

Health Care Employment Law Update

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Practice Area: Health Industry Labor, Employment and Immigration

H1N1

The U.S. is geared up for a mass inoculation program if one is needed in the fall. The CDC guidelines are recommending that pregnant health care workers exposed to the virus take Tamiflu. Some hospitals are accommodating pregnant health care workers' requests to be transferred away from direct healthcare duties when that can be accommodated. The CDC says that pregnant women are no more likely to contract the H1N1 virus than other workers.

ADA

The new ADA laws made a major change in dealing with disabled employees. To be disabled, an employee no longer has to have an impairment which lasts a long time or a lifetime. Now the impairment can last as little as six months. That means the employee who has a back problem and has surgery may qualify for reasonable accommodations (e.g., a longer leave of absence) if he or she has a back problem for at least six months. The hard decision to be made is when the employee has no more FMLA or compensatory leave time left, but the impairment has only existed for less than six months, but may last for six months or longer.

Affirmative Action

The U.S. Supreme Court found unlawful a city's refusal to certify the results of a firefighter promotional test where white candidates had outperformed minority candidates. The Court held that where the exam was job related and consistent with business necessity and an equally valid less discriminatory testing alternative was not available, the results were to be certified despite the potential of a class action lawsuit alleging disparate impact on a protected class.

Domestic Partners (Wisconsin)

Under Wisconsin's new state budget, domestic partners are entitled to certain benefits. One of these benefits is they now qualify for Wisconsin's Family Medical Leave Act. Domestic partners can be either same-sex or opposite-sex couples. Two weeks of leave can be taken by an eligible employee for the care of a partner or the partner's parent with a serious health condition. Coverage does not allow for care of a child of a partner. Private employers are not legally required to extend healthcare benefits to domestic partners.

EFCA

The Democrats have recently abandoned their efforts to eliminate the secret ballot election in union organizing campaigns. However, still in the legislation is the mandatory arbitration for first contracts and the substantial penalties imposed only on employers for violation of the NLRA during a union organizing campaign.

Restrictive Covenants

The Wisconsin Supreme Court has recently held that multiple restrictive covenants in one agreement are valid even if one of the restrictive covenants is not. Previously, the law had seemed to hold that the entire agreement was invalid if one of the covenants was invalid. Employers need to carefully write restrictive covenants in light of this recent ruling so that each covenant is independent of the other.

Wisconsin FMLA Leave For Pregnancy

The Equal Rights Division of the Department of Workforce Development has taken the position that a pregnant mother can take 12 weeks of federal FMLA leave for medical reasons and an additional six weeks of family leave for the birth of the child even if there is no other medical reason other than the woman being pregnant. There is a current challenge to this position. In this challenge, the employer maintains that the two leaves should run concurrently (so long as within 16 weeks of the baby's birth) not consecutively.

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