

Ten HR Issues from 2005¹
Employment Roundtable
December 8, 2005

The following are ten important developments in labor and employment law during 2005:

<u>Issue</u>	<u>Page</u>
1. OREGON LEGISLATIVE UPDATE.....	2
2. TITLE VII UPDATE	8
3. MANDATORY RETIREMENT	9
4. AMERICANS WITH DISABILITIES ACT (ADA) UPDATE.....	11
5. OFCCP UPDATE	13
6. NLRB UPDATE	15
7. SUMMARY OF PROTECTED LEAVES IN OREGON.....	18
8. BENEFITS UPDATE	20
9. SUPREME COURT HOLDS TIME SPENT DONNING AND DOFFING PROTECTIVE CLOTHING IS COMPENSABLE IN <i>IBP, INC. V. ALVAREZ</i>	25
10. TERMINATION FOR OFF-DUTY CONDUCT (WEBLOGS)	27

¹ This memorandum contains a summary of information obtained from laws, regulations, court cases, administrative rulings and legal publications, and should not be viewed or relied upon as legal advice. Ater Wynne LLP urges readers of this memorandum to consult legal counsel regarding specific legal issues and factual circumstances.

1. OREGON LEGISLATIVE UPDATE

The following is a summary of the employment-related laws passed during the last Oregon legislative session:

- **Nursing Mother (Non) Legislation (2005 Or Laws 466)**

While the initial version of this bill required that employers provide reasonable break periods and breastfeeding facilities to nursing mother unless doing so would cause undue hardship, the law as enacted only requires that an employer “may provide reasonable unpaid rest periods to accommodate an employee who needs to express milk for her child.” Moreover, “if the employer is required by law or contract to provide the employee with paid rest periods, the employer shall treat the rest periods used by the employee for expressing milk as paid rest periods, up to the amount of time the employer is required to provide as paid rest periods.” The new law covers those employers who employ 25 or more employees in the State of Oregon, but imposes no new mandatory obligations on them.

- **Remedies for Discrimination (2005 Oregon Laws 199, Amending ORS 659A.885)**

This amendment clarifies the remedies available for discrimination based on:

- (1) Service as member of the Oregon legislature (compensatory damages allowed);
- (2) A request for a leave of absence to serve as a firefighter (compensatory damages allowed);
- (3) Off-duty use of tobacco (backpay and equitable remedies, but not compensatory damages).

- **Military Leave (2005 Oregon Laws 78, Amending ORS 399.230)**

This law amends ORS 399.230 to expand leaves of absence for active military service. The prior law only covered members of the Oregon militia. The new law applies to a militia member of any state who is called into active service.

- **Meal Breaks for Minors (2005 Oregon Laws 154, Amending ORS 653.315)**

The law amends ORS 653.315 to delete the requirement that the 30-minute meal break mandated for minors age 16 and under must occur at noon.

- **Family Leave Health Care Providers (2005 Oregon Laws 171, Amending ORS 659A.150)**

This law amends ORS 659A.150 to expand the term “health care provider” for purposes of Oregon family leave law. The term now includes registered nurses, nurse midwives,

chiropractors, and spiritual healers (including Christian Science practitioners) practicing within the scope of their professional license or certification.

- **Workplace Safety Whistleblowing Discrimination Complaints (2005 Oregon Laws 198, Amending ORS 654.062)**

This law amends ORS 654.062 to expand the scope of protection afforded to individuals who complain of workplace safety and health violations. The old law provided remedies only to existing employees, while the new law also covers prospective employees. The new law also sets a one-year statute of limitations.

- **Increase in Minimum Wage (ORS 653.025)**

Effective January 1, 2006, the Oregon minimum wage increases from its current rate of \$7.25 to \$7.50 per hour.

- **Workers' Compensation Independent Medical Exams (2005 Oregon Laws 675)**

This law is intended to address concerns about the perception of bias in connection with independent medical examinations (IMEs) conducted for the purpose of determining eligibility for workers' compensation benefits. The Department of Consumer and Business Services is required to maintain a list of authorized medical providers and issue rules regulating IMEs. Employees are afforded a mechanism to challenge the insurer's designated location for the IME and are subject to a monetary penalty for failure to attend an IME without justification or prior notice.

- **Tax Treatment of Dependant Care Assistance (2005 Oregon Laws 283, Amending ORS 657.115)**

This new law, which amends ORS 657.115 to provide that "wages" do not include dependant care assistance for the purpose of unemployment compensation, conforms Oregon law to federal tax law.

- **Unemployment Benefits for Victims of Certain Offenses (2005 Oregon laws 278, Amending ORS 657.176 (12))**

This new law expands the exceptions from disqualification for unemployment benefits to include victims and the parents or guardians of minor children who are victims of domestic violence, stalking, or sexual assault who leave work or fail to apply for or accept suitable available work to protect the individual or minor child from further domestic violence, stalking, or sexual assault. The individual must pursue reasonable alternatives to leaving work or refusing suitable work.

- **Payment of Estimated Wages (2005 Oregon HB 3319, Amending ORS 652.150)**

This law amends ORS 652.150 to allow payment of estimated wages to employees who quit with less than 48 hours' notice and fail to turn in time records necessary to calculate final pay. Such pay is due within five days of the employee's termination. Any additional amount owing is due within five days after the employee turns in the time records.

The amendment of ORS 652.150 provides an additional defense to employers, who have been the target for class action wage and hour suits in recent years. Such suits are attractive to plaintiffs' attorneys because, while the actual dollar amounts owed to an individual employee are often quite low (even a few dollars or cents), the potential recovery can be significant when multiplied across broad job classifications over a two or three-year period. When plaintiffs recover unpaid wages plus attorney fees, interest, and, in many cases, multiple penalties for arguably the same conduct, the employer's exposure can be huge. As a result, many employee-oriented law firms are actively looking for and exploiting opportunities to bring such suits. A colorable, though weak or even unsubstantiated claim by one employee can lead to a broad "fishing expedition" during the initial discovery phase of the litigation, resulting in a wide range of possible class action claims. An individual employee is often eager to pursue such claims on a class-wide basis because as "class representative" (*i.e.*, the named plaintiff) the individual typically receives an "incentive award" in addition to the payout to which he or she may be entitled.

Common class action claims exist under the Fair Labor Standards Act (FLSA)² and its Oregon equivalent,³ as well as under additional state law requirements for final pay and deductions from wages.⁴ Plaintiffs also bring breach of contract actions to recover commissions, accrued vacation and sick time, and other benefits. While a two- or three-year statute of limitations typically applies to a statutory wage and hour claim,⁵ a six-year statute of limitations applies to Oregon contract claims.⁶ Plaintiffs often obtain class action status with as few as 25 employees, and it is becoming easier to get cases certified as class actions by showing that some of the factual or legal issues in the case are "common" to all class members. Judges often certify classes on the basis that the payroll data in the possession of the employer is objective and unambiguous, and the wage and hour claims are, essentially, "no fault" claims.

Even inadvertent mistakes in wage practices have the potential for huge damage awards.⁷ In addition, plaintiffs often argue in favor of "stacking" penalties (*i.e.*, awarding multiple state and

² 29 USC §201, *et seq.*

³ ORS 653.025 (minimum wage); ORS 653.261 (overtime), ORS 653.055 (penalty for failure to pay minimum wage or overtime).

⁴ ORS 652.140 (payment of final pay), ORS 652.150 (penalty wages for violation of final pay statute), ORS 652.200 (attorney fees in action for wages), ORS 652.610 (deductions from wages).

⁵ *See* ORS 12.110.

⁶ ORS 12.080.

⁷ As a general rule, employers cannot avoid liability merely by demonstrating that they acted unintentionally. *See, e.g., Wilson v. Smurfit Newsprint Corp.*, 197 Or App 648 (2005) (seller that failed to

federal penalties based upon one type of alleged misconduct).⁸ Plaintiffs also are arguing with some success that the failure to pay wages owing solely under federal law (*e.g.*, overtime at rates that include certain bonuses), also constitutes a violation of *state* law based on Oregon's broad definition of "wages," thus entitling them to the more favorable state penalty.

Common mistakes that often result in wage and hour class action suits are final pay violations, misclassification of employees as exempt/non-exempt, misclassification of employees as independent contractors, improper payroll deductions, failing to provide meal and rest breaks, working off-the-clock, failure to pay commissions and bonuses, and improper calculation of overtime.

Congress recently enacted the *Class Action Fairness Act of 2005*, Public Law 109-2, 119 Stat. 4. The Act allows defendants to remove state class actions to federal court when there is the potential for at least 100 members in the class and the compensation sought exceeds \$5 million. Employers typically prefer to be in federal rather than state court for a variety of reasons, the most important of which may be that federal courts are more reluctant to certify cases as class actions than state courts. On the other hand, Oregon's class action procedure provides some distinct benefits to employers not available in federal court. For example, plaintiffs must provide at least 30 days' notice before filing a state class action, after which defendants have an opportunity to "cure" the alleged violation and potentially avoid paying plaintiffs' attorney fees.⁹ Employers must act quickly, however, to take advantage of this procedure. In addition, Oregon law limits the amount of the judgment entered against the defendant after a trial to the total sum of the certified claim forms actually filed by the plaintiffs.¹⁰ By comparison, under federal law, the judgment can include the full amount of the damages of *all* of members of the class, regardless of whether or not those individuals file a certified claim form with the court. This is not true for a "collective action" under the FLSA.

LESSON

Employers with multiple employees in a single job classification are at higher risk of being targeted for class action wage and hour violations. Employers that administer their payroll from out of state are also particularly vulnerable to final pay problems due to the short time limits for paying final pay in most states. To reduce the likelihood of being a class action target, employers should review their wage and hour policies on a regular basis to ensure compliance with federal

pay employees immediately upon termination liable for final pay penalties even though employees were hired by purchaser with no break in service).

⁸ *See, Wilson v. Smurfit Newsprint Corp., supra* (employer that makes illegal deductions from final pay liable for penalty wages under ORS 652.150 (up to 30 days' wages) and ORS 652.615 (\$200 penalty). The failure to pay overtime may also result in double penalties where the employer fails to remedy the overtime violation by the time the employee terminates. In addition to liability for the unpaid wages, the employer may be liable for an overtime penalty of either liquidated damages of up to twice the amount of unpaid overtime (under federal law) or up to 30 days' wages (under state law), plus an additional penalty of up to 30 days' wages for the final pay violation (under state law).

⁹ ORCP 32H and I.

¹⁰ ORCP 32F(2).

and state law and act promptly to correct any wage and hour violations discovered, including violations affecting former employees.

- **Independent Contractor Definition (2005 Oregon SB 323/HB 2446, Amending ORS 670.600, 670. 605)**

This law is intended to clarify the definition of “independent contractor” for Oregon workers’ compensation, unemployment, tax, and contractor licensing purposes, and limit the criteria needed to qualify. As it affects employers, the law is not a significant change from prior law.¹¹

The misclassification of employees as independent contractors remains a common and potentially costly mistake. Employers often wish to retain workers as independent contractors as opposed to employees on short-term projects, to avoid the payment of cash compensation or benefits, or to accommodate a worker’s request. However, state and federal laws narrowly define the circumstances under which independent contractor status is available, and employers have certain duties to their employees under state and federal law.

The failure to properly characterize those individuals who meet the definition of “employee” could have serious consequences. Both federal and state laws require payment of minimum wage and overtime to non-exempt employees, and a minimum salary to exempt employees

¹¹ The following criteria must be met to qualify:

- (1) The individual must be free from direction and control of the company in means and manner of work (subject only to company’s right to specify desired results).
- (2) The individual meets at least three of the following criteria (showing that the individual is customarily engaged in an independently established business):
 - a. The individual maintains a business location that is either (i) separate from the business or work location of the person for whom the services are provided, or (ii) in a portion of the individual’s residence that is used primarily for business.
 - b. The individual bears the risk of loss related to the business or the provision of services as shown by factors such as: (i) entering into fixed price contracts; (ii) being required to correct defective work; (iii) providing service warranties; or (iv) maintaining indemnification agreements, liability insurance, bonds or E&O liability insurance.
 - c. The individual provides contracted services for two or more different persons within a 12-month period, or routinely engages in business advertising, solicitation or other marketing efforts reasonably calculated to obtain new contracts to provide similar services.
 - d. The individual makes significant investment in his/her business through means such as: (i) purchasing tools or equipment; (ii) paying for the premises or facilities where services are provided; or (iii) paying for licenses, certificates or specialized training required to perform the services.
 - e. The individual has the authority to hire and fire other persons to provide or assist in providing the services.
- (3) The individual is licensed under ORS chapter 671 (applicable to architects and landscape architects and contractors) or 701 (applicable to construction contractors), as applicable, or responsible for obtaining any licenses or certificates necessary to provide the services.

(subject to certain limited exceptions).¹² In addition, employers must maintain accurate records of all hours worked by non-exempt employees.¹³ The minimum wage, overtime, and salary requirements applicable to employees cannot be satisfied by stock or other forms of non-cash compensation that may be paid to independent contractors. In addition to exposure for minimum wage and overtime, the failure to pay cash compensation may subject a non-complying employer to claims for final pay violations.¹⁴

Non-complying employers may also be required to pay amounts that should have been withheld or paid on the employees' behalf (*e.g.*, taxes, FICA, FUTA, benefit contributions, the value of lost benefits), plus penalties, interest, other damages, and/or attorney fees.¹⁵ Workers sustaining work-related injuries, who would otherwise be required to rely solely on workers' compensation benefits, may be able to assert a negligence claim against the employer. The worker may also assert claims for harassment or discrimination, which are otherwise unavailable to an independent contractor.

Oregon limits the circumstances under which an employer may impose restrictions on competition by employees, but does not similarly limit the ability to restrict competition by independent contractors.¹⁶ The failure to properly classify a worker for purposes of imposing a noncompete may unintentionally result in the failure to satisfy statutory criteria, rendering such an agreement unenforceable.

LESSON

In light of the potential risks, it is important to properly characterize the employment relationship at its inception, and to confirm that the characterization is consistent with the employer's definitions and intent as set forth in any contracts and company benefit plans. Prior to entering into a consulting or independent contractor relationship with anyone, the employer should, at a minimum, confirm the following:

- (1) Whether or not the individual maintains an established business;
- (4) Whether the individual holds a business license;

¹² See 29 USC § 206(a); 29 USC § 207(a) (requiring payment of overtime to non-exempt employees for hours worked in excess of 40 in one work week); ORS 653.261(1) (requiring payment of overtime to non-exempt employees for hours worked in excess of 40 in one work week); 29 CFR 541.600 (establishing a minimum salary of \$455 per week for exempt employees, subject to limited exceptions); ORS 653.025 (establishing the minimum wage in Oregon); ORS 653.010(9) (defining "salary" under Oregon law as no less than the state minimum wage multiplied by 2,080 hours per year, then divided by 12 months). The current minimum wage under federal law is \$5.15. The minimum wage in Oregon is \$7.50, effective January 1, 2006.

¹³ 29 USC § 211(c); ORS 653.045(1)(b).

¹⁴ See ORS 652.140.

¹⁵ See, *e.g.*, *Vizcaino v. Microsoft*, 173 F3d 713, *amended*, 184 F3d 1070 (9th Cir 1999), *cert. denied*, 528 US 1105 (2000).

¹⁶ See ORS 653.295.

- (5) Whether or not the individual maintains a business location;
- (6) Whether or not the individual works for any other individual or entity and, if so, in what capacity;
- (7) Whether the individual owns or has rights to the information, equipment and services to be provided;
- (8) Whether the individual carries business insurance.

It is important to remember that the foregoing factors and considerations are not exhaustive. In each case, the employer must make a determination based on the particular facts.

2. TITLE VII UPDATE

- **Employers Must Prevent Harassment by Third Parties**

The Ninth Circuit recently confirmed that employers have an affirmative duty to prevent harassment by third parties. In *Galdamez v. John Potter, Postmaster General*,¹⁷ the Ninth Circuit granted a new trial to an Hispanic woman, Galdamez, who had alleged race, color, and/or national discrimination against the Postal Service after she endured three years of criticism and harassment from the town's citizens and customers while acting as postmaster. Galdamez alleged that her managers rebuffed her reports of harassment and requests for assistance. The court ruled that the Postal Service had a duty to investigate and remedy actionable harassment by customers and community members, because an employer may be held liable for third-party harassment of its employees "where it ratifies or condones the conduct by failing to investigate and remedy it after learning of it."

LESSON

This hostile environment theory of employer liability asserted by *Galdamez* is grounded in negligence and ratification, rather than intentional discrimination. Employers on notice of any type of illegal discrimination by customers, vendors or other third-parties must take appropriate action to stop it. A failure to act to protect employees may be interpreted as condoning discriminatory behavior and thereby creating a hostile environment at work.

- **FAVORITISM CAN CONSTITUTE SEXUAL HARASSMENT**

A supervisor who dates a subordinate can spell trouble for an employer. If the relationship does not work out, the subordinate may contend the relationship was not consensual and claim sexual harassment. In addition, the co-workers of the subordinate may claim that the supervisor showed favoritism toward the paramour. While the co-workers typically have no actionable sex discrimination claim (because both men and women are equally disadvantaged by the supervisor's favoritism toward the paramour), the Court may look beyond the obvious scenario

¹⁷ 415 F3d 1015, 2005 WL 1653618 (9th Cir 2005).

when the plaintiff alleges a pattern and practice of favoritism that results in a hostile environment.

In *Miller v. Department of Corrections*,¹⁸ the chief deputy warden at a state prison had overlapping affairs with three female subordinates over a five-year period. Those involved were not discreet and the affairs were common knowledge at the workplace. The plaintiffs, two female employees, alleged that the warden gave preferential treatment to his paramours. The California Supreme Court stated that while isolated instances of favoritism by a supervisor toward an employee with whom the supervisor is conducting a consensual sexual affair ordinarily would not constitute sexual harassment, “when sexual favoritism in the workplace is sufficiently widespread it may create an actionable hostile work environment in which the demeaning message is conveyed to female employees that they are viewed by management as ‘sexual playthings’ or that the way required for women to get ahead in the workplace is by engaging in sexual conduct with their supervisors or the management.”

LESSON

This case is important because it expands the scope of a sexual harassment claim in California where there is a pattern and practice of favoritism toward paramours that disadvantages co-workers who are not sexually involved with the boss. Even with the absence of complaints, employers should be wary of romantic relationships between supervisors and subordinates, especially when there has been a series of relationships with co-workers.

3. MANDATORY RETIREMENT

In January of this year, the EEOC filed a class action lawsuit¹⁹ in Chicago, alleging that a law firm operating as a partnership violated the Age Discrimination in Employment Act (ADEA) in 1999 when it downgraded²⁰ and expelled 30+ former partners, most of whom were in their late 50s or early 60s. The EEOC seeks to vindicate the rights of all other former partners who involuntarily retired since 1978 pursuant to the firm’s mandatory retirement policy. Although the ADEA only prohibits discrimination against “employees,” the EEOC’s position is that:

Whatever titles [the firm] had decided to give these lawyers partner, counsel, or otherwise our investigation indicated that they had no voice or control in governance of the firm and that they could be and were fired just like any other employees without notice and without the vote or consent of their fellow attorneys. A small self-perpetuating group of managers at the top ran everything, and that was it end of story.²¹

¹⁸ 2005 WL 1661190 (Cal 2005).

¹⁹ CA No. 05 C 0208 (ND Ill 2005).

²⁰ The partners were downgraded to “senior counsel” or “counsel” status.

²¹ EEOC Press Release dated January 13, 2005 (quoting EEOC Regional Attorney John C. Hendrickson), <http://www.eeoc.gov/press/1-13-05.html>.

Although no individual partners filed a charge of discrimination, the EEOC began its investigation after the law firm told news media that it had demoted partners to create opportunities for younger lawyers and referenced its mandatory retirement age.²²

LESSON

Employers with mandatory retirement policies covering partners, shareholders, and others deemed “non-employees,” may inadvertently be violating age discrimination laws. “In most circumstances, individuals who are partners, officers, members of boards of directors, or major shareholders will not qualify as employees.”²³ However, “an employer may not evade the strictures of Title VII [and other employment laws] simply by labeling its employees as ‘partners.’”²⁴

The mere fact that a person has a particular title--such as partner, director, or vice president--should not necessarily be used to determine whether he or she is an employee or a proprietor. * * * Nor should the mere existence of a document styled “employment agreement” lead inexorably to the conclusion that either party is an employee.²⁵

An individual’s status depends on whether “the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization’s control. If the individual is subject to the organization’s control, he/she is an employee.”²⁶ In determining an individual’s status, the EEOC considers the following factors:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual’s work;
- Whether and, if so, to what extent the organization supervises the individual’s work;
- Whether the individual reports to someone higher in the organization;
- Whether and, if so, to what extent the individual is able to influence the organization;
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;
- Whether the individual shares in the profits, losses, and liabilities of the organization.²⁷

²² EEOC Press Release dated June 9, 2005, <http://www.eeoc.gov/press/6-9-05.html>.

²³ See *EEOC Compliance Manual*, <http://www.eeoc.gov/policy/docs/threshold.html#2-III-A-1-d>.

²⁴ *Hishon v. King & Spalding*, 467 US 69, 79, n. 2 (1984) (Powell, J., concurring).

²⁵ *Clackamas Gastroenterology Associates, P. C. v. Wells*, 538 US 440, 450 (2003).

²⁶ See footnote 21, *supra*.

²⁷ *Id.*; see also, *Clackamas Gastroenterology*, 538 US 448-450 (adopting EEOC guidelines).

4. AMERICANS WITH DISABILITIES ACT (ADA) UPDATE

- **EEOC Guidance on Association Provision of ADA**

This year, the EEOC issued guidance on a seldom-used provision of the ADA that prohibits employers from discriminating against an applicant or employee who has a known association with a disabled individual.²⁸ A familial relationship with the disabled individual is not required.

The prohibition covers hiring, firing, and other terms, conditions, and privileges of employment.²⁹ However, the association provision does not impose an obligation on the employer to provide a reasonable accommodation to a person without a disability due to that person's association with someone who has a disability.

The following acts are considered discriminatory under the association provision:

- Firing or refusing to hire someone based on concerns that the individual will acquire a condition from a family member or other individual with whom he/she has a relationship;
- Refusing to provide health insurance for an employee's family member with a disability when the employer generally provides health insurance for employee dependents;
- Harassing someone based on the individual's association with a person with a disability;
- Providing lesser benefits to someone who has a relationship or association with an individual with a disability than those provided to all other employees;
- Firing, refusing to hire, or denying any benefit or privilege of employment to someone because of concern that the employer's image will be negatively affected by an applicant's or employee's association with individuals with disabilities (for example, discriminating against an employee who provides volunteer services for people with HIV/AIDS or psychiatric disabilities).

LESSON

Consideration of an individual's off-duty associations is generally a bad idea. In addition to the prohibition under the ADA, it is unlawful in Oregon to discriminate against applicants and

²⁸ EEOC Questions and Answers About the Association Provision of the Americans with Disabilities Act, http://www.eeoc.gov/facts/association_ada.html.

²⁹ For example, an employer may not refuse to hire someone because of an unfounded fear that the individual will be excessively absent or unproductive because of the need to care for a child with a disability.

employees based on the race, religion, color, sex, national origin, marital status or age of any other person with whom an employee or applicant associates.³⁰

- **EEOC Guidance on Cancer as a Disability**

This year, the EEOC released guidance on when to treat cancer as a “disability” under the ADA.³¹ Cancer is a disability when it or its side effects substantially limit(s) one or more of a person’s major life activities. For example, a person who receives radiation treatment for cancer that causes her to experience extreme nausea and constant fatigue, such that she must take frequent breaks at work and must rely on her husband and children to do household chores, has a disability because the cancer substantially limits her ability to care for herself. Even when the cancer itself does not substantially limit any major life activity (such as when it is diagnosed and treated early), it can lead to the occurrence of other impairments, such as depression, that may qualify as disabilities. Cancer also may be a disability if it was substantially limiting at a prior time, in which case the person has a record of a disability. Lastly, cancer is a disability when it does not significantly affect a person’s major life activities, but the employer treats the individual as if it does.

LESSON

Cancer is treated like any other impairment under the ADA. Consequently, the same rules applicable to medical inquiries and examinations limit an employer’s ability to inquire about an individual’s history of or treatment for cancer. That means an employer cannot ask an applicant whether she has ever had cancer; whether she is undergoing chemotherapy or radiation or taking medication used to treat or control cancer; or whether she has ever taken leave for surgery or medical treatment, or how much sick leave she has taken in the past year. Moreover, if an applicant voluntarily reveals that she has cancer, the employer may not ask any questions about the cancer, its treatment, or prognosis. However, if an employer reasonably believes that an accommodation will be required, the employer may ask whether the applicant will need an accommodation and, if so, what type. The employer must keep confidential any information an applicant discloses about a medical condition. An employer may make disability-related medical inquiries and examinations of existing employees only if they are job related and consistent with business necessity.³²

- **Proving the Existence of a Disability in the Ninth Circuit**

The Ninth Circuit recently issued a blow to employers by holding that no comparative or medical evidence is required to establish a question of fact sufficient to defeat summary judgment regarding the existence of disability. This means that a plaintiff can establish he or she suffers from an ADA-protected disability merely by submitting a declaration, containing sufficient detail, that the impairment substantially impairs a major life activity. The plaintiff in *Head v.*

³⁰ ORS 659A.030(a) and (b).

³¹ EEOC Questions and Answers About Cancer in the Workplace and the Americans with Disabilities Act (ADA), <http://www.eeoc.gov/facts/cancer.html>.

³² 42 USC § 12112(d)(4)(A)(1994); 29 CFR 1630.14(c)(1998).

*Glacier Northwest, Inc.*³³ avoided summary judgment on the issue of whether his depression and bi-polar disorder qualified as an ADA-protected disability by submitting an affidavit that detailed how his condition impaired the major life activities of sleeping, interacting with others, thinking, and reading. The Ninth Circuit also held that, to make out an ADA discrimination claim, an employee need prove only that his disability was a “motivating factor” in the employer’s decision to terminate or take other adverse action against him.

LESSON

ADA discrimination law continues to evolve. While the Supreme Court may be restricting the scope of the ADA, this does not appear to be true in the Ninth Circuit. Employers also need to be aware that the ADA may come into play even with employees who are not generally viewed as “disabled” under the common meaning of the word (such as associates of the disabled, those diagnosed with cancer, and even those without traditional medical evidence of a disability).

5. OFCCP UPDATE

- **Federal Contractors Subject to New Rule on Record-Keeping With Respect to Internet Applicants**

The Office of Federal Contracts Compliance (OFCCP) has published a final rule on data collection and recordkeeping with respect to internet job applicants.³⁴ The final rule, which applies only to certain federal contractors, is effective February 6, 2006.

Federal contractors for some time have been required to solicit race and gender data, and comply with other recordkeeping requirements with respect to job applicants. The OFCCP requires this data so that it can monitor the contractors’ hiring practices for potential discrimination. The OFCCP has studiously avoided defining the term “applicant,” stating on a recent EO Survey Form that “[t]he concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunity. This interest might be expressed by completing an application form, or might be expressed orally, depending upon the employer’s practice.”

With the increased use of e-mail and internet job sites such as Monster.com, federal contractors have complained about the recordkeeping burden associated with the potentially large number of “applicants” and the ambiguity surrounding the definition of “applicant” in the context of these relatively new electronic resources. The OFCCP responded to these concerns by issuing the new rule defining “Internet Applicants.” The rule is intended to assist federal contractors in determining the pool of job seekers for whom it must solicit data and retain records, and appears to provide some useful tools.

The new rule defines an “Internet Applicant” as meeting four criteria:

³³ 413 F3d 1053 (9th Cir 2005).

³⁴ *Obligation To Solicit Race and Gender Data*, 50 Fed. Reg. 58,945, 58963 (Oct. 7, 2005) (to be codified at 41 CFR Part 60-1).

- (i) The individual submits an expression of interest in employment through the Internet or related electronic data technologies;
- (ii) The contractor considers the individual for employment in a particular position;
- (iii) The individual's expression of interest indicates the individual possesses the basic qualifications for the position; and
- (iv) The individual at no point in the contractor's selection process prior to receiving an offer of employment from the contractor, removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the position.³⁵

If, as to a particular position, a contractor considers expressions of interest submitted both via the internet/electronic methods and traditional methods, the contractor should apply the Internet Applicant rule to determine its data collection and record-keeping obligations for all applicants for the position.³⁶ For example, if the contractor posts an advertisement on its web-site for an engineer position and encourages applicants to apply via the website or send a hard copy resume to the HR manager, all applicants for the position would fall under the Internet Applicant rule.

The new rule contains an important concession to employers by including within the definition only those individuals the contractor actually considers for employment in a particular position. "Considering" the individual means the contractor "assessed the substantive information provided in the expression of interest with respect to any qualifications involved with a particular position."³⁷ The rule allows a contractor to establish procedures by which it will not consider certain job seekers. Specifically, the rule allows employers to "establish a protocol under which it refrains from considering expressions of interest, such as unsolicited resumes, that are not submitted with respect to a particular position."³⁸

To qualify as an "Internet Applicant" under the new rule, the individual must indicate that he/she possesses the "basic qualifications for the position." The new rule defines basic qualifications as qualifications the contractor has advertised (posted on its web site) or, if the employer does not advertise, qualifications the contractor has established before considering anyone.³⁹ The basic qualifications must be non-comparative (*e.g.*, require that the job-seeker be among the top-five

³⁵ 41 CFR 60-1.3(1).

³⁶ 41 CFR 60-1.3(2).

³⁷ 41 CFR 60-1.3(3).

³⁸ If there are a large number of expressions of interest, the contractor can use "data management techniques" such as random sampling or absolute numerical limits to reduce the number of expressions of interest to be considered. Thus, an employer that searches an electronic resume database and retrieves thousands of resumes, need not track the race and gender of all of the individuals whose resumes are retrieved if it first uses certain neutral procedures to narrow the pool for further consideration. Such neutral procedures may include, for example, selecting only every third resume for consideration or looking at just the first fifty resumes.

³⁹ For example, if the employer does not advertise a position but instead searches online resume banks, the employer must establish the criteria in advance and make a record of the criteria prior to considering any expression of interest for that particular position. 41 CFR 60-1.3(4).

job-seekers in terms of years of experience), objective, and relevant to the performance of the particular position.

The rule allows employers can further narrow the potential applicant pool by excluding those job seekers who are unresponsive to repeated communications from the contractor about interest in the position, or use exclusionary data, such as salary requirements or preferences as to type of work or location of work, provided the contractor has a uniformly and consistently applied policy or procedure of not considering similarly situated job seekers.⁴⁰

Finally, the new rule provides guidance on the types of records the federal contractor must retain with respect to on-line resumes or internal resume databases. For example, when a federal contractor uses an external resume database, the rule requires the contractor to maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor.⁴¹

LESSON

Federal contractors should evaluate their current methods for collecting applicant data. Employers should update their processes to comply with the new rule and to take advantage of some of the techniques the new rule allows for narrowing the pool for which data collection and recordkeeping are required.

6. NLRB UPDATE

- **Cintas Corp. and Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC (UNITE)**⁴²

This year the National Labor Relations Board found that a broadly worded confidentiality provision contained in an employee handbook violated Section 8(a)(1) of the National Labor Relations Act (NLRA).⁴³ The union challenged the following provisions, claiming that they had a chilling effect of the employees' right to discuss the terms and conditions of their employment:

- (i) At page 5 - Our business is highly competitive. Fortunately, we have an advantage over our competition. That advantage is our people "partners," as we call ourselves.

⁴⁰ 41 CFR 60-1.3(5).

⁴¹ 41 CFR 60-1.12(a).

⁴² 244 NLRB No. 118 (June 30, 2005).

⁴³ Section 8(a)(1) of the NLRA provides: "It shall be an unfair labor practice for an employer-- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 USC § 158. Section 7 provides that: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...." 29 USC § 157.

- (i) At page 16 - We honor confidentiality. We recognize and protect the confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters.
- (ii) At page 20 - Examples of behavior that could result in disciplinary action are:

...violating a confidence or unauthorized release of confidential information.

The NLRB concluded that these provisions "could reasonably be construed" to prohibit employees from discussing their wages or terms and conditions of employment with other employees or the union. Although Cintas was aware that employees were discussing wages and terms of employment in the context of a union organizing campaign, it did not apply the confidentiality policy to prohibit such communication or discipline employees for engaging in it. The NLRB nevertheless found a violation of Section 8 and issued a cease and desist order.

LESSON

Despite the widespread use of broad restrictions on disclosure of confidential information, the *Cintas* decision makes clear that such policies violate the NLRA if they can reasonably be construed by employees as prohibiting conduct protected under Section 7. Employers should, therefore, review and, if necessary, modify their confidentiality policies, even if they have never been applied to prohibit employees from discussing wages, benefits, or other terms and conditions of employment.

- **Guardsmark, LLC and Service Employees International Union Local 24/7⁴⁴**

This year, the National Labor Relations Board considered the following three work rules instituted by Guardsmark, a private security firm:

GENERAL ORDERS, Paragraph 5: While on duty you must follow the chain of command and report only to your immediate supervisor. If you are not satisfied with your supervisor's response, you may request a meeting with his or her supervisor. If you become dissatisfied with any other aspect of your employment, you may write the Manager in Charge or any member of management. Written complaints will be acknowledged by letter. All complaints will receive prompt attention. Do not register complaints with any representative of the client.

GENERAL ORDERS, Paragraph 18: Solicitation and distribution of literature not pertaining to officially assigned duties is prohibited at all times while on duty or in uniform, and any known or suspected violation of this order is to be reported to your immediate supervisor immediately.

REGULATIONS, Paragraph 4: While on duty you must NOT ... fraternize on duty or off duty, date or become overly friendly with the client's employees or with co-employees.

⁴⁴ 344 NLRB No. 97 (June 7, 2005).

The union complained that all three rules unlawfully restricted the employees' exercise of Section 7 rights. The NLRB agreed that the first rule requiring employees to lodge complaints through the chain of command "explicitly trenches upon the rights of employees under Section 7 to enlist the support of an employer's clients or customers regarding complaints about terms and conditions of employment." Guardsmark asserted that the "no solicitation in uniform" rule was only meant to apply when the company's insignia was not camouflaged. The NLRB found that employees would not construe the rule so narrowly. Guardsmark's only claimed justification for the rule was that solicitation while in uniform would suggest to the public that the company was providing unlawful assistance to a labor organization. The NLRB reasoned that the company's stated justification was a defense to an allegation that had not been made by the union (*i.e.*, that employees should be permitted to engage in solicitation with the employer's business insignia exposed). Accordingly, the NLRB found the "no solicitation in uniform" rule violated Section 8. The NLRB upheld the "no fraternization" rule, finding that it was designed to provide safeguards to avoid compromising security due to personal entanglements and was, therefore, justified.⁴⁵

LESSON

The NLRA protects *all* employees, not just union members. Consequently, all employers are subject to unfair labor practice charges for adopted work rules that infringe on Section 7 rights. Employers should periodically review policies and procedures to make sure that they do not infringe on employees' rights under the NLRA.

- **AFL-CIO Split and Its Effect on Union Organizing Activity**

Last summer, three international unions – the Teamsters, the Service Employees International Union, and the United Food and Commercial Workers -- left the AFL-CIO, taking with them more than 4 million members and more that \$28 million in annual dues. Many had complained for years that the AFL-CIO wasn't doing enough to limit the decline in union membership or make unions relevant in today's workplace.⁴⁶ The departing unions joined with UNITE-HERE to form Coalition to Win (CTW), which represents roughly 5.4 million unionized employees in the United States.

At its founding convention, CTW announced that it plans to target more than 50 million non-union workers in industries including health care, retail, hospitality, construction, transportation, property services, food production and utilities. The CTW also announced that it intends to spend \$750 million annually on organizing activities.

In response to CTW's stated plans, the AFL-CIO has also increased its organizing activities. The SEIU, in particular, has focused on organizing since the split. In contrast to the other unions that have seen their memberships decline or hold steady in past years, the SEIU's membership has

⁴⁵ One NLRB member dissented, pointing out that the rule already mentions dating, making it likely that workers would understand fraternization to mean something else ("the primary meaning of the term 'fraternize' * * * is 'to associate in a brotherly manner,' *** and that kind of association is the essence of workplace solidarity.").

⁴⁶ In fact, last year, only 8% of private-sector workers were unionized.

soared from 625,000 in 1980 to 1.8 million today. This is due, in part, to the increase in service sector workers, who hold jobs that cannot easily be outsourced (caretakers, bus drivers, etc.). In addition, the SEIU has changed its tactics, for example, by negotiating neutrality agreements, targeting specific industries, and making organizers more accountable.

LESSON

It is too early to determine any long lasting effect of the unions' split from the AFL-CIO. Unions have traditionally supported democratic candidates and lobby around such critical issues as health care costs, pension benefits, and pay raises, none of which have fared well under a republican regime. It is unclear whether the split is likely to have an effect on the next presidential campaign or on intermediate elections. What is clear is that some unions are rethinking their strategy. In Oregon we have already seen the SEIU targeting long-term care providers (nursing homes and assisted living facilities) for organizing, with some success.

Employers that hope to avoid unionization of their workforce need to understand the needs of their employees and be responsive to them. Satisfied employees have no need for a union. Above all, employers must be on the lookout for signs of organizing and be ready with their own campaign.

7. SUMMARY OF PROTECTED LEAVES IN OREGON

Although these leaves are not new in 2005, there have been changes to Oregon leave laws that expanded protections to employees. The following is a brief summary of Oregon laws affording employees a protected leave of absence from work:

- **OFLA**

The Oregon Family Leave Act (OFLA), which was passed by the 1995 Legislature, requires employers of 25 or more employees to provide their workers with a job-protected leave of absence of 12 and, in some cases, up to 36 weeks, for their own serious health condition, including conditions related to pregnancy and childbirth (medical leave), to care for a family member with a serious health condition (family leave), following the birth, adoption, or placement of a foster child (parental leave), and to care for a sick child (sick child leave). To qualify for parental leave, the employee must be on the payroll for the preceding 180 calendar days (paid or unpaid). To qualify for all other OFLA leave (including pregnancy disability leave), the employee must have worked an average of at least 25 hours per week during the preceding 180 calendar days.

- **Firefighters Leave**

Volunteer firefighters of a rural fire protection district, and firefighters employed by a city or private firefighting service, who request a leave of absence to perform emergency service pursuant to ORS 476.510 to 476.610 may be granted an unpaid leave of absence by an employer until release from such service permits the employee to resume the duties of employment. Once a leave of absence is granted, the employee's job is protected. When service is complete, the

employee is entitled to reinstatement to the former or an equivalent position, without loss of seniority, vacation credits, sick leave credits, service credits under a pension plan, or any other accrued right or benefit.

- **Leave to Donate Bone Marrow**

Employees who work an average of at least 20 hours per week may use accrued paid leaves to donate bone marrow.⁴⁷ The employee may determine the length of the leave, not to exceed the lesser of employee's accrued paid leave or 40 work hours, unless the employer agrees otherwise. The employer may require medical verification of the purpose and length of the leave. An employer may not retaliate against an employee who requests or uses accrued paid leave under this law.

- **Leave to Serve in State Militia**

A member of any state militia who is called into active service is entitled to an unpaid leave of absence until release from such active service permits the employee to resume the duties of employment.⁴⁸ Employers must provide reinstatement to the employee's former position or an equivalent position without loss of seniority, vacation, sick leave, service credits under a pension plan, and any other accrued employee benefit. Employees released from duty must report to work within seven calendar days.

- **Leave for State Legislative Service**

This law allows any member of the Legislative Assembly whose employment is "interrupted by reason of attendance upon regular or special sessions of the Legislative Assembly or the performance of official duties as a member of the Legislative Assembly" to take an unpaid, job-protected leave of absence.⁴⁹ The employee is required to give notice at least 30 days before a regular session or as soon as it is reasonably apparent that a special or emergency session is to be called. The employee must be reinstated to the position and benefits that would have been afforded if there had been no break in service. Employees who take leave are protected from discrimination, harassment, discipline, discharge, intimidation, or coercion based of their legislative service.

- **Jury Duty Leave**

Employees summoned to jury service may not be discharged, threatened, intimidated or coerced because of such service.⁵⁰

⁴⁷ ORS 659A.312.

⁴⁸ ORS 399.230

⁴⁹ ORS 171.120-171.125

⁵⁰ ORS 10.090.

- **Workers' Compensation Leave**

Employers absent due to work-related injuries must be reinstated to their former positions or, if they are disabled from performing their regular duties, reemployed in a position that is available and suitable.⁵¹ Employers cannot discipline workers for absences due to a compensable injury, so long as the time off work is covered by time loss compensation or the absences medically certifiable by the attending physician in connection with the compensable injury.⁵²

- **Crime Victims Leave**

This law permits crime victims⁵³ to take an unpaid leave of absence to attend criminal proceedings unless the leave would result in an undue hardship to the employer's business.⁵⁴ Employees are eligible if they worked an average of at least 25 hours per week in the 180 days preceding the leave.⁵⁵ The employee may use any accrued paid vacation or any other paid leave that is offered by the employer in lieu of vacation during the period of leave. An employer who denies protected leave or discharges or threatens to discharge a worker who takes such leave commits an unlawful employment practice.⁵⁶

8. BENEFITS UPDATE

- **Deadline for Automatic Rollover of 401(k) Distributions**

Beginning March 28, 2005, retirement plans can no longer make "cashout" distributions that exceed \$1,000. A "cashout" distribution occurs after a participant in a qualified plan (401(k), profit sharing, etc.) terminates service. Until recently, a plan could distribute a benefit of \$5,000 or less without the participant's consent. This allowed the plan to eliminate small benefit amounts from the plan, thereby simplifying recordkeeping and reducing the administrative costs of the plan. Participants with benefits exceeding \$5,000 (and sometimes their spouses) must give written consent before a plan may make a distribution.

The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA)⁵⁷ amended the cashout provisions. EGTRRA requires a plan to open an IRA and rollover any terminated participant's benefit amounts between \$1,000 and \$5,000 if the participant does not affirmatively elect a distribution. The selection of the IRA provider and the initial investment in the IRA are fiduciary activities under ERISA. The DOL recently issued guidance to plan administrators for meeting these new responsibilities.

⁵¹ ORS 659A.043, 659A.046.

⁵² OAR 839-006-0117(3).

⁵³ A "crime victim" is "a person who has suffered financial, social, psychological or physical harm as a result of a person felony, as defined in the rules of the Oregon Criminal Justice Commission, and includes a member of the immediate family of the person." ORS 659A.190(2).

⁵⁴ ORS 659A.192.

⁵⁵ ORS 659A.190(4).

⁵⁶ ORS 659A.194.

⁵⁷ 26 USC § 1, *et seq.*

Plan sponsors must amend their calendar year plans by December 31, 2005, to comply with the EGTRRA changes that go into effect on March 28, 2005. Plans with non-calendar years may have earlier or later deadlines. All plans have a choice of methods they can use to comply with the automatic rollover provisions for distributions occurring after March 27, 2005:

(1) Reduce the Cashout Threshold to \$1,000

Plans can avoid the new rules by reducing the plan's automatic cashout level from \$5,000 to \$1,000 because the automatic rollover requirement applies only to cashout distributions that exceed \$1,000. The plan could then continue to cash out participants with benefits less than \$1,000 without change. However, the plan would be required to retain participants with benefits that exceed \$1,000. This may increase the plan's administration costs.

(2) Comply with the Safe Harbor Rules

The Safe Harbor in the DOL Regulations has several elements.

- a. Rollover Amount: The rollover to the IRA cannot exceed \$5,000 (plus any prior rollovers to the plan). The plan may apply the safe harbor to all distributions under that amount, including those less than \$1,000 (if the plan elects to automatically rollover these distributions, instead of cashing them out to the participant).
- b. IRA: The plan must automatically rollover the distribution to an Individual Retirement Account or Individual Retirement Annuity.
- c. Written Agreement: The plan must enter into a written agreement with the IRA custodian or trustee that specifically provides (i) for the investment of the rollovers in permitted investments (see (d) below), and (ii) that fees charged will not exceed the safe harbor limits (see (e) below).
- d. Investments: The plan must invest the rollover in a product designed to preserve principal, offer a reasonable rate of return, and maintain liquidity. Examples offered by the DOL are money market funds, certificates of deposit, or other "stable value" products.
- e. Fees and Expenses: The IRA provider cannot charge more for the automatic rollover accounts than they charge for similar regular rollover accounts and the fees charged must be reasonable.
- f. Disclosures: The plan administrator must give participants a written disclosure describing the plan's automatic rollover provisions. The disclosure can be part of the Summary Plan Description (SPD) or a Summary of Material Modifications to the SPD. The disclosure must include an explanation of the IRA investment product, how the plan will allocate expenses to the IRA, and the name, address and telephone number

of the plan contact who can answer participants' questions about the plan's automatic rollover provisions. It must also identify the IRA provider and the fees the provider will charge.

- g. Prohibited Transaction Relief: If the Plan sponsor selects an affiliated IRA provider, or provides the IRA itself (e.g., the plan sponsor is a bank, brokerage firm, etc.), the automatic rollover is a prohibited transaction. The regulations offer relief if the sponsor meets some additional requirements.

(3) Offer "Deemed IRAs"

Under EGTRRA, a "deemed IRA" is a separate account provided by the plan that is treated as an IRA. If the plan does not use a separate trust to establish the IRA accounts, an administrative violation in one of the IRAs will disqualify the entire plan. However, if the plan uses a separate trust, the DOL believes that the plan fiduciaries retain fiduciary liability for monitoring the IRA account to ensure it complies with the qualification requirements applicable to IRAs. For example, the DOL position would mean an IRA that fails to make a required minimum distribution is a breach of fiduciary duty by the plan's fiduciaries. Until the DOL explains its position more completely in regulations, the risk of liability associated with this option remains substantial.

LESSON

Unless the employer's plan satisfied the requirements of the Safe Harbor rules as of March 27, 2005, no cashout distributions (between \$1,000 - \$5,000) should be made until the plan determines how to respond to the new rules. All of the options discussed above require a plan amendment, which must be adopted by the end of the first plan year occurring after March 28, 2005 (December 31 for a calendar year plan). The plan's Summary Plan Description and distribution explanation notice will also require revisions. If the plan will offer automatic rollovers, the plan sponsor will need to find a financial services provider willing to take the small rollover accounts and negotiate an agreement with them that meets the conditions of the DOL Regulations.

- **Roth 401(k) Contributions**

Beginning in 2006, 401(k) plans may allow participants to treat some or all of their 401(k) salary deferral contributions as "Roth" contributions. Roth contributions are not excluded from taxable income at the time they are made to the plan, like a traditional salary deferral. Instead, the contribution is post-tax, but withdrawal and accumulated earnings from the plan may be withdrawn income tax-free.

Roth contributions are subject to the same 401(k) dollar limitation (\$15,000 in 2006). Roth contributions are *not* in addition to, but in lieu of regular 401(k) contributions. While Roth

contributions may be advantageous for a few employees in low marginal income tax brackets, most employees are probably better off using pre-tax 401(k) contributions.⁵⁸

Adding a Roth 401(k) creates significant difficulties and additional expense for plan sponsors, increases the likelihood of mistakes, will not increase overall plan contribution limits, and may not provide the best financial return for most employees. Running a 401(k) plan is already a difficult job due to applicable fiduciary duties and strict ERISA and tax codes. Adding a Roth 401(k) feature would increase that burden, as well as the risk and expense of administering a 401(k) plan.

LESSON

Roth IRA accounts make sense for individuals with little or no taxable income that receive very little tax savings contributing to traditional 401(k) or IRAs anyway, and the Roth has the advantage of tax-free growth. Roth IRAs are especially useful in family business situations, where some long-term retirement savings is desirable for the owners' children who are working in the business, but the children are excluded from the 401(k) plan for plan design reasons. Otherwise, there is not any significant advantage to Roth 401(k) accounts that warrant the additional costs and complexity associated with them.

⁵⁸ Consider the following example:

A working couple, both age 35, with combined income of \$100,000 per year, have two children, a home mortgage, and no other deductions. Assume after personal exemptions and itemized deductions they have taxable income of \$75,000, putting them in the 25% federal income tax bracket. If they save \$3,000 per year pre-tax in a 401(k) plan for just 10 years, by age 65, it would grow to \$166,000 at a 7% annual return. They could then withdraw \$22,800 per year for 10 years before the money was depleted. If they were still in the 25% income tax bracket, they would have \$17,100 left each year after taxes. Alternatively, consider what would happen if the couple saved the same \$3,000 in a Roth 401(k).

First, to keep their same current after-tax income, the Roth contribution would have to be reduced to \$2,250, since the income tax on the original \$3,000 would be \$750. By age 65 the Roth account would grow to \$124,500. Over 10 years, they could withdraw \$17,100 per year before depleting the account. No income tax is due on the withdrawals, so they have \$17,100 net.

The net after-tax withdrawal in both cases is \$17,100 per year. In other words, for the same tax rate, there is no advantage to the Roth contribution over the 401(k) contribution. This conclusion holds for any investment return and for contributions made at any age. For the same tax rate, the economic benefit of the Roth is equivalent to the 401(k). However, if the majority of the working couple's retirement income in the above example is their 401(k) savings and Social Security, they will have nowhere near \$75,000 in taxable income in retirement. Even if taxes are increased in future years, it is more likely they will be increased at the upper income levels, and a couple drawing \$40,000 in combined Social Security and 401(k) income will not be in a tax bracket greater than 25%. So, who should contribute to a Roth? Employees with little or no taxable income who wish to save for retirement. But, if they have little or no taxable income, they can contribute up to \$4,000 (the limit in effect for 2005-2007) per year in a Roth IRA. Roth contributions are not limited until an individual has over \$95,000 in adjusted gross income (\$150,000 for joint filers.)

- **Severance Pay as Deferred Compensation**

After Enron, Congress passed several new laws addressing issues that received wide-spread publicity during the Enron collapse. One issue was that executives receiving distributions from nonqualified deferred compensation plans while rank and file employees could not receive distributions from the 401(k) and ESOP plans due to an unfortunately-timed service provider change.

The new statutes added extensive rules and penalties that applied to “deferred compensation,” broadly defined as compensation that the employee has a legally binding right to during one taxable year that is not paid and included in the employee’s income until a later taxable year.⁵⁹ This broad definition reaches all kinds of common employee benefit arrangements, such as stock options, restricted stock, stock appreciation rights and severance plans or arrangements. An employment agreement may offer severance payments under certain circumstances affording the employee a legally binding right to severance pay upon signing the letter or agreement. The severance payments are not made until the conditions are satisfied, which may be many years later. The arrangement, therefore, meets the statutory definition of “deferred compensation” and is subject to the new rules.

Fortunately, Congress did provide some exceptions for certain types of severance arrangements or plans.

- Collective bargaining arrangements that provide for separation pay upon involuntary termination or pursuant to a “window” program, if the arrangement is included in the agreement and resulted from arm’s length negotiations between the employer and representative. Also, the representatives cannot include any organization in which more than half the members are owners, officers, or executives of the employer and the agreement results from good faith bargaining.
- For calendar year 2005 only, payments to non-key employees under severance plans classified as welfare benefit plans under DOL regulations. The regulations describe a welfare severance plan as one that limits benefits to twice the employee’s compensation paid out over no more than 24 months.
- Arrangements providing separation pay upon an involuntary termination or pursuant to a window program if the separation pay (not including certain reimbursements, in-kind benefits and de minimus payments discussed below) does not exceed two times the lesser of the employee’s prior year compensation or the qualified plan compensation limit (for 2005, \$210,000), and the payments are made by December 31 of the second year after the separation occurs.
- Arrangements that include reimbursements for business expenses, outplacement services or moving expenses directly related to the employee’s termination, if paid

⁵⁹ Prop. Treas. Reg. 1.409A-1(b)(1); Notice 2005-1 Q&A-4(a).

by December 31 of the second year after the year in which the employee terminated service.

- Arrangements that entitle employees to in-kind benefits from the employer (for example, free cable service to terminated employees of a cable company).
- Arrangements that entitle employees to reimbursement or payment of benefits that do not exceed \$5,000 (e.g., moving expenses).
- Arrangements that provide payments are completed by the later of 2½ months following the year of termination or 2½ months following the employer's year in which the termination occurred. For example, if the employer and employee both have tax years ending on December 31, and the employer terminates employees on February 1 and November 1, 2006, the exception is satisfied if payments to both terminated employees are completed before March 15, 2007.⁶⁰

Additional rules apply to some participants or regarding interaction with other plans. Substituting a separation plan to replace a deferred compensation plan causes the replacement separation plan to become subject to the deferred compensation rules even if it satisfies an exception. Key employees of publicly-traded companies are required to wait at least six months from termination to receive any payments, which may make it difficult to meet the 2½ month rule discussed above.

If severance arrangements do not meet one of the exceptions, the arrangement must comply with the complex deferred compensation rules. Many typical arrangements will not meet those rules, causing the employee to become subject to a 20% penalty tax on all previously untaxed deferred compensation, including vested but unexercised stock options, stock appreciation rights, restricted stock or other types of incentive compensation.

LESSON

Employers should review all existing severance arrangements, both formal and informal, to ensure they meet one of the exceptions above. Employers should otherwise consult with legal counsel about methods of compliance with the deferred compensation rules.

9. SUPREME COURT HOLDS TIME SPENT DONNING AND DOFFING PROTECTIVE CLOTHING IS COMPENSABLE IN *IBP, INC. V. ALVAREZ*⁶¹

In a landmark decision, the U.S. Supreme Court recently resolved a conflict between two circuit courts regarding the compensability of time spent donning and doffing protective clothing required for work.

⁶⁰ Prop. Treas. Reg. 1.409A-1(b)(4)(i); Notice 2005-1 Q&A-4(c).

⁶¹ 126 S.Ct 514 (November 8, 2005) (decided under the Fair Labor Standards Act of 1938 (FLSA), 29 USC § 201, *et seq.*, as amended by the Portal-to-Portal Act of 1947 (PTPA), 29 USC § 254, *et seq.*

The Supreme Court held long ago that where the donning and doffing of specialized protective gear is an “integral and indispensable part of the principal activities” for which the workers are employed, then the time spent actually changing into and out of that protective gear is compensable under the FLSA.⁶² In *Alvarez*, the Court held that the time spent by employees in a meat-packing plant walking from the locker room to the production area *after* donning protective clothing at the beginning of the workday, and the time spent walking back to the locker room *before* doffing the protective clothing at the end of the workday, is also compensable time. In addition to this “walking” time, the Court held that time spent waiting to don the clothing at the beginning of the workday is *not* compensable, but time spent waiting to doff the clothing at the end of the workday *is* compensable.

The Court recognized that under Section 4(a) of the PTPA, Congress excluded from compensable time under the FLSA (1) time spent walking, riding, or traveling to and from the actual place of performance of the principal activity or activities the employee is employed to perform; and (2) activities that are “preliminary” or “postliminary” to said principal activity or activities, which occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.⁶³ However, the Court stated that under its prior holding in *Steiner v. Mitchell*,⁶⁴ the donning and doffing of required protective gear is *itself* a “principal activity” under Section 4(a) of the PTPA, and the locker room or dressing area where the gear is donned and doffed is the relevant “place of performance” under the same section. Thus, under the Department of Labor’s so-called “continuous workday” rule (which generally defines the workday as “the period between the commencement and completion on the same workday of an employee’s principal activity or activities”),⁶⁵ the workday starts once the employee begins donning the protective clothing and ends when the employee finishes doffing that clothing. Accordingly, the time spent walking from the dressing area to the production area at the beginning of the workday and back again at the end of the workday, as well as any time spent waiting to doff the protective gear at the end of the workday, is all compensable time under the FLSA because it is all part of the “continuous workday.” However, time spent waiting to change *into* the protective gear at the start of the workday is generally *not* compensable, because it is preliminary to the commencement of the principal activity that starts the workday (*i.e.*, preliminary to the act of donning the protective gear).⁶⁶

⁶² *Steiner v. Mitchell*, 350 US 247 (1956) (court held compensable the “time incident to changing clothes at the beginning of the shift and showering at the end, where [employees] must make extensive use of dangerously caustic and toxic materials, and are compelled by circumstances, including vital considerations of health and hygiene, to change clothes and to shower in facilities which state law requires their employers to provide....”). “Principal activities” are the activities for which the employees are employed.

⁶³ 29 USC § 254(a).

⁶⁴ See footnote 4, *supra*.

⁶⁵ 29 CFR § 790.6(b) (2005).

⁶⁶ The Court noted, however, that such pre-donning waiting time might be compensable if the employer *required* the employee to arrive at the changing area at a particular time to begin waiting to don the protective clothing. 126 SCt at 527-28.

LESSON

Employers whose workers are required to wear protective clothing as an integral and indispensable part of their employment should examine their compensation policies to ensure that the following activities are paid: (1) time spent donning the protective clothing at the start of the workday; (2) post-donning walking time required to get from the dressing area to the work area; (3) pre-doffing walking time required to get from the work area to the dressing area; (4) any additional pre-doffing waiting time; and (5) time spent doffing the protective clothing at the end of the workday. Employers should also note that they may be liable for pre-donning waiting time if they *require* their workers to arrive at the locker room or dressing area at a specific time, prior to donning their protective clothing.

10. TERMINATION FOR OFF-DUTY CONDUCT (WEBLOGS)

The increasing popularity of web logs or “blogs”⁶⁷ has created new concerns about off-duty employee conduct.⁶⁸ Blogs are websites where individuals publish diary or journal-like entries on a wide variety of topics that often include comments about work as part of the blogger’s day-to-day activities. It is not unusual for blogs to include derogatory attacks on the employer, offensive statements, or inappropriate pictures. Employers may feel that such content reflects badly on the company, particularly if the employer and/or blogger are easily identified.

While employers may want to react quickly to weblogs deemed inappropriate, regulating conduct that occurs off duty may not be justifiable or lawful. For example, web log entries may contain complaints about the employer’s illegal or unsafe conduct, as well as the employee’s opposition to discrimination, political expression, union sentiments, and/or discussion of terms and conditions of employment, all of which may be protected activity under various whistleblowing, discrimination, and labor laws. On the other hand, employers need not turn a blind eye to an employee’s defamatory statements or disclosure of confidential information.

Examples of Recent Blog-Related Terminations:

- In January of 2005, a Google employee was fired for making comparisons between employment conditions at Google and his former employer, Microsoft.⁶⁹
- A part-time trainer at La Colonia Boxing Club (owned by the City of Oxnard) lost his job after his employer received an anonymous letter from a parent complaining about the contents of his blog. The parent felt that some of the pictures posted were “crude” and some of the conversation “X-rated.” The employee never

⁶⁷ Krysten Crawford, *Practicing Safe Blogging*, CNN Money, <http://money.cnn.com/2005/04/08/technology/personaltech/blogging/> (April 8, 2005) (noting that there are now over 8.5 million blogs, up from 100,000 two years ago, with as many as 40,000 new blogs going online each day).

⁶⁸ D. Michael Henthorne, *What About the Blog? A Familiar Challenge in a New Context*, 13 No. 10 S.C. Emp. L. Letter 2 (July 2005).

⁶⁹ *Id.*

mentioned his job on his blog. He is considering a lawsuit against his employer, which is a public entity.⁷⁰

- A Delta Air Lines flight attendant was fired for posting “inappropriate” pictures of herself and co-workers on her “Diary of a Flight Attendant” blog. She subsequently filed a sex discrimination charge with the EEOC, alleging that male employees with similar online photos were not terminated.⁷¹
- A Microsoft contract employee was fired for publishing pictures of Apple computers being delivered to Microsoft’s corporate headquarters on his blog.⁷²
- (Although there are no publicized terminations to date), Apple Computer obtained a court order seeking the names of bloggers who revealed confidential information about a product in development.⁷³

LESSON

Employers that become aware of potentially harmful blogging need to think twice before taking any disciplinary action against the responsible employee. Acting on off-duty conduct may violate the individual’s rights and play havoc with employee morale. Employers should carefully consider whether to take any disciplinary action after consultation with legal counsel.

⁷⁰ Marjorie Hernandez, *Personal Blog Can Cost You a Job*, Seattle Post-Intelligencer, http://seattlepi.nwsourc.com/business/249880_blogworkers28.html (November 28, 2005).

⁷¹ *Id.*; L.A. Lorek, *Corporate Insiders Take to Blogging*, MySA.com, <http://www.mysanantonio.com/business/stories/MYSA111705.1E.blogging.15faf191.html> (November 17, 2005) (quoting the former employee: “My case is an example of how you should not treat blogging. It was just really bad publicity for Delta”). The former flight attendant is now working on a book on the experience. She also noted that her employer did not have either a blogging nor an internet policy.

⁷² D. Michael Henthorne, *What About the Blog? A Familiar Challenge in a New Context*, 13 No. 10 S.C. Emp. L. Letter 2 (July 2005).

⁷³ Krysten Crawford, *Practicing Safe Blogging*, CNN Money, <http://money.cnn.com/2005/04/08/technology/personaltech/blogging/> (April 8, 2005).