HARRANG LONG GARY RUDNICK P.C.
ATTORNEYS AT LAW

CHIEFLY L&E

HLGR's Quarterly Labor and Employment Law Bulletin

Spring 2013

Inside This Issue: *HLGR Attorney Updates; Proposed Oregon Legislation; New FMLA Regulations; At Will Employment Changes; Authority of the NLRB; Overpayment of Health and Welfare Trusts; Right to Marry; and Safety Clothing. Employers with questions are encouraged to contact Shari Lane, Sharon Rudnick, or Kate Grado.*

Proposed Oregon Legislation

The 77th Oregon Legislative Assembly convened on January 14, 2013. As always, the employment arena provides fertile ground for new legislation. Several bills were presented early in the legislative session which, if passed, could have significant implications for employers, including:

- **SB 1** requires employers to provide paid or unpaid time off for Veterans Day to employees who are veterans.
- **HB 2068** extends exclusive remedy protections of workers' compensation statutes to LLC members and partners, shielding them from personal liability stemming from workers' compensation injuries.
- **HB 2682** excludes confidential investigation files from personnel records that must be provided to employees. The bill defines confidential investigation files to include witness statements, investigator notes, and other underlying documentation that are gathered to support an employment decision.
- **HB 2683** authorizes employers to pay employees' wages by direct

continues on next page >>

For employers in business and government alike, employees are your most valuable, and often most expensive, asset. How you handle employment issues can have a significant impact on your bottom line. Our labor and employment attorneys provide creative, strategic legal counsel – targeted to your mission and business environment. We can help ensure the most proficient use of human resources, prevent costly disruptions, and help you identify and address issues before they become costly claims or lawsuits.

We specialize in providing labor and employment advice, counseling and litigation services to public and private employers.

Labor and Employment Team:

Shari Lane
Jeff Matthews
Sharon Rudnick
Jens Schmidt
Joshua Stump

Associates:
Andrea Coit
Kate Grado
Hwa Go
John C. Rake
Kate Watkinson Wright

Manage Your Subscription

You will soon be able to subscribe, unsubscribe and otherwise manage your subscription online. Stay tuned for more details coming soon! Until then, you can email requests to clientservice@harrang.com.

deposit at the discretion of the employer. This bill seeks to remove the current statutory requirement that the employer and employee agree to payment by direct deposit.

- **HB 2416** makes it an unfair employment practice for an employer to violate ORS 404.250, which governs leave of absences for search and rescue volunteers.
- **HB 2111** revises the standard for determination of whether an individual is substantially limited in major life activity for purposes of being classified as "disabled." It changes the standard from "materially restricts" to "restricts." The bill was proposed at the request of the Commissioner of the Bureau of Labor and Industries, Brad Avakian.
- **HB 2606** extends the time limit for filing a complaint or civil action for employment discrimination based on a protected status of an employee from one year to two years.
- **HB 2645** establishes a paid short term disability insurance program to be established and administered by the Bureau of Labor and Industries. The bill contemplates that the program will be funded by premiums withheld from employee paychecks and imposes payroll and record keeping obligations on employers.
- **HB 2654 and SB 344** prohibit employers from compelling an employee or applicant to disclose the password to their social media accounts.
- **HB 2907** requires BOLI to establish a full time position for an investigator dedicated to investigating misclassification of employees as independent contractors and establishes civil penalties for misclassification.
- **HB 3307** requires an employer who fails to provide a meal or rest period in accordance with rules adopted by BOLI to pay the employee an additional one and a half hours of wages for each day the employer is in violation of rules.
- **HB 3308** expands protections afforded employees for engaging in certain activities related to a wage claim.
- **HB 3390** requires an employer with six or more employees to provide at least seven days of paid sick leave each year to eligible employees and creates a new protected class of employees who utilize, attempt to utilize or inquire about use of paid sick leave.
- **HB 3138** includes payments due for accrued vacation time in the meaning of "wages" for purposes of a wage claim and prohibits employment contracts or employer policies from providing for the forfeiture of accrued vacation wages upon termination.
- **SB 573** establishes a right of civil action for a claim for unpaid wages against the employer and gives an employee a lien upon an employer's property for the amount of unpaid wages to which the employee is entitled.

New FMLA Regulations and Poster

The U.S. Department of Labor (DOL) marked the twentieth anniversary of the Family and Medical Leave Act (FMLA) by issuing new FMLA regulations on February 6, 2013. The regulations, which took effect on March 8, 2013, implement several recent statutory expansions of the FMLA pertaining to protections for military family members and airline flight crews. The regulations also clarify DOL's position concerning calculation of intermittent leave and remind employers of their obligation to comply with the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA). Below is a summary of the most significant aspects of the new regulations.

Record Keeping Requirements and Forms

The regulations include a reminder to employers of their obligation to comply with the confidentiality requirements of GINA to the extent that records and documents created for

FMLA purposes contain family medical history or genetic information. Under the FMLA and GINA, employee records and documents relating to any medical certification or family medical history must be maintained as confidential medical records in separate files from the usual personnel files, and may only be disclosed under certain limited circumstances. In addition to the regulations, DOL has published an updated FMLA poster and has also updated several of its optional-use FMLA forms.

Military Family Leave

The most extensive changes to the FMLA regulations concern the various forms of military family leave. In general, these changes expand FMLA coverage for family members of covered military service members and veterans.

Qualifying Exigency Leave

FMLA qualifying exigency leave is leave to allow eligible family members of certain military personnel to address issues that arise in connection with certain military deployments. The revised regulations increase the maximum number of leave days from 5 to 15 that an eligible family member may take to bond with a military member on short-term, temporary rest and recuperation during deployment. Parental care, a new category of qualifying exigency leave which may be utilized to make arrangements for care of parents of military members, has been added to the existing categories of leave.

Military Caregiver Leave

Military caregiver leave has been expanded to include leave to care for covered veterans who are undergoing medical treatment, recuperation or therapy for a serious injury or illness. The definition of what constitutes a serious injury or illness of a covered veteran is broad and flexible. Military caregiver leave has also been expanded to include care for pre-existing injuries or illnesses of covered service members that were aggravated in the line of duty.

Intermittent Leave

The DOL has also clarified several issues pertaining to the calculation and use of intermittent leave. The maximum increment for FMLA leave taken on an intermittent or reduced schedule basis is the shortest increment of time that the employer uses to account for other forms of leave, provided that it is not greater than one hour. The revised regulations clarify that this means an employer must allow FMLA leave to be used in at least one-hour increments and must permit use in shorter increments if shorter increments are permitted for any other form of leave. For example, if an employer accounts for sick leave in 15-minute increments and vacation leave in one-day increments, the employer must allow FMLA leave to be used intermittently in 15-minute increments. If an employer accounts for all forms of leave in one-day increments, FMLA may be used in one-hour increments.

The DOL also clarified that an employer can only count FMLA leave that is actually taken and may not also include time that is worked for the employer. For example, if an employer typically counts FMLA leave in one-hour increments and an employee arrives at work a half-hour late for an FMLA reason, but the employer waives its policy of counting leave in one-hour increments and puts the employee to work immediately, the employer cannot then deduct a full hour from the employee's FMLA entitlement. In that circumstance, only 30 minutes may be counted.

FMLA Advice for Employers

Employers covered by the FMLA should review all FMLA policies and forms to ensure that they are consistent with the regulations. Employers should ensure that they are accounting for intermittent leave in increments of one hour, or shorter increments if other forms of leave are permitted in shorter increments. Additionally, employers should ensure that management employees are trained on the expansions of qualifying military family leave, so that potential leave requests can be identified appropriately. Covered employers should also replace their current FMLA posters with the revised poster available on the DOL website and should review record keeping maintenance and disclosure policies to ensure compliance with FMLA and GINA.

continues on next page >>

Shari Lane Joins HLGR's Labor & Employment Practice

We are pleased to announce that Shari L. Lane has merged her law practice with ours and is now Of Counsel with HLGR.

Shari will be an integral part of the firm's Labor & Employment practice. Shari's practice focuses on advising employers in personnel issues and labor negotiations and on representing employers facing administrative agency claims and audits. Shari's advice and representation of employers is practical and down-to-earth, guided by her experiences as a business owner, employer, and manager.

Prior to becoming Of Counsel at HLGR, Shari was the owner of Northwest Employment Law LLC in Portland and prior to that, an attorney with Cosgrave Vergeer Kester LLP, and Operations Manager for the Oregon Bureau of Labor & Industries.

You may contact Shari by calling 503.242.0000 or emailing her at shari.lane@harrang.com.

The At-Will Employment Doctrine Takes Another Hit – *Cocchiara v. Lithia Motors*

In a recent decision that caught the attention of many employers, the Oregon Supreme Court held that a prospective employee can bring both promissory estoppel and fraudulent misrepresentation claims in the context of at-will employment.

Mr. Cocchiara worked as a salesperson for Lithia Motors for eight years. Following a heart attack, Cocchiara sought a less stressful job and received an offer of employment with a different employer. When Cocchiara informed his manager of the offer of outside employment, the manager told Cocchiara about a new "corporate" job available with Lithia Motors that would meet his health needs. The manager made a call to Lithia Motors' corporate offices and informed Cocchiara that he had been given the corporate job and to report to headquarters the following day. To Cocchiara's disappointment, he reported to headquarters to discover that he had not been hired for the job; instead, he was simply interviewing for the position. Cocchiara ultimately was not hired for the corporate job with Lithia Motors – and the position with the outside employer had already been filled.

Cocchiara sued Lithia Motors on a theory of promissory estoppel and fraudulent misrepresentation, amongst other claims. Cocchiara sought economic damages for the income that he would have earned in the corporate job with Lithia Motors. Both claims require reasonable reliance by the plaintiff on a promise or representation. Lithia Motors moved for summary judgment on the promissory estoppel and fraudulent misrepresentation claims, in part arguing that Cocchiara had no reasonable basis to rely on the corporate job offer because the corporate job was an at-will position – Cocchiara could have been terminated at any time. The trial court granted, and Oregon Court of Appeals affirmed, Lithia Motors' motion for summary judgment.

The Oregon Supreme Court reversed and remanded the case to trial court, stating that

"[a]lthough an employer has a right to fire an at-will employee – though not for an unlawful reason – without liability, the fact that the employer has that right does not mean that a prospective employee can never reasonably rely on a promise of at-will employment. And if a prospective employee does reasonably rely on such a promise, a remedy may be necessary to avoid injustice." The court's ruling creates yet another exception to the at-will employment doctrine.

Employers with questions about extending job offers to applicants should contact a member of our Labor & Employment Team.

Caution: Even though employment in Oregon is technically "at will," so many exceptions to the at-will standard have developed that an employer should be very cautious about relying on the at-will standard to terminate an employee – it certainly can be a trap for the unwary. At a minimum, all of the circumstances with the employee should be carefully reviewed with your HR department or you should consult with legal counsel before making a decision to terminate an employee based on the employee's "at will" status.

Court Questions Authority of the National Labor Relations Board (NLRB)

The D.C. Circuit Court recently held in *Noel Canning v. NLRB* that President Barack Obama's appointment of three NLRB members in January 2012 were invalid. If upheld by the Supreme Court, the decision will call into question the validity of the many actions of the NLRB over the course of 2012.

Employers should not, however, view the court's decision as a license to ignore the recent and upcoming activity of the NLRB. In an official response to the court's decision, the NLRB signaled that it will continue to operate and enforce decisions and rules promulgated over the course of 2012, as the NLRB considers the court's ruling to be applicable only to the specific case before the court in *Noel Canning*. Employers should continue to monitor the impact of *Noel Canning* as the all-but-certain appeal of the decision before the U.S. Supreme Court develops.

Mark Amberg Accepts In House Position with City of Portland

It is with a bittersweet note that we say goodbye to Mark Amberg, whose last day with HLGR is May 3, 2013.

As we wish Mark all the best for the future, we are also working diligently to transition his work load to our other talented L&E attorneys.

Clients with pending matters will be contacted immediately, but anyone with questions regarding this transition may contact Jeff Matthews by calling 541-485-0220 or via email at jeffery.j.matthews@harrang.com.

Health and Welfare Trust Overpayment Can Be a Costly Mistake: *Greater St. Louis Construction Laborers Welfare Fund v. Park-Mark, Inc.* (8th Cir. Nov. 2012)

This recent 8th Circuit case is a red flag for all union shops, as it demonstrates the extensive discretion and authority vested in the trustees of a health and welfare trust, and the courts' inclination to affirm that discretion and authority. In *Greater St. Louis*, the employer accidentally overpaid contributions into the employee Health and Welfare funds by $548,257. When the employer discovered its mistake, it stopped making payments into the fund, and requested that the Trust credit the account in the amount

of the overpayment. The Trust refused and sued the employer, and the employer counter sued for restitution of the overpayments. The Eighth Circuit recognized that "contributions made by a mistake of law or fact may be returned," but nevertheless sided with the Trust, finding no refund or set-off of future contributions was due to the employer, because: (1) the criteria for making payments were clear (in the collective bargaining agreement); (2) the employer's delay in seeking a refund was "inexcusable;" and (3) a refund would adversely affect the trust funds.

The decision is curious, on all three bases: (1) the court agreed there had been a "mistake of law or fact," but found misreading or misapplying CBA terms and instructions was not the kind of "mistake" that justified restitution; (2) the employer's request for refund was made the same year the mistake was discovered – not "inexcusable delay" by most standards; and (3) the Trust has or should have some obligation to manage the funds according to expected revenues – so the overpayment was or should have been a windfall, and a refund should not harm the fund.

Though *Greater St. Louis* is not binding on employers in the 9th Circuit, the lesson for employers making contributions into a health and welfare trust is this: to avoid (or quickly catch) mistakes, regularly conduct a self-audit of your contributions and the criteria for making contributions.

The Right to Marry

The U.S. Supreme Court recently heard argument in two cases: *Windsor v. U.S.* and *Hollingsworth v. Perry*. *Windsor* is a challenge to the Defense of Marriage Act (commonly known as DOMA), which imposes a federal definition of marriage as a union between one man and one woman. *Hollingsworth* challenges California's "Prop. 8," the amendment to the state constitution that repealed the right of same sex couples to marry.

The prevailing prediction seems to be that DOMA may be struck down, as it represents an intrusion of federal law into the traditional state domain of marriage laws. Some scholars point to the fact that such a ruling would be attractive to both conservative justices (who favor states' rights) and liberal justices (who favor expanding civil rights protections to sexual orientation). In any event, the invalidation of DOMA would have an impact on employers who provide federally regulated benefits (such as ERISA-governed plans). Under DOMA, it was illegal to extend such benefits to same-sex partners and spouses.

Predicting what will happen with *Hollingsworth* is even trickier. Although both cases address the right to marry, there is no automatic correlation; that is, even if DOMA is repealed, that does not necessitate restoring California's right to marry, nor would a reversal of California's Prop. 8 require a change in federal law.

Note that Oregon and Washington already prohibit discrimination in employment based on sexual orientation. In addition, both states prohibit discrimination based on marital status (a prohibition with renewed significance where some of the state's residents are not permitted to marry).

Safety Clothing – Another Supreme Court Case to Watch

The Fair Labor Standards Act generally requires employers to pay employees for the time it takes to put on and take off required safety gear (sometimes referred to as "donning and doffing"). However, there is an exception for changing "clothes," where a collective bargaining agreement provides that such changes are not compensable. The U.S. Supreme Court has agreed to decide whether the 800 workers who brought suit in *Sandifer v. United States Steel Corp.* are entitled to back pay for the time they spent changing into and out of safety clothing – even though their collective bargaining agreement provides that such time is not compensable.

continues on next page >>

UPCOMING EVENTS

Sign up for the next Breakfast Seminar!

Medical Examinations, Fitness for Duty Evaluations, and Background Checks

HARRANG LONG GARY RUDNICK P.C.
ATTORNEYS AT LAW

Presenting Attorneys: Kate Grado and Shari Lane

HLGR BREAKFAST SEMINARS

Brought to you by our labor & employment attorneys.

You are cordially invited. . .

to attend our next breakfast seminar. This free, invitation-only event is extended to clients and friends of the firm. Seating is limited. Continental breakfast is included and will be served at 8:15 a.m.

Medical Examinations, Fitness for Duty Evaluations, and Background Checks

We will discuss:

- The processes and laws that govern when and how you can request that an employee submit to a medical examination;
- When and how to require fitness for duty evaluations, and what to do with the results; and
- When and how to conduct criminal background checks and what to do with the information.

RSVP to nicole.kiser@harrang.com or call 541.485.0220 or 800.315.4172.

Sign up to receive news and invites at: harrang.com.

EUGENE
June 5, 2013
8:30 to 9:30 a.m.
Continental breakfast at 8:15 a.m.

Harrang Long Gary Rudnick P.C.
360 East 10th Avenue, Suite 300

(Event is located in the 10th and Mill Street Building. Pay parking is available at the parking lot on the corner of 10th Avenue and High Street.)

RSVP by May 31 for Eugene

PORTLAND
June 13, 2013
8:30 to 9:30 a.m.
Continental breakfast at 8:15 a.m.

Harrang Long Gary Rudnick P.C.
1001 SW Fifth Avenue, 16th Floor

(Event is located in the Congress Center Building. Validated parking is available in the parking garage on Sixth Avenue directly across the street from the Congress Center.)

RSVP by June 10 for Portland

BEND
June 27, 2013
8:30 to 9:30 a.m.
Continental breakfast at 8:15 a.m.

Phoenix Inn
300 NW Franklin Avenue

(Event is located at the Phoenix Inn. Free parking is available at the Phoenix Inn and in the Bend parking garage across the street.)

RSVP by June 24 for Bend

RSVP today to reserve your space by calling 541.485.0220 or 800.315.4172 or via email to nicole.kiser@harrang.com.

Eugene
June 5, 2013
RSVP by May 31

Portland
June 13, 2013
RSVP by June 10

Bend
June 27, 2013
RSVP by June 24

Visit our "Events" page at harrang.com for more details.

Portland
1001 SW Fifth Avenue
16th Floor
Portland, OR 97204-1116
503.242.0000
503.241.1458 (fax)

Eugene
360 E 10th Avenue
Suite 300
Eugene, OR 97401-3273
541.485.0220
541.686.6564 (fax)

Salem
333 High Street, NE
Suite 200
Salem, OR 97301-3632
503.371.3330
503.371.5336 (fax)

harrang.com
800.315.4172