

THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER

HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES

PREPARED BY ATTORNEYS BETTY BECHTEL, MICHAEL SANTO AND JIM COLLING

2nd Quarter

BECHTEL & SANTO, L.L.P.

2007

NEW COLORADO LAWS ARE HARD ON EMPLOYERS.

Governor Ritter risked carpal tunnel syndrome during the final weeks of the 2006-2007 Colorado State Legislative session by signing 400-plus bills into law. Luckily, not all of these new laws affect employers—but the ones that do, are not generally employer-friendly. For example:

“Sexual Orientation” is now a protected status. Colorado’s Anti-Discrimination Act has long prohibited discrimination and harassment in employment against any person otherwise qualified because of disability, race, creed, color, sex, age (40-70), national origin, or ancestry. Effective August 8, 2007, Senate Bill 07-025 expands the list of protected status by adding “sexual orientation.” Section 24-34-401(7.5) defines “sexual orientation” as “a person’s orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or an employer’s perception thereof.” The Act explains that protection for sexual orientation does not “preclude an employer from requiring compliance with a reasonable dress code as long as the dress code is applied consistently.”

Now, what if John becomes Joan and Joan insists on dressing as a woman at work and using the women’s bathroom and locker facilities? Will it violate state law to require “Joan” to dress manly at work and use facilities based on her biological gender rather than her self-image gender? We don’t know the answer. Colorado courts will have to interpret what transgender protection means in practical terms. Other state courts have dealt with such issues after their state legislatures made sexual orientation a protected status. With regards to facility use, the Minnesota Supreme Court’s decision in *Goins v. West Group*, 635 N.W.2d 717 (2001) may be instructive to our courts.

In *Goins*, an employee who was in the process of changing sexual identity from male to female claimed that the employer discriminated against her based upon her sexual orientation by designating restrooms and restroom use on the basis of biological gender. The Minnesota state law protects transgender individuals from discrimination, like Colorado’s new law. Nevertheless, the court concluded that the employer’s designation of restroom use, applied uniformly, on the basis of “biological gender,” rather than self-image, was not unlawful discrimination. If Minnesota’s lead is followed by

THE EMPLOYER'S ADVISORY is published quarterly by BECHTEL & SANTO, LLP, 205 N. 4th Street, Grand Junction, Colorado 81501, (970) 683-5888. Legal editors are Betty C. Bechtel, Michael C. Santo and Jim C. Colling. The publication is designed to provide information about legal issues facing employers, but not to provide legal advice with regard to specific circumstances. Readers with legal questions should address them to their legal counsel. Downloadable versions located at www.bechtelsanto.com.

Prepared by Attorneys Betty Bechtel, Michael Santo, and Jim Colling.
Copyright 1994-2007 Bechtel & Santo, L.L.P.

Colorado courts, Joan could be required to use the biologically appropriate restroom or locker at work. But can she also be required to dress like biological men? It depends on what Colorado's legislature meant by "a reasonable dress code." Will it matter if male co-workers complain about sharing their private domain with Joan in her dress and high heels? The likelihood of Colorado employers facing such perplexing issues has increased with the passage of this law.

The right of employers to recover attorney fees in certain employment suits is eliminated. There was once a law in Colorado providing that when an ex-employee sues the employer claiming he or she was terminated for engaging in legal activities off-the-job and off-the-premises in violation of C.R.S. § 24-34-402.5(2), whoever won the law suit would be awarded the costs and attorney fees incurred in defending the claim. Effective July 1, 2007, SB 117 amends this law by awarding costs and attorney fees only to the ex-employee who wins, and only if the employer has more than 15 employees. If the employer wins, regardless of its size, the employer must eat its costs and attorney fees. Will this change encourage plaintiffs' attorneys to sue employers under this law? Definitely.

Penalties for not paying wages upon termination are increased. Private employers who fail to pay an employee all wages, commissions, and accrued vacation benefits owed at the time of termination are subject to penalties if the employee demands payment in writing within 60 days following termination. Previously, the penalty was 10-days' pay or 50% of the amount owed, whichever was greater. Also, whoever won the law suit was entitled to an award of costs and attorney fees against the other. As of May 31, 2007, the penalty increased and the employer's right to recover attorney fees decreased.

H.B. 1247 amended Colorado's Wage Claim Act (C.R.S. 8-4-109 and 8-4-110 of the Act) by increasing the penalty to 125% of the first \$7,500 owed, and 50% of the amount owed in excess of \$7,500, or up to 10-days' pay, if greater. Also, if the employer's failure to pay was willful, the penalty is increased by 50%. On a more pleasant note, if the employer pays within 14 days after receiving the written demand, no penalty is owed.

Regarding attorney fees, the statute no longer requires the court to award fees to the prevailing party. Instead, if the employee recovers wages greater than the amount tendered by the employer within the 14-day grace period, the employee "may" be awarded costs and attorney fees against the employer. The employer cannot recover costs and attorney fees unless the employee claims more than \$7,500 is owed (or a greater amount if the small claims court jurisdiction is higher than \$7,500) and the employee fails to recover a greater sum than the amount tendered by the employer within the 14-day grace period.

Clearly, it is in the employer's best interest following receipt of a 60-day demand letter to quickly determine if the employee's claim has merit, and to pay at least the undisputed amount within 14 days. Otherwise, the cost of the dispute could escalate many fold!

Cancer in firefighters presumed to be work-related for workers' compensation purposes. Effective May 17, 2007, HB 1008 adds to the Colorado Workers' Compensation Act § 8-41-209, creating a presumption that any firefighter who gets cancer of the brain, skin, digestive system, hematological system, or genitourinary system has an occupational disease covered by workers' compensation, if the firefighter was employed as a firefighter for at least 5 years and underwent a physical exam at the time hired or thereafter that did

not disclose any pre-existing condition. In order to defeat the claim, it is now the employer's burden to prove that the work did not cause the cancer. Rumor has it that this amendment is causing a major increase in workers' compensation premiums for fire departments. Go figure!

Employers lose exclusive right to select a treating physician. HB 1176, effective January 1, 2008, amends C.R.S 8-43-404(5) by taking away the employer's right to name the treating physician when an employee has a work-related injury. Instead, the employer must maintain a list of at least two physicians or two corporate medical providers, or one physician and one corporate medical provider, from which the injured employee selects his or her treating physician. The statute provides that if there are fewer than four such providers within 30 miles of the employer's place of business who are willing to provide services, then the employer may designate one physician or one corporate medical provider. Also, if the employer is a health care provider or a public entity with its own provider system, the physician may be designated from the employer's own system. Finally, within 90 days following the date of injury, the injured employee may make a one-time challenge-free change in physicians to another physician on the list, assuming the employee has not yet reached maximum medical improvement.

SUE FIRST, ASK QUESTIONS LATER

Title VII, which is the Federal law prohibiting employment discrimination based on sex, race, national origin, and religion, requires individuals to file a charge of discrimination within 300 days of the alleged discriminatory conduct ("Charging Period"). But when must an individual file a charge if the alleged discriminatory decision

has a continuing affect that is felt by the employee every pay period (e.g., the employee's compensation)? In such a case, is it within 300 days of the last discriminatory decision (e.g., a discriminatory evaluation), or is it within 300 days of the last paycheck received by the individual? Well, this was the exact issue presented to the United States Supreme Court in *Ledbetter v. Goodyear*, 2007 WL 1528298 (2007). And while the decision didn't generate a lot of headlines, its affect will be felt for a long time by employees attempting to sue employers for the effects of past decisions.

Lilly Ledbetter worked for Goodyear Tire Company from 1979 until 1998. Over this period, employees, like Ledbetter, were given or denied raises based on the performance evaluations they received. In 1998, when she retired, Ledbetter was the lowest-paid employee in her position: she earned \$3,727 per month and the next lowest-paid male working in the same position earned \$4,286. Ledbetter sued Goodyear for sex discrimination and claimed that during the course of her employment several supervisors had given her poor evaluations because of her sex, that as a result of these evaluations her pay was not increased as much as it would have been if she had been evaluated fairly, and that these past pay decisions continued to affect the amount of her pay throughout her employment and her retirement benefits, which were based on her compensation received during employment. At trial, the jury agreed with Ledbetter and awarded her backpay and damages. Goodyear appealed.

On appeal, Goodyear contended that Ledbetter's Charge with the EEOC was untimely, and her claim should be dismissed, because she did not establish that any evaluation she received during the 300-day Charging Period was discriminatory based on her sex. The Court of Appeals agreed with

Goodyear, dismissing her case, so Ledbetter appealed to the United States Supreme Court.

Specifically, Ledbetter appealed the issue of “whether a plaintiff may bring an action under Title VII alleging illegal pay discrimination when the disparate pay is during the [Charging Period], but is the result of intentionally discriminatory pay decisions that occurred outside the [Charging Period].” Ledbetter urged the Supreme Court to focus on the paychecks that were issued to her during the Charging Period, each of which, she contended, was a separate act of discrimination. And she argued that the paychecks were unlawful because they would have been larger if she had been evaluated in a nondiscriminatory manner prior to the Charging Period. In essence, Ledbetter was arguing that it was sufficient that discriminatory acts that occurred prior to the Charging Period had continuing effects during the Charging Period. But the Supreme Court disagreed with her.

In ruling against her, the Supreme Court explained that the continuing effects of alleged precharge discriminatory acts do not make out a present violation: “A discriminatory act which is not made the basis for a timely charge ... is merely an unfortunate event in history which has no present legal consequence.”

The Ledbetter decision should prevent employees from successfully suing under Title VII based on decisions and actions occurring more than 300 days before the charge is filed, even if the decision or action has a continuing adverse effect.

Side Note: For those of you who had money on “9 ½ years” in your office pool for how long it takes to go from the initial EEOC Charge to a United States Supreme Court decision, collect your prize at the door.

GETTING THE EMPLOYEE’S SIDE OF THE STORY

Have you ever had an employee that does something so outrageous or just ticks you off so bad that you can’t wait another second to fire him? Well that’s exactly how Kramer, the president of Newman University, feels after hearing that George, a tenured English professor, is accused of sexually harassing a member of the cafeteria staff. Kramer has warned George before about his inappropriate comments and this is the last straw. Furious, Kramer vows to not only terminate George immediately, but to also inform every other college in the state about George’s behavior. When Elaine, the school’s human resource director, hears about Kramer’s intentions, she runs down the hall to catch him yelling: “wait, Kramer, wait...we are a public institution!!!”

Elaine knows that the 14th Amendment prohibits a public entity from depriving a person of life, liberty, or property, without due process. Accordingly, because Newman University is a public university, she knows that before taking any major adverse employment action, such as termination or suspension without pay, the University must determine whether it is depriving George of a protected interest, and if so, must first provide him with due process.

Does George have a protected interest at stake?

Public employees may have both a property interest and a liberty interest at stake when employers take adverse employment actions. Anytime an employee is entitled to specific government benefits, a property interest is at stake. Entitlement to benefits, such as wages or continued employment, means that the employee has received some actual or implied promise that they will

continue to receive benefits. Unlike private employees, who usually are employed at-will, public employees often have contractual or statutory provisions that create rights to continued employment unless there is just cause for termination. Individuals who are tenured like George, or employees who are hired for a term period, have a reasonable expectation that they will continue to be employed, and paid, for the duration of the term. This expectation creates a property interest that can not be taken without “due process.”

Additionally, public employees have a protected liberty interest in their reputation and ability to get employment. If an employer’s adverse employment action damages the employee’s reputation, and this results in the inability to get another job, then the employee’s protected liberty interest in his or her reputation is harmed. If George can show that he is unable to get future employment, that the university actually stigmatized his reputation by informing other employers of George’s behavior, and that the adverse employment action is what hampered his ability to find another job, then the university could be charged with violating George’s liberty rights without due process unless the appropriate safeguards were used by the university.

Well, what should the university do before terminating George?

If George has a property or liberty interest at stake (in this fact pattern, he probably has both), then the University must ensure that fair procedures are used before the termination occurs. What “fair procedures” are depends on the degree of loss for the employee, the potential risk that the employer is wrong, the value that additional safeguards would have, and the burden on the public entity of having additional procedural

requirements. The courts have said that “due process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

In almost all circumstances, having fair procedures means having some sort of **pre-termination** or **pre-suspension** hearing. Only in situations where the employer has a compelling reason, such as a major safety concern, should an employer wait until after the action is taken to hold a hearing. The hearing should include notice of the proposed adverse employment action, notice of, and access to, the evidence on which the action is based, and an opportunity to respond to the reasons for, and evidence supporting, the adverse employment action. Additional safeguards that public employers may use, depending on the situation, include: allowing an employee to present evidence; permitting cross-examination of adverse witnesses; using an impartial decision maker; and allowing the employee to be represented by counsel.

Once the employee has been provided with an opportunity to clear his or her name and the employer can show that it has used fair procedures in determining that the adverse employment action is appropriate, the employer can proceed with taking whatever action it deems appropriate.

Practical Tip: Holding a pre-termination meeting is a good idea for private employers as well. Such meeting give employees an opportunity to tell their side of the story. This provides employers with valuable information on any potential lawsuits, and allows employers to make informed adverse employment decisions. In addition, an employer’s stated reasons for an adverse employment action appear more credible, if any later disputes arise, when it can show that it was diligent in investigating the accuracy of its stated reasons before firing.

Q. & A.

Q. Our son who is 15 is working for our Company this summer. Must he be covered by Workers' Compensation?

A. Yes, unless the facts are such that he is not an employee. There is no exclusion under Colorado's Workers' Compensation Act for minors or for the children of the business owners, per se. If your son is just hanging around the office, without any promise of compensation or any real duties, and occasionally, at his own volition does a small task, he may not be an employee. But if he has actual responsibilities for promised pay, workers' compensation requirements will apply.

Q. Donny has missed 11 weeks of work under FMLA. We told her this week that if she does not return by next week, her FMLA expires and she will be discharged. She replied that next week is her second year anniversary with the Company and she will be entitled to another 12 weeks of FMLA. Can this be? We thought she could only have 12 weeks off in any 12-month period?

A. This depends on how your FMLA policy is written. Hopefully, your policy explains that the employee is entitled to 12 weeks FMLA in a "rolling" 12-month period, based on the 12 months preceding the date of requested leave. If your policy does not designate how you determine the 12-month period, courts generally favor the 12-month period that is most favorable to the employee. It could be a calendar year, a fiscal year, or an employment year.

Q. We have certain designated light-duty positions for employees who are injured on the job and temporarily can not perform their regular job. When an employee reaches maximum medical improvement, if the permanent restrictions still prevent him from doing his regular job, he is no longer offered the light-duty position and is terminated if there are no regular jobs he can perform. Is this legal?

A. Assuming you have given the employee all leave to which he is entitled, have offered him any vacant regular positions for which he is qualified, and have lived up to any other promises you made to him about employment, it should not violate any law for you to terminate employment when he reaches maximum medical improvement (MMI) and can not perform the essential functions of his job. Neither Colorado's Workers' Compensation Act, nor the Americans with Disabilities Act requires an employer to maintain an employee indefinitely in a light-duty, modified position.

JULY SEMINAR IN DURANGO

The Employer's Advisory editors, Betty Bechtel, Michael Santo, and Jim Colling will be presenting a full-day Employment Law Update seminar in Durango on July 18, 2007, sponsored by the Durango Area Human Resources Managers (DAHRM). See our website at www.bechtelsanto.com for more details.