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Labor & Employment Newsletter

Taft

Fall 2008

Taft's Immigration Practice Group Welcomes Nadya Chang

Taft is pleased to welcome Nadya Chang to its Immigration practice group. Nadya previously practiced with the firm at the beginning of her twenty-year legal career, and she is delighted to be back at the place she has long referred to as her "professional alma mater."

In the seven years before she rejoined Taft, Nadya built and developed a busy immigration law practice where, in addition to employment-related immigration matters, she handled marriage, naturalization and citizenship, consular processing, NAFTA, Special Immigrant, and other similar cases. Immigration law has a personal significance for Nadya and her husband, who adopted their daughters from China and Guatemala.

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Be Prepared for the ADA Amendments Act

On January 1, 2009, the ADA Amendments Act of 2008 ("ADAAA") takes effect. The Act, which is intended to expand the definition of a disability under the Americans with Disabilities Act ("ADA"), was signed into law on September 25, 2008 by President Bush.

What does this mean for employers? It means that many employees who were not disabled under the ADA may now be considered disabled and, therefore, eligible for accommodation and protected from discrimination.

How does the ADAAA redefine "disability"?

Over the years, numerous ADA lawsuits have been dismissed because employees' impairments did not substantially limit a major life activity – and, therefore, did not constitute disabilities as those terms had been defined by the courts. The Supreme Court in particular has handed down a number of victories for employers, setting a strict standard for individuals to qualify as disabled under the ADA.

The ADAAA reverses a number of these employer victories and changes the disability analysis. Although an impairment must still substantially limit a major life activity to qualify as a disability, an individual may now be disabled even if the substantial limitation is corrected by mitigating measures (with the exception of ordinary corrective lenses) or even if the impairment is in between episodes or in remission.

The definition of "major life activities" also becomes much more broad under the ADAAA. Major life activities will now include such things as standing, lifting, bending, reading, and concentrating, along with the host of other activities previously found to constitute major life activities. Major life activities will also include the operation of any major bodily function, including the immune system, normal cell growth (such as cancer), digestive, bowel, bladder,

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neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. This expanded definition will likely increase claims by employees with, for example, back injuries or other conditions that limit their ability to lift, stand, or bend. It will also increase claims by individuals – particularly students – who assert they are disabled because of problems learning, reading, or concentrating.

Duty to Accommodate

Employers will still have to reasonably accommodate actual disabilities if necessary to enable the employee (or job applicant) to perform the essential functions of the job, or otherwise enjoy equal employment opportunity. Whereas much of the analysis under the ADA hinged on whether the individual was disabled (and employers could disregard accommodation requests from many employees because they were not disabled), an employer's offers of accommodation and the accompanying processes will now come under increased scrutiny as more employees may be eligible for accommodation. The ADAAA does clarify, however, that an employer need not accommodate a "regarded as" disability.

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While the ADAAA may greatly expand the number of individuals who can claim to have a disability, it does not mandate that all of these individuals receive an accommodation from their employer. If the employee's disability does not affect the employee's ability to perform the job or otherwise enjoy equal employment opportunity, no accommodation is required. In other words, the law will still require an accommodation only to enable an employee to perform the essential functions of the job. Similarly, if an employee will not be able to perform the essential functions of the job even with an accommodation, no accommodation is required.

If a reasonable accommodation is required, an employer must engage in an interactive process with the employee in an effort to determine an appropriate accommodation. As before, accommodations may include job restructuring, a leave of absence, a modified work schedule, reassignment to a vacant position, or modified job duties, equipment, or facilities. An employer does not have to provide the employee with the specific accommodation the employee requests.

The ADA, even as amended by the ADAAA, also does not require an employer to eliminate the essential functions of a job in order to accommodate an employee with a disability. However, not all job functions are essential. Courts consider job descriptions and performance evaluations, in addition to testimony, to determine what functions are essential to a job. With the increased likelihood that more people will have a "disability," written job descriptions and evaluations may become even more important. Employers should periodically review and update these documents to ensure that the essential functions for each position are accurately described before an accommodation request is received.

Discrimination

As in the past, employers are at risk for discrimination claims whenever they take adverse action against an individual who has a disability. The ADAAA increases this risk, by increasing the number of individuals with legally-recognized disabilities.

In addition to expanding the number of people who may have a disability, the ADAAA also expands the scope of individuals who are regarded as disabled under the ADA. Anyone who has an actual or perceived physical or mental impairment – regardless of whether the impairment in fact limits or is perceived to limit a major life activity – may be regarded as disabled and thus protected. This change makes it critical for employers to ensure that decisions are based on actual conduct or performance rather than impairments, disabilities, or assumptions about an employee's capabilities.

With this new legislation, it is expected that employers will see an increase in disability discrimination claims and litigation. A manager's offhand comment about an individual's impairment could be enough to send a matter into litigation, as could the failure to recognize a legitimate accommodation request. As in other areas of employment law, training managers and supervisors on what to say and (perhaps more importantly) what not to say can save employers the time and expense of litigation. Training should also be provided on how to recognize and handle an accommodation request and how to discipline timely and appropriately.

To learn more about the changes under the ADA Amendments Act, we encourage you to consult your legal counsel, visit www.taftlaw.com/practices/content/38-americans-with-disabilities-act, or register for one of Taft's upcoming client seminars described in this newsletter.

– written by Patricia A. Pryor

Important Year-End Deadlines For Employee Benefit Plans

The end of the 2008 calendar year is fast approaching. As always, the year's end brings numerous deadlines for the sponsors of retirement and welfare benefit plans. Consider these important guidelines as you administer your employee benefit plans:

Certain Year-End Plan Notices:

Safe-Harbor Notices

Sponsors of 401(k) plans who intend to satisfy the nondiscrimination requirements by making a safe-harbor contribution must provide an annual notice to plan participants within a reasonable period before the beginning of each plan year. A notice provided at least 30 days prior to the beginning of a plan year will be deemed to have been provided within a reasonable period. Thus, December 1 should be the target for sending notices under calendar-year 401(k) plans. Year-end notices are also required for 401(k) and 403(b) plans with qualified automatic contribution arrangements and qualified default investment alternatives. If applicable, these notices can generally be combined with the plan's safe-harbor notice.

HIPAA Privacy Notices

A Notice of Privacy Practices must be provided by group health plans at least once every 3 years. Although your plan may not be required to provide the privacy notice this year, some plan sponsors elect to provide this notice on an annual basis to avoid a missed deadline.

Women's Health & Cancer Rights Act Notices (WHCRA)

Health plan sponsors are required to provide a WHCRA notice to plan participants at the time of enrollment and annually. Many employers elect to satisfy this notice requirement by communicating the breast cancer reconstruction mandate in open enrollment materials.

Medicare Part D Creditable Coverage Notice

Employers offering prescription drug coverage to employees or retirees covered by Medicare Part A or B are required to provide participants with a notice of "creditable coverage" every year before November 15, or within one year of the previous disclosure. Notice is required whether or not your prescription coverage is considered creditable.

Major Plan Amendments Required by Year-End:

403(b) Plans

The final IRS 403(b) regulations now require that all plan sponsors of a Code Section 403(b) plan adopt a written plan document by January 1, 2009 that contains all of the material provisions of the plan, including eligibility, benefits, distributions, and applicable limitations. Existing written plan documents may need to be amended to comply with the final regulations.

Nonqualified Deferred Compensation Arrangements

All nonqualified deferred compensation arrangements – including all employment agreements, severance arrangements, and other individual compensation arrangements which provide for a deferral of income – must adopt written plan documents that comply with the requirements of Code Section 409A by December 31, 2008.

Cafeteria Plans

The IRS has adopted proposed regulations for cafeteria plans. When final, these regulations will require amendments to most cafeteria plans. Although there is no final word from the IRS, it is possible (though unlikely) that the final regulations will be in place in time to require plan amendments by January 1, 2009.

January 2009 Deadline:

Determination Letter Applications for "Cycle C" Filers

The IRS determination letter submission deadline for a Cycle C filer (generally, an individually-designed qualified retirement plan sponsored by an employer with a federal employer identification number ending in a 3 or an 8) is January 31, 2009. While determination letters are not required, applying for a determination letter is recommended for most individually-designed qualified retirement plans.

This list is not intended to be comprehensive for all year-end deadlines for employee benefit plans. Please contact your legal advisor to discuss deadlines and other administrative issues relating to your particular plans.

– written by Stacey A. Huse

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Nadya finds her immigration practice particularly satisfying because of its fundamental human aspect. "The most gripping moment of my legal career occurred in Immigration Court," she says, "when my client, after being granted asylum, lifted his face from his hands, wet with tears, to thank the judge for 'giving back' his life. The judge responded, 'Welcome to America.' That moment lives with me and is a reminder that every immigration decision directly affects a human being, in addition to its effect on employers and communities."

Taft also benefits from the experience Nadya gained during her seven years handling complex domestic and international matters in the legal department of a multi-billion dollar manufacturing company. "Working in-house was a great experience," she says, "because it gave me the chance to see what the practice of law was like from that perspective. I've applied those lessons to my private practice."

Nadya earned her law degree from the College of William and Mary, and she also has an M.A. in English literature from the University of Rochester and a B.A. from the University of Chicago. She joins Brian Ambrosia, Joel Makee, Hannah Meils, and Toshio Nakao in the Taft Immigration and Citizenship practice group headed by Mike Zavatsky and Mick Terrell.

Preventing Identity Theft in the Workplace

With the increased occurrence of identity theft, privacy issues are a growing concern for employers. The common personnel file often has all of the information needed to steal someone's identity: name, address, Social Security number, driver's license number, birth date, and the like. Is an employer liable if this information is taken from its files or lost?

The potential for liability exists if an employer has not acted reasonably or has contributed to a disclosure of such information. Some states have enacted statutes with specific requirements for protecting Social Security numbers and other personal identifiers. As each state has its own particular requirements, employers should consult with counsel about what is required in the states where they operate. Nonetheless, some generally applicable guidelines for safeguarding employee information include the following:

- Limit access to personal identifying information to those with a need to know
- Secure hard-copy personnel files in locked cabinets
- Use data encryption and passwords for personal information maintained electronically
- Maintain tax documents, benefit documents, and other forms that include sensitive personal information in files separate from discipline/performance files
- Avoid placing full Social Security numbers or other personal identifying information on documents (including checks) distributed to employees or others
- Implement and enforce a policy on privacy and confidentiality, including practices for proper disposal of documents containing personal information

Many states also require companies to notify individuals whose information may be affected by a security breach, particularly with respect to electronically stored personal information. Employers should immediately contact counsel in the event of an apparent breach.

Overall, limiting use of – and access to – personal identifiers can help employers avoid unnecessary litigation and limit the risk for unauthorized use of an employee's information.

– written by Patricia A. Pryor

Recent Cases Highlight the Need for Carefully Written FMLA Policies

Periodic review of employment policies is always wise, and this is particularly true for compliance with the Family and Medical Leave Act. Several recent cases illustrate the costs and lost opportunities that can result if FMLA policies are not carefully written.

In one decision, an employee at a Michigan college began medical leave during December and was fired the following spring after being out for 12 weeks. The employee sued, arguing that she was entitled to 12 weeks within that *calendar* year. The college responded that it granted FMLA leave based on its fiscal year, which ran from July to the end of June. Importantly, the college's handbook did not define a "year" for FMLA purposes, and references to the July 1 fiscal year were found only in other leave policies apart from the FMLA policy.

The court ruled in favor of the employee. According to a Department of Labor regulation, "the option that provides the most beneficial outcome for the employee will be used" when employers fail to establish a "leave year" (such as a fiscal year or a rolling year based on each employee's start date). Given that regulation, the college's failure to clearly designate a leave year in its FMLA policy meant that the employee could restart the clock on her entitlement to 12 weeks of leave once the new calendar year began that January. Thus, she was still protected by the FMLA at the time of her termination.

In another case, an employee was not actually covered by the FMLA because his worksite had fewer than 50 employees within a 75-mile radius. Yet the employer's handbook provided leave for "all employees" – without regard to the size of each individual's worksite – who met the other eligibility criteria of the FMLA. Finding that employers may choose to "offer FMLA-like leave benefits using eligibility requirements less restrictive than those in the FMLA," the court concluded that the employee could not be terminated or replaced before the promised 12 weeks had passed. Even though the FMLA did not actually apply, the court held the employer to the terms of its poorly written FMLA policy.

All is not bad news when it comes to FMLA policies, however, as illustrated by a recent Indiana case. The employer had a policy prohibiting "gainful employment during a non-occupational medical leave of absence." Citing this policy, the employer fired an employee who was selling auto parts from his home during an FMLA leave. Because the employer had an "honest suspicion" that the employee was violating the written company policy with his side business, the court rejected the employee's FMLA lawsuit. Without that written policy, the employer likely would have had no recourse against the employee.

The lesson to be drawn from these cases is that written FMLA policies can help limit employers' liability, but the policies can also aggravate or even *create* that liability if not prepared carefully. Review your organization's FMLA policy with counsel to ensure it is more likely to help than hurt in the event of an employment claim.

– written by Justin D. Flamm

The Employee Free Choice Act

Organized labor has made the misleadingly named Employee Free Choice Act its highest legislative priority. While the Act's supporters and opponents reassess the political landscape in the wake of the November 2008 election, employers should be mindful of this proposed law and how they can best position themselves in case it becomes reality.

The Act has three primary elements. First, it would require certification of a union when a majority of employees have signed union cards. This would effectively put an end to almost all secret-ballot organizing elections, exposing employees to union harassment and intimidation.

Second, the Act would require employers and newly certified unions to enter mediation and then binding arbitration if they do not agree on an initial contract after 90 days of negotiations. As a practical matter, arbitrators would impose most first contracts. Neither party could appeal the arbitration decision, and its terms would last for two years.

Third, the Act would significantly increase the penalties for unfair labor practices committed by employers – but not unions – during an organizing drive or the bargaining process.

Employers who are currently non-union should assess their vulnerability to organizing campaigns. Supervisors should be trained how to recognize and address warning signs of union activity. Further, employees need to know their rights if approached by union organizers, as well as the ramifications of union authorization cards. These steps should be taken before union activity is discovered, since it may be too late once employees sign. Employers also need to refocus attention on employee/management relations and communication, which will become critical as unions get more aggressive in courting new members.

– written by Robert H. Fischer Jr.

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Taft Stettinius & Hollister LLP

425 Walnut Street, Suite 1800

Cincinnati, OH 45202-3957

P: (513) 381-2838 / www.taftlaw.com