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EMPLOYMENT LAW QUARTERLY

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Good Intentions, Unintended Consequences: Paid Time Off Can Lead to Tax Liability

*by Michele L. Jakubs**

Paid Time Off programs ("PTO") allow employees to earn leave that they later can use for vacations, sicknesses and personal holidays. Under such programs, employees typically earn leave in accordance with factors such as years of service, position, and full or part-time status. PTO programs generally require employees to obtain approval from their employers prior to using their leave (except when advance notice is not possible, as in the case of an illness) and do not permit employees to carry a negative leave balance. Many employers believe PTO programs are less burdensome to administer because the employer does not have to track both "vacation" and "sick" time. However, employers must evaluate their PTO programs to ensure they comply with all applicable state and federal regulations.

When an employee separates from service, the employee often receives his or her unused leave balance in a single lump-sum payment. However, most employers may not know that amounts paid to an employee for unused leave upon separation constitute wages subject to income tax withholding and employment taxes. Employers must treat such payments accordingly.

Allowing employees to sell unused PTO back to the company at the end of the year is also another practice that can create tax problems for the employer and employee. If the employee has the option to either cash-out the PTO or roll it over to the next year, the employer must immediately tax the employee on the entire amount even if the employee *actually* elects to roll over the unused PTO. Under the federal income tax "constructive receipt" doctrine, the IRS considers the roll over amount received and taxable at the time the PTO is available for a taxpayer to cash out, even if the taxpayer elects to defer his or her receipt of the amount. To avoid this situation, employers should not give employees a choice to cash out or roll over their PTO. The IRS stated that mandatory cash outs do not create a "constructive receipt problem."

To avoid these and other unintended tax consequences, employers should discuss the design of their PTO plans with a knowledgeable attorney.

**Michele L. Jakubs, an OSBA Certified Specialist in Labor and Employment Law, practices in all areas of employment law and has experience designing employee PTO plans. For more information about paid time off plans and the potential tax consequences, please contact Michele at mlj@zrlaw.com or 216.696.4441.*

Zashin & Rich Co., L.P.A. represents individuals in all facets of domestic relations law and employers in all aspects of employment, labor and workers' compensation law.

Family & Medical Leave Act Protects a Pre-Eligibility Request for Post-Eligibility Leave

*by Patrick M. Watts**

The Eleventh Circuit recently held that the Family & Medical Leave Act ("FMLA") protects a pre-eligibility request for post-eligibility leave. *Pereda v. Brookdale Senior Living Communities, Inc.,* No. 10-14723 (11th Cir. Jan. 10, 2012).

Brookdale Senior Living Communities ("Brookdale") operates numerous senior living facilities. Brookdale hired Kathryn Pereda ("Pereda") in October 2008. Pereda informed management in June 2009 that she was pregnant and would need leave under the FMLA after the birth of her child in November 2009. At the time Pereda requested leave, she was not eligible for FMLA protection because she had not worked the requisite hours (1,250 hours during the previous 12-month period) and had not yet experienced a triggering event, the birth of her child.

Pereda alleged she was a top performer but that Brookdale began harassing her after they learned of her pregnancy. She claimed Brookdale criticized her job performance and placed her on a performance improvement plan with "unattainable goals." Moreover, Pereda alleged that Brookdale had given her permission to attend pregnancy-related doctors' appointments but then subsequently disciplined her for attending those appointments. Brookdale terminated Pereda's employment when she took time off in September 2009.

Pereda filed suit in the United States Court for the Southern District of Florida, alleging FMLA interference and retaliation. The Southern District held that Brookdale did not interfere with Pereda's FMLA rights because she was not entitled to leave at the time she requested it, and that because she was not eligible for leave she could not have engaged in "protected activity" under the FMLA. Thus, according to the Southern District, Brookdale could not have retaliated against Pereda.

Pereda appealed to the Eleventh Circuit Court of Appeals. The Eleventh Circuit reversed and found for Pereda on both counts. As part of its decision, the Court resolved a question it had left open in a previous case, *Walker v. Elmore County Bd. of Educ.,* 379 F.3d 1249 (11th Cir. 2004). The *Walker* court held that the FMLA did not protect a pregnant teacher who requested leave which would begin several days prior to her eligibility.

The *Pereda* court first found that, because the FMLA requires advance notice of a need for future leave, the FMLA protects employees from interference before a triggering event occurs. The Court reasoned that any other outcome would be illogical and "becom[e] a trap for newer employees and exten[d] to employers a significant exemption from liability." After examining the various elements of the FMLA regulatory scheme, the court concluded that allowing the district court's ruling to stand would frustrate the purpose of the FMLA.

The court then examined Pereda's FMLA retaliation claim. The court held that a pre-eligible request for post-eligible leave is "protected activity" because the FMLA "aims to support both employees in the process of exercising their FMLA rights and employers for the absence of employees on FMLA leave." Thus, Pereda also had stated a potential claim for FMLA retaliation.

The Court narrowed its finding to state that a pre-eligible discussion of post-eligible FMLA leave is protected activity and stated that an employer could still terminate an employee for legitimate reasons. While this case arose in the Eleventh Circuit, all employers must be mindful of employee eligibility for FMLA leave and evaluate all FMLA requests carefully – especially if the employee will become FMLA-eligible in the future.

Patrick M. Watts, an OSBA Certified Specialist in Labor and Employment, has extensive FMLA compliance and litigation experience. For more information about the FMLA, or this court's decision, please contact Patrick at pmw@zrlaw.com or 216.696.4441.

Blowing the Whistle - OSHA Issues New Regulations and Revises Its Whistleblower Complaint Procedure

*by Lois A. Gruhin**

The Occupational Safety and Health Administration ("OSHA") recently issued an interim final rule amending its whistleblower regulations under the Sarbanes-Oxley Act of 2002 ("SOX"). OSHA published its interim rule in the Federal Register on November 3, 2011, and it became effective upon publication.

The Dodd-Frank Wall Street Reform and Consumer Protection Act amended SOX, making significant changes to SOX whistleblower procedures. The new regulations classify subsidiaries of publicly-traded companies as covered employers. Additionally, the regulations protect employees from retaliation, extend the statute of limitations for retaliation complaints from 90 days to 180 days, provide those who complain with the right to a jury trial in some instances, and restrict the ability of individuals to waive or arbitrate whistleblower claims under SOX. The regulations improve OSHA's procedures for handling SOX whistleblower complaints and make the procedures consistent with OSHA's procedures for handling other OSHA-administered statutes.

Another significant change pertains to the filing of whistleblower claims. The new regulations permit oral SOX whistleblower complaints. Upon receipt of an oral complaint OSHA prepares a written complaint. OSHA intended this change to be consistent with the Supreme Court's recent decision in *Kasten v. Saint-Gobain Perf. Plastics Corp.,* 131 S. Ct. 1325 (2011). OSHA will also now accept a complaint filed in any language. Finally, any person can file a complaint so long as the person has the consent of the affected employee.

Perhaps the most significant change for employers is that OSHA may order a company to provide a SOX whistleblower complainant with the same pay and benefits that he or she received prior to termination of employment, or what is referred to as "economic reinstatement." This "economic reinstatement" differs from "preliminary reinstatement" in that the whistleblower is not obligated to return to work before the complaint is resolved, as he or she could have been under prior SOX regulations. Furthermore, employers do not have the option to choose between economic reinstatement and actual reinstatement. Instead, the interim rule allows OSHA to make the decision as to whether to allow for economic reinstatement, as opposed to decide on a case-by-case basis. The stated purpose for this rule change is to accommodate situations where the evidence indicates that reinstatement prior to the conclusion of administrative adjudication is inadvisable for some reason, such as where the company demonstrates the complainant to be a security risk.

If you would like further information about the whistleblower provisions of SOX and how they may affect your company, please contact Lois Gruhin.

**Lois A. Gruhin has experience with OSHA compliance and whistleblower claims. If you have any questions, please contact Lois at lag@zrlaw.com or 216.696.4441.*

California Dreamin' – Employers Need to Be Aware of Important Changes to California Employment Law

*by Jason Rossiter**

Change is a-comin' to California's employment laws. Employers who operate in California should be aware of these important changes.

Gender Expression

Gender expression is now a protected class under California's Fair Employment & Housing Act ("FEHA"). Gender expression refers to a person's gender-related appearance and behavior, whether or not stereotypically associated with the person's assigned sex at birth. "Sex" is now defined in several anti-discrimination statutes, including the FEHA, to include gender expression. The redefinition aims to protect the rights of transgender people. With this change, employers must allow employees to appear or dress consistently with his or her gender expression.

Wage-and-Hour Related Changes

The following wage and hour changes, a result of the Wage Theft Protection Act of 2011, went into effect January 1, 2012. The new changes require immediate employer action as employers must keep a signed, written acknowledgement for each employee. A template of the notice and acknowledgement is available via the Department of Industrial Relation's website: **http://www.dir.ca.gov/dlse/Governor_signs_Wage_Theft_Protection_Act_of_2011.html.**

- Employer must provide all employees with:
  - The rate(s) of pay and basis for such rate(s); allowances including meal or lodging, and the regular payday as designated by the employer.
  - The full legal name of the employer, including any "doing business as" names used by the employer, as well as the address of the employer's main office and the telephone number of the employer;
  - The name, address, and telephone number of the employer's workers' compensation insurance carrier;
  - The new regulations also require the employer to furnish new employees with "any other information the Labor Commissioner deems material and necessary;" and,
  - If the above-mentioned information ever changes, all affected employees must receive notice of the change within seven days of the effective date of the change.
- If an employer has non-California employees working in the state of California, including temporary or daily employees, these employees are entitled to overtime under California's laws.
- Additionally, any agreements between employers and employees who receive commissions must be in writing and signed by the employee in question.
  - This writing must "set forth the method by which the commissions shall be computed and paid," and the employee must receive a copy of his or her signed writing.

Leave-Related Changes

- California employees are also now entitled to up to six weeks of paid leave each year to donate organs and bone marrow.
  - This is more expansive than federal and prior California law.
  - The new law, California Labor Code sections 1508 through 1512, applies to employers with 15 or more employees.
- Pregnancy leave policies in California must also now allow for continuation of medical insurance benefits for pregnancy-related disabilities.

No Credit Checks Allowed

- Employers may no longer use credit checks in the employment application process.

Misclassification Penalties Increase

Employers who misclassify employees as independent contractors face increased sanctions, including:

- criminal sanctions;
- joint-and-several liability for those who advise employers to misclassify; and,
- civil penalties of up to $25,000 for each infraction.

Employers with California employees, even those with temporary or daily employees, should take note of these significant changes and ensure they are in full compliance so as to avoid significant penalties.

Jason Rossiter practices in all areas of labor and employment law and has extensive compliance experience. He is licensed to practice law in California, Pennsylvania and Ohio. For more information about these and other changes to California law contact Jason at bjr@zrlaw.com or 216.696.4441.

Indiana Becomes First State in Over Ten Years to Pass "Right-to-Work" Law

*by Patrick J. Hoban**

Governor Mitch Daniels signed Indiana's "Right-to-Work" ("RTW") law on February 2, 2012 – making Indiana the first state in over a decade to do so. The law prohibits companies and unions from negotiating a contract requiring non-members to pay fees for union representation.

Indiana's contentious RTW law came after much-heated debate. In February, 2011, Democratic representatives left the state for five weeks to deny a quorum prohibiting their Republican colleagues from moving forward on RTW legislation. However, Governor Daniels succeeded in signing the RTW law, making Indiana the 23rd state with RTW laws on its books.

The National Right to Work Legal Defense Foundation launched a task force to defend the law and announced that it will give free legal advice to workers who wish to exercise their new rights. Current union members will not be able to stop paying dues immediately as the law only applies to contracts entered into *after* March 14, 2012.

For or Against Right-to-Work Laws

Supporters of the law emphasize that it will attract business and create jobs pointing to research showing employers favor states with RTW laws. They also lodge ideological arguments against compulsory payment for an unwanted service. Specifically, they argue that forcing employees to pay union dues violates their Constitutional right to freedom of association.

Critics argue that Indiana's new law will fail to provide the benefits promised by legislators. In addition, critics believe that RTW laws harm workers by encouraging freeloading. The National Labor Relations Act forces unions to intervene on behalf of members when their employers take illegal action, regardless of whether the member pays dues. Critics fear this costly and time-consuming burden will significantly weaken union power.

What Can We Learn from Oklahoma

Oklahoma was the last state to sign a RTW law. Proponents of the law expected it to bring new companies to Oklahoma and increase job growth. On the ten-year anniversary of its signing, the National Right to Work Committee celebrated what it claimed was a 12.2% growth in employee compensation since 2001 and a 3.2% increase in private sector employment between 2003 and 2010.

However, the Economic Policy Institute ("Institute") tells a different story. According to the Institute, the number of new companies coming to Oklahoma has decreased by one-third as has the number of manufacturing jobs. The Oklahoma Department of Commerce admits the latter, but emphasizes that the law has increased productivity. However, the Institute points out that this means fewer workers are producing more, an outcome it does not applaud.

On the National Level

President Barack Obama made his stand on RTW laws clear during a Labor Day Speech last year stating "when I hear of these folks trying to take collective bargaining rights away, trying to pass so-called 'right-to-work' laws for private sector workers, that really means the right to work for less and less." It comes as no surprise that the Republican presidential candidates have a much different attitude. After the Indiana House passed its RTW law, presidential candidate Ron Paul wrote a congratulatory letter to the National Right to Work Committee stating, "every American owes you a debt of gratitude for your leadership and dedication." According to his official website, Paul has made passing a national RTW act a "centerpiece" of his campaign. While Paul has been the most enthusiastic RTW supporter, Newt Gingrich, Rick Santorum and Mitt Romney have all spoken approvingly of a national RTW law.

What Can Indiana Expect

Organizations disagree as to what the citizens of Indiana can expect. The Indiana Chamber of Commerce estimates that "personal income per capita in 2021 [will] be $968 higher, or $3,872 higher for a family of four, than if a RTW law [had] not [been] enacted." However, The Economic Policy Institute found that in Oklahoma, wages and benefits are approximately $1,500 lower than comparable (union and non-union) workers in non-RTW states. Additionally, Oklahoma workers are less likely to get health care or retirement benefits. The Institute also warns that RTW laws have no effect on job growth.

Union members went to federal court on February 22, 2012 asking that Indiana's new right-to-work law not be enforced. This is the first lawsuit and latest conflict over the divisive legislation. The long-term impact of Indiana's RTW legislation remains to be seen.

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Writing on the Wall: New Jersey Employers Subject to New Posting and Notice Requirements

*by Stefanie L. Baker**

The New Jersey Department of Labor and Workforce Development ("NJDLWD") recently issued new regulations concerning employer posting and notice requirements. These changes come on the heels of New Jersey's 2010 law requiring employers to maintain and report records under state wage, benefit, and tax laws.

These newly-implemented regulations require an employer to "conspicuously post" a notice of its obligations in an accessible place. Employers can access a sample notice online at the NJDLWD's website (**http://lwd.state.nj.us/labor/forms_pdfs/EmployerPosterPacket/MW-400.pdf**). Employers can comply either by posting the notice where other employment-related notices are posted or by posting the notice on the employer's Internet/intranet site, provided the employer has an Internet/intranet site for exclusive use by its employees and to which all employees have access. Along with the posting requirement, employers must also provide every employee a copy of the notification.

Additionally, New Jersey employers must provide employees hired after November 7, 2011 with written copies of the notification upon hire, and all current employees should have received written copies by December 7, 2011. New Jersey employers can comply with the notice requirement by sending copies of the notice via e-mail.

The required postings address employers' obligation to maintain payroll records, temporary disability insurance records, workers' compensation records, and Employer's Quarterly Reports pursuant to the New Jersey Gross Income Tax Act. New Jersey employers should assess whether they are in compliance with these new regulations. Failure to comply with the posting and distribution requirements could lead to a fine of up to $1,000, as well as criminal penalties.

**Stefanie L. Baker practices in all areas of labor and employment law. For more information about New Jersey's posting requirements or other state or federal posting requirements please contact Stefanie at slb@zrlaw.com or 216.696.4441.*

Indiana Becomes First State in Over Ten Years to Pass "Right-to-Work" Law

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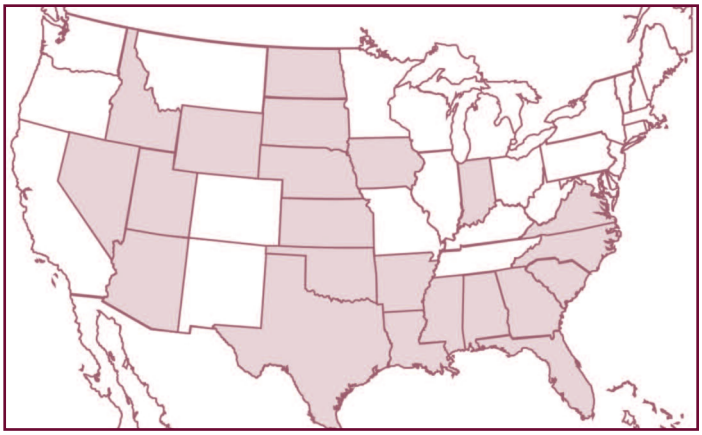
As the map shows, Indiana was the first in the generally union-friendly "Rust Belt" to pass RTW legislation, and the first nationally to do so in a decade. The highlighted states represent "Right-to-Work" states:



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Z&R Shorts

George S. Crisci will present "Social Media in the Workplace" on May 17, 2012, at the Ohio State Bar Association and NLRB Region 8 Annual Labor Law Seminar beginning at 9 AM at Ritz Carlton Hotel in Cleveland, Ohio. To register, go to **www.ohiobar.org**.

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