

MODERN MANAGEMENT

WASHINGTON UPDATE

Health Care Focus for Congress

After the August recess Congress returns still focused on the health care overhaul legislation. No parameters have been set, but President Obama would like it to include an employer mandate provision—employers are required to pay for employees' health insurance or pay a penalty.

Also on the Agenda

There are a number of other workplace bills on the agenda this fall. Unless health care takes up most of the session, Congress may address comprehensive immigration legislation, unemployment insurance extension, and expansion of the Family and Medical Leave Act.

Employee Free Choice Act

So far the EFCA does not have the support needed from 60 senators in order to move it to a vote. Unless things change it may have to wait until next year. If passed, EFCA would amend the National Labor Relations Act to establish a procedure whereby the National Labor Relations Board ("NLRB") would certify a union as the bargaining representative of employees if a majority of employees of the unit signs valid union authorization cards without secret ballot election. The EFCA in its current form also provides for government arbitration of a collective bargaining agreement in the event that the employer and the union are unable to negotiate a contract.

FIRED FOR PORN, SUED FOR AGE DISCRIMINATION

A 57 year-old oilfield worker in Texas was discharged after it was discovered that his login and password were used for viewing pornographic websites. His position was filled by a younger employee.

After a routine check for electronic computer viruses on a computer provided to and accessed by over 200 employees, a technician discovered an employee's login and password were used to visit pornographic internet sites. Human Resources was notified. After confirming the employee was onsite on the days the computer was used, the employee was fired for violating the companies "information security user policy" which he signed several years before. The policy "prohibited any display on a company computer of indecent, profane, obscene, intimidating, or unlawful material." A violation of this policy could result in disciplinary action, including termination.

(Continued on page 2)

Volume 3, Issue 10, October 2009

SEMINAR INVITATION

Lemle & Kelleher, L.L.P. presents

Achieving Cost Containment in Your Employee Relations Program

Tuesday, October 27, 2009
8:30 am—12:00 pm

Embassy Suites Baton Rouge
Caucus Room
4914 Constitution Avenue
Baton Rouge, LA

Cost:

- \$25.00 per attendee

Topics:

- How to reduce liability while hiring productive employees
- How to design effective personnel policies
- How to lower monetary exposure to wrongful discharge claims
- How to avoid the cost of Unions legally

Presenters:

- Louisiana Chemical Association
 - Dan Borné
- Lemle & Kelleher, L.L.P.
 - E. Fredrick Preis, Jr.
 - Eve B. Masinter
 - Bryce G. Murray
 - Joseph Hugg

To register please contact:

Judith Copping
Director of Marketing
Lemle & Kelleher, L.L.P.
504.584.9151
jcopping@lemle.com

FIRED FOR PORN, SUED FOR AGE DISCRIMINATION, continued

The vacated position was filled by a 43 year-old who had been with the company for 6 months. The terminated employee denied inappropriate use of the computer and filed suit in the U.S. District Court for the Northern District of Texas claiming he was discharged due to his age. The company filed a motion for summary judgment, which was granted by the district court. In the ruling, the Court found that the worker "could not prove either that his firing was pretextual or that his age was a factor in the company's decision."

Upon appeal to the U.S. Fifth Circuit Court of Appeals the worker argued that the district court held him to an unreasonably high burden of proof, disregarded disputed issues of material fact, and discounted a manager's discriminatory comment. The Fifth Circuit affirmed the lower courts ruling.

EEOC PUBLISHES PROPOSED REGULATIONS ON ADA

On September 23, 2009, the U.S. Equal Employment Opportunity Commission ("EEOC") published its proposed Americans with Disabilities Act ("ADA") regulations. The proposed revisions reflect changes made by the ADA Amendments Act ("ADAAA") of 2008, which makes it easier for an individual seeking protection under the ADA to establish a disability, which went into effect on January 1, 2009. The public now has 60 days to submit comments on the proposal.

The ADAAA makes changes to the definition of the term "disability" by rejecting the holdings in several U.S. Supreme Court decisions and portions of EEOC's prior ADA regulations, thus making it easier for an individual to establish a disability as defined by the ADA. The ADAAA emphasizes that the definition of disability should be construed in favor of "a broad coverage of individuals to the maximum extent permitted" by the terms of the ADA and generally shall not require extensive analysis.

HIPAA BREACH NOTIFICATION RULE

In August the U.S. Department of Health and Human Services ("HHS") issued a rule requiring providers, payers, clearinghouses and other HIPAA-covered entities to notify (promptly) affected individuals in instances of a data breach. Large breaches, involving over 500 individuals, requires prompt notification to HHS and the media. Smaller breaches are to be reported annually to HHS. Additionally, business associates of HIPAA-covered entities are required to notify entities.

LEMLE & KELLEHER LABOR AND EMPLOYMENT ATTORNEYS

E. Fredrick Preis, Jr., epreis@lemle.com, 504.585.6371

Eve B. Masinter, emasinter@lemle.com, 504.584.9173

Louis Colletta, Jr., lcolletta@lemle.com, 504.584.9147

Bryce G. Murray, bmurray@lemle.com, 504.585.6359

Bridget A. Dinvaut, bdinvaut@lemle.com, 504.586.1241

Joseph Hugg, jhugg@lemle.com, 504.584.9148

ABOUT LEMLE & KELLEHER, L.L.P.

With offices in Louisiana and Texas, Lemle & Kelleher offers responsive, innovative, and experienced legal representation covering a broad range of practice areas. For more information please visit www.lemle.com.

This electronic newsletter is provided to clients and friends of Lemle & Kelleher, L.L.P. The information described is general in nature, and may not apply to your specific situation. Legal advice should be sought before taking action based on the information discussed. Applicable State Bar or Attorney Regulations May Require This Be Labeled as "Advertising."

MEMBER

LEX MUNDI

THE WORLD'S LEADING ASSOCIATION OF INDEPENDENT LAW FIRMS