

Employment Law Newsletter

edited by K. Preston Oade

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EMPLOYEE HANDBOOKS ARE PART OF THE LAW OF THE WORKPLACE

by Jennifer Sloan Bielak

The U.S. Court of Appeals recently ruled that an employee not eligible for leave under the Family and Medical Leave Act (“FMLA”) is nonetheless entitled to FMLA leave, because the employee satisfied all conditions for FMLA leave set forth in the employee handbook. *Peters v. Gilead Sciences, Inc.*, No. 06-4290 (7th Cir. July 14, 2008).

The FMLA provides leave to eligible employees. Employees are only eligible if they have worked more than 1,250 hours during the previous 12 months and the employer has at least 50 employees within a 75-mile radius of the work site (the “50/75 rule”). The employee handbook in the *Gilead* case, however, made no mention of the 50/75 rule.

In the lawsuit that eventually followed, the employer argued that Peters was ineligible for FMLA leave because he did not satisfy the 50/75 rule. The employee pointed out, however, that he satisfied all conditions for leave specified in the employee handbook. The U.S. Court of Appeals agreed that the employee may be entitled to leave as a matter of contract law based on the employee handbook.

Many employers incorrectly believe that employee handbooks are not binding legal contracts based on “disclaimers,” which state that the handbook is not a contract. These disclaimers, however, are often invalid. Under basic principles of contract law, whenever there is a conflict between general and specific contract terms, the general term is ignored, and the specific term is enforced. Thus, one cannot take away a specific contract right – like the right to progressive discipline or employee leave – with a general provision saying that the employee handbook is not a contract. *If a handbook term gives employees specific rights, it is probably an enforceable employment contract.*

The case stresses the importance for employers of understanding that employee handbooks and personnel policies are part of the law of the workplace and need to be written as such. Avoid idealistic policies that reflect the way an ideal workplace is supposed to work. Instead, write policies that are simple, that can be understood and followed by all managers and supervisors, and that are easy to apply in actual practice.

WHAT IS THE EEOC DOING WITH YOUR COMPANY'S CONFIDENTIAL INFORMATION?

The answer is, “no one knows,” including, it seems, the EEOC. A federal appeals court recently found that the EEOC's own rules allowing disclosure of confidential information without notice conflicted with its Freedom of Information Act regulations, which require notice before such disclosure. *Venetian Casino Resort LLC v. EEOC*, No. 06-5361 (D.C.Cir. June 27, 2008). In light of the court's ruling, this much is clear: employers should not assume confidential information will stay that way once it gets to the EEOC.

Often, crafting a response to the factual allegations in an EEOC charge is the most obvious challenge for employers. But, you cannot ignore the risk that documents supporting your response could end up in a potential plaintiff's or competitor's hands. So, what can you do?

First, be proactive about looking for potential pitfalls. If your company does not typically work with outside counsel in responding to EEOC requests, make sure the person who responds is trained to spot these types of issues. Not every response to an EEOC charge will implicate confidential information, but it's better to think about it beforehand than have to deal with it when it's already too late.

If the EEOC has requested sensitive documents, especially regarding others considered for a position or more detail about a particular process, think about whether the documents contain confidential information. If so, there may be several ways to proceed.

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First, you could try contacting the EEOC to determine the agency's position on how it will treat confidential information. If negotiating with the EEOC directly does not resolve the issue, you may have to consider going to court to request an injunction or other relief to avoid having to provide the information, or to keep the EEOC from disclosing your information without notice.

Either way, be sure to mark documents "confidential" if you have a basis to believe that they are, and consider submitting them with a request that the documents not be disclosed to third parties. That way, your position regarding the status of the documents is clear to the EEOC and to any court that may later review the documents.

As always, HRO employment lawyers can help you deal with this type of issue.

INDEPENDENT CONTRACTORS: DOS AND DON'TS

State and federal laws regulate whether an employer should classify a worker as an "employee" or "independent contractor." Classifying workers as independent contractors can seem like an attractive option, but the cost of misclassifying a person can mean significant liability.

Recent class action lawsuits indicate that employers may start to face more claims from workers who argue that, although they were classified as independent contractors, they were owed the benefits, like insurance, typically received by employees. To avoid such claims, consider the following questions before classifying a worker as an independent contractor:

- 1) Does the contract person have another source of income?
- 2) Does the contractor advertise his or her services to others?
- 3) Whose business card does the person carry?
- 4) How much control does the "employer" have over the means and methods of performing work?
- 5) Does the contractor furnish his or her own tools, computer, or supplies?

Every situation is different, but these questions can help avoid making the wrong decision. The more the company controls when, where, and how a person performs the work, the more likely that worker will be classified as an employee. Finally, consider whether a regular employee would normally do this work. If so, it might be more difficult to argue that the worker was truly an independent contractor.

EMPLOYERS TAKE NOTE: EEOC Adopts New Guidelines for Religious Bias Claims

In response to a significant increase in religious discrimination charges over the past 15 years, the Equal Employment Opportunity Commission ("EEOC") recently adopted a new compliance manual section on religious discrimination.

In addition to discussing statutory definitions of religion and the court-developed "ministerial exception" to Title VII coverage, the manual covers topics like defenses to religious bias claims, employers' obligations to accommodate religious beliefs and practice absent undue hardship, and potential conflicts among employees regarding religion. The EEOC has also published a "best practices" list for employers on its website.

The EEOC's compliance manual does not affect the federal regulations on religious discrimination. However, employers may find the compliance guidance helpful, because it summarizes case law and points to areas where the EEOC's interpretation of the law differs from federal court decisions.

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ERISA Corner *by Sheldon H. Smith*

When Is A Benefit Plan Administrator Personally Liable As A Fiduciary?

The highest duty under the law is to act as a “fiduciary,” which means a responsibility to act in the best interest of others, even if doing so is inconsistent with your own best interests. The Employee Retirement Income Security Act of 1974 (“ERISA”) imposes such a duty on plan administrators and others under a variety of circumstances.

Recently, there has been an increase in the number of ERISA lawsuits alleging breach of fiduciary duty, highlighting the importance of knowing when you are a plan fiduciary, and understanding what you must do in order to protect yourself from personal liability. Some fiduciaries believe that they do not have fiduciary duties, because a plan allows participants to direct their investments or because they are not named as a fiduciary in the plan documents. However, they may be surprised to learn that they are subject to fiduciary duties and are personally liable for losses resulting from a breach of those duties.

On April 2, 2008, the Department of Labor (“DOL”) submitted a friend of the court brief in the appeal of *Hecker v. Deere & Co.*, Case No. 06-C-719-S (W.D. Wisc., June 21, 2007) to the 7th Circuit Court of Appeals. The plaintiffs in *Deere* are participants in the Deere & Co. 401(k) plan. They brought suit alleging a breach of fiduciary duties based on Deere’s lack of knowledge regarding the fees paid on the investment options, which arguably caused the Plans to pay excessive fees, and for Deere’s alleged failure to disclose fee information to the participants. They also allege that the plan trustee and plan manager owed fiduciary duties to the plan’s participants regarding the selection of available investment options. According to the friend of the court brief filed by the DOL, there was a fiduciary duty relating to the selection and monitoring of investment options, disclosure of material information to participants, and the existence of “functional fiduciaries,” who are not otherwise fiduciaries according to the plan documents.

Section 404(c) of ERISA relaxes the fiduciary duty where a plan allows participants to direct their investments. There is no fiduciary duty to the extent that a loss or breach is a direct or necessary result of the participant’s exercise of control. Nonetheless, the DOL has always maintained that 404(c) does not protect a fiduciary for his imprudent or disloyal selection or monitoring of investment options in a 404(c) plan. Therefore, if the loss was a result of a plan participant’s failure to diversify, 404(c) would relieve the fiduciary for breach of fiduciary duties regarding diversification. However, if the loss was due to the imprudent selection or monitoring of investment options, such as the selection of investment options that charge excessive fees, 404(c) will not relieve fiduciaries of liability for a claimed breach of their fiduciary duties.

In addition to the duty of the fiduciary to prudently select and monitor investment options, a fiduciary may have a duty to disclose certain information. While ERISA requires certain disclosures to participants, the DOL takes the position that the list of required disclosures is not exhaustive. Fiduciaries may also have a duty to disclose material information under their duties of prudence and loyalty, even if the participant does not specifically request the information. This includes information that the participant needs to know in order to make an informed decision, but to which he or she does not otherwise have access. Whether the duty to disclose is satisfied by disclosing only that which is required under ERISA, or stems from the fiduciary’s duties of prudence and loyalty and is more expansive, depends upon the facts and circumstances of each case.

Finally, the DOL contends that a party may be a functional fiduciary under ERISA as a result of its actions, even if it is not a fiduciary under the terms of the plan. Someone may be a functional fiduciary to the extent they:

- Exercise discretionary authority or control over management of the plan or disposition of the plan assets;
- Render investment advice for a fee or have the authority to do so; or
- Have discretionary authority or responsibility in the administration of the plan.

Because failure to fulfill fiduciary duties can result in personal liability, it is important to know what your duties are and how to fulfill them. If you have any questions regarding your fiduciary duties and potential liability, please contact one of HRO’s Compensation and Benefits lawyers.



HRO's Going Green

In an effort to help save the Earth's natural resources, HRO would like to extend to you the opportunity to receive the Employment Law Newsletter electronically. HRO keeps archival copies of the newsletter on our website under the Publications section: <http://www.hro.com/publications>.

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California Corner *by Elizabeth H. Murphy*

Huge Victory – Employers Need Only “Provide,” Not “Ensure,” Meal and Rest Breaks

In a highly-anticipated published opinion, the California Court of Appeal, Fourth Appellate District, has settled the issue of what it means to “provide” a meal period. In the sea of wage and hour class action cases burdening California’s courts, litigants and judges have been struggling over what, exactly, employers are obligated to do: force employees to take their rest and meal periods, or merely “provide” them. For now, pending the plaintiffs’ anticipated appeal to the California Supreme Court, the answer is “provide” or “make available.” “While employers cannot impede, discourage or dissuade” employees from taking rest and/or meal periods, they “need only provide, not ensure,” rest and meal periods are taken. The Court explained, with respect to rest breaks, that “as long as employers make rest breaks available to employees, and strive, where practicable, to schedule them in the middle of the first four-hour work period, employers are in compliance.”

The Court also rejected the argument that the employer violated the Labor Code by providing “early lunches” within an hour of an employee’s arrival at work, even if employees then had to work more than five hours without an additional meal break. Utilizing a “common sense meaning” of statutory language, the Court reasoned that a California employer must provide a 30-minute meal break to non-exempt employees who are permitted to work more than five hours per day, not for every five hours worked. The Court settled other highly significant issues, holding that: (i) employers can only be liable for employees working off the clock if they “knew or should have known” that employees were doing so; and (ii) because individual issues predominate in rest and meal period and off the clock claims, such claims are “not amenable to class treatment.”

This ruling, at least while it remains good law, will have far-reaching and economically significant impacts in the hundreds of thousands of wage and hour class action cases that are pending throughout California.

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