EMPLOYMENT & BENEFITS LAW REPORT

FLASTER GREENBERG
ATTORNEYS AT LAW • A PROFESSIONAL CORPORATION

A Newsletter from the Employee Benefits and Employment and Labor Practice Groups

WINTER 2006

Happy New Year: Employment Law Changes and Trends to Watch Out for In 2007

BY MICHAEL D. HOMANS

The New Year promises to bring a wealth of change in employment law, thanks in part to the election of a Democratic majority in Congress, but also due to other trends.

Although we are better at applying the law than predicting it, we feel pretty safe in advising readers and employers that they will have to deal with the following developments in employment law in 2007 and beyond:

Minimum wage increases: Both New Jersey and Pennsylvania already have approved legislation increasing their minimum wages to $7.15 per hour. New Jersey's law took effect on October 1, 2006, and Pennsylvania is raising its minimum wage to $6.15, effective January 1, 2007, and to $7.l5 on July 1, 2007. Likewise, the voters in six states approved minimum wage hikes in ballot referendums in the November elections.

In addition, congressional Democrats have pledged to make raising the federal minimum wage from $5.15 a priority in 2007. No one can predict whether they will succeed; however, a raise beyond the new minimums in New Jersey and Pennsylvania in 2007 seems unlikely. As a result, any raise in the federal minimum wage may have little effect on employers in the region, and may actually benefit them indirectly, as competitors in other states with lower minimum wages could see their labor costs rise if the federal minimum wage is increased.

Retaliation claims: As we discussed in a previous update, the United States Supreme Court's decision earlier this year in *Burlington Northern & Santa Fe Railway v. White* liberalized and loosened the definition of an adverse action sufficient to support a claim for retaliation under federal anti-discrimination laws. As a result, employers can expect an increase in retaliation claims in 2007 and beyond.

New Jersey's broad, new employee protections: New Jersey enacted a new law in the summer of 2006 that prohibits employers from requiring employees to attend meetings or participate in communications about religious, political, social or community matters.

The first lawsuits under The Worker Freedom from Employer Intimidation Act can be expected to percolate through the courts in 2007.

The Act requires that if employers send communications to employees about such activities and/or hold voluntary meetings about such subjects at work, then the employer must notify employees of their right to refuse to participate in such activities and/or to disregard the communications. The Act also prohibits retaliation against employees who make a good-faith report of a violation of the law.

To avoid problems, employers in New Jersey should: (1) ensure that any meetings or communications on religious, political, social or community matters include a notice that participation is completely voluntary and that employees are free to disregard or ignore such communications and meetings; (2) ensure that employees are not discriminated against or penalized in any way for not participating in such activities; and (3) protect employees who report a violation of the Act against retaliation.

We recommend that all New Jersey managers and human resources professionals be educated on the Act, which further expands the extensive rights of employees in New Jersey.

Reverse discrimination and other novel claims: The number of "reverse discrimination" claims continues to rise as more males and Caucasians claim to be the victims of discrimination favoring women and racial minorities. Based on our experience, juries are often sympathetic to these claims, yet employers are often less zealous about protecting the rights of "majority" status employees.

Likewise what are known as "same-sex harassment" cases — in which men claim to be harassed by men, or women claim

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New Retirement Plan Requirements and Opportunities Under the Pension Protection Act of 2006

By Elliot D. Raff
and Michael P. Spiro

The Pension Protection Act of 2006 (the "Act") made vast changes in the way traditional defined benefit pension plans must be funded by employers. In addition, the Act has created new requirements for defined contribution plans, such as 401(k) plans, as well as new retirement planning opportunities that may be of interest to sponsors of defined contribution plans.

This article will provide a brief overview of some of the more notable Act provisions relating to defined contribution plans. It is only an overview — many of the provisions are much more involved than presented here. A number of the provisions of the Act will require changes to existing plans and methods of plan administration, while other provisions are optional. In all events, sponsors of defined contribution plans should be aware of these new legal requirements:

EGTRRA Permanence. The Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") expanded retirement savings opportunities, for example, by increasing compensation and contribution limits, creating "catch-up" contributions in 401(k) plans, increasing deduction limits, and creating after-tax "Roth" elective deferral accounts that are non-taxable on distributions. EGTRRA was, by its own terms, temporary and would have expired in 2011. The Act now makes the EGTRRA retirement plan provisions permanent.

Accelerated Vesting of Employer Contributions. Previously, EGTRRA required shorter vesting periods for matching contributions. The Act now requires, effective for plan years starting after December 31, 2006, that all employer contributions (not just matching contributions) vest under schedules at least as favorable as three-year cliff vesting (*i.e.*, full vesting after three years), or a six-year graded vesting schedule (*i.e.*, 20 percent per year beginning after two years).

New Rules Regarding Hardships and Unforeseen Financial Emergencies. 401(k) plans are, in general, permitted to make in-service distributions only based on a participant's financial hardship, although what constitutes a "hardship" for this purpose is circumscribed by regulations. Under the Act, the Secretary of the Treasury has been instructed to modify these regulations to provide that if an event would constitute a hardship if it occurred with respect to the participant's spouse or dependent, then the same event will constitute a hardship if it occurs with respect to any other beneficiary designated by the participant under the plan.

Safe Harbor Default Investment Option. In general, ERISA Section 404(c) provides that if a plan gives participants the right to direct how their plan accounts will be invested and the participant does so, then the fiduciaries will not be responsible for losses resulting from the participant's directions. By its terms, ERISA Section 404(c) fiduciary protection would not be available if a participant fails to make any investment election. Under the Act, a participant will be *deemed* to have exercised this right if, in the absence of an affirmative participant direction, the plan automatically invests a participant's plan account in a "safe harbor default investment". Under proposed Department of Labor regulations, a safe harbor default investment may be: (a) a life-cycle or targeted retirement date fund; (b) a balanced fund; or (c) a professionally managed account.

In practical terms, this provision extends ERISA Section 404(c) fiduciary protection even to instances where a participant fails to make an investment election. This provision is effective for plan years starting after December 31, 2006.

Automatic Contribution Arrangements. Previous IRS guidance authorized so-called automatic enrollment/contribution arrangements. The Act expands this guidance and gives statutory authorization for what is now referred to as an "automatic contribution arrangement" or "ACA." Under an ACA, if an employee meets the 401(k) eligibility requirements and does not make an affirmative election (to contribute or not), the employee automatically would be enrolled and elective deferrals ("401(k) contributions") would start at a pre-set level. These contributions would continue until there is an affirmative election by the employee either to stop making contributions or to change the contribution rate.

The Act specifically preempts state laws, such as wage payment laws, that created questions as to the validity of these arrangements. However, to obtain the benefit of preempting state law, the plan must provide a default investment option that complies with the safe harbor ERISA Section 404(c) requirements explained above.

In addition, the Act creates a "safe harbor" ACA that eliminates the need for annual 401(k) testing, thereby allowing highly compensated employees to contribute without regard to the contribution rate of non-highly compensated employees. This safe harbor may be less expensive than the testing safe harbor that has been available since 1996 and thus, may be of interest to employers that were "on the fence" about whether to make their plan a safe harbor plan.

These provisions are effective for plan years starting after December 31, 2007, except that the preemption term is in effect immediately (affording relief to existing arrangements).

Diversification Requirements. Many companies whose stock is publicly traded offer company stock as a 401(k) plan investment option and make employer contributions in the form of stock. Until now, the retirement plan rules did not include requirements regarding a participant's right to divest his or her plan account of company stock (except in very limited circumstances).

Following the collapse of Enron and WorldCom, there was great public pressure to create rules requiring such plans to allow participants to divest employer stock. Thus, the Act provides new diversification

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requirements with respect to contributions invested in publicly traded employer securities: a participant must be allowed to divest/reinvest elective deferrals immediately and to divest/reinvest other employer contributions after three years of service. At least three investment options must be offered and the right to divest must be exercisable at least quarterly. This does not apply to free-standing Employee Stock Ownership Plans (ESOPs), since ESOPs are required to invest primarily in employer securities. This requirement is effective for plan years beginning after December 31, 2006, but phases in over three years with respect to employer securities acquired prior to January 1, 2007. Notice of these rights must be furnished to participants at least 30 days before each plan year.

Investment Advice by Fiduciary Advisors. Studies show that many participants make very poor decisions regarding how much to contribute to their 401(k) plans and how to invest their contributions. Some employers offer "investment education" but few go the next step and offer personalized investment advice, *i.e.*, professional advice based on all of a participant's circumstances as to how much to contribute to a 401(k) plan and how to invest his 401(k) account, to best achieve his retirement saving goals. A major reason many employers have not established such programs is concern over fiduciary liability (being held responsible for bad advice), while a reason investment advisors have not widely embraced the concept is concern over whether they can be paid with plan assets if the advisor is the plan's broker (or an affiliate of the broker).

A number of the provisions of the Act will require changes to existing plans and methods of plan administration, while other provisions are optional.

Providing relief to both fiduciary liability and prohibited transaction concerns, the Act creates the "eligible investment advice arrangement." In this arrangement, a "fiduciary advisor" may provide investment advice to participants and receive payment from the plan without creating prohibited transactions even if that advisor or an affiliate is also, for example, the plan's broker (and receives commissions on securities trading). In addition, the Act provides that a fiduciary will be deemed to satisfy his/her fiduciary duties with respect to the arrangement if it meets the various requirements detailed in the Act; a fiduciary is responsible for selecting and generally monitoring the advisor but would not, normally, be responsible for the actual advice given.

Rollover by Non-Spouse Beneficiaries. If a participant dies before receiving a full distribution of his or her plan account, the participant's surviving spouse is permitted to roll the plan account balance into an IRA and can receive distributions based on the surviving spouse's life expectancy (or joint life expectancy with a beneficiary). However, under prior law, death benefits could not be rolled over by a non-spouse beneficiary. The Act expands this "inherited IRA" rule so that distributions to a non-spouse beneficiary may be rolled over to an IRA of the non-spouse beneficiary and withdrawn over the non-spouse's life expectancy. This provision applies to distributions after December 31, 2006 (presumably even if the participant died prior to such date).

Rollovers to Roth IRAs. Distributions from qualified trusts, tax-sheltered annuities, governmental 457 plans and traditional IRAs may be rolled over directly into a Roth IRA. For tax years prior to January 1, 2010, however, a rollover to a Roth IRA will be allowed only if the taxpayer's adjusted gross income for the year of the distribution does not exceed $100,000. Amounts rolled over to a Roth IRA will be includable in gross income in the year of the distribution. This provision applies to distributions after December 31, 2007.

Penalty-Free Withdrawals for Participants Called to Active Duty. Reservists called to active duty for a period longer than 179 days may elect to receive a distribution from an IRA or of elective deferrals from the date of his/her duty orders until the end of his/her active duty period without incurring the 10 percent penalty for early withdrawals, although the distribution is subject to income tax. After the end of active duty, the reservist has a two-year period during which he/she may repay the withdrawn amount. There is no penalty for not repaying the distribution. As to repayment of elective deferrals, the statute does not indicate whether repayment is to be on a pre- or after-tax basis. This applies to individuals ordered to active duty after September 11, 2001 and before December 31, 2007.

Additional IRA Contributions for Individuals Affected by Employer's Bankruptcy. If an employer becomes bankrupt, individuals who were participants in a 401(k) plan of the employer, under which the employer matched at least 50 percent of the employee's contributions with employer stock, may elect to make additional contributions to an IRA of up to $3,000 in tax years 2007 through 2009.

Periodic Benefit Statements. Retirement plans are already required to provide periodic benefit statements, but only upon a participant's request and not more often than annually. With the growth of 401(k) plans, participant-directed investment, daily valuation, and the Internet, many, if not most, participants already receive periodic statements automatically, which include a wealth of information. However, this was not the result of legal requirements but of market forces. Now, the Act establishes updated and expanded minimum standards for benefit statements.

For plan years beginning after December 31, 2006, defined contribution plans that have participant-directed investments must provide a statement at least quarterly. Many 401(k) plans providing daily valuation services may already satisfy the new requirements, but such statements may not routinely be provided to all persons legally entitled to such statements, such as beneficiaries. Statements may not include all information that will be required, such as a description of limits or restrictions on the right to direct investments, a statement on the importance of diversification, and a notice of the Department of Labor's website.

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Fiduciary Liability During Blackout Periods. "Blackout periods" are periods during which participants cannot effect plan account transactions, such as changing investment allocations or obtaining distributions. Blackout periods most typically occur during the transition between investment managers or other plan service providers, although they may also occur when an investment option is being replaced. The law already requires furnishing participants with advance written notice of an upcoming blackout period. However, during a blackout period, ERISA Section 404(c) fiduciary protection is not available because participants are unable to direct how their accounts should be invested. The Act establishes a safe harbor for blackout periods, which will extend ERISA Section 404(c) fiduciary protection, but will not become effective until plan years beginning after December 31, 2007.

Cash Balance Plans. Over the last five years, some employers that sponsor traditional defined benefit pension plans have converted such plans into "cash balance plans," which are defined benefit plans that have aspects of defined contributions plans. These conversions have resulted in substantial litigation, Congressional investigation, and media coverage because of concerns that such conversations could be detrimental to employers who were plan participants at the time of the conversion.

The Act now provides detailed guidance for the establishment of cash balance plans, whether by conversion of an existing defined benefit plan or the adoption of a new plan. Dealing with one of the most contentious issues, the Act provides that a cash balance plan will not violate any age discrimination laws if the accrued benefit for a participant is not less than the accrued benefit of a younger but similarly situated participant. The Act permits a cash balance plan to pay a lump sum benefit equal to the participant's account balance after August 17, 2006 (the date of enactment of the Act). This change eliminates the so-called "whipsaw" concern, which arises from discrepancies between the interest rate credited to cash balance accounts and the interest rate used to calculate the present value of the annuity stream of payments the cash balance will generate by establishing specified minimum rates of return. Further, consistent with the changes to vesting schedules described above, the Act provides that, prospectively from June 29, 2005, a cash balance plan must provide for vesting after three years of service. Finally, the Act directs that regulations be issued regarding the application of the new rules in corporate merger and acquisition transactions where acquired employees are switched from a traditional defined benefit plan into a cash balance plan. All of these changes are likely to fuel the conversion to and establishment of cash balance plans. u

If you have any questions regarding the Act or would like to discuss your circumstances in particular, please contact Allen P. Fineberg, Elliot D. Raff, Michael P. Spiro or the attorney with whom you are in regular contact.

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harassment by women — are becoming increasingly common since the Supreme Court officially recognized such claims in 1998. Again, employers need to be careful to protect employees against same-sex harassment, as much as traditional sexual harassment. Importantly, the courts have made clear that same-sex harassment can violate the law even if the harasser does not have any sexual interest in the alleged victim.

Deferred compensation litigation and audits: This important area has been a recurring theme in our client alerts and updates. With the IRS revising its rules on deferred compensation plans, employers can expect both the IRS and employment lawyers to be more vigilant in reviewing the terms of deferred compensation plans offered to executives. Now is not the time to aggressively skirt the law with such plans. Instead, until the dust clears on the recent revisions, employers should carefully consider any new plans before implementation, and review existing plans to determine their compliance with the new regulations.

More family-leave claims: Enacted in 1993, the Family and Medical Leave Act ("FMLA") turned 13 in 2006, and appropriately it is no longer a "minor" law or unimportant nuisance for employers. Instead, the FMLA has matured (although it is still somewhat rambunctious) into a well-established body of law, with the number of claims and suits it generates likely to continue growing in 2007.

Like an adolescent, the FMLA continues to mystify employers because it often interacts in complex ways with "sister laws," including those relating to disability benefits, workers compensation and discrimination based on disability, gender and pregnancy. Further complicating matters in New Jersey, the N.J. Family Leave Act provides protections that differ in many ways from the FMLA, and the New Jersey Law Against Discrimination also prohibits discrimination based on family status.

One legal commentator has coined the term "family responsibilities discrimination" to describe the growth in claims arising under the FMLA and similar state laws. The theory is that employers seem less and less likely to hire and promote workers, especially mothers, who have childcare or family care responsibilities.

Regardless of whether this hypothesis holds true, employers can expect that family and medical leave issues will not go away in 2007. u

2007 Free Luncheon Seminars for Entrepreneurs

Free luncheon seminars will be held from 11:30 a.m. to 2 p.m. in Flaster/Greenberg's Conference Center, at 1810 Chapel Avenue West, in Cherry Hill. To register, contact Stacie Koch, at 856-661-2281; e-mail firm@flastergreenberg.com; or register on-line at www.flastergreenberg.com. Seating is limited.

Tuesday, February 13, 2007
"Top 10 Mistakes New Businesses Make in Employment Law — How To Avoid Them With Your Business"
Speaker: Michael Homans, Esq.

Tuesday, March 13, 2007
"A Survival Guide to Protecting a Good Name: How to Capitalize on Your Brand or Business Name"
Speaker: Jordan A. LaVine, Esq.

Tuesday, April 10, 2007
"What to do When the IRS & Division of Taxation Come Knocking"
Speaker: Alan H. Zuckerman, CPA, Esq.

Tuesday, May 8, 2007
"Smart Business Moves — What to Look for in Your Next Lease"
Speakers: Allen P. Fineberg, Esq. and Steven H. Gartner, President, Metro Commercial Real Estate, Inc.

Tuesday, June 12, 2007
"Dealing with First Employees: Stock Options, Inventions, and Restrictive Covenants"
Speakers: Michael D. Homans, Esq. and Elliot D. Raff, Esq.

Be our guest for breakfast on January 23rd

Rutgers School of Business – Camden Quarterly Business Outlook

Proudly co-sponsored by Flaster/Greenberg and the Chamber of Commerce Southern New Jersey

Speakers:
Economy: Dr. Joel Naroff, Chief Economist, Commerce Bank and President, Naroff Economic Advisors
Retail Food: Judy Spires, President, Acme Markets
Non Profit: Mark Boyd, CEO, Goodwill Industries of Southern New Jersey/Quaker City Goodwill
Regional Economic Development: Tom Morr, President & CEO, Select Greater Philadelphia

Clarion Hotel & Conference Center
Cherry Hill, NJ
Registration and breakfast: 7:45 a.m.
Program: 8:30 a.m. - 9:30 a.m.

Register by January 17th
Telephone: Stacie Koch at Flaster/Greenberg at 856-661-2281
Email: firm@flastergreenberg.com

"Doing Business Globally" January 25, 2007

The Chamber of Commerce Southern New Jersey will present "Doing Business Globally" on January 25, 8:30 to 11 a.m. at The Mansion on Main Street in Voorhees. The program will help prepare business owners to enter the global market by addressing the importance of companies' competitive strategies for conducting international business.

Moderator: Lauri Ann Plante, vice president of Client Relations at Right Management, Inc,

Keynote speaker: Joanna Savvides, president of the World Trade Center of Greater Philadelphia, will provide an overview of how to conduct business globally.

Panelists: Jordan LaVine, Esq., head of the Trademark and Copyright section of the Intellectual Property Practice Group at Flaster/Greenberg, will discuss protection of brands globally, tools for protecting trademarks, international licensing, and distribution agreements; Dennis DuBois, senior vice president and director of International Trade Banking for Sovereign Bank will speak broadly about financing opportunities for international trade to include traditional lines of credit, letters of credit, Export-Import Bank financing, and foreign exchange services; Jonathan Ward, Organizational Consultant and Leadership Coach for Right Management, Inc. will discuss how to manage a virtual team; Earl Baker, International Account manager for UPS, will examine the logistics of supply chain synchronization.

Cost to attend: $40 for pre-registered Chamber members; $65 for non-members and members without a reservation. For more information, call (856) 424-7776 or visit www.chambersnj.com.

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