

Happy Holidays from the JBW&K Employment Law Practice Group



Dear Clients and Friends,

As 2010 comes to a close, we want to thank you for letting us provide you legal services, and wish you Happy Holidays. We hope you find this newsletter informative. We look forward to serving you in 2011.

Robyn Hylton Hansen, Chairman
Employment Law Practice Group

IN THIS ISSUE

**Employment Termination—A
Look Beyond the Emotions**

**Healthcare Reform: What Em-
ployers Must Know in 2011**

FMLA Update

**Overtime Payments Under the
FLSA**

Employment Termination—A Look Beyond the Emotions

By Robyn H. Hansen and Robert Q. Johnson



In our current economic climate, layoffs and terminations of employment have unfortunately become a commonplace occurrence. Understanding the responsibilities and obligations of both the employer and employee in these difficult times can help to prevent an otherwise emotional situation from exploding into claims and lawsuits. In this article, we will explore the issues faced by both employers and employees in these situations, and shed some light on the appropriate answers.

When employers are facing the hard decision of cutting costs by cutting the number of employees, some immediate questions arise: How much notice should we provide? How do we select the employees to lay off? The answer to the first question will vary from employer to employer based on a number of factors. An employer employing 100 or more employees involved in a plant closing or a mass layoff of 500 or more employees (or 50-499 if that number constitutes at least 33% of the employer's active workforce) is covered by the Worker Adjustment and Retraining Notification Act ("WARN") and must comply with its provisions, including 60 days advance notice to employees of a layoff or plant closing.

The notice question may also be controlled by a union contract or individual employment agreements. Absent a contractual obligation or the applicability of WARN, generally no specific notice is required. Employees in Virginia generally are employed at the will of the em-

... Employment Termination—A Look Beyond the Emotions

(Continued on page 1)

ployer. Being employed at will means that the employer has the right to terminate the employee's employment at any time, with or without notice, for any reason whatsoever so long as that reason is not otherwise prohibited by law.

What is otherwise prohibited by law? The answer to this question helps provide guidance in answering the second question as to how to select the employees for lay off. Various federal civil rights statutes, as well as Virginia statutes, prohibit terminating an employee's employment because the employee is in a protected class, including race, color, national origin, sex, pregnancy, age, disability, genetic information, or those who engage in protected activity. In making a selection of employees to lay off, employers should not consider any factors relating to these protected classifications. Some legitimate factors that employers may consider in determining who to lay off are business needs, work performance, or seniority.

Employers often provide terminated employees with some type of transition assistance including severance pay, outplacement services, and subsidized health insurance premiums. In return for this transition assistance, employers often require terminated employees to execute a release of any and all claims against the employer that may have arisen during the employment period. Does offering the severance package with a release mean that the employer violated rights of the employee? The simple answer is no, the severance package and release alone are not evidence that the employer did anything wrong. The severance package is actually a way the employer can help those displaced employees, yet receive in return an assurance that it will not later be faced with the expense incurred in defending itself against discrimination or wrongful termination claims.

This severance package, however, must meet various legal requirements to be binding and enforceable. For all terminated employees over the age of 40, the release must comply with the notice provisions of the Age Discrimination in Employment Act (ADEA) to legally release claims under the ADEA. These notice provisions, depending on the facts of the layoff, may include directing the employee to seek legal counsel, providing a 45-day review period and a seven day revocation period, or an age work force analysis.

The execution of the severance package alone does not jeopardize the employee's opportunity to receive unemployment compensation through the Virginia Employment Commission. An employee generally will be disqualified for unemployment benefits only if the employee voluntarily quit or engaged in misconduct in connection with work. The recovery of unemployment compensation, however, contrary to prevalent misconceptions, does not mean that the employee was wrongfully terminated.

The employer's size also determines whether it is obligated to provide the employee the right to continue health insurance coverage. The Consolidated Omnibus Budget Reconciliation Act (COBRA) requires employers employing twenty or more full time equivalent employees to provide terminated employees with notice of their rights to continue health insurance coverage. The rules are somewhat complex but generally an employee and eligible dependents are entitled to eighteen months of continuation coverage with employee or dependent being responsible for payment of the entire premium. The federally-mandated employee COBRA subsidy ended for employees terminated after May 31, 2010. Additionally, if the employer employs fewer than twenty full time employees, the employee generally is entitled to 12 months of continuation coverage pursuant to Virginia law, with the premiums paid by the terminated employee, an expansion of the previous requirement of only 90 days of continuation coverage.

While no employer or employee wants to face these difficult decisions, an appropriately conducted employee layoff can minimize difficulties and expense and provide terminated employees with a smooth transition in an otherwise turbulent time.♣

NOTICE: In anticipation of major employment and/or benefit law changes this year, if you would like for us to contact you as changes occur, please ensure we have a valid e-mail address for you on file by contacting Judie Key at

For more information on any of the topics in our newsletter, call us at 757-873-8062. To ensure you continue to receive future issues, please e-mail us at jkey@jbwk.com. All future issues will be distributed via e-mail. Thus, if you do not have access to e-mail, please call Judie to ensure you are placed on our mailing list.



Health Care Reform: What Employers Must Know in 2011

By Robert Q. Johnson

The Patient Protection and Affordable Care Act, the landmark health care legislation passed in March, has resulted in numerous shifts in employer-provided healthcare coverage. Although many of the major provisions are not implemented for several more years, 2011 will bring some significant changes. The following are a few key provisions of which employers must be aware:

Tax Free Medical Accounts (HSA, FSA, MSA)

- No reimbursement for over-the-counter drugs (except insulin) without a prescription
- Increase in tax penalty to 20% on withdrawals for nonqualified medical expenses

Dependent Coverage

- Plans must offer dependent coverage to participants' children until age 26, regardless of residency, marital status, student status, or financial dependency. Plans do not have to cover spouses of dependent children or dependents of dependent children.

W2 Reporting

- Originally scheduled to take effect in 2011, the IRS delayed the requirement that employers report the cost of employer-provided healthcare on employees' W2, making it optional in 2011.

Grandfathered Plans

- Certain health insurance plans in effect as of March 23, 2010 may be eligible for "grandfathered" status, relieving them of some obligations under the PPACA.

Small Employer Tax Credits

- Employers with fewer than 25 full-time employees whose average annual wages are less than \$50,000 are eligible for tax credits on employer-paid premiums for health coverage.♣

FMLA Update

By Robyn H. Hansen

The United States Department of Labor's Wage and Hour Division has issued new guidance on when employees may take FMLA leave to care for a child that is not biologically related to them. In Administrator's Interpretation 2010-3, dated June 22, 2010, the Department of Labor clarified that employees may take leave to care for a child for with whom they have an *in loco parentis* relationship. Such a relationship can be formed through either day-to-day care or financial support; only one is required. For instance, an employee may be entitled to FMLA leave to care for the child of the employee's unmarried partner, regardless of whether the employee provides financial support to the child or whether the employee is biologically related to the child. ♣

Overtime Payments Under the FLSA



By Christopher L. Rathlev

The United States Congress passed the Fair Labor Standards Acts (FLSA) in 1938, as a part of the economic recovery initiatives that followed the Great Depression.

The FLSA applies only when an employer/employee relationship exists. Generally, an employer of more than two employees, who is engaged in interstate commerce, is considered an employer under FLSA. *(continued on last page)*

Overtime Payments Under the FLSA

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Certain special exemptions exist pertaining to these provisions which will not be discussed in this article. It is probably one of the more misunderstood and unintentionally violated statutory schemes in the workplace. When and to whom overtime payments are due is one area that often confuses employers. The FLSA requires that covered, "nonexempt" employees receive overtime pay for hours worked over 40 per workweek (any fixed and regularly recurring period of 168 hours — or seven consecutive 24-hour periods) at a rate not less than one and one-half times the regular rate of pay. Employers generally are not required to pay overtime for hours worked in excess of eight hours in any one day. Additionally, overtime pay is not required for working holidays or weekends unless the time spent working actually exceeds 40 hours.

Overtime is calculated by reference to the employee's regular rate of pay. Regular rate of pay is all remuneration for employment paid to on behalf of the employee. Several very limited exclusions exist to determining the base rate of pay. Purely discretionary bonuses not based on hours, production, or efficiency, Christmas gifts or payments to qualified profit sharing plans are recognized exclusions.

Compensatory time-off or "Comp Time," is not available as an alternative to overtime for private sector employees. It, however, is available to public sector employees. Comp time occurs when a public employee is given the opportunity to accrue time off at the rate of time and one half for all overtime hours worked in excess of 40 in a work week in lieu of receiving overtime pay.

Congress has set forth certain categories of employees that are exempted from the overtime provisions of the FLSA. Exempt employees are generally white collar workers. The exempt standard is strictly construed against the employer, meaning that the employer must precisely meet each element of an exemption with respect to each claimed exempt employee. The failure to properly abide by the standards causes the employee to become non-exempt. The FLSA sets forth six categories of exempt employees, three of which are traditionally recognized exemptions. The six exemptions are:

- 1) Executive Employees
- 2) Professional Employees
- 3) Administrative Employees
- 4) Highly Compensated Employees
- 5) Computer Related Occupations (as defined in the DOL Regulations)
- 6) Outside Sales Employees

In order to qualify as exempt, an employee, except for outside sales, must meet two tests. One test is known as the specified duties test. In order to meet that test, the employee must perform duties consistent with the exempt position. The second test involves the method of compensation. As a general rule to qualify as exempt, an employee must be paid on a salary basis. A professional, administrative or computer-related employee may also be paid on a fee basis and still qualify as exempt.

Meeting the salary basis component appears to be one of the biggest contributors to the confusion in understanding and misapplying the FLSA. An employee will be considered to be paid on a salary basis if the employee regularly receives a predetermined amount representing all or part of the employee's compensation each pay period. This amount cannot be subject to a reduction due to variations in the quality or quantity of the work performed. The employee must receive a full salary for any week in which the employee performs any work without regard to the number of days or hours worked; however, an employee need not be paid for any work week in which the employee does not perform any work. Employers often misapply these rules by either paying employees on a salary basis without regard to their job duties; or by paying a specified salary but making deductions from that salary in hourly increments. In certain specified instances, a deduction may be made from the pay of an exempt employee without destroying the salary basis test, including for example, a deduction may be made when the employee is absent for work for a full day or more, for personal reasons other than sickness or accident. Additionally, deductions may also be made for absences of a full day or more as a result of sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability.♣