is important to keep in mind that Colorado employers also must comply with the State's Employment Verification Law and retain copies of employees' I-9 documentation along with an Affirmation of Legal Work Status form. In this way, employers document a procedure both online and on paper.

Updated Documentation.

This spring, DHS updated the I-9 acceptable documents list. The I-688 "Temporary Resident Cards" and the I-668A and I-668B "Employment Authorization Cards" are no longer acceptable I-9 documentation for either identity or employment authorization purposes. But the I-766 Employment Authorization documents are still accepted. The recently-released United States Passport Card and

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the temporary form I-551 are now listed as acceptable documentation for establishing both identity and employment authorization.

Importantly, DHS's new rules explain that employers may no longer accept expired documents. Previously, expired documents could establish an employee's identity. Employers should keep in mind that they are responsible for keeping track of employees whose verification documents contain expiration dates. When an employer or an employer's representative examines new employees' documentation, the employer should note whether the documents expire and the date of expiration. Employers are required under Section 3 of the I-9 form to re-verify employees' documentation that contains an expiration date on or before the date on which the document expires.

Know the Special Rules for Lawful Permanent Residents, and Non-Immigrants.

When you hire lawful permanent residents or non-immigrants, it is a good idea to familiarize yourself with the I-9 Handbook (M-274, available online at www.uscis.gov). The new I-9 Handbook includes pictures of sample documents and also guidelines about information that should be gathered for certain non-immigrant classifications. For example, if you hire an F-1 or M-1 Non-Immigrant Student, the new rules explain that employers should record on the I-9 form and make copies of: (1) "the student's foreign passport;" (2) "form I-20 with the designated school official's endorsement for employment on page 3;" and (3) "a valid Form I-94/I-94A indicating F-1 nonimmigrant status." Note that this documentation and information exceeds the I-9's general rule that new employees must only produce either one document from List A or one document each from Lists B and C. However, over-documenting every new employee may subject an employer to penalties.

THE EEOC'S FINAL REGULATIONS ON THE AMENDMENTS TO THE AMERICANS WITH DISABILITIES ACT

On May 24, 2011, the EEOC's Final Regulations concerning the Americans with Disabilities Act Amendments Act went into effect. While there were not a massive number of changes from the proposed to the final rules, a few were critical changes.

For example, under the original ADA, the definition of a disability was "a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment." While that definition technically remains the same under the ADAAA, the Regulations make it clear that the scope of the definition is now substantially broadened, thus making it more likely than ever that the disability of an employee of a covered employer (*i.e.*, employing 15 or more employees) qualifies for protection under the ADA.

Substantially Limiting. The Regulations clearly state that under the ADAAA, an impairment need no longer prevent, or even significantly or severely restrict, performance of a major life activity to be substantially limiting. Rather, a disability "shall be construed in favor of broad coverage" and "should not require extensive analysis." Thus, in determining whether an employee is limited in a major life activity, he should be compared to "most people in the general population." So the determination need not be exacting or even require medical or scientific analysis. And an impairment need only limit one major life activity, with the

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focus on the extent to which the disability limits the major life activity, not what the employee can achieve. Therefore, theoretically, even though an employee with dyslexia has risen through the organization, that employee may still be considered disabled due to his disability. Practical Tip: Since the focus shifted from proving whether the employee is disabled to whether the employer fulfilled its obligations under the ADA, as well as whether discrimination occurred, employers should make sure job descriptions are updated and clearly define the essential functions of a position.

Predictable Assessments. The Regulations also include examples of impairments that will almost always substantially limit a major life activity; impairments for which an individualized assessment "can be conducted quickly and easily, and that will consistently result in a determination that the person is substantially limited in a major life activity." Such impairments include: blindness, deafness, intellectual disabilities, partially/completely missing limbs, the required use of a wheelchair, cancer, cerebral palsy, diabetes, autism, epilepsy, HIV, muscular dystrophy, multiple sclerosis, major depressive disorder, schizophrenia, bipolar disorder, post-traumatic stress disorder, and obsessive compulsive disorder. According to the Regulations, such impairments will almost always constitute a substantial limitation on a major life activity and require an assessment that is "particularly simple and straightforward." Practical Tip: While the Regulations decline to go so far as to label such impairments "per se disabilities," (*i.e.*, intrinsically disabling), a determination of whether such impairments qualify as disabling under the ADAAA need no longer be approached on a case-by-case basis, as would other impairments; employers can virtually always rely on them qualifying as a disability.

Major Life Activity. The definition of "major life activities" received a bit of an update, too. The non-exhaustive list of major life activities initially included: performing manual tasks, caring for oneself, eating, seeing, hearing, walking, standing, lifting, bending, speaking, breathing, learning, reading, and working. But major life activities now also include: sitting, sleeping, concentrating, thinking, communicating, reaching, interacting with others, and the operation of major bodily functions, including functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, circulatory, respiratory, endocrine, hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary systems, cardiovascular systems, and reproductive functions. Practical Tip: Since the Regulations state that a major life activity no longer need be "of central importance to daily life," employers may now consider just about everything a person does during the day (or at night) a major life activity!

Mitigating Measures. One of the more dramatic changes in the Regulations is the fact that the positive effect of mitigating measures, including but not limited to, medication, medical equipment and devices, prosthetic limbs, hearing aids, mobility devices, oxygen therapy equipment, use of assistive technology, reasonable accommodations, and learned behavioral or adaptive neurological modifications, psychotherapy, behavioral therapy, and physical therapy–can no longer be considered when evaluating whether an employee is disabled. That is, if an employee is substantially limited in a major life activity without these aids, even though the individual always uses the aids, then that employee is considered disabled under the ADAAA. The only exceptions to this new rule are ordinary eyeglasses and contact lenses.

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Mitigating measures aren't completely written out of the story, though: even though an employee's condition wouldn't normally substantially limit a major life activity, if the mitigating measure the employee takes to alleviate the effects of the condition–like a psychotropic medication–would substantially limit a major life activity, then the employee will still be considered disabled. Practical Tip: While the positive or negative effects of mitigating measures may no longer be used to evaluate whether an employee is disabled, they may still be relevant in determining whether an employee is qualified to perform the essential functions of the position or poses a direct threat to his own safety or the safety of others.

Impairments that are Episodic or in Remission. Perhaps equally dramatic is the modification in the Regulations that an impairment that is episodic or in remission is still considered a qualifying disability if it would substantially limit a major life activity when active. This means that chronic impairments with symptoms or effects that are episodic rather than present at all times can be deemed a disability, even if the symptoms or effects would substantially limit a major life activity only when the impairment is active. Chronic impairments may include, but aren't limited to: epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder, and schizophrenia. And cancer is an example of an impairment in remission that may possibly return in a substantially limiting form. Practical Tip: Employers may still need to engage in the interactive process and consider reasonable accommodations for employees who are in between episodes or in remission.

Regarded As. Under the new Regulations, an employer is now considered to regard an employee as having a disability if the employer takes an adverse action based on an actual or perceived impairment that is not transitory (*i.e.*, lasting or expected to last six months or less) or minor. So an employer taking an adverse employment action against an employee based on a straightforward sprained ankle, which is expected to heal normally, wouldn't amount to regarding that employee as disabled, as such impairment is transitory and minor. But taking an adverse action based on what the employer perceived to be a substantially limiting disability, say, HIV, but was in actuality only a common flu virus, would amount to regarding an employee as disabled and thus avail the employee of the protections of the ADA! Practical Tip: The focus in a "regarded as" case is now on how the employer treated the employee due to a physical or mental impairment, regardless of whether the employer believed the impairment was substantially limiting, so employers should steer clear of making employment decisions premised purely on assumptions about an employee's perceived, but unsubstantiated, disability.

UPCOMING SEMINAR

The Employer's Advisory editors will present a full-day Employment Law Update seminar in Durango on August 3, 2011, sponsored by the Durango Area Western Colorado Human Resources Association (DAHRM). The seminar will discuss issues regarding background checks, wage-and-hour compliance, Title VII, and Employee Handbooks.

Additionally, the afternoon session is designed to help employers handle day-to-day employment issues created by the "difficult" employee. Among other things, this session will discuss how to properly document an employee's bad behavior and performance problems and how to properly handle leave and duty-modification requests under the ADAAA and FMLA.

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Q&A

Q. Our restaurant's waiters receive tips from customers that average $25 per hour. Do we have to pay any wages to the waiters in addition to the tips?

A. Yes. Under Colorado's Minimum Wage Order Number 27, you can apply only $3.02 per hour of the tips received by tipped employees toward meeting your minimum wage obligation. Colorado's minimum wage for 2011 is $7.36 per hour. Thus, you must pay the tipped employees at least $4.34 per hour in addition to the tips they receive. If they work overtime, you must pay them $8.02 in addition to their tips ($7.36 minimum wage x 1.5 = $11.04 overtime rate, less the $3.02 tip credit). But remember, you lose the right to use the $3.02 tip credit if you do not notify employees in advance that you are using a tip credit and tell them the amount of the tip credit and the amount of the cash wage. Also, if you want to use the tip credit, you must not take any portion of the employees' tips for management's uses or require them to share with employees who do not regularly receive tips (such as cooks). Further, you must not add a mandatory "gratuity" to the customers' bills and treat that money as tips. Tips must be a voluntary gratuity from the customer. Money received as a mandatory gratuity is income to the employer, not the employee. If it is distributed to the employees, it is regular wages and must be added to the regular rate of pay when computing overtime rate. Thus, if an employee receives $25 per hour in mandatory gratuities and works overtime, the overtime rate is $37.50 (that is, 1.5 x $25) and no tip credit can be used.

Q. If we allow a non-exempt employee to do work at home after hours, must we then pay for the employee's commute time to work?

A. No. Home-to-work travel is not work time and need not be compensated so long as it is within the normal commute distance for that job and no work is being performed while traveling. The fact that an employee does some work at home before or after their regular work day does not convert the home-to-work travel into work time. Of course, you must pay for the time the employee works at home, and once the employee gets from home to the first work site of the day, all additional travel during the work day must be compensated. 2011 WL 1677737.

Q. We pay a guaranteed salary to our installers and compute their overtime pay based on the fluctuating work week method. We'd like to also give them an incentive bonus based on production. What effect,if any, will the incentive bonus have on the overtime pay?

A. According to new FLSA regulations, the fluctuating work week method of computing overtime (overtime is .5 times the salary/total hours worked) can only be used if the guaranteed salary covers all hours worked and there are no additional forms of compensation based on the quantity or quality of work. This means that if you add an incentive bonus you must pay overtime based on the traditional 1.5 times the salary's effective hourly rate when applied to the first 40 hours worked, plus .5 times the incentive pay divided by the total hours worked that week. For example, if your installer earns a salary of $600 per week, additional overtime pay for 50 hours computed by the fluctuating workweek method would be only $60 total. But if you add on a $10 incentive bonus, the additional overtime pay will be $226 computed by the traditional method. DON'T PAY BONUSES to employees under a fluctuating work week compensation plan!

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