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EMPLOYMENT LAW UPDATE

MILLER, JOHNSON, SNELL & CUMMISKEY, P.L.C. FALL 2003

Workers Compensation: Symptomatic Aggravation of an Underlying Pre-Existing Condition is No Longer Compensable

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A landmark decision eagerly anticipated by Michigan employers arrived on July 30, with a Michigan Supreme Court ruling that changes the rules concerning aggravation of pre-existing medical conditions.

Before this decision, an employee who had a pre-existing condition that was made symptomatically worse as a consequence of work activities was entitled to workers disability compensation benefits. But in *Rakestraw v General Dynamics Land Systems*, the Supreme Court held that, without a clear distinction between the symptoms and the pre-existing condition, symptomatic aggravation of a pre-existing condition is no longer compensable.

Case law had held that under § 301(1) of the Workers Disability Compensation Act, aggravation of symptoms of a pre-existing condition was compensable even if no work-related injury had occurred. The Supreme Court reversed that finding as being inconsistent with the clear language of the statute, which requires proof of causation in order to establish benefits – that is, proof that an employee suffered a personal injury "arising out of and in the course of employment."

The Supreme Court explained that the Michigan statute requires the claimant to provide proof of a work-related injury, beyond aggravation of symptoms of the pre-existing condition. The plaintiff has the burden of establishing the relationship between the injury and the workplace event by a preponderance of the evidence. The Court held that symptoms that are consistent with the progression of a pre-existing condition are not compensable. The burden rests upon the claimant to differentiate between the pre-existing condition, which is not compensable, and the work-related injury, which is.

In *Rakestraw*, the Workers' Disability Compensation Magistrate had awarded benefits on the basis of the aggravation of symptoms of a non-work-related medical condition. The plaintiff had a previous neck condition which had been surgically repaired. He recovered from the injury, became asymptomatic, and returned to employment, but experienced symptoms on the job that led to a disability. The magistrate found that the plaintiff did not show any objective signs of either post-surgical changes or worsening of spondylosis of the cervical spine. She found that his work activities had not significantly contributed to, aggravated, or accelerated any such changes. Still, she held that the plaintiff's employment aggravated the symptoms of the pre-existing neck condition to the point that he could no longer work, and

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therefore she awarded benefits.

That decision was confirmed by the Michigan Workers' Compensation Appellate Commission, which cited cases from the Michigan Court of Appeals as precedent for their decision. The Michigan Court of Appeals denied leave to appeal.

The Supreme Court, however, reversed this decision and overruled previous cases from the court of appeals that held that symptomatic aggravation of a pre-existing condition alone could be compensable for as long as those increased symptoms resulted in disability. Under the court of appeals ruling, once the claimant returned to his pre-existing condition, the liability ceased.

The Court explained that where symptoms complained of are equally attributable to the progression of the pre-existing condition and a work-related injury, plaintiff will fail to meet his burden of proof by a preponderance of the evidence. In order to establish "a personal injury arising out of and in the course of employment" under § 301(1) of the Act, the plaintiff must show that the injury arose out of and in the course of employment, and is distinct from the pre-existing condition.

In dissenting opinions, Justices Weaver and Kelly complained that the Supreme Court's majority opinion should be governed by the liberal construction rule that has generally been applied in workers compensation cases. That rule holds that the Act is a remedial statute that should be construed liberally to grant benefits rather than deny them. The dissenting Justices would apply this liberal interpretation of the statute to hold that aggravation of symptoms may constitute a work-related injury that is compensable under the Act. Justice Kelly stated in a scathing dissent that the majority decision is "a crippling blow to the liberal construction rule" and that the decision "shakes the foundations of established worker's compensation jurisprudence." She went on to say that "the majority's decision represents a serious departure from established law and a disavowal of established public policy," and that it constitutes changes that are "seriously ill-conceived."

As a practical matter, *Rakestraw* stands for the proposition that a claimant will not be compensated merely for showing that symptoms of an underlying pre-existing condition are worse. Rather, he must establish that the symptoms are distinct and different from the symptoms of his pre-existing condition and prove that any increased pathology is not the consequence of the natural progression of the pre-existing condition but of work activity that has significantly contributed to, aggravated, or accelerated it. In other words, the claimant must establish an injury. Symptoms alone of a pre-existing condition which have been aggravated or accelerated by work activity are no longer compensable in Michigan.

By themselves, symptoms that are equally attributable to the progression of a pre-existing condition and a work-related injury are no longer compensable in Michigan. In short, the plaintiff must prove an injury.

Miller Johnson in the News

■ David M. Buday spoke on "Legal Issues in Human Resource Management" for the annual conference of Quorum Health Resources on October 1. At a seminar sponsored by the Council on Education in Management on November 21, he will speak on "Disciplining and Terminating Workers' Comp Claimants: Making Prudent Employment Decisions While Avoiding Wrongful Discharge and Retaliation Liability" and Kristen L. Kroger will speak on "Managing Return to Work, Reasonable Accomodations and Leave Issues While Staying in Compliance with ADA, FMLA and Workers' Compensation Laws."

■ David M. Buday, John F. Koryto and Sarah K. Willey will present "Employee Discharge and Documentation in Michigan" at a Lorman Educational Services seminar on December 11.

■ Jack C. Clary and Marcus W. Campbell will present "Navigating the Maze of Overtime and Related Wage-Hour Law in Michigan" for Lorman Educational Services seminar on November 13 in Traverse City.

■ Brent D. Rector will be presenting "Workplace Safety and Health" on November 20 and December 4 to the Michigan Manufacturers Association.

■ Elizabeth Welch Lykins has been accepted into the Grand Rapids Chamber of Commerce Leadership Grand Rapids for 2004.

■ David M. Buday is on the Board of Directors for the American Heart Association and serves on the 2004 Gala committee.

■ Gary A. Chamberlin presented October 9 at the Michigan Negotiators Association fall conference on the topic "No Child Left Behind Labor Agreement Language Issues." He also spoke on "Developing and Implementing the Affirmative Action Plan" for the Michigan State University School of Labor & Industrial Relations at the Human Resources Education and Training Center in Livonia on October 15.

■ On November 19 and 20, Elizabeth McIntyre, Gary A. Chamberlin, Brent D. Rector and Jennifer Jordan will give an FMLA 2003 Update sponsored by the Council on Education and Management.

■ Jack C. Clary was reelected to the Board of Directors for Safari Club International, Michigan Chapter and is chair of the Conservation Committee.

Are Your Employment Documents Consistent?

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More and more, employers are taking advantage of binding pre-dispute arbitration agreements to force employees to arbitrate their disputes rather than sue an employer in court. Many employers have reaped the benefits of including a shortened statute of limitations in their handbooks, arbitration agreements, or employment applications. However, in order to get such results, you must occasionally revise your employment documents and, more important, make sure that one document does not cancel the effect of another.

For example, you, like many other employers, might put language like this in an agreement and have your employees sign it: "This is the entire agreement and cancels all previous agreements." Now, as attorneys, we can try to argue on your behalf that that's not what you intended, but our job is much easier if your documents do not contain such language unless you really mean it.

Suppose an employee signs an arbitration agreement but later signs a noncompete agreement that cancels "all previous agreements." Arguably, the arbitration agreement is no longer enforceable. This is certainly not what you intended. The solution? Don't let the problem arise. Review all the documents you distribute to employees and make sure they're compatible.

Arbitration Agreements

Many employers have weighed the costs and benefits of implementing a binding arbitration agreement that applies to all employees in the event a dispute arises over their employment. The Michigan Court of Appeals upheld the validity of these agreements in 1999. The agreement must be in the form of a binding contract. But, if the agreement is incorporated into a handbook that states that "this is not a contract" (to ensure at-will employment), the arbitration agreement is not a contract either. Miller Johnson generally solves this problem by creating an addendum to the handbook that contains the policies the employer desires to be enforced as contracts (for example, the arbitration agreement and a non-compete agreement).

Generally, the arbitration agreement itself can be short and incorporate the rules of a reputable arbitration group (such as the American Arbitration Association), or it can be lengthy and spell out all the procedures afforded an employee who pursues arbitration. The Michigan courts have spelled out the specific criteria an arbitration agreement must meet in order to be enforceable.

Elizabeth Welch Lykins

Perhaps the biggest area of debate in arbitration agreements has been the use of "fee splitting"— that is, making the employee share in the costs of the arbitration. The courts have struggled with this, because the costs can be several thousand dollars, compared to a small filing fee in court. Many Courts have struck down fee-splitting agreements. The Sixth Circuit examines each situation case-by-case and might rule, for example, that a high level executive should split the fees. However, this provides little guidance for employers trying to draft agreements for a company that encompasses lower level employees through management. As a result, many employers have capped employee costs at a low number – perhaps $200.

It is important to note that each state and federal circuit has its own rules regarding the enforceability of arbitration agreements. Therefore, if your company uses one handbook and one set of policies for all facilities, including those in different states, you should consult with your attorney to find out whether your policies will in fact be binding. For example, California and the Ninth Circuit Court of Appeals have routinely struck down such agreements on the grounds that employees do not really have an opportunity to bargain over the terms of the contract. When reviewing an arbitration agreement, California courts will simply state that the agreement is unenforceable and allow the employee to pursue a lawsuit in court.

Shortened Statute of Limitations Language

All employers should seriously consider implementing a shortened statute of limitations in their employment application and handbook addendums. Typically, under Michigan law an employee has three years to bring a lawsuit alleging discrimination based on membership in some protected class (race, gender, national origin, religion). The courts in Michigan have found that parties can agree, by contract, to a

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The University of Michigan Admission Cases

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What Do They Mean for Employers?

Certainly you've heard about the recent United States Supreme Court decisions on the University of Michigan's admission policies, and you probably know that the Supreme Court ruled that public universities could consider race when selecting applicants for admission. But do you understand what – if any – impact the decisions may have on your organization's employment decisions?

The truth is that the decisions have no direct application to the employment arena right now. However, they may open the door for employers to argue that they also should be allowed to consider race in order to establish and maintain a diverse workforce.

The Supreme Court Holds That Public Universities Can Consider Race in Selecting Applicants for Admission

In the University of Michigan cases, prospective students challenged the school's undergraduate and law school admission policies because they took into account the race of the applicant. The Supreme Court's opinions in both of the cases clearly endorse student body diversity as an important interest that can justify the use of race in university admissions. In reaching that conclusion, the Court relied on its earlier decisions stating that public universities hold a "special niche" due to the important purpose of public education and the expansive freedoms of speech and thought within the university environment. In addition, the Court relied on empirical evidence showing that a diverse student body better prepares students to work in a diverse society and gives them the necessary skills for today's global marketplace.

It is worth noting that the Supreme Court also reinforced the principle that quotas and set-asides for particular groups are unlawful. It held that the law school's admission policy passed constitutional muster because it was an individualized, holistic view of each applicant's file and gave weight to diversity factors other than race. On the other hand, the Court struck down the undergraduate admission policy because it automatically awarded an applicant 20 of the 100 points needed for admission if he or she belonged to certain racial or minority ethnic groups. The automatic distribution of 20 points made race a decisive factor for virtually every minimally qualified applicant.

The University of Michigan cases apply only to student admissions at colleges and universities that either are public or accept some amount of federal funding. Although the court recognized an eventual connection between education and employment, the decisions have no direct application to the employment landscape.

The Landscape of the Future: Affirmative Action in Employment?

Sarah K. Willey

After the University of Michigan decisions, the law regarding affirmative action in employment remains the same. Currently, employers may legally take race into account only under very limited circumstances. If they are engaged in government contracts or subcontracts, they must comply with federal regulations to create and follow affirmative action plans. In addition, under some circumstances, the EEOC may certify certain racial preferences as part of an agreement to conciliate claims of past discrimination. Finally, the Supreme Court has approved the limited use of racial preferences that are designed to eliminate a manifest racial imbalance in traditionally segregated job categories.

There has been speculation that the University of Michigan cases may open the door for employers to similarly argue that the goal of having a diverse workforce can justify the use of racial preferences, but an employer seeking to extend the Michigan cases to its organization would face some hurdles. The Supreme Court's rationale depends heavily on the importance of diversity in higher education and does not necessarily transfer readily to employment. Likewise, even if a court is willing to conclude that an interest in diversity can justify the consideration of race in employment decisions, the employer would probably still have to show that it initiated a hiring policy in order to achieve diversity and that it did not use quotas or set-asides.

Practical Suggestions

Until courts decide the issue, employers who seek a more diverse workforce can structure their hiring processes to avoid the direct consideration of race. For example, they can use hiring criteria that is likely to foster diversity but does not necessarily implicate race – for example, personal talents, unique work or service experience, leadership potential, the ability to communicate with a variety of people, personal adversity/social hardships, foreign experiences/travel, and unique life experiences. In addition, to forestall assertions that hiring criteria are merely a subterfuge, employers should avoid using any criteria that tend to exclude certain racial groups and should apply the criteria to all applicants even handedly.

Court Briefs

■ **Employer's control over arbitrator selection voids arbitration agreement.** A former employee was not required to arbitrate her discrimination claims, because the arbitration agreement she signed with her employer gave the employer exclusive control over the pool from which the arbitrator would be selected. In this important ruling from the Sixth Circuit Court of Appeals, the court outlined the guarantees of neutrality an arbitration agreement must contain before an employee can be forced to use the agreed arbitration procedure for statutory claims. This is a fast-changing area of the law. Employers who use pre-dispute arbitration agreements need to update their policies to be in compliance with the most recent decisions.

■ **Discharge for moonlighting while on FMLA leave okayed.** The employer enforced a policy prohibiting employees from working elsewhere while on leave of absence. The employee's wife was pregnant, and he took FMLA leave to care for her. While on leave, he managed his wife's restaurant. He was terminated for violation of the employer's policy forbidding moonlighting while on leave. The Sixth Circuit Court of Appeals found no FMLA violation for enforcing the no-moonlighting policy. The court held that an employer need not reinstate an employee after FMLA leave if using a uniformly applied policy governing outside or supplemental employment results in the employee's discharge. It is important to note that the employer applied its no-moonlighting policy to all types of leave.

■ **Supreme Court gives broad discretion to plan administrators for medical decisions under ERISA plans.** In a victory for ERISA disability benefit plan administrators, the high court held that a plan administrator has broad discretion to make determinations of eligibility for benefits. Plan administrators are not required to give special deference to the opinions of claimants or their treating physicians; instead, a plan administrator may reject the opinion of the treating physician, so long as the eligibility decision is not arbitrary or capricious.

■ **Reassignment to temporary job not a reasonable accommodation under ADA.** The employer acknowledged that the employee had an ADA-covered disability but refused to transfer him to a temporary position. According to the Sixth Circuit, "While an employer must reassign a disabled employee to a vacant position if the employee is qualified, an employer is not required to reassign a permanently disabled employee to a temporary position for recuperating employees or a rotating-type position." In its unpublished decision, the court also rejected the employee's claim that the temporary position should be awarded until the parties could investigate other alternatives.

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shortened limitations period -- even as little as six months -- within which to bring a claim. However, under Title VII, no lawsuit may be filed until the employee receives a notice of right to sue from the EEOC, and an agreement to shorten the limitations period must be tailored to accommodate that. Some employers have simply opted for a one-year limitation period. This language has been helpful in getting many lawsuits dismissed for failure to meet the shorter deadline.

NON-COMPETE/TRADE SECRET AGREEMENT

Many employers use non-compete or trade secret agreements that are tailored to their specific industry. The agreement can be incorporated into a handbook or made a separate document. If yours is part of a handbook, you'll most likely want the agreement to be contractually binding. If it is a separate document, review it carefully to make sure it does not contain language that cancels the effect of other agreements.

Fortunately, there are many tools human resources professionals can use to mitigate the damages caused by a lawsuit. But, because the laws are always changing, you absolutely must make a point of auditing your documents from time to time. Make sure they have evolved to reflect changes in the law and that a new document is not canceling one already in place. Your Miller Johnson employment attorney can help you with all or part of this process.

Annual Employment Law Seminar October 21 and 29

Laws, court rulings, agency regulations and political appointments that affect your organization change every day. We stay on top of these changes and so can you. At Miller Johnson's Annual Employment Law Seminar we will present recent legal developments along with practical information that your organization needs to manage its workforce.

The breakout session format allows you to select topics that are most important to you, and offers an opportunity to interact with our presenters. The 2003 MJSC Employer's Deskbook and the 2003 MJSC Employer's Deskbook updates will be distributed to attendees.

For more information, visit our website at www.millerjohnson.com/resource/seminars.asp

Legal Clips

■ **Employers need to gear up for new HIPAA privacy rules.** Larger employers who sponsor group health plans should already be in compliance with these rules, and by April 14, 2004, other employers should be, too. Miller Johnson is ready to assist you with a compliance kit. Please contact Mary Bauman, Brent Rector, or any member of the Miller Johnson Employee Benefits group for assistance with this new employer obligation.

■ **New Certification Requirement for All Foreign Health Care Workers.** The Department of Homeland Security recently issued a final rule requiring additional certification for all foreign health care workers. The rule applies to nurses, physical therapists, occupational therapists, speech-language therapists and pathologists, medical technologists, and physician assistants seeking to work in the United States. It states that these health care professionals will not be admitted into the United States unless they first obtain a certificate verifying that their education, training, licensing, experience, and English skills are comparable to those of American health care workers. Beginning July 26, 2004, the certification requirements will apply to all seven categories of foreign health care workers, and those who are seeking admission must have the certificate by then. Workers who are already in the United States may continue to work, but they must obtain the credentialing certificate by July 26. If a foreign worker does not have it by then, he or she must terminate employment.

■ **New DOL regulations for FLSA exempt status coming soon.** Expect the DOL to issue a new set of regulations to update and clarify how employers must comply with the Fair Labor Standards Act. The DOL is reviewing comments on its proposals to overhaul the regs that have been used for decades to decide which employees are exempt from receiving the FLSA overtime premium. Key changes expected are elimination of the "short test" and "long test," an increase in the minimum weekly salary required for exempt status, and a new rule exempting certain workers earning more than $65,000 per year.

■ **Expect more rulemaking from DOL on FMLA and USERRA.** The FMLA regulations issued in 1995 have been subject to several court challenges, many of which have set aside parts of the DOL regs. The DOL is considering how to respond to this judicial criticism and should issue proposed changes soon. One will likely be in the penalty provision for an employer who does not timely designate a leave as FMLA leave. Also on the rulemaking agenda are regulations under the Uniformed Services Employment and Re-employment Rights Act. Currently there are no DOL regs under that act, but the DOL intends to propose regs to provide guidance on several provisions of USERRA, including re-employment positions, discrimination, benefits, pensions, and enforcement. After a comment period, the new regs would be issued in final form, probably in 2004.

■ **Keeping settlement negotiations confidential.** HR professionals are frequently involved in settling employment issues even before claims are filed in court or with an administrative agency. Can settlement discussions be used if negotiations do not resolve the dispute? A recent Sixth Circuit Court of Appeals decision held that these can be privileged and exempt from disclosure in later litigation, since there is a strong public policy in favor of secrecy about matters discussed by parties during settlement negotiations. The case was between two companies that had a business dispute not involving employment issues, but the reasoning should extend to employment situations. To promote this confidentiality, employers engaged in resolving disputes with their employees should consider entering into a written confidentiality agreement before conducting substantive settlement discussions.

■ **New COBRA Notice Regs Will Require a Change in procedures.** The DOL has issued proposed regs on notification of plan participants regarding COBRA. We expect the regs will be finalized next year. When final, the rules will require employers to revise their COBRA procedures and to amend their health SPDs and COBRA forms. If employers fail to develop adequate forms and procedures they could be subject to penalties under ERISA and may be required to offer COBRA in circumstances where it otherwise would not be available. If you would like more information regarding the proposed rules please contact Mary Bauman, Susan Sherman, or any member of Miller Johnson's Employee Benefits practice group. Miller Johnson has also prepared an article summarizing the proposed regs which can be found on our website at www.millerjohnson.com.

■ **Unions helped in organizing drives by NLRB rulings.** Two NLRB rulings were recently affirmed by the Sixth Circuit Court of Appeals, in each case helping the union in its organizing drive. In one, a union promise of T-shirts and hats if they voted for the union was not sufficient to overturn the election because they were not distributed until after the election was over. In the other, off-duty employees

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New IRS Ruling Permits Over-the-Counter Drugs to be Reimbursed Under a Medical Flexible Spending Account

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The IRS has issued a significant new ruling which permits medical flexible spending accounts (FSAs) to reimburse the cost of non-prescription or over-the-counter (OTC) drugs. In issuing the ruling, the IRS recognized that more and more drugs are now available without a prescription and that the retail price of an OTC drug is often greater than the prescription drug co-pay the employee would be required to pay under his or her employer's group health plan.

In the new guidance, the IRS specifically indicated that the cost of non-prescription antacids, allergy medicines, pain relievers and cold medicines could be reimbursed under a medical FSA. However, the IRS indicated that in order for any such drug to be reimbursed, it must be purchased to alleviate or treat an illness or injury. Other non-prescription drugs also appear to qualify, again, as long as they are purchased to alleviate or treat an illness or injury.

While the cost of OTC drugs used for medical care may be reimbursable, other non-prescription items, such as dietary supplements and vitamins, which are purchased to maintain good health, are not reimbursable. The IRS also reaffirmed its prior guidance that the cost of toiletries (such as toothpaste) and cosmetic items (such as face cream) are not reimbursable.

Because this ruling is the IRS's interpretation and clarification of existing law rather than new guidance, the ruling may be immediately followed. If your flex plan document was written generically enough to allow reimbursement for any expense considered medical care within the meaning of Section 213 of the Internal Revenue Code, then you may immediately begin reimbursing qualifying OTC drug costs which have been incurred during the current plan year. If your flex plan was drafted by Miller Johnson, it was drafted in this generic fashion.

On the other hand, if your flex plan document was not drafted by Miller Johnson, you need to make sure that your plan permits reimbursement of OTC drugs. If your plan specifically indicates that it does not reimburse the cost of non-prescription drugs or if your plan confines eligible expenses to those which constitute deductible medical expenses under the Internal Revenue Code, then your plan must be amended before reimbursement may begin. This is because in the ruling, the IRS indicated that non-prescription drugs continue to not constitute a deductible medical expense under the Internal Revenue Code. If you have any questions as to whether your document permits immediate reimbursement, you should contact the employee benefit professional who prepared the document. Otherwise, feel free to contact Miller Johnson.

Mary V. Bauman

Even if your plan permits reimbursement, you will also want to make sure that you review your SPD and claim forms to make sure that they are consistent with the requirements of this new guidance. For example, it will be very important that your claim form requires substantiation for these expenses. Not only will the participant need to bring in a receipt clearly identifying the OTC drug, your claim form should also require the participant to verify that the drug was purchased to alleviate or treat an illness or an injury.

Another question you may frequently receive from participants is whether they may make a mid-year election change now to increase the medical FSA contributions to take advantage of this ruling. The answer to this question is "no."

The questions this IRS ruling raises are many:

- **Do you need a doctor's slip saying this drug is necessary?** No.
- **Can you buy a whole case of Tylenol and claim reimbursement because you know your family will need it in the near future?** The guidance doesn't say.
- **Are certain items such as Ben Gay a "drug?"** The guidance doesn't say.
- **While you cannot obtain reimbursement for non-prescription vitamins purchased for overall good health, what if vitamins such as Vitamin C or Zinc are purchased when you feel a cold coming on. Is that cost reimbursable?** The guidance doesn't say.

We anticipate the IRS will give us more information on this ruling. In the meantime, if you have any questions, please contact the author, Mary V. Bauman, or any member of the Miller Johnson Employee Benefits Practice Group.

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working at one nursing home of an employer were allowed to distribute pro-union literature in the parking lot of another nursing home owned by the same employer, despite the employer's rule limiting access to its property. These rulings are likely to be exploited by unions in future organizing drives. It makes more sense now than ever for employers to be pro-active rather than wait for signs of organizing activity. Miller Johnson can assist you in taking preventative action to minimize the risk of organizing.

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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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