Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

EMPLOYMENT LAW MATTERS

Latest legal developments and practical guidance for effective HR management February 2004

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Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. provides comprehensive legal representation and counseling exclusively to public and private sector employers in the areas of employment law and labor relations.

Pre-Employment Questions About Military Status OK?

In a previous edition of our newsletter, we reported on a new state law which prohibits employers from discriminating against prospective or current employees on the basis of their military status. One of the more perplexing provisions of the new law involves a prohibition against certain "pre-employment inquiries" regarding a job applicant's military status. Specifically, the new amendment to the Human Rights Law (N.Y. Executive Law §§296 et seq.) provides that it is unlawful:

> For any employer ... to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, sexual orientation, **military status**, sex, disability, genetic predisposition or carrier status, or marital status, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification..... N.Y. Executive Law §296(1)(d) (emphasis added).

Prior to the inclusion of "military status" in this list of prohibited pre-employment inquiries, the New York State Division of Human Rights (NYSDHR) interpreted this section to mean that even asking a question about one of the listed characteristics violated the Human Rights Law. In other words, if an employer asked an applicant his or her age or marital status, for example, either on a job application form or during a job interview, the employer would be automatically liable for discrimination.

The bottom line is ...

Employers should carefully document their reasons for not hiring applicants who provide military status information. This documentation should clearly indicate that the applicant's military status was not a factor in the hiring decision.

Understandably, both public and private sector employers were concerned about the inclusion of "military status" in this list. Under the NYSDHR's old interpretation, even a question about an employee's employment history (if he/she served in the military) might be considered an "indirect" inquiry about the applicant's military status.

In an effort to get the NYSDHR's current interpretation with respect to pre-employment inquiries regarding military status, our law firm requested a formal opinion from the General Counsel's office of the NYSDHR. The response we received indicates a shift in the NYSDHR's position regarding these inquiries. In her opinion letter, General Counsel Gina M. Lopez Summa states that:

> ...the mere asking of a particular question in a pre-employment context, without a causal connection or relevant relationship to a claim of discrimination under the Human Rights Law did not violate the provisions of Executive Law §296.1 (d), as the inquiry would thus not constitute either a direct or indirect "limitation, specification or discrimination" as to any of the protected

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Pre-Employment Questions About Military Status OK? (continued)

bases of discrimination, as required by the law.

Thus, as long as an employer does not use the information so obtained to discriminate against persons with military status, as prohibited by §296.1 such inquiries, would not appear to violate the employment provisions of Human Rights Law §296.1(a)(d). Nor would a person without military status qualify as a protected person under this section of the Human Rights Law.

As a practical matter, however, this interpretation still presents problems for employers. For example, let's assume that an employer receives information on an applicant's military or veteran status either on an application or during an interview. If the employer chooses not to hire the applicant for reasons unrelated to that status, the applicant may still believe that employer discriminated against him/her and sue the employer for a violation of the Human Rights Law. In order to reduce the potential expense of defending such claims, employers should carefully document their reasons for not hiring applicants who provide this information. This documentation should clearly indicate that the applicant's military status was not a factor in the decision.

Changes to Overtime Regulations Clear Senate Obstacles ...For Now

The controversial proposal revamping the overtime exemptions for "white collar" employees under the Fair Labor Standards Act (FLSA) has finally cleared Congressional obstacles – at least for now. On January 22, the U.S. Senate finally approved a spending bill that had been used by Congressional opponents to block the release of the amended regulations by the U. S. Department of Labor's (DOL) Wage and Hour Division. The amended regulations are designed to simplify the criteria for determining when employees are exempt from eligibility to receive overtime pay under the FLSA. The current regulations have been in place – virtually unchanged -- for 50 years. While opponents claim the new regulations will eliminate overtime for millions of individuals by reclassifying them as exempt workers, DOL projections indicate that many workers will become eligible for overtime pay for the first time.

While the DOL may still make changes to the final regulations, the following are some of the highlights of the proposed changes:

Minimum Salary Level Increased: Under current rules, an employee earning only $155 a week can qualify as a "white collar" employee not entitled to overtime pay. The DOL's proposal would raise this minimum salary to $425 a week – an increase of $270 a week and the largest increase since the FLSA was passed by Congress in 1938.

Duties Tests Rely on "Primary Duty": The proposed changes retain the current "short test" reliance on an employee's primary duty, but would eliminate the long-inactive "long test" rule restricting exempt employees from devoting more than 20% of their time in a workweek performing non-exempt duties.

Executive Duties: The proposed executive duties test has three requirements: (1) managing the enterprise; (2) directing the work of two or more employees; and (3) having authority to hire or fire (or such recommendations are given particular weight).

Administrative Duties: The proposal would replace the "discretion and independent judgment" test, which has been the subject of confusion and litigation, with a new test that employees must hold a "position of responsibility."

Professional Duties: The proposal expands the definition of "exempt learned professionals" to include employees who gain equivalent knowledge and skills through a combination of job experience, military training, attending a technical school or attending community college.

Employees Treated More Equitably: The DOL also proposes to allow deductions from the salary of exempt employees for full-day absences taken for disciplinary reasons, such as sexual harassment or workplace violence.

Currently, only hourly workers' wages are subject to such deductions. The proposal retains the "salary basis" rule prohibiting deductions from exempt salary for partial-day absences.

The DOL is expected to publish the final regulations in March 2004. However, opponents of the new regulations in the Senate are considering invoking the powers of the Congressional Review Act (CRA) to rescind the regulations. As you may recall, the CRA was used successfully in 2001 to rescind OSHA's ergonomics standard.

Ferrara-Fiorenza Law Firm Announces Dates for 2004 Employment Law Breakfast Briefing Series

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. announces the schedule for its 2004 "Breakfast Briefing Series" on employment law and personnel management issues. The workshops, presented to the public **at no charge**, are scheduled for the second Thursday of each month beginning in April. They will be held from 7:45 AM to 9 AM at the Wyndham Hotel, 6301 Route 298, East Syracuse, New York (location subject to change).

The next "Breakfast Briefing" will be held on **April 8, 2004**, and is entitled **"Am I Exempt? The New Fair Labor Standard Act Regulations and You."** After several Congressional attempts to block their implementation, the federal Department of Labor's new FLSA regulations will take effect in 2004. These regulations will make broad and sweeping changes to how employees may be classified for purposes of determining their eligibility for **overtime pay**. This session will give participants an understanding of how the new exemption standards should be applied, and provide them with practical suggestions for complying with all the new regulatory requirements.

The workshops will be conducted by the attorneys of **Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.** The Ferrara-Fiorenza Firm's practice is dedicated to representing employers in the areas of employment and labor relations law.

Experienced in counseling clients with regard to a full range of day-to-day personnel issues, the Firm's attorneys have become well-versed in all aspects of human resource management. This has led to a fresh, non-traditional approach to providing legal services to its clients. It has become the Firm's goal to help its clients avoid costly employment-related litigation through training in the use of standardized HR practices and protocols.

Space is limited for each workshop. Those wishing to attend should contact the Firm as soon as possible at **315-437-7600** to make reservations or learn more about the Firm.

Dates and Topics

DATE	TOPIC
April 8, 2004	Am I Exempt?: The New Fair Labor Standard Act Regulations and You
May 13, 2004	Do You Really Understand HIPAA?
June 10, 2004	Investigating Employee Misconduct: Hidden Trap Doors
July 8, 2004	Doctor's Notes, Work Restrictions and the Absent Employee: Know the Rules
September 9, 2004	"Red Flag Audit": Common Employment Law Mistakes. Are You Making Them?
October 14, 2004	What You Don't Know About Employee Documentation
December 9, 2004	Employment Law: The Year in Review

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HIPAA Privacy Rule: Are You Sure Your Plan is Exempt?

Flexible Spending Plans / Dental Plans

If a company does not have access to any confidential medical information about its employees in connection with its fully-insured health plan, the company will likely fall under the "administrative exception" to the HIPAA Privacy Rule. However, if company officials have such access with respect to small, self-funded health/dental plans — provided as part of a flexible spending arrangement, for example — they would be required to fully comply with the Rule.

Under these circumstances, the administrative exception does not apply, even where the company uses a third-party plan administrator.

Third-Party COBRA Administration

Companies will often outsource the administration of the COBRA rights of plan participants (e.g., providing required notices, etc.). Even if a plan is otherwise exempt under the administrative exception mentioned above, the third-party contract for COBRA administration will bring it within the requirements of the Privacy Rule. This would require the plan to amend the contract with the third party to include specific provisions outlined in the HIPAA regulations.

Access to Health Information in Order to Advocate for Employees

The administrative exception may also not be available where human resources staff members serve as advocates for employees claiming benefits. This kind of communication with insurance carriers — e.g., about an employee's health condition and benefit claims — will likely cause the administrative exception to be lost.

In light of the foregoing, companies should carefully examine the administration of their health plans to determine what steps for compliance, if any, need to be taken.

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