Workplace Notes

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The I-9 Employment Verification Process has Changed

The U.S. Department of Homeland Security has revised the I-9 form, and with it, the process for verifying the authorization of new hires to work in this country required of all American employers.

It is now permissible for employers to sign and retain I-9 forms electronically.

Five documents that used to be acceptable as "List A" proof of identity *and* employment authorization are no longer good for both purposes:

- Certificate of U.S. Citizenship (Form N-560 or N561)
- Certificate of Naturalization (Form N-550 or N-570)
- Alien Registration Receipt Card (I-151)
- Unexpired Reentry Permit (Form I-327)
- Unexpired Refugee Travel Document (Form I-571)

A new item has been added to "List A."

- Unexpired Employment Authorization Documents with photographs (I-688, I-688A, I-688B, I-766)

The form's instructions now provide that the employee must furnish a Social Security number on the Form I-9, only if the employer participates in E-Verify.

E-Verify is an electronic database that permits an employer to submit data on a newly hired employee to DHS and receive a response as to the apparent legitimacy or illegitimacy of the individual's claim to be work-eligible in the United States. A negative response does not authorize or even permit immediate termination. The employment continues while the employee attempts to correct any error in the government's data.

E-Verify participation is required by some government contracts, some state statutes (not in Connecticut or New York) and by some large corporations. It is attractive on its own merits to many employers.

If you are considering E-Verify participation, look carefully at the whole set of obligations it entails. It makes good sense for some organizations, less for others, and presents threshold questions for all.

Make sure that the I-9 forms you are using are the most current version issued by the Department of Homeland Security and that your staff is requiring and viewing acceptable documentation.

For more information, please contact Margaret M. Sheahan at 203-330-2138 or by email at msheahan@pullcom.com.

Statute of Limitations Preserved on Equal Pay Claims

One of the more common discrimination claims brought against employers is the allegation that female employees as a class are paid less than male employees for essentially the same work. Such claims are often asserted as sex discrimination in violation of Title VII, the federal law against discrimination in employment, which has a relatively short statute of limitations. Unless an employee files a complaint of discrimination with the Equal Employment Opportunities Commission within 180 days of the alleged discriminatory event (or within 300 days in states such as Connecticut which have an analogous state agency: the Connecticut Commission on Human Rights and Opportunities), the employee cannot make the claim or file a lawsuit. The filing period is usually considered to start when the discriminatory event occurs; for example, when the female employee is hired at the lower pay rate which is alleged to be discriminatory.

In the case of *Ledbetter v. Goodyear Tire and Rubber Co.*, decided last year by the U.S. Supreme Court, the court heard the claim of a female employee who argued that she could not necessarily know what the pay rates were for similarly situated male employees or when male employees may have received raises that she did not. She asked the court to declare that each individual paycheck was a separate discriminatory event, so that she could file her complaint within 180 days of whenever she learned of the alleged disparity in pay, even if it had prevailed for many years. However, the court adhered to the prior rule and held that the act of issuing paychecks could not be challenged as a discriminatory event. The actual basis of the claim had to be the date of the decision to set compensation rates, so that the statute of limitations was not renewed upon the receipt of each successive paycheck.

This ruling led to the introduction in the U.S. Congress of the so-called Ledbetter Fair Pay Act to amend Title VII to allow a disportionate pay claim to be commenced at any time upon the receipt of any subsequent paycheck. This in effect would overturn the Supreme Court decision and enshrine the argument of Ms. Ledbetter. Although the proposed Act passed the House of Representatives, it was narrowly rejected by the Senate. It was opposed by organizations representing businesses who realized how difficult it would be for an employer to explain and defend pay decisions made years or even decades earlier.

Of course, it is always possible for the legislation to be re-introduced. But for now, employers can expect a challenge to a pay differential allegedly based on sex to come no more than 10 months after the pay decision is made, allowing them a reasonable time to investigate or make adjustments, which is the reason why Title VII was given such a short statute of limitations period when it was first enacted in 1964.

For more information, please contact Michael N. LaVelle at 203-330-2112 or by email at mlavelle@pullcom.com.

New Kinds of Federal FMLA Leave Require Policy and Practice Changes

In January of this year, a federal statute providing funding for our country's military added two new species of FMLA leave to the compliance obligations of American employers with 50 or more employees. The basic thrust of the amendments is to provide FMLA's job security protection to members of military families absent from work because of a relative's deployment or to care for a relative injured in the line of duty. The changes are not simple, however, and the differences in the new entitlements from the existing ones require careful attention.

First, the amendments add to the list of FMLA reasons for leave "any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation." The secretary of labor has not yet issued regulations to let us know what a "qualifying exigency" is. Whatever it is, it will now be another reason that will entitle an employee with 12 months service to the employer and 1,250 hours worked in the 12 months preceding the leave to use all or part of his or her 12-week federal FMLA entitlement.

A second change is the availability of leave for care of a relative rendered ill or injured in the line of military duty. Important distinguishing features of this new leave entitlement include the following:

- It is available to the injured service member's "next of kin" even if the relationship is not one of spouse, child or parent, so long as the employee is the "nearest blood relative."
- The employee may take up to 26 (not just the usual 12) weeks of leave for this purpose in a single (read, *once* in a lifetime) 12-month period. If the employee also takes leave for another, more familiar FMLA reason in this 12-month period, the combined entitlement is capped at 26 weeks.
- The military relative's health condition has a different standard than the familiar "serious health condition." The relative must be undergoing medical treatment, recuperation or therapy in or as an outpatient of a military health care facility or in a unit for military personnel in outpatient treatment. The treatment must be for an illness or injury incurred in the line of duty and rendering him or her unfit to perform the duties of his/ her office or rank.

For Connecticut employers of sufficient size to have obligations under both the federal and state FMLA laws, these new federal amendments present additional challenges. For example, leave for the "qualifying exigency" of a relative's deployment does not fit any category of leave provided by the state law and therefore would not deplete the employee's state entitlement of 16 weeks in 24 months.

FMLA requires employers to provide employees notice of their FMLA rights by publishing a policy. Revision and update of your company's FMLA policy is in order.

Commission Agreements Must be Carefully Written

There are state and federal laws and Department of Labor rules which regulate the payment of an employee's regular salary. A regular rate of pay or salary amount must be established in advance by the employer, in excess of the minimum wage, and must be paid on a regular pay day, usually weekly or bi-weekly, with overtime for non-exempt employees and deductions only as allowed by law. There are no such laws or regulations governing the payment of commissions. Instead, the method of calculating and paying commissions is left to an agreement between each employer and the employee.

There are no legal requirements as to the amount of commissions (other than that an employee paid purely on commissions must receive at least a minimum wage) or when commissions are considered earned or will be paid. Typically, a sales commission is earned when the salesperson completes the last act necessary to conclude the sale, but commission agreements can provide for a forfeiture of commissions, for example, that a commission will not be paid unless the employee is still employed on the commission pay day. The key rule imposed by law is that a commission agreement must be detailed and precise, and any ambiguity will be construed in favor of the employee.

This principle is illustrated in the recent Connecticut case of *Ravetto v. Triton Thalassic Technologies, Inc.*, decided by the Connecticut Supreme Court in March of this year. The commission agreement in that case had a fairly common provision in which the employee was permitted to take a draw against future commissions, also sometimes described as an advance on commissions to be earned in the future.

However, one employee ended his employment with the company at a point when the advances which he had taken against future commissions exceeded the commissions that he had actually earned. The employer wanted him to repay the excess advances, by giving a credit against other amounts that were owed to him. However, in a trial of the issue the court concluded that the employer was not entitled to reimbursement of excess advances in the absence of an express or implied agreement by the employee to reimburse the employer.

As with commission forfeitures, the courts recognize that whether an employer is entitled to recover advances in excess of earned commissions is a question of contract interpretation. Since an employer can generally write a commission agreement as it wishes, the mere use of such terms as "advance" or "draw," standing alone, does not sufficiently indicate a mutual intent by the employer and the employee to obligate the employee to repay advances. A repayment obligation could constitute a significant liability, and no employee will be held to have intended to undertake the obligation of repayment unless the agreement imposes that burden fully and precisely.

An employer can still create a right of reimbursement of unearned advances, but only if the commission agreement says to the employee in so many words that he acknowledges and agrees to an obligation to repay advances in excess of unearned commissions if he leaves employment before his commission earnings balance his draw.

As a general rule, an employer cannot be too detailed in writing plans for non-salary compensation, such as commissions or bonuses. The employer should attempt to anticipate all contingencies: customers failing to pay, customers rejecting goods, employees leaving before the end of a calculation period or before the commission/bonus pay day, sales started by one employee and completed by another, caps on commissions or bonuses, and so on. Commission and bonus plans can be as generous or as restrictive as the employer wishes, as long as the rules of the plan are spelled out in advance and the employee provides a signed acceptance. Sketchy or imprecise plans are a trap for the unwary, since doubtful provisions will be construed in favor of compensation for the employee.

Attorney Notes

The Labor and Employment Law Section welcomes **Jon Orleans**, **Dan Schwartz** and **Adam Mocciolo** to Pullman & Comley. Jon recently joined the firm as a member and is located in our Bridgeport office. Dan is also a member of the firm and located in our Hartford Office. Adam joined the firm as an associate and is located in our Bridgeport office.

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