

# EMPLOYMENT & LABOR RELATIONS LAW

### AMERICAN BAR ASSOCIATION SECTION OF LITIGATION

Summer 2012, Vol. 10 No. 3

#### **TABLE OF CONTENTS**

#### Articles »

#### **EEOC Issues Final Rule on Disparate Impact and RFOAs**

By James C. Bailey

The rule codifies Supreme Court holdings and offers guidance on applying the defense.

#### Piling On: Admission of "Me Too" Evidence

By Kevin J. O'Connor

Be wary of testimony from co-employees.

### Harsh Rulings Against H-1B Employers For LCA Violations

By Anthony F. Siliato and Scott R. Malyk

Willful violations and even careless mistakes can result in the award of back pay to the foreign-national worker.

#### MLR in Group Markets: Will Many Plan Participants Receive Rebates?

By Wayne Jacobsen, Melissa Hulke, and Sonya Kwon

Recent data show \$700 million will be going to only a small percentage of participants.

#### Tales from the Great White North: Terminations in Canada

By Karen M. Sargeant

"At will" employment is unheard of above the 49th parallel.

#### **News & Developments »**

#### No Arbitration Required for Unhired Applicant

A job applicant was not bound by the ambiguous arbitration provision contained in her employment application, according to a recent First Circuit decision.

#### Fracking Activities Could Pose Heightened Risks to Employers

Along with an increase in a company's employee pool comes heightened responsibilities for employers in the fracking industry.

#### **ARTICLES**

# **EEOC Issues Final Rule on Disparate Impact and RFOAs**

By James C. Bailey – September 25, 2012

On April 30, 2012, a final rule on "Disparate Impact and Reasonable Factors Other Than Age Under the Age Discrimination in Employment Act" promulgated by the Equal Employment Opportunity Commission (EEOC) became effective. 29 C.F.R. § 1625.7. This rule does not set new standards for asserting a "reasonable factors other than age" (RFOA) defense, but codifies the holdings of Supreme Court decisions, including *Smith v. City of Jackson*, 544 U.S. 228 (2005) and *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008). The rule also provides guidance on the application of the RFOA defense, offering a list of factors that can be considered relevant to whether an employment practice is based on RFOA.

An employer's reliance on RFOA is an affirmative defense to liability for disparate-impact discrimination claims under the Age Discrimination in Employment Act (ADEA). Cases of "disparate impact" discrimination are claims that an employer's use of a facially neutral policy has a greater negative impact on a protected classification—as relevant here, older workers; proof of an age-related motivation is not required to prevail under the statute. The RFOA defense asserts that the negative impact on older workers stems from reasonable factors *other than* age.

In contrast, allegations of disparate treatment—claims of intentional discrimination based on age—are often countered by a defense of "bona fide occupational qualification" (BFOQ), which acknowledges that age *was* a factor in the employer's decision, but that the decision was lawful under the circumstances. The BFOQ defense is not available to disparate-impact claims.

Disparate-impact claims had not always been recognized under the ADEA. But the Supreme Court, in *Smith*, resolved a longstanding circuit split by ruling that disparate-impact claims are cognizable under the ADEA. For an employer to prevail under the ADEA, *Smith* also ruled, it need only show that its practices are based on reasonable factors other than age, a lower standard than the "business necessity test" used in as a defense to Title VII claims.

In *Meacham*, a related case, the Supreme Court confirmed that the burden of proving an RFOA defense is on the employer and reiterated that the "business necessity test has no place in ADEA disparate-impact cases." 554 U.S. at 84. As the Court explained, the RFOA defense is the appropriate defense to a disparate-impact ADEA claim because the age-neutral employment practice causing the unlawful impact is "other than age" and "otherwise prohibited."

The recent final rule incorporates the holdings of both cases and clarifies that:

- The RFOA defense is only available to claims of disparate impact, not disparate treatment.
- It is not available if age is used as a limiting factor.

© 2012 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

- The individual challenging the employment practice has the burden of identifying the specific employment practice responsible for the adverse impact.
- There is a presumption that an employment practice that adversely impacts individuals in the protected class is discriminatory unless justified by a reasonable factor other than age.
- The employer bears the burden of proof to show that the employment practice was both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer.

The "reasonableness" of a factor other than age is evaluated from the perspective of a "prudent employer mindful of its ADEA responsibilities"; it is assumed that a prudent employer "should know that the law prohibits the use of neutral practices that disproportionately affect older workers" and will use reasonable care "to avoid limiting the opportunities of older workers, in light of all the surrounding facts and circumstances." Final Rule, 77 Fed. Reg. 19083 (March 30, 2012).

The rule provides a non-exhaustive list of considerations considered relevant to the evaluation of whether a practice is based on a reasonable factor other than age:

- (i) The extent to which the factor is related to the employer's stated business purpose;
- (ii) The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination;
- (iii) The extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;
- (iv) The extent to which the employer assessed the adverse impact of its employment practice on older workers; and
- (v) The degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.

29 C.F.R. § 1625.7(e)(2). However, "[n]o specific consideration or combination of considerations need be present for a differentiation to be based on reasonable factors other than age. Nor does the presence of one of these considerations automatically establish the defense." 29 C.F.R. § 1625.7(e)(3).

<sup>© 2012</sup> by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

The commission acknowledged concerns expressed by some commentators during the rule-making process that the rule would "lead to unwarranted scrutiny of business decisions, permit second-guessing of routine decisions, and make it harder for employers to defend against frivolous litigation." Final Rule, 77 Fed. Reg. at 19081. The ADEA and disparate-impact analysis do demand scrutiny of some employment practices that disproportionately harm older workers; however "[i]n holding that the RFOA is an affirmative defense, the Supreme Court recognized that scrutiny of employer decisions that cause an adverse impact is warranted, as employers must persuade 'factfinders that their choices are reasonable' and that 'this will sometimes affect the way employers do business with their employees." *Id*.

The EEOC noted that, as the extent to which an employer assessed the impact of a practice on older workers is a consideration under section 1625.7(e)(2)(iv), some employers might feel compelled to perform additional and possibly costly disparate-impact analysis. However, the EEOC believes such an effect would be minimal, because (1) large employers already perform such analysis; and (2) formal analysis will not be required in cases where the number of affected employees is small, or where the employer already has reason to believe that the practice will not negatively impact older workers. The EEOC also noted that small, cost-sensitive employers may easily find helpful tools by searching the Internet for an "online disparate-impact analysis calculator" and that the EEOC plans to offer free materials to assist small businesses in implementing this rule.

**Keywords:** litigation, employment and labor relations law, Equal Employment Opportunity Commission, age discrimination

James C. Bailey is a partner with Bailey & Ehrenberg in Washington, D.C.

<sup>© 2012</sup> by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

# Piling On: Admission of "Me Too" Evidence

By Kevin J. O'Connor – September 25, 2012

When an employer is sued for employment discrimination and is facing trial, a common issue is whether the employee will be permitted to introduce evidence at trial of other instances of discrimination or harassment against co-employees (i.e., "me too" evidence). The threat of such evidence being admitted requires careful attention during the discovery phase and the use of pretrial motions to attempt to exclude such evidence wherever possible. The very threat of such claims coming into evidence and uncertainty over what will come into evidence can even stand in the way of resolving the case before trial.

The issue of admissibility will turn on the nature of the employee's claims as compared to those of the potential witnesses. Use of the evidence will likely require that such evidence be sanitized, and accompanied by a limiting instruction, so as not to unduly prejudice the employer.

In the federal courts, the starting point for any analysis of this issue is Federal Rule of Evidence (FRE) 404(b):

- (1) **Prohibited Uses**. Evidence of a crime, wrong or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
- (2) **Permitted Uses; Notice in a Criminal Case**. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. . . .

In *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140, 552 U.S. 379 (2008), the U.S. Supreme Court discussed the general admissibility of other acts of harassment (age discrimination) in the workplace when an age-discrimination claim was made and where the employee sought to introduce testimony by other former employees who claimed to have been similarly fired in violation of the law. The district court precluded the evidence with little discussion. On appeal, the Tenth Circuit ruled that the district court had improperly excluded the evidence and remanded for a new trial. The Supreme Court vacated the order of the court of appeals and remanded the case to the district court for it to undertake a careful balancing test under FRE 403.

In *Sprint*, the employee was ultimately unsuccessful in trying to introduce evidence of discriminatory actions allegedly taken against other employees in the same protected class by a supervisor *different* from the one who made the decision to terminate the plaintiff-employee. The Court remanded for a determination of whether the claims of the other employees could be admitted at trial:

<sup>© 2012</sup> by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

The question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case. Applying [FRE 403] to determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry. Because [FRE 401 and 403] do not make such evidence *per se* admissible or *per se* inadmissible, and because the inquiry required by those Rules is within the province of the District Court in the first instance, we vacate the judgment of the Court of Appeals and remand the case with instructions to have the District Court clarify the basis for its evidentiary ruling under the applicable Rules. *Id.* at 1147, 552 U.S. at 388.

On remand, the district court held firm, providing a detailed analysis of why the allegedly discriminatory actions taken against other co-employees (which the court characterized as "anecdotal, subjective claims of age discrimination . . . [and] discrimination on the basis of age, sex and disability") was not admissible. *Mendelsohn v. Sprint/United Mgt. Co.*, 587 F. Supp.2d 1201, 1218 (D. Kan. 2008).

It is not uncommon for employees to seek to introduce "me too" evidence in any number of scenarios, and the issue has spawned many reported decisions. The case where a victim of sexual harassment seeks to introduce evidence of other women victimized in the same manner, and by the same wrongdoer, presents a simple and straightforward analysis, and the evidence will likely come in, subject to being sanitized and with a limiting instruction. *See, e.g., Lehmann v. Toys R. Us, Inc.*, 132 N.J. 587, 611 (1993) ("plaintiff may use evidence that other women in the workplace were sexually harassed" where that female employee is pursuing a hostile-workenvironment claim based on gender).

The difficulty arises where an employee is arguably muddying the waters by focusing attention on the claims of other employees whose connection to his or her own case is tenuous. There, the question is not just relevance, but also whether the introduction of such evidence would have a prejudicial impact as compared to its probative value, and the potential for waste of time and jury confusion.

Unless an employee is able to show some logical connection between the "me too" evidence and his or her theory of recovery, an employer has a strong argument that it would be unduly prejudicial to permit the employee to parade a series of disgruntled employees before the jury to talk about their unproven allegations of wrongdoing. Permitting that evidence would create a need for mini-trials as to each claim, which would undoubtedly confuse the jury and prejudice the employer.

In Ansell v. Green Acres Contracting Co., 347 F.3d 515, 521–22 (3d Cir. 2003), the court made clear that other acts of discrimination can only come in when it is relevant to an issue in dispute and involves members of the same protected class. Interestingly enough, in that age-discrimination case, the court permitted the employer to introduce evidence of hiring individuals

<sup>© 2012</sup> by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

under the age of 40 after termination of the plaintiff-employee, under the intent exception of FRE 404(b).

Even where the other claims evidence pertains to persons in the same protected class, this is not a guarantee that the evidence will be admitted. In *Moorehouse v. Boeing Co.*, 501 F. Supp. 390 (E.D. Pa.), *aff'd*, 639 F.2d 774 (3d Cir. 1980), for instance, a plaintiff in an age-discrimination case sought to introduce testimony from five other employees who claimed to have been subjected to similar age discrimination, during different time periods and each under different circumstances. The court refused to entertain the testimony:

To have pursued the former option [admitting the testimony], defendants would have been forced, in effect, to try all six cases together with the attendant confusion and prejudice inherent in that situation. . . . In the Court's view, each of the factors set forth in [Rule 403], danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, and needless presentation of cumulative evidence, would have resulted had each plaintiff in the other cases testified about his lay off. *Id.* at 393; *see also Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 263–64 (3d Cir. 1999) (recognizing that such evidence is admissible only when the claims are of persons who are similarly situated and in the "same protected class.").

In *Hayes v. Sebelius*, 806 F. Supp.2d 141, 145 (D. D.C. 2011), the district court provided an excellent summary of the law since *Sprint* on the admission of "me too" evidence. The court described a four-factor test to be applied in the federal courts when considering whether to admit such evidence:

- (1) whether past discriminatory or retaliatory behavior is close in time to the events at issue in the case
- (2) whether the same decision maker was involved
- (3) whether the witness and the plaintiff were treated in the same manner
- (4) whether the witness and plaintiff were otherwise similarly situated

There, the district court excluded from evidence the testimony of two former co-employees in that Title VII case where the plaintiff-employee could not satisfy the four-part test and stretched to show any logical connection between their alleged experiences with harassment and the claims by the employee.

The "motive," "opportunity," or "intent" exceptions therefore play a critical rule in these evidence disputes, as does the need to show that the plaintiff-employee is similarly situated with (i.e., in the same protected class) as the proposed witness. *See Allen v. Magic Media, Inc.*, 2011 WL 903959, \*3–4 (D. Kan. 2011) (in context of a sex- and age-discrimination case, holding that evidence of general discriminatory practices by a supervisor over other similarly situated employees could be admissible). The court will need to closely examine the time frame in which

<sup>© 2012</sup> by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

the conduct was alleged to have occurred, and "stray racial comments should typically not be admitted unless the plaintiff can link them to personnel decisions or the individuals making those decisions." *Heno v. Sprint/United Mgt. Co.*, 208 F.3d 847, 856 (10th Cir. 2000); *compare Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994) (holding that a plaintiff alleging employment discrimination may challenge the employer's proffered explanation by showing "that the employer treated other, similarly situated persons out of his protected class more favorably, or that the employer has discriminated against other members of his protected class or other protected categories of persons"); *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 776–77 (10th Cir. 1999) (evidence can be used to establish or negate discriminatory intent); *Heyne v. Caruso*, 69 F.3d 1475, 1479–80 (9th Cir. 1995).

As shown by *Sprint* and the cases that have followed, the courts must closely scrutinize this evidence and, where admitted, sanitize the evidence and use a limiting instruction. Employers are well advised to take full discovery on any potential "me too" testimony and use in limine motions to limit the jury's exposure to such testimony at trial.

**Keywords:** litigation, employment and labor relations law, discrimination, harassment, hostile work environment

Kevin J. O'Connor is a partner with Peckar & Abramson, P.C. in River Edge, New Jersey.

<sup>© 2012</sup> by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

# Harsh Rulings Against H-1B Employers For LCA Violations

By Anthony F. Siliato and Scott R. Malyk – September 25, 2012

Despite its drawbacks, the H-1B visa classification is, by far, the most sought-after temporary work visa in the United States for foreign-born professional workers. The H-1B category requires sponsorship by a U.S. employer and is limited to "specialty occupations" that generally require the candidates hold at least a bachelor's degree (or an equivalent combination of education and/or experience) in a relevant discipline. H-1B petitions are filed with the U.S. Citizenship and Immigration Services (USCIS), a branch of the Department of Homeland Security.

## What Is a Labor Condition Application?

The labor condition application (LCA) form is a key component of an H-1B petition. The LCA stipulates the required wage levels and working conditions that the sponsoring employer guarantees for the H-1B worker. More specifically, the LCA is an attestation to the Department of Labor (DOL) that: (i) The working conditions for the foreign national will be identical to those of U.S. workers; (ii) the salary will equal either the prevailing wage in the area of employment or match the actual wage being paid to others similarly employed by the employer, whichever is greater; (iii) that there is no strike or lockout at the employer's facility; and (iv) that the employer has met all other requirements of the H-1B program as specified in the DOL regulations. The posting of an LCA and certification of the same by the DOL is a necessary precondition to filing an H-1B petition.

Sponsoring employers who fall within the definition of H-1B dependency (based upon the number of H-1B workers in their overall workforce) are required to submit further attestations including, with some exceptions, the completion of statutorily prescribed recruitment efforts to locate U.S. workers.

The authority of the DOL to investigate H-1B violations is tied to the attestations contained in the LCA. The employer reaffirms these duties when it submits the certified LCA with an I-129 Petition for Nonimmigrant Worker to the USCIS to obtain authorization from the USCIS for the worker to enter the United States and work under the H-1B classification. *See* 20 CFR § 655.705(c); 8 CFR § 214.2(h)(4)(iii)(B).

As demonstrated by the Wage and Hour Division cases discussed herein, in addition to the award of back wages, there are numerous fines, penalties, and even criminal sanctions that may arise from an employer's LCA violations.

### The Wage Attestation Contained in the LCA

By filing the LCA with the DOL, a sponsoring employer certifies that it will pay the "required wage" to the H-1B worker for the duration of the foreign national's "authorized period of stay." See 8 CFR § 214.2(h)(4)(iii)(B)(2). As described above, the required wage must be the equivalent to at least the prevailing wage in the geographic location of employment, or the actual

© 2012 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

wage (including benefits) the sponsoring employer pays to similarly employed U.S. workers, whichever is greater.

In addition to awards of back pay for failure to pay the required wage, violations of the regulatory obligations placed on the employer can also result in civil penalties and fines to the employer up to \$1,000 per violation, and up to \$5,000 per violation for a finding of a "willful" failure to comply with the regulations. Moreover, if the ALJ determines a violation is willful, and, as a result of such violation a U.S. worker was displaced, the employer may be subject to additional fines of up to \$35,000 per incident. Finally, an employer may be debarred from using the H-1B program for a period of up to three years for a finding of willful misconduct.

Recently, the Office of Administrative Law Judge (ALJ) decided a Wage and Hour Division case that alleged various LCA violations of H-1B workers of a New Jersey-based employer. In particular, the ALJ found the employer liable for willfully failing to pay 18 H-1B workers the required wage (as the employer attested it would in the LCA) and awarded those employees collectively over \$250,000 in back pay. The ALJ also imposed civil penalties in the amount of \$67,000 for what the judge felt were willful violations of the LCA provisions.

### "Benching" H-1B Workers During Nonproductive Periods

Because the sponsoring employer certifies that it will pay the "required wage" for the duration of the foreign national's "authorized period of stay," if an H-1B worker is rendered inactive during that period due to a decision attributable to the employer, the employer is still bound by the LCA to pay the H-1B worker the required wage even if he or she is not performing work during that period of time. *See* 20 C.F.R. §655.731(c)(6)(ii), (7)(I).

On the other hand, an employer may be excused from the wage payment requirements of the LCA when the H-1B worker

experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience (*e.g.*, touring the U.S., caring for an ill relative) or render the nonimmigrant unable to work (*e.g.*, maternity leave, automobile accident which temporarily incapacitates the nonimmigrant) . . . [or] there has been a *bona fide* termination of the employment relationship.

See 20 C.F.R. §655.731(c)(7)(ii).

Thus, the key to the analysis of whether the employer maintains an obligation to pay the H-1B worker the required wage set forth in the LCA is whether the H-1B worker's nonproductive status is due to the worker's voluntary absence from work or whether such status is the result of a decision of the sponsoring employer. If the latter, then back wages may be awarded to the H-1B worker who successfully pursues a claim with the Wage and Hour Division of the DOL.

<sup>© 2012</sup> by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

## The Requirement of a Bona Fide Termination of an H-1B Worker

Like most employees in the United States, H-1B workers are typically at-will employees. That said, however, if an H-1B worker is terminated prior to the conclusion of his or her "authorized period of stay," with some exceptions, the sponsoring employer has an affirmative duty under the regulations to effectuate a bona fide termination of the H-1B worker. Failure to do so can result in an award of back wages to the H-1B worker for the duration of the foreign national's "authorized period of stay," whether or not the H-1B worker remained employed during that period.

For there to be a "bona fide termination of the employment relationship" under the act, there must be (i) notice to the employee that the employment relationship has ended; (ii) notice to the USCIS that the employment relationship has ended; (iii) revocation of the LCA validity period during which the H-1B worker can remain in the United States to work for the specific employer; and, (iv) an offer of payment for transportation of the H-1B worker back to his or her last place of foreign residence. See 8 C.F.R. §214.2(h)(4)(iii)(E). If, however, the H-1B worker voluntarily resigns, transfers his or her employment to another H-1B employer, or changes his or her status to another lawful visa classification, the travel-reimbursement requirement is nullified.

In another recent Wage and Hour case, the ALJ awarded more than \$150,000 in back wages, interest, and legal fees to a *single* H-1B worker who was wrongfully terminated by his California-based employer after only four months of H-1B employment. The basis for such a sizeable award was, in part, punitive, as the judge found that the employer had unlawfully retaliated against the H-1B worker upon learning that he filed a grievance with the DOL's Wage and Hour Division. The H-1B worker alleged in his grievance that he had been unlawfully "benched" and unpaid for much of his first four months of employment. Because the employer was unable to evidence proper notification to the USCIS of the H-1B worker's termination and, further, was unable to demonstrate it had offered to reimburse the terminated H-1B worker the cost of his travel back to his last residence abroad, the judge found the employer failed to effectuate a bona fide termination. As such, the judge ordered the employer to pay the H-1B worker the \$60,000 yearly salary listed in the LCA for the remaining two years and eight months of the H-1B worker's "authorized period of stay" in the LCA.

#### Conclusion

In the wake of these somewhat harsh rulings, it may be prudent for your clients to reexamine the regulatory obligations placed on them as an H-1B sponsoring employer. The decisions discussed above are clear examples of how not only willful violations, but even careless mistakes (e.g., failing to notify the USCIS of an H-1B worker's termination), can result in the award of back pay to the H-1B worker, along with substantial fines to a sponsoring employer and possibly even debarment from the H-1B program.

When one considers how pro-enforcement the USCIS and the DOL have become under the Obama administration, with a drastic increase in H-1B audits and Wage and Hour Division investigations (often incident to the termination of an H-1B employee), one can predict that

<sup>© 2012</sup> by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

back-wage awards and penalties will not only become more commonplace but will also continue to get larger and more punitive in nature. What is more important, many of these issues can be avoided through the implementation of an immigration-compliance program coupled with open communication with qualified immigration counsel regarding decisions that affect foreign-national employees—especially when an employer is contemplating hiring or terminating an H-1B worker.

**Keywords:** litigation, employment and labor relations law, USCIS, LCA, labor condition application, Wage and Hour Division, DOL

Anthony F. Siliato is a partner and Scott R. Malyk is a senior associate with Meyner and Landis LLP in Newark, New Jersey. Maria M. Mihaylova assisted with the authoring of the article.

<sup>© 2012</sup> by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

# MLR in Group Markets: Will Many Plan Participants Receive Rebates?

By Wayne Jacobsen, Melissa Hulke, and Sonya Kwon – September 25, 2012

Headlines have indicated that approximately \$700 million in medical-loss-ratio (MLR) rebates will be distributed to consumers in the small and large group insurance markets, but the Department of Health and Human Services (HHS) continues to update MLR data, and a closer look at the recently updated data further confirms that only a small percentage of plan participants will receive rebates.

The burden of rebate distribution to plan participants in the small and large group markets generally lies with employers. As a result, employers have numerous determinations to make, including whether they may be able to retain a portion of the rebate, the group of participants to whom rebates will be distributed, the method of distribution, and how to calculate the rebate. It is important for employers to manage plan-participant expectations during the rebate-distribution process.

#### What is MLR?

MLR refers to the percent of premium dollars that health-insurance issuers spend on medical-care claims and expenses for activities to improve healthcare quality and composes an important provision in section 2718 of the Public Health Service Act as added by the Affordable Care Act (ACA). Effective January 1, 2011, the ACA establishes minimum MLR requirements for each state of 80 percent for health-insurance issuers in the individual and small group markets and 85 percent in the large group market.

Health-insurance issuers that do not meet these MLR standards are required to provide rebates to policyholders, typically employers who sponsor the health plan in the small and large group markets. Health-insurance issuers first reported their MLR data to HHS by June 1, 2012, for the 2011 reporting year, and paid rebates by August 1, 2012.

Current data indicate that of the \$1.1 billion in estimated total rebates, \$287 million will be distributed to the small group market and \$406 million to the large group market.

#### **No Rebates for Self-Insured Plans**

When discussing MLR rebates in the small and large group markets, it is important to consider that three out of five covered workers are in plans that self-insure and are exempt from MLR requirements. Self-insured plans are insurance arrangements by which the employer assumes financial responsibility for the costs of plan participants' medical-care claims and are more common among larger employers because they can spread risk over a larger number of plan participants. Because insurance companies often manage the administrative functions of an employer's self-insured plan, participants in self-insured plans may be unaware of how the plan is funded and not realize that the plan is exempt from MLR requirements.

© 2012 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Two out of five covered workers are in fully insured plans that are subject to MLR requirements. Fully insured plans are insurance arrangements by which an employer contracts with a health plan that assumes financial responsibility for the costs of enrollees' medical-care claims.

## **Updated Rebate Data**

Although the deadline for MLR reporting to HHS was June 1, 2012, MLR rebate data continue to change due to late submissions and revised submissions from several companies. HHS's <a href="website">website</a> posts the most recent version of the raw data submitted by insurance companies subject to MLR requirements as of July 10, 2012 (raw data), and indicates that "This file will be updated periodically." HHS has informed us that the raw data will continue to be updated every two weeks. The raw data have certain limitations. For example, certain calculated fields in the MLR reporting form are not included, such as the rebate amount, and have to be calculated by the user.

Our calculations of the rebate based on the July 10, 2012, raw data are generally consistent with HHS's List of Health Insurers Owing Rebates in 2012, also dated July 10, 2012, and are posted on HHS's website. In the instances where they differ, we assumed that the July 10, 2012, list was more authoritative.

HHS confirmed that the raw data and the July 10, 2012, list, which we were informed is based on the raw data, is the most reliable and up-to-date source of MLR rebate information.

### Who Is Receiving Rebates in the Small Group Market

The \$287 million in rebates for the small group market is only attributable to 18 percent of covered lives, which includes plan participants and their dependents, in that market. The remaining 82 percent participated in plans that met or exceeded MLR requirements. For current purposes, the small group market includes employers with either 1–50 or 1–100 employees, depending on how the market is defined within a given state.

The average rebate per covered life for those expecting a rebate is \$87, or even less if employers retain portions of the rebates, in the small group market. However, the average rebate per covered life for the entire small group market is only \$15 considering the 82 percent of covered lives that will not receive a rebate.

### **Who Is Receiving Rebates in the Large Group Market**

Similarly, the \$406 million in the large group market is only attributable to 12 percent of covered lives in that market. The remaining 88 percent participated in plans that met or exceeded MLR requirements.

The average rebate per covered life for those expecting a rebate is \$66 in the large group market, or even less if employers retain portions of the rebates. However, the average rebate per covered life for the entire large group market is only \$8 considering the 88 percent of covered lives that will not receive a rebate.

© 2012 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

## Can Employers Retain a Portion of the Rebate?

Employer-sponsored insurance is the leading source of health insurance in America and covers approximately 150 million nonelderly people. Approximately 60 percent of employers offer health insurance to their employees. Employers pay for an average of 82 percent of plan participants' premiums for single coverage and 72 percent of plan participants' premiums for family coverage. Given that employers often pay a portion of employees' health insurance premiums, employers should refer to applicable guidance to determine whether they may retain a portion of the MLR rebate check.

Employer-sponsored group health plans are generally subject to the Employee Retirement Income Security Act (ERISA). The Department of Labor (DOL) published <u>Technical Release</u> No. 2011-04 in December 2011 with guidance that centers on whether premium rebates are "plan assets" under ERISA. The "plan assets" question is critical—if a rebate constitutes plan assets, then the employer may not be able to retain it.

If a plan itself or a trust holding assets of a plan is the policyholder, then the rebate would typically constitute plan assets. However, such instances are fairly rare. Employers (rather than their health plans) are typically the holders of health-insurance policies, and health plans typically do not have assets held in trust.

In the more typical case, the employer is the policyholder. However, in the view of the DOL, that fact is not conclusive. Employers must "carefully analyze the terms of the governing plan documents and the parties' understandings and representations." In many instances, the plan documents may be silent or ambiguous regarding the ownership of rebates. The DOL guidance states that in such cases, "the portion of a rebate that is attributable to participant contributions would be considered plan assets." The DOL guidance provides five examples:

- While it seems self-apparent, the DOL guidance expressly states that if the employer paid all of the premiums, then no part of the rebate is attributable to participant contributions.
- Also self-apparent (and also expressly stated) is that if participants paid all of the premiums, then the entire rebate is attributable to participants' contributions.
- If participants and the employer each paid a fixed percentage of the premiums, then a pro-rata portion of the rebate is considered attributable to participants' contributions.
- If the employer paid a fixed dollar amount, and participants were responsible for any additional costs, then the entire rebate may be attributable to participants' contributions.
- Finally, if participants paid a fixed dollar amount, and the employer was responsible for any additional costs, then the rebate may not be considered attributable to participants' contributions.

<sup>© 2012</sup> by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Of course, specific arrangements vary, but some may argue that under the first scenario (participants don't pay any of the premiums), the third scenario (participants pay a fixed percentage) and the fifth scenario (participants pay a fixed dollar amount), at least part of the rebate may be retained by the employer. In these cases, the estimates of the distributed amounts may be adjusted downward to reflect the portion retained by the employers.

It may not always be obvious which scenario best fits a particular employer's plan, and the DOL guidance may not cover every possible scenario. For instance, how a typical cafeteria plan should be treated may sometimes be unclear. In many instances, the dollar cost to participants for each payroll period during an entire year is fixed at the time of open enrollment in a cafeteria plan. In such a situation, an employer may argue that the fifth scenario applies, which could entitle the employer to retain the entire rebate. But the employer's dollar cost might also be fixed for the entire year through the contract with the insurance company. Plan participants might therefore argue that the third or fourth scenario applies, which could entitle the plan participants to receive some or all of the rebate.

An employer that retains a rebate to which it was not entitled could be subject to penalties under ERISA. In general, such an employer would be considered to have used assets of a plan for the employer's purposes rather than plan purposes. The employer would be obligated to reimburse the plan for the use of such assets. A civil penalty of up to 5 percent of the amount involved could be payable to the DOL under section 502(i) of ERISA. If the employer fails to reimburse the plan within 90 days of being notified by the DOL, an additional civil penalty of up to 100 percent of the amount involved could be payable under section 502(i). If reimbursement to the plan is made pursuant to a court order or a settlement agreement with the DOL, a civil penalty of 20 percent of the reimbursed amount would be payable to the DOL pursuant to section 502(l) of ERISA. However, the penalty under section 502(l) would be reduced by any penalty payable under section 502(i).

If an employer is uncertain whether it is entitled to retain a rebate or is concerned about possible penalties, it could simply choose to treat the rebate as plan assets. This may make sense for some employers receiving small rebates.

#### **Rebate Calculation**

The employer typically acts as the plan administrator for purposes of ERISA, as provided in ERISA Section 3(16)(A)(ii). The employer is therefore subject to ERISA's fiduciary standards in determining how to allocate rebates among participants, but the DOL guidance offers helpful leeway: An allocation of rebates is not improper "merely because it does not exactly reflect the premium activity" of plan participants. Thus, after an employer determines the amount, if any, that it may retain, it must determine how the rebate will be allocated among participants.

Employers may include one or more of the following groups of plan participants in rebate distribution:

<sup>© 2012</sup> by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

- currently active in the plan in 2012
- were active in the plan in 2011, the reporting year upon which the rebate is based
- were active in the plan in 2011 and are still active in the plan at the time the rebate is received in 2012
- former employees who participated in the 2011 plan

The DOL guidance notes that it is proper to take into account the cost of processing rebates, which may weigh against distributing rebates to former employees. Other factors may complicate the process of defining a group of rebate-eligible plan participants, such as if plans are not on calendar years, and participants start or end in the middle of those years, if certain participants were on COBRA, or if participants switched coverage due to life events in the middle of the years.

There may be multiple coverage options within a single plan. The DOL guidance states that the rebate should generally be allocated to the participants who are covered by the policy to which a rebate relates, but leaves open the possibility that rebates could sometimes be allocated on another basis such as a plan-wide basis. However, a rebate generated by one plan cannot be applied to a separate plan.

Employers also need to determine how to calculate each eligible participant's share of a rebate. Choices may include dividing the rebate equally among plan participants or on the basis of each plan participants' contribution toward the premium.

As with other choices employers must make, there is little explicit guidance to instruct employers on the appropriate method of rebate calculation, but the DOL appears to provide leeway to employers: An allocation method may weigh the competing interests of participants, provided "such method is reasonable, fair, and objective." The employer has a duty of impartiality to the plan participants. Thus, for example, if a plan administrator was also a plan participant, the administrator could not properly favor himself or herself in determining how to allocate a rebate.

#### **Method of Rebate Distribution**

After employers determine the amount, if any, that they may retain, and to which plan participants they are distributing rebates, they have several choices with respect to how to distribute the rebate <u>according to</u> HHS, including:

- providing a check in the mail,
- a lump-sum reimbursement to the same account that was used to pay the premium if it was paid by credit card or debit card,
- reducing future premiums such as a participant premium holiday, or
- applying the rebate in a manner that benefits its employees.

<sup>© 2012</sup> by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Fiduciary standards should be considered, and the DOL suggests that the latter two methods may be used if distributing the rebate to participants is not cost-effective. For example, the analysis above suggests per-participant rebates will often be under \$100. Even if an employer concludes that the entire rebate should be allocated to plan participants, the cost of processing rebate checks might consume a large percentage of the rebate. In such an instance, a brief premium holiday may be more valuable to plan participants.

In general, ERISA requires that plan assets be held in trust. In practice, however, many employers rely on the DOL's longstanding policy that it will normally not enforce the trust requirement for such plans. The DOL guidance states that this "no enforcement" policy will apply to rebates if they are used to pay premiums or distributed to participants within three months of receipt.

#### **IRS Guidance**

In April 2012, the IRS issued frequently asked questions regarding the tax implications of MLR rebates. In most instances, employees pay their portion of healthcare premiums on a pre-tax basis. If a rebate is distributed in cash to such an employee, it will constitute taxable wages and must be reported by the employer as such. If employees receive credits reducing their pre-tax premiums, their taxable income increases. Employers will have an obligation to understand the different accounting implications of the rebates, which will differ based on the timing and method of payment.

## **Managing Plan Participant Expectations**

Plan participants received notices from health-insurance issuers by August 1, 2012, for the 2011 reporting year. Such notices indicate whether a rebate was provided to the policyholder, typically the employer in group markets. Upon learning that their plan will be receiving a rebate, plan participants may expect a check. Given that employers have numerous decisions to make that can affect the amount of rebate plan participants receive, including whether to retain a portion of the rebate; determining the group of plan participants to whom to distribute rebates; the method of distribution; and how rebates are calculated; it is important for employers to communicate with plan participants and set clear expectations as to what they may be receiving and why.

Employers may also wish to expressly address possible future rebates in their plan documents, summary plan descriptions, and open enrollment materials. For instance, an employer may seek to make it clear that any rebates payable with respect to future premiums may be retained by the employer (as long as the rebate does not exceed the aggregate premium paid by the employer).

#### Conclusion

While headlines have touted rebates in the hundreds of millions of dollars in the group markets, plan participants in employer-sponsored health-insurance plans may be surprised to find out they will not be receiving a rebate because they are in plans exempt from MLR requirements or their plan met or exceeded MLR requirements.

© 2012 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

For plans that do receive rebates, policyholders, typically employers, should be aware of fiduciary duties under ERISA and various guidance and governing regulations. Carefully choosing whether a portion of the rebate may be retained and carefully choosing an allocation method for the portion of a rebate that will not be retained may help minimize the risk of penalties and litigation. Further, employers should actively consider their communications with plan participants regarding the rebate distribution process.

**Keywords:** litigation, employment and labor relations law, medical loss ratio, small group market, large group market, HHS, ERISA, DOL

<u>Wayne Jacobsen</u> is a partner with O'Melveny & Myers LLP in Newport Beach, California. <u>Melissa Hulke</u> is an associate director in the Healthcare Compliance & Investigations practice segment of Navigant Consulting in Phoenix, Arizona. <u>Sonya Kwon</u> is a managing director in the Disputes and Investigations practice of Navigant Consulting in Los Angeles, California.

<sup>© 2012</sup> by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

# Tales from the Great White North: Terminations in Canada

By Karen M. Sargeant – September 25, 2012

I have often had American employers ask me if I know what I'm talking about. And that question always comes when they are asking if they can terminate an employee's employment. The first shock comes when I explain that there is simply no concept of "at will" in Canada. The second shock comes when I explain how high the cause threshold is. The next shock comes when I explain that without cause, an employee is entitled to reasonable notice or pay in lieu of reasonable notice, the same notice that an employee who was affected by a downsizing would be entitled to. And the last and biggest shock comes when I explain just how much that notice or pay in lieu of notice can be.

The following explains just how complicated, and expensive, the termination landscape in Canada can be.

### **Cause for Termination?**

The first issue to be decided is whether there is cause to terminate an employee's employment. Employees terminated for cause are entitled to no notice, pay in lieu of notice, or severance pay.

The term "just cause" has been defined in a number of court decisions. The British Columbia Supreme Court in *Leung* v. *Doppler Industries Inc.*, [1995] 10 C.C.E.L. (2d) 147, for example, defined "just cause" as:

[C]onduct on the part of the employee incompatible with his or her duties; conduct which goes to the root of the contract with the result that the employment relationship is too fractured to expect the employer to provide a second chance.

Quoting from an earlier case (*Chalk* v. *Women's Emergency Centre (Woodstock) Inc.*, [1989] O.J. No.21), the Ontario Superior Court of Justice in *O'Dwyer* v. *Dominion Soil Investigation Inc.*, offered the following test:

[A]bsent a flagrant dereliction of duty, it must be shown that something was done clearly inconsistent with the proper discharge of the employee's duties that reasonably indicates a risk of injury to the employer's interest through continued employment.

Clear examples of just cause include dishonesty, most notably theft, serious misconduct, incompetence, or conduct incompatible with the employee's duties or prejudicial to the employer's business. The concept of just cause is, however, very much fact-driven. As was stated by the Saskatchewan Court of Queen's Bench in *Smith* v. *General Recorders Ltd.*, [1994] 121 Sask. R. 296:

<sup>© 2012</sup> by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

There is no compendium of employment misdemeanours which alone or in combination will justify the summary dismissal of an employee. Each case stands to be decided according to its own facts. Clearly though, it is not enough that an employer is displeased by the employee's performance. There must be some serious misconduct or substantial incompetence.

Thus, "cause" will be assessed in the context of the particular workplace and, in some circumstances, the courts have held that a warning is a precondition to summary dismissal. Further, past conduct and conduct discovered subsequent to the dismissal may be considered. In all instances, employer condonation of the alleged "cause"—e.g., by failing to act in a timely fashion—may deprive the employer of its entitlement to dismiss for cause.

From a practical standpoint, an employer asserting just cause bears a heavy onus. As it represents an all-or-nothing proposition, i.e., the employee may be summarily dismissed without notice or payment in lieu if cause is established, courts are generally reluctant to find that just cause exists except in the clearest cases. Employers must recognize that cause is extremely difficult to establish unless there is a fundamental element of dishonesty or serious misconduct.

Having said that, incompetence represents a special case of cause and is dealt with somewhat differently by the courts. In that respect, Canadian courts have said on numerous occasions that to establish just cause on the basis of incompetence, the employer must first establish that:

- An objective standard of work that the employer desires or requires was set;
- this standard was communicated to the employee;
- the employer provided suitable instruction to the employee if the employee did not initially hold himself or herself out to be able to perform the job to the standard set by the employer;
- the employee was capable, but chose not to meet the standard; and
- there had been a warning to the employee that failure to meet the standard would result in dismissal (incidental to such a warning, some cases have held that the employer must provide practical guidance on improvement of work methods or results).

### Notice, Pay in Lieu of Notice, and Severance Pay

In each Canadian province, an employer is obligated under employment or labor standards legislation to provide an employee whose employment is being terminated without cause with notice, or pay in lieu of notice. While each province is slightly different, those notice periods range in the one- to eight-week range. For example, in Ontario, Canada's most populous province, those periods are as follows:

<sup>© 2012</sup> by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Notice/Pay in Lieu of Notice	3 months to less than 1 year − 1 week
	1 year to less than 3 years – 2 weeks
	3 years to less than 4 years − 3 weeks
	4 years to less than 5 years – 4 weeks
	5 years to less than 6 years – 5 weeks
	6 years to less than 7 years – 6 weeks
	7 years to less than 8 years – 7 weeks
	8 or more years – 8 weeks

Where the employment of large numbers of employees is being terminated—e.g. 50, or more in any period of four weeks or fewer—employers must provide additional notice or pay in lieu of notice.

In Ontario and for federally regulated employers (such as the banks or airlines), employers must also provide severance pay. For example, in Ontario, employers with an annual Ontario payroll of \$2.5 million or more are obligated to give severance pay to employees with five or more years of service. Employees are entitled to one week per completed year of service to a maximum of 26 weeks, calculated to the nearest month (e.g., 6 years and 7 months of service = 6.7/12 weeks of severance pay).

In addition, in Quebec and the federal sectors, certain employees are protected from termination of employment, unless just cause or a good reason, such as restructuring, exist. Fortunately, the majority of Canadian provinces do not have such restrictions. But unfortunately, the statutory amounts set out above do not end the story in any Canadian jurisdiction.

### Reasonable Notice or Pay in Lieu of Reasonable Notice

In addition to notice, pay in lieu of notice, and severance pay under employment or labor standards legislation, employees terminated without cause are entitled to reasonable notice or pay in lieu of reasonable notice under the common law or, in Quebec, the Civil Code. Unless the parties have expressly contemplated a termination date for the contract of employment, i.e., set a fixed term of employment, the employer must provide the employee with notice of termination or payment in lieu of such notice, absent just cause for the termination.

The length of the notice period may be set by mutual agreement as a term of the contract of employment, although it must accord, at least, with the minimum employment or labor standards legislation in the jurisdiction. If there is no agreed period of notice, a period of "reasonable notice" will be inferred by the courts. In fact, in Canada, the term "wrongful dismissal" often refers not to the termination of the employment itself, which is permissible unless it contravenes human rights, employment standards, or other specific legislation, but to the failure to provide adequate notice or payment in lieu of notice to the dismissed employee.

The period of reasonable notice is designed to provide the employee with the opportunity to find reasonable alternative employment. In the absence of an express agreement as to notice between

<sup>© 2012</sup> by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

an employer and employee, the reasonable notice to which an employee is entitled is determined by a number of factors, including:

- character of the employment;
- length of service;
- age of the employee;
- the employee's compensation; and
- the employee's prospects of obtaining similar employment.

While all employment and labor standards statutes in Canada provide for minimum notice periods in the absence of just cause, these are minimum requirements only. Reasonable notice periods at common law or pursuant to Quebec's Civil Code are usually significantly greater than these minimum statutory requirements.

The determination of what constitutes reasonable notice is made on a case-by-case basis. There are no "rules of thumb" or formulas, although many courts have been known to award one month or more per year of service. Decisions in similar cases by common-law courts are most frequently used as precedents in arriving at a determination. The generally accepted "rough upper limit" on notice periods in most provinces is 24 months. In these provinces, this is usually reserved for senior executives, in their late 50s or early 60s, with very lengthy service. This upper limit varies somewhat in other provinces.

## Mitigation

There is a duty on all dismissed employees to take reasonable steps to seek alternative employment, unless an employment contract contains an express provision to the contrary. Failure to do so will result in a reduction of damages awarded.

The duty to mitigate may include an obligation to move or change the character of employment. It is important to realize, however, that the dismissed employee is not under an obligation to accept a substantially different job or a job that pays significantly less. While the dismissed employee has a duty to mitigate, the employer has the onus in a wrongful-dismissal court action to show that the employee has failed to take reasonable steps to mitigate.

#### **Constructive Dismissal**

Employees are entitled to treat themselves as having been "constructively dismissed" when their responsibilities and duties have been altered so significantly that the employer can be said to have repudiated the employment contract. When an employee is constructively dismissed, the law considers the situation to be like any other dismissal requiring reasonable notice.

Situations where a constructive dismissal has been found include:

- reduction in responsibilities and duties;
- unilateral decrease in salary;

 $\odot$  2012 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

- changes in hours or shifts;
- placing an employee on probation;
- unreasonably postponing an employee's start date; and
- unilateral requirement regarding mandatory retirement.

As a result, transfers of employees, changes to compensation plans, and modifications to employee duties must all be considered very carefully before implementation. Providing reasonable notice to employees of anticipated changes to the terms and conditions of their employment will alleviate many concerns in this area.

#### **Conclusion**

Navigating the termination landscape in Canada can be a minefield. Entitlements vary by province. Cause is difficult to achieve. Employment and labor standards only provide for minimum entitlements. There are no formulas for determining what is reasonable notice. And those periods of reasonable notice can be very high, as much or more than one month per year of service. Termination provisions in employment agreements are therefore very important and something we recommend you suggest to your clients. Just be sure that they do not include any reference to employment "at will," a concept that simply does not exist in any Canadian jurisdiction.

**Keywords:** litigation, employment and labor relations law, at will, just cause

Karen M. Sargeant is a partner with Fasken Martineau DuMoulin in the firm's Toronto, Ontario, office.

<sup>© 2012</sup> by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

#### **NEWS & DEVELOPMENTS**

# No Arbitration Required for Unhired Applicant

Arbitration provisions in employment agreements are generally enforceable against the employees who sign them. But what about when the arbitration agreement is in a job application—and the potential plaintiff is an applicant who never got the job?

The U.S. Court of Appeals for the First Circuit held in a recent case that a job applicant was not required to arbitrate her gender-discrimination claim against the company to which she applied, despite the fact that her employment application contained an arbitration provision.

The case, <u>Gove v. Career Systems Development Corporation</u>, No. 11-2468 (1st Cir. July 17, 2012), involved a plaintiff, Ann Gove, who applied for a job at career Systems Development Corporation (CSD). Gove, who was pregnant when she applied, did not get the job. She filed suit in the U.S. District Court for the District of Maine, alleging gender and pregnancy discrimination in violation of Title VII of the Civil Rights Act of 1964 and the Maine human-rights statute.

CSD moved to compel arbitration in the case, arguing that Gove was bound by the arbitration clause contained in her application for employment. The application stated that its submission constituted an agreement to arbitrate "all pre-employment disputes."

The district court held that there was no valid agreement between the parties to arbitrate Gove's claims. The appeals court affirmed the district court on different grounds, concluding that it was not the validity of the agreement that was in question, but its scope.

CSD urged the First Circuit to interpret "pre-employment disputes" broadly, as applying to any disputes that arose between the time of application and hiring, whether or not the hiring ever occurred. Gove argued that the court should instead adopt a literal meaning of pre-employment, i.e, if there is no employment, there can be no pre-employment period.

The court held that because the application's arbitration language was ambiguous, and because Gove had no meaningful opportunity to question or bargain over the terms of the application, the application must be construed, pursuant to Maine contract law, against its drafter, CSD.

**Keywords:** litigation, employment and labor relations law, First Circuit, arbitration

— Shira Forman, Dornbush Schaeffer Strongin & Venaglia LLP, New York, NY

<sup>© 2012</sup> by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

# Fracking Activities Could Pose Heightened Risks to Employers

In recent years, the fracking boom in the United States has led to hundreds of thousands of new jobs in the energy industry. According to a recent report commissioned by America's Natural Gas Alliance, fracking and other unconventional natural-gas production techniques may create as many as 1.5 million jobs in the United States by 2035.

But along with an increase in a company's employee pool comes heightened responsibilities for employers in the fracking industry. Not the least of these obligations are those imposed by the Occupational Safety and Health Association (OSHA), the country's primary federal agency charged with the enforcement of safety and health legislation.

Last month, OSHA, along with the National Institute for Occupational Safety and Health (NIOSH), issued a <u>hazard alert</u> about fracking worker safety, stating that employers must ensure that their workers are properly protected from overexposure to silica in fracking operations. The hazard alert was spurred by a <u>letter</u> from the AFL-CIO, the U.S.'s largest federation of unions, to OSHA, calling for action to protect workers from silica exposure during fracking. Citing a recent <u>field study</u> by NIOSH ascertaining that 79 percent of exposed silica samples exceeded the NIOSH Recommended Exposure Limits, the letter urged OSHA to make a new silica standard and to expand its field work in the fracking industry to include medical surveillance of workers.

The OSHA alert reminds employers that they are "responsible for providing safe and healthy working conditions for their workers," and cautions that "Employers must determine which jobs expose workers to silica and take actions to control overexposures and protect workers." According to OSHA, "a combination of engineering controls, work practice, protective equipment, and product substitution where feasible, along with worker training, is needed to protect workers who are exposed to silica during hydraulic fracturing operations." The alert lists a number of specific practices that employers can implement in their efforts to achieve the goal of worker safety in fracking operations.

The alert is significant to employers, in that it could increase the potential for OSHA investigations of fracking operations, particularly in the event of a report of harm to an employee for silica exposure. The alert also increases the risk that an employee injury could result in a willful violation of the Occupational Safety and Health Act, which carries significant penalties of up to \$70,000 per violation. Employers are well advised to take all appropriate safety precautions against potential silica exposure to their employees.

Keywords: energy litigation, fracking, OSHA, NIOSH, silica

— Kelley Edwards, Littler Mendelson P.C., Houston, TX

<sup>© 2012</sup> by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

#### **EDITORIAL BOARD**

#### **Newsletter Editors**

- » Brian Koji
- » Jerrilyn Malana

#### **Web Editors**

- » Celina Joachim
- » Nicole A. Crawford
- » Shira Forman

#### **Committee Cochairs**

- » Daniel E. Harrell
- » David N. Michael
- » Christina O. Alabi

### **Staff Editor**

» J.R. Haugen

The views expressed herein are those of the author(s) and do not necessarily reflect the positions or policies of the American Bar Association, the Section of Litigation, this committee, or the employer(s) of the author(s).

ABA Section of Litigation Employment & Labor Relations Law Committee <a href="http://apps.americanbar.org/litigation/committees/employment/home.html">http://apps.americanbar.org/litigation/committees/employment/home.html</a>

<sup>© 2012</sup> by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.