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EMPLOYMENT LAW UPDATE

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IN THIS ISSUE

RECENTLY ISSUED *USERRA* REGULATIONS PUT A NEW SPIN ON OLD OBLIGATIONS

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The U.S. Department of Labor's Veterans Employment and Training Service released final rules under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) last December. The final regulations took effect in January and apply to all private employers as well as state and local governments.

Michael E. Stroster

Susan H. Sherman

USERRA is a federal employment statute enacted to encourage non-career military service by eliminating or minimizing the disadvantages for employees who voluntarily elect, or who are involuntarily selected, to serve in the U.S. Armed Forces. Because of the increasing use of reserve service members in military campaigns around the world, employers are being confronted more frequently with questions concerning their responsibilities under this statute. USERRA generally prohibits employers from discriminating against job applicants or employees who are past or present members of the Uniformed Services (or who may have an obligation to serve) because of their service or status. In addition, Congress has created certain reemployment rights for qualified employees upon their return from service. Following are an employer's key reemployment requirements under USERRA:

- Returning service members are entitled to reemployment after their military service unless they fail to comply with their obligations under USERRA.
- Employers must reinstate returning service members within two weeks after they apply for reemployment, absent unusual circumstances.
- Returning service members are entitled to receive the same seniority, status, and pay they would have attained if they had remained continuously employed (the "escalator principle").
- Returning service members are required to follow specific timetables and procedures when they report back to work.

USERRA REGULATIONS, *continued on page 7*

COURT BRIEFS

EMPLOYERS FACE INCREASED DEMANDS TO ACCOMMODATE RELIGION IN THE WORKPLACE. A recent Sixth Circuit Court of Appeals case shows how religion in the workplace is getting more attention these days. Title VII prohibits employment discrimination based on religion and requires employers to provide "reasonable accommodation" unless it imposes an "undue hardship." A Supreme Court case from the 1970s interpreted this to require the employer to bear only minimal cost. The Sixth Circuit just sent a case back for trial on whether the employer did enough to accommodate an employee's need to take off Saturdays, his day of worship. There is an increased interest in this accommodation requirement, and it's not just limited to scheduling around an employee's Sabbath and religious holidays. What about religious objections to parts of a job? What about accommodating an employee's conviction to proselytize in the workplace? What about the rights of other employees who believe that this proselytizing is harassing? Watch out for these potentially thorny issues. There is also a bill pending in Congress designed to overturn the Supreme Court case, which if passed will increase employers' duty to provide religious accommodation.

INCOMPLETE VS. INADEQUATE MEDICAL CERTIFICATIONS UNDER FMLA. The Sixth Circuit continues to provide guidance on the FMLA, following the DOL regs under FMLA closely. In a few recent cases, the court provided two clear rules on Medical Certifications. First, the court said that "shall" is mandatory, so the reg (stating that the "employer shall advise an employee whenever the employer finds a certification *incomplete"* and provide time to "cure any such deficiency") requires the employer to return an "incomplete" medical certification (med cert) to the employee. Second, the court said this reg does not apply when the employee fails to return any med cert at all, since no med cert is not an "incomplete" med cert. The court did not need to decide the issue of whether a med cert that was invalid on its face could be treated as invalid – and thus deny FMLA leave – or alternatively should be treated as an "incomplete" med cert which must be returned to the employee. Watch for more on this important FMLA issue.

MILLER JOHNSON IN THE NEWS

MARY V. BAUMAN presented "What do businesses need to know about employee benefits in 2006/2007?" at a seminar sponsored by The Campbell Group insurance agency on April 18th.

DAVID M. BUDAY and **SARAH K. WILLEY** will present at the Lorman Education Services seminar "Advanced Topics in the Family Medical Leave Act in Michigan" on July 28th.

PETER J. KOK and **NATHAN D. PLANTINGA** led three sessions at the Council of Reformed Churches Conference in Colorado on May 1st. The topics included application of federal and state employment laws to religious organizations, and legal developments affecting religious organizations. They also presented at the "Prevailing Wage Law in Michigan" seminar on April 21st in Kalamazoo for Lorman Education Services.

PETER J. KOK and **BRENT D. RECTOR** conducted the Northern Michigan Chapter of Associated Builders and Contractors' 2006 Annual Labor Relations Update on April 24th in Marquette, MI. The topics they covered included: MIOSHA, civil suits for job-site accidents, prevailing wage, handbooks and the latest union organizing tactics.

SUSAN H. SHERMAN is the chairperson of the Cedar Springs Red Flannel Festival Queen's Pageant Scholarship Committee.

MICHAEL E. STROSTER, MARCUS W. CAMPBELL, KEITH E. EASTLAND, CONNIE L. MAREAN, and **CATHY A. TRACEY** presented "Employment Law from A to Z" on May 4th for Lorman Education Services.

LEGAL CLIPS

AMENDMENT TO MICHIGAN MINIMUM WAGE LAW MAY REQUIRE MORE OVERTIME. The Michigan minimum wage goes up to $6.95, effective October 1. When it does, Michigan employers will also have to start complying with the state law's overtime rules, which provides for fewer "exemptions" than the federal wage-hour law. Both have exemptions for white collar jobs – executive, professional, and administrative. But the Michigan law does not have an exemption for outside salespeople, truck drivers, or several other classifications established under federal law. If you have exempt employees, you need to assess the impact of this change by October 1.

SHOULD YOUR EMPLOYMENT POLICIES INCLUDE AN ARBITRATION AGREEMENT? More employers are using arbitration agreements as a way to get control of employment claims. They are not advisable for all employment situations, but you should consider them whenever you revise employee handbooks and other employment policies and when you enter into executive employment agreements. Another strategy that should be explored is an agreement with the employee that any claims that do end up in litigation will be decided by the court without a jury. Jury trial waivers are not as common as arbitration agreements, but they are a trend to watch. To be effective, agreements for arbitration and/or jury trial waiver must be carefully drafted as part of your overall employment policies.

HAVE YOU ADDED A SSN PRIVACY POLICY YET? If not, you're late. Effective January 1, 2006, a new Michigan statute requires every employer to have a written policy on how it will comply with the requirements to keep Social Security numbers private. You can do this by amending your existing handbook. If you haven't reviewed the handbook in a few years, this may be a good time to freshen it up and include a SSN privacy policy as you do so.

ANNUAL QUOTA ON POPULAR H-1B VISAS ALREADY REACHED FOR BACHELOR-DEGREED CANDIDATES. The H-1B visa is primarily used for hiring foreign-born engineers, computer professionals, and other professionals for positions requiring "specialized knowledge." There is an annual limit of 65,000 H-1B visas for employees with bachelor degrees. The 2007 fiscal year quota was recently hit on May 26, 2006, well before the start of the next fiscal year. Job candidates with a master's degree from a U.S. university were specifically allocated 20,000 visas annually, and this quota will likely be hit soon. During this present fiscal year, the quota for applicants with a U.S. master's degree lasted four months, or until January 2006. The 2006 fiscal year H-1B visas for candidates with a bachelor's degree have not been available since August 2005. Federal regulations prohibit seeking an H-1B visa more than six months in advance of the scheduled start dates, so April 1, 2006 was the first date of filing for the coming 2007 fiscal year, which begins October 1, 2006. Although some pent-up demand had been expected, filing rates unexpectedly increased in late May or the USCIS counts had been grossly in error. For additional details about the H-1B visa program, including qualified positions and filing procedures, visit the Miller Johnson website. Information can also be obtained from Miller Johnson's Immigration Practice Group: John Koryto, Mike Stroster, Ileana McAlary, and Connie Marean.

NEW AMENDMENT TO MICHIGAN CORPORATION STATUTE PROTECTS MINORITY SHAREHOLDER / EMPLOYEE. The Michigan Legislature recently amended the Michigan Business Corporation Act, and one new wrinkle will be important to corporations that have minority shareholders who also work as employees. The amendment includes termination of employment or limitation on employment benefits as potentially unfair and oppressive conduct toward a minority shareholder.

SAVE THE DATE

EMPLOYMENT LAW SEMINAR

Miller Johnson's annual half-day Employment Law seminars are scheduled for **October 17** at DeVos Place in Grand Rapids and **October 25** at the Fetzer Center in Kalamazoo. The seminars' sessions offer management and human resource professionals a current overview of major changes in employment law and practice changes that affect virtually all businesses. We have applied for HRCI credits.

Health Care
UPDATE

NEW CRIMINAL BACKGROUND LEGISLATION FOR HEALTH CARE PROVIDERS: MUDDYING THE WATERS

by David M. Buday; budayd@millerjohnson.com; 269.226.2952
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In February, Michigan enacted new legislation that at an initial and superficial glance seems straightforward and appropriately aimed at ensuring that individuals with criminal backgrounds do not have access to some of the most vulnerable people in our society. Unfortunately, a careful review of the four bills the Legislature passed reveals a process that is cumbersome, contradictory, and confusing. If violated, it can result in criminal sanctions against individuals and organizations.

In general, the purpose of the new legislation is to require certain health care facilities to conduct criminal background checks and to prohibit those facilities from employing, contracting with, or granting privileges to individuals who have been convicted of certain crimes.

Here are answers to five basic questions employers might ask about this new legislation. They do not provide a comprehensive analysis of the law, and because of the potential for criminal liability, if you are a covered employer you should take the time to review and completely understand this new legislation.

WHAT ORGANIZATIONS ARE AFFECTED BY THE LAW?

The legislation identifies the nine types of organizations listed below as covered entities. However, three of the listed organizations – hospitals with swing bed services, psychiatric facilities, and intermediate care facilities for people with mental retardation – are not specifically defined either in the new legislation or in the public or mental health codes, creating uncertainty as to what those terms mean.

David M. Buday

Sarah K. Willey

- Nursing homes
- County medical care facilities
- Hospice facilities
- Hospitals with swing bed services
- Homes for the aged
- Home health agencies
- Adult foster care facilities
- Psychiatric facilities
- Intermediate care facilities for people with mental retardation

WHAT INDIVIDUALS ARE COVERED BY THE LAW?

The requirements of the new law apply not only to employees but to individuals granted clinical privileges and certain independent contractors. To be covered, individuals must have access to or provide direct services to patients or residents on a regular basis. Significantly, the law broadly defines "direct access" to include not only access to a patient or resident, but also to "a patient's or resident's property, financial information, medical records, treatment information or any other identifying information." Under that broad definition, billers, dietary staff, and vendors who regularly provide services directly to or for patients or residents would probably be covered. As a result, you must look broadly at all of your relationships with any type of service provider who has almost anything to do with patients or residents to determine if they have "direct access."

WHAT PENALTIES DOES THE LAW IMPOSE? The law imposes criminal penalties for covered entities and individuals. Inexplicably, it imposes criminal liability on individuals who knowingly use or disseminate criminal history information obtained pursuant to the procedures set forth in the legislation. This is perplexing because criminal history information is a public record – knowingly or unknowingly – and thus what the legislation has done, is criminalize the dissemination of public information in this limited context.

criminal check is completed, (3) make a request to the state police and to any relevant licensing or regulatory department regarding criminal background checks and checks of all relevant registries, and (4) provide notice to the individual if his or her record contains a relevant offense.

WHAT DOES THE LAW REQUIRE FOR CURRENT EMPLOYEES, CONTRACTORS, AND PRIVILEGE HOLDERS – THAT IS, FOR INDIVIDUALS WHO WERE HIRED ON OR BEFORE APRIL 1, 2006?

> "The identified health care organizations must put in place a particular framework for performing specific criminal background checks and fingerprinting individuals before they are hired."

In addition, applicants, employees, contractors, and/or privilege holders who provide false information are potentially subject to criminal liability. You are also potentially subject to criminal liability if you knowingly and willfully fail to conduct the required criminal background checks.

WHAT ARE THE REQUIREMENTS REGARDING NEW HIRES?

In general, you must put in place a particular framework for performing specific criminal background checks and fingerprinting individuals before they are hired. Organizations that have historically been doing criminal background checks are not in compliance and must change their procedures to the one set forth in the new legislation. By way of example, under the law, you must (1) obtain the applicant's identification and written consent for the criminal history check, (2) require certification that the individual has not been convicted of any of the relevant offenses if he or she will begin employment before the

At first glance, the legislation seems to "grandfather" current staff out of the criminal history check requirement. However, closer examination shows that grandfathering is seriously undermined by the provision that certain kinds of previous offenses (listed in federal law – and federal law that is anything but simple) will require termination. The dichotomy presents you with a choice. Even though the law does not require you to ask current employees about criminal convictions or obtain criminal history checks, should you do it anyway? Nothing in the new law prevents you from doing so. On balance it seems that employers would not want to take the risk of unknowingly employing an individual with a criminal conviction in a patient access position and, as a result, will want to make sure that no staff members have been convicted of any relevant crime.

The State Department of Community Health has worked diligently and expeditiously to make available forms and materials that will help you

CRIMINAL BACKGROUND LEGISLATION, *continued on page 7*

IMMIGRATION REFORM DEBATE – WHY EMPLOYERS SHOULD TAKE A STAND

by John F. Koryto; korytoj@millerjohnson.com; 269.226.2979

John F. Koryto

From burdensome quotas limiting employer access to both professionals and lower skilled workers to mandatory recruiting steps for most employment-based permanent resident status petitions, there is much opportunity for improvement of the immigration system confronting employers. But what, if any, reform may come to pass is far from certain.

U.S. employers have much at stake in this debate. In the past year, employers attempting to gain permanent resident status for professional-level employees have encountered growing processing delays, and a quota system that has resulted in additional wait times of five years and longer following approval of a permanent resident – "green card"– status petition. When the current legal route to permanent resident status is so cumbersome and requires lengthy waiting times, it is no wonder so many workers enter illegally or fail to maintain legal status.

> "The current debate could easily lead to passing enforcement-only provisions that add obligations and risks for employers, while the issues of meaningful access to qualified professionals and an appropriate supply of skilled and unskilled labor are left unresolved."

Approximately 12 million "illegal" or "undocumented" foreign nationals work in the U.S.; they represent 5 percent of the workforce. Calls for mass removal or deportation of such workers are clearly unrealistic and, even if it were feasible, that action would be detrimental to employers. From the President to the U.S. Chamber of Commerce, calls for a guest worker program that allows a path to legal status have intensified. But opposing reforms have also been offered that would drastically increase penalties for employing undocumented workers and increase an employer's obligations to investigate a worker's legal status. A burden with additional costs that employers surely won't welcome.

The current system, under which only proof of the employer's actual knowledge of an employee's undocumented status leads to fines or other sanctions, lends itself to abuse, as most employers admit. Only the most egregious cases of hiring undocumented workers have been pursued. This haphazard and inconsistent enforcement of laws barring employment of undocumented workers has allowed unfair competition to flourish in many sectors of the economy. Employers willing to skirt the law often get away with substandard wages and evade other employment law obligations that are honored by the vast majority.

The current debate could easily lead to passing enforcement–only provisions that add obligations and risks for employers, while the issues of meaningful access to qualified professionals and an appropriate supply of skilled and unskilled labor are left unresolved. Access to qualified foreign nationals to fill positions in engineering, scientific research, medical, and similar professions will continue to be limited by outdated arbitrary quotas unless employers take a stand and demand reform.

Whether or not employers express their opinions about immigration reform, they will feel its impact. Here is a link that provides additional information on proposed immigration reform, including a position statement from the U.S. Chamber of Commerce, which favors certain reform initiatives: http://www.uschamber.com/issues/index/immigration/default.

Questions about reform proposals may also be directed to members of the firm's Immigration practice group including: John Koryto, Mike Stroster, Ileana McAlary, and Connie Marean.

CRIMINAL BACKGROUND LEGISLATION, *continued from page 5*

comply with this new law. Unfortunately, in its haste, it has created forms that present some additional issues – for example, questions that may be unlawful under Michigan's Elliott-Larsen Civil Rights Act. You should carefully review those forms with legal counsel before using them.

Last, Miller Johnson has developed a compliance kit that walks you through this law. The kit also contains forms and other materials to assist with implementation. As always, if you need assistance in this area, please contact the authors or any of our health care employment attorneys.

USERRA REGULATIONS, *continued from page 1*

- Employers must make reasonable efforts to accommodate a disability incurred during military service if it limits the service member's ability to perform his or her job.
- Service members also have specific rights to continued coverage under their employers' health care and other benefit plans during the military leave.
- Returning service members must be given credit for the military service under their employers' retirement plans and have the right to make up 401(k) contributions for the time period they were gone. The final regulations state that employer contributions must generally be made up within 90 days of the service member's return to the employer.

The final regulations provide particularly important new guidance regarding the requirement to offer an employee who is leaving active employment for military service the opportunity to keep employer-provided health insurance during the military service. This requirement applies in addition to COBRA. And unlike COBRA, it applies to all employers, regardless of their size.

The regulations state that a plan administrator may develop reasonable procedures for employees/service members to follow in electing and paying for continued health coverage under USERRA, and that health coverage may be cancelled for an employee/service member who does not follow the established procedures. If a plan administrator does not develop and communicate procedures for electing and paying for continued health coverage under USERRA, no violation occurs. But the employee/service member will be able to elect health coverage retroactively, to the beginning of the military service, at any time during the first 24 months of the military leave. This is likely to result in increased costs to the plan and the employer, because individuals will wait to see if they have significant health expenses before electing continuation coverage.

As a result, we recommend that plan administrators take the time to develop such procedures and communicate them to employees. You should also consider implementing a general military leave policy if you do not already have one. For assistance in formulating such a policy or for specific questions related to USERRA, we recommend that you contact a member of our Employment or Employee Benefits Practice Groups.

A more complete discussion of USERRA and your obligations as an employer under USERRA is available in the Resource Center/Publications section of our website at www.millerjohnson.com.

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Have a question about a specific employment-related legal area? If so, please contact us. We would welcome the opportunity to assist you.

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