LORD BISSELL BROOK LLP

Labor and Employment Law

MARCH 2005 VOLUME XII, ISSUE 2

HEADLINES

- Wal-Mart Hit With $7.5 Million Verdict In ADA Case
- FTC Updates FCRA Summary Of Rights Sheet
- Pizzeria Can Be Liable For Ineffective Steps To Remedy Co-Worker Harassment
- New NLRB Election Rules
- Department Of Labor Greenlights Drug Tests For Employees Who Have Returned From FMLA Leave
- Employers Have New Obligations To Employees On Military Leave
- Retaliation Finding Under Sarbanes-Oxley Leads To Reinstatement Of CFO

Insert

- Final Regulations Issued For Notice Requirements Under COBRA

Labor & Employment Law is prepared by the members of Lord, Bissell & Brook LLP's Labor and Employment Law Group. It is intended for general information purposes only and does not constitute legal advice. This information is not intended to create, and it does not create an attorney-client relationship. Readers should not act upon this information without first consulting a lawyer.

Labor & Employment Law is published six times annually. If you would like to be removed from our mailing list, please contact us at either unsubscribe@lordbissell.com or Lord, Bissell & Brook LLP, 115 S. LaSalle St., Chicago, Illinois 60603, Attention: Marketing. If we are not so advised, you will continue to receive this newsletter.

© 2005 Lord, Bissell & Brook LLP.

Wal-Mart Hit With $7.5 Million Verdict In ADA Case

Patrick Brady, a 19-year old individual with cerebral palsy, was hired to work in the pharmacy at a Wal-Mart store in Centereach, New York. After working one day in the pharmacy, the head pharmacist left him off of the work schedule for two weeks—with the exception of a two-day period in which he stocked shelves outside of the pharmacy department. The next day he was scheduled to work, the head pharmacist sent Brady to see the store's personnel manager. When he met with the personnel manager, Brady was told that he could no longer work in the pharmacy. Instead, he was assigned to collect shopping carts in the parking lot. The store manager told Brady that the head pharmacist did not consider Brady "fit" to work in the pharmacy and was concerned that Brady would give out the wrong prescriptions. After Brady complained about his new assignment, he was again reassigned, this time to a position stocking shelves in the food department. Upset over the "menial" work in the food department, Brady quit and filed suit under the Americans With Disabilities Act ("ADA") and the New York State Human Rights Law.

"...juries will look for ways to punish employers who do not give employees with disabilities a fair chance...."

In his lawsuit, Brady contended that Wal-Mart subjected him to a hostile work environment based on his disability, failed to provide him with reasonable accommodations for his disability, and asked inappropriate disability-related questions prior to granting him a conditional offer of employment. The jury found in Brady's favor on all of his claims and awarded him over $9,000 in lost wages, $2.5 million in compensatory damages (for emotional distress), and $5 million in punitive damages. *Brady v. Wal-Mart Stores, Inc.*, No. 03-CV-3834. Although the ADA caps compensatory and punitive damages at $300,000, the New York Human Rights Law contains no cap on compensatory damages—so the full $2.5 million compensatory award may stand. The $5 million punitive damages award will be reduced pursuant to the ADA's caps (the New York law does not allow for punitive damages), but Brady's attorneys plan to argue that the $300,000 cap applies to each of Brady's three claims—hostile work environment, failure to accommodate, and the inappropriate pre-hiring inquiries—meaning that Brady will try to recover a total of $900,000 in punitive damages. In all, it is possible for the total award to Brady to end up close to $3.5 million—which might be more than Brady could have earned if he had worked for the company his entire working life.

The $7.5 million jury award highlights the fact that stereotyping an individual based on his or her disability is not only unlawful, but juries will look for ways to punish employers who do not give employees with disabilities a fair chance to show that they can do their jobs.

Kevin D. Kelly | 312.443.0217 | kkelly@lordbissell.com

FTC Updates FCRA Summary Of Rights Sheet

The Federal Trade Commission, the agency responsible for administering the Fair Credit Reporting Act ("FCRA"), recently updated the FCRA "Summary of Rights" disclosure to incorporate the changes made to the FCRA by the 2003 Fair and Accurate Credit Transactions ("FACT") Act. The new disclosure supersedes the old disclosure form.

There are two situations in which employers

Summary Of Rights - continued on page 4

Pizzeria Can Be Liable For Ineffective Steps To Remedy Co-Worker Harassment

Kathleen Loughman was employed by Malnati Organization, Incorporated ("Malnati"), which owns and operates a chain of pizzerias in the Greater Chicago area. Loughman worked at Malnati's restaurant in Naperville, Illinois. In mid-2003, she filed a lawsuit against Malnati alleging sexual harassment. Loughman alleged that, throughout her employment, kitchen workers whistled at her, made inappropriate comments and asked her for sex. Though the alleged verbal harassment bothered her, the focus of her complaint was three physical confrontations with co-workers.

The first incident occurred in November 2000, when kitchen employee Martin Ruellas allegedly put his arm around Loughman's waist, pushed her into a room, tried to kiss her and blocked her path for several minutes when she tried to get away. Loughman reported the incident to her manager, who warned Ruellas that he would be fired if he touched her again. Ruellas did not bother Loughman again.

About a year later, two co-workers followed Loughman into a walk-in cooler and turned off the lights. One of the co-workers, Hector Hernandez, allegedly pinned Loughman against the wall, grabbed her chest and tried to put his hand down her pants. Loughman reported this incident to a co-worker, who informed the manager. Although Hernandez did not assault her again, he continued to be scheduled on the same shift as Loughman, and he allegedly continued to make inappropriate comments to her.

In August 2002, driver Tom Schaller allegedly ran his hands through Loughman's hair, slid a hand up her shirt and touched her stomach. Loughman reported this incident to a different manager than the one to whom the previous incidents had been reported. After the report, Malnati's district manager apologized to Loughman and began an investigation of the first two incidents. Schaller was required to apologize to Loughman and Hernandez was fired.

> "The effectiveness of the policy will be measured by the result, not by how many times the employer tells employees about the need to abide by it.

The trial court granted summary judgment to Malnati. The Court of Appeals for the Seventh Circuit (covering Illinois, Indiana and Wisconsin) reversed, ruling that Loughman's case should not have been dismissed. In sending the case back to Judge Leinenweber for a trial, the Seventh Circuit explained:

> Noting that Ruellas did not bother Loughman after the first incident, that Malnati's eventually fired Hernandez, and that Schaller apologized to Loughman and was transferred to another store, the district court found that "Malnati's not only had a sexual harassment policy in place but had an effective one." We're not convinced, however, that the policy—or Malnati's response to the incidents involving Loughman—really was that effective. Loughman was not complaining merely of inappropriate jokes or comments, though she put up with those as well, but of serious physical violations. Considering the severity of the incidents, a reasonable jury could determine that simply talking to the people involved in the first two aggressive incidents was not a sufficient response. The mere fact that none of the employees physically assaulted Loughman a second time does not necessarily mean that Malnati's response was adequate. (Cites omitted.)

The court also noted that one of the managers had talked to the kitchen workers 10 to 20 times about how to treat female employees, often after complaints from employees. In the court's view, "the frequency of the discussions suggests that a different approach was needed." *Loughman v. Malnati Organization Incorporated, doing business as Lou Malnati's Pizzeria*, Case No. 04-1564.

As this case illustrates, adopting a sexual harassment policy is not enough. Also, merely reprimanding employees for violating the policy may not be enough. Rather, employers must take steps to make sure that their policy is *effective*. The employer must take action that eliminates the hostile environment—including terminating employees (particularly when they are the subject of multiple complaints). The effectiveness of the policy will be measured by the result, not by how many times the employer tells employees about the need to abide by it.

***Kathryn Montgomery Moran* | *312.443.1749* |**
kmoran@lordbissell.com

New NLRB Election Rules

Starting March 1, 2005, the National Labor Relations Board ("NLRB") is allowing employers and unions to voluntarily agree to a new procedure to expedite the resolution of all questions concerning NLRB-conducted elections. Previously, the NLRB used two types of consent procedures—a "Stipulated Election" Agreement and a "Consent Election" Agreement. In a "Stipulated Election," the parties agree that no pre-election hearing is necessary before the election is held. If there are challenges to the election filed after the votes are cast, the challenges are decided by the NLRB Regional Director for the region in which the election is held. But either party can appeal the Regional Director's decision to the NLRB. In a "Consent Election," the parties stipulate to election details, the same as in a "Stipulated Election." But the Regional Director is authorized to decide all post-election objections and challenged ballots; there is no appeal to the NLRB.

Under the procedure that just took effect, the parties can sign a "Full Consent Election" Agreement. In a "Full Consent Election", the Regional Director will not only issue a final decision on post-election issues (as in a "Consent Election"), but he will also decide all pre-election issues. In other words, there does not have to be an agreement on pre-election issues for the entire matter to be resolved strictly by the Regional Director.

Although the NLRB is making a big splash about this new "option" to expedite union elections, the likelihood is that it will be used infrequently. Currently, most employers refuse to sign Consent Elections Agreements. Therefore, the odds are that "Full Consent Election" Agreements will be even rarer—except for the fact that unions will certainly be pressing employers to sign a "full consent."

Steven H. Adelman | 312.443.0405 | sadelman@lordbissell.com

Department Of Labor Greenlights Drug Tests For Employees Who Have Returned From FMLA Leave

Can employers drug test employees returning from Family and Medical Leave Act ("FMLA") leave, or is this an impermissible "fitness for duty" requirement? The Department of Labor addressed this issue in a recent Opinion Letter responding to an inquiry asking whether the employer could require employees returning from FMLA qualifying leave to undergo drug testing within three days of their return to work. The Department of Labor discussed its regulations regarding "fitness for duty" certifications, and noted that such certifications can be required only with regard to the particular health condition that caused the employee's need for leave. The Opinion Letter went on to state that, "Nothing in the FMLA prohibits an employer from requiring an employee to submit to drug testing *once the employee has returned to work*." Thus, the Department of Labor's position is that drug tests cannot be a prerequisite for reinstatement, but they can be conducted soon after the employee is back on the job.

Kathryn Montgomery Moran | 312.443.1749 | kmoran@lordbissell.com

Employers Have New Obligations To Employees On Military Leave

The new Veterans Benefits Improvements Act of 2004 alters an employer's obligation under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") in two ways. First, it requires employers to provide notice to employees of their rights under USERRA (which can be satisfied by posting a notice). Second, it amends USERRA to increase from 18 months to two years the period during which employers must extend to an employee in military service the option of maintaining employer-sponsored health insurance coverage.

Under the new Act, all employers (regardless of size) are required to provide employees with information concerning their rights and benefits under USERRA staring March 10, 2005. This requirement is to be satisfied by placing a poster in the place where employers customarily place notices to employees. The USERRA poster can be downloaded at http://www.dol.gov/vets/programs/userra/poster.pdf.

Under COBRA, continued health insurance coverage generally lasts for 18 months. Similarly, USERRA previously required that employers who provide health insurance coverage for their employees must continue such coverage for employees on a military service related leave of absence for up to 18 months. With the passage of the Veterans Benefits Improvements Act, however, the maximum duration of continuing health coverage has been extended to 24 months. The added period of time applies to any employee who elected continuing coverage on or after December 10, 2004, the day President Bush signed the new Act into law.

Jolen V. Anderson | 312.443.0362 | janderson@lordbissell.com

Editors

Steven H. Adelman
sadelman@lordbissell.com
312.443.0405

Kathryn Montgomery Moran
kmoran@lordbissell.com
312.443.1749

This material may constitute advertising under certain codes.

Office Locations

ATLANTA

CHICAGO

LONDON

LOS ANGELES

NEW YORK

WASHINGTON

www.lordbissell.com

© 2005 Lord, Bissell & Brook LLP.

Retaliation Finding Under Sarbanes-Oxley Leads To Reinstatement Of CFO

In January 2004, an Administrative Law Judge ("ALJ") for the U. S. Department of Labor rendered the first decision finding that an employer had violated the Sarbanes-Oxley Act by terminating an employee in retaliation for "whistleblowing" with respect to alleged violations of "corporate ethics" by his employer. *See* Newsletter Vol. XI, Issue 2 (March 2004). The case involved the former CFO of Cardinal Bankshares Corp., David Welch, who had raised concerns that the company's president was overriding internal financial controls. Welch took a number of actions that he believed were protected by the whistleblower provisions of Sarbanes-Oxley, including refusing to certify a quarterly financial statement due to what he viewed as irregularities. After refusing to meet with company officials—allegedly because they would not allow his attorney to attend a meeting at which his conduct was to be discussed—Welch was discharged. After the ALJ found in favor of the former CFO but before he issued a damage award, the bank filed an appeal. Ultimately, the Fourth Circuit Court of Appeals determined that there were no appeal rights until there was a final order covering the issue of damages. Therefore, the case was sent back to the ALJ to rule on damages.

> ...the ALJ said that Welch was entitled to reinstatement—even though it might mean "bumping" his replacement and working directly with the people who had caused his discharge.

The ALJ has now issued a backpay award of approximately $40,000, plus approximately $25,000 in special damages for costs, travel and job search expenses, plus $108,006 in attorneys' fees. Additionally, despite vigorous opposition to reinstating Welch as CFO, the ALJ said that Welch was entitled to reinstatement—even though it might mean "bumping" his replacement and working directly with the people who had caused his discharge.

The parties have 30 days to file an appeal with the Administrative Review Board, which hears reviews on behalf of the Secretary of Labor. It is expected that an appeal will be filed, particularly in view of the Bank's staunch opposition to Welch returning to work. *Welch v. Cardinal Bankshares Corp.*, DOL ALJ, #2003-SOX-15.

Steven H. Adelman | 312.443.0405 | sadelman@lordbissell.com

Summary Of Rights - continued from page 1

are required to provide the "Summary of Rights" disclosure. First, an employer must provide the disclosure to any employee or applicant who is the subject of an investigative consumer report (a background check involving personal interviews). The disclosure must occur before initiating the investigation. Second, an employer who wishes to take an adverse action against an employee or applicant based on the contents of a consumer report must provide the disclosure as part of the pre-adverse action notice to the employee or applicant.

A copy of the new "Summary of Rights" disclosure can be obtained through the FTC's Web site at: http://www.ftc.gov/os/2004/11/041119factaappf.pdf.

Kevin D. Kelly | 312.443.0217 | kkelly@lordbissell.com

FINAL REGULATIONS ISSUED FOR NOTICE REQUIREMENTS UNDER COBRA

Last May, the Department of Labor's Employee Benefits Security Administration issued long-awaited final regulations under the Consolidated Omnibus Reconciliation Act of 1985 ("COBRA"). The new regulations revise the notice requirements applicable to plan administrators, employers and employees that are considered "qualifying beneficiaries" under COBRA. For plans which operate on a calendar year basis, the revised notice requirements took effect on January 1, 2005.

BACKGROUND

The COBRA provisions generally require that any "group health plan" offer qualified beneficiaries the opportunity to elect continuation coverage following certain events that would otherwise result in the loss of coverage. Such events are referred to as "qualifying events." Continuation coverage is a temporary extension of the qualified beneficiary's previous group health coverage.

The final regulations consist of four separate sections, each of which describes changes applicable to the following notices required to be given by employer, employee and plan administrator: (i) general notice, which must be delivered to all plan participants by either the employer or the plan administrator; (ii) notice of qualifying events that must be provided by the employer to the plan administrator; (iii) notice of qualifying events that must be provided by the employee to the plan administrator; and (iv) election notice and other notices that the plan administrator must provide to qualified beneficiaries before and after election of continuation coverage. Each of these notice requirements is described in detail below.

THE GENERAL NOTICE

A group health plan must provide written notice of COBRA rights to each covered employee and spouse (if any) at the time of commencement of coverage under the plan. This general notice must be provided within 90 days of commencement of coverage under the plan, and may be sent to the participant's address only if the participant's spouse also resides at the participant's address (if not, the spouse must be sent the general notice under a separate mailing). The general notice can accompany or be included in the plan's Summary Plan Description. The general notice must set forth the basic information regarding COBRA, and the rights and responsibilities of qualified beneficiaries that a participant or beneficiary would need to know before the occurrence of a qualifying event in order to protect his or her COBRA rights. This general notice is intended to be simple and straightforward so as to avoid confusion by plan participants. It must contain some plan-specific identification information, including the name, address and phone number of a party or parties who will provide information about the plan and COBRA upon request. The regulations contain a model general notice that plan administrators and employers may adopt to ensure compliance with the new COBRA notice requirements.

EMPLOYER'S NOTICE OF QUALIFYING EVENT TO THE PLAN ADMINISTRATOR

An employer must provide notice to the plan administrator of certain instances in which an employee or other beneficiary loses coverage under the plan. An employer must provide notice to the plan administrator when one of the following "qualifying events" occurs: the employee's termination of employment or reduction in hours of employment (resulting in loss of coverage), the employee's death, the employee's becoming entitled to Medicare, or the commencement of a proceeding in bankruptcy with respect to the employer. This notice must be made no later than 30 days after the date of the qualifying event (or, in some instances, within 30 days of the loss of coverage). This notification must contain sufficient information to allow the administrator to determine the identity of the plan, the covered employee, the qualifying event, and the date of the qualifying event.

QUALIFIED BENEFICIARIES' NOTICE OF QUALIFYING EVENT TO THE PLAN ADMINISTRATOR

Each covered employee or qualified beneficiary is responsible for notifying the plan administrator of a qualifying event that is either the divorce or legal separation of the employee from his or her spouse, or a child becoming no longer eligible to be covered as a dependent under the plan. Furthermore, each covered employee or qualified beneficiary

is responsible for notifying the plan administrator of the occurrence of a second qualifying event (which would extend COBRA coverage), a determination of disability by the Social Security Administration, and a determination by the Social Security Administration that a qualified beneficiary is no longer disabled. The plan may specify reasonable notice requirements that a beneficiary must follow. For example, the plan may require that this notice be delivered in writing or on a specific form and may dictate other requirements due on notification (e.g., a copy of a divorce certificate). If no requirement regarding notice is set forth in the general notice, a qualifying beneficiary may give oral or written notice so long as such notice is reasonably calculated to bring information of the qualifying event to the plan administrator. The plan must allow a participant a minimum of 60 days in which to give notice to the plan administrator of the qualifying event. This 60-day period runs from the latest of (i) the date of the qualifying event, (ii) the date on which there is a loss of a coverage, or (iii) the date on which the participant received the general notice of his or her obligation to provide notice and the procedures for providing such notice.

PLAN ADMINISTRATOR'S NOTICE OBLIGATIONS; THE ELECTION NOTICE

The Election Notice A plan administrator must notify each qualified beneficiary who is entitled to elect continuation coverage of his or her COBRA rights. This notice must be made within 14 days after the plan administrator is notified of a qualifying event. This notice must provide qualified beneficiaries with information about their right to elect continuation coverage under the plan. Where the qualifying event is one for which the employer must notify the plan administrator, this notice may be made within 44 days of the qualifying event if the employer is the plan administrator (or, if the plan provides that COBRA coverage starts on the date of loss of coverage, the date the qualified beneficiary loses coverage under the plan). The election notice must contain specific information regarding the plan participant's coverage under the plan prior to the qualifying events to ensure that plan participants have access to information about individual coverage under the plan (i.e., which beneficiaries may elect continuation coverage). In addition, the election notice must contain general information similar to the information contained in the general notice (discussed in Part I above) so that plan participants have all available information in one packet. The regulations contain a model election notice that plan administrators and employers may adopt to ensure compliance with the new COBRA notice requirements.

The "Unavailability Notice" If the plan administrator receives information regarding a qualifying event from an individual who is not eligible to elect COBRA continuation coverage, the plan administrator must provide notice to the individual explaining why he or she is not entitled to such coverage. This "unavailability notice" must be provided within 14 days of the plan administrator's receipt of the notice from the individual of the qualifying event.

Notice of Early Termination Plan administrators must provide notice of early termination of COBRA coverage. For example, if the qualified beneficiary does not pay a required premium in full or on time, or if the qualified beneficiary becomes covered under another group health plan, notice must be given. This notice may be combined with the notice of the certificate of creditable coverage required under HIPAA.

Emily A. Bateman | 312.443.0629 | ebateman@lordbissell.com