November 2009
Volume XIII Number 4

Workplace Law Alert

Tanner & Guin, LLC
COUNSELORS AT LAW

Capitol Park Center
2711 University Boulevard
Tuscaloosa, AL 35401
(205) 633-0200

418 Lorna Square Office Complex
Birmingham, AL 35216
(205) 832-1990

632 Gulf Shores Parkway
Suite 208
Gulf Shores, AL 36542
(251) 968-0200

Workplace Law Group

Bert M. Guy
(205) 633-0206
bguy@tannerguin.com

Thomas W. Scroggins
(205) 633-0227
tscroggins@tannerguin.com

Justin G. Williams
(205) 633-0218
jwilliams@tannerguin.com

Brooke M. Nixon
(205) 633-0236
bnixon@tannerguin.com

Wendy M. Pinner
Senior Paralegal
(205) 633-0237
wpinner@tannerguin.com

Katherine D. Huffman
Spanish Translation PGA
(205) 633-0240
khuffman@tannerguin.com

Inside this issue:

FMLA + ADA = A Recipe for Disaster for Some Employers 1
The Sixth Circuit Court of Appeals holds that an employee may take up to 12 weeks of unpaid FMLA leave even if the employee has already taken leave pursuant to the employer's leave policy and that employers are required to engage in an interactive accommodation discussion under the ADA.

"Worker Freedom Act" Begins Infiltrating at State Levels 2
On June 30, 2009, Oregon became the first state to enact the AFL-CIO's model "Worker Freedom Act." The Act prohibits employers from disciplining employees who refuse to attend anti-union and certain other meetings.

GINA is Just Around the Corner 3
The compliance date for the employer provisions of the Genetic Information Nondiscrimination Act is November 21, 2009.

The Department of Labor Proposes Regulations Mandating Notification to Employees of their Rights Under Federal Labor Laws 4
The U.S. Department of Labor proposes regulations requiring government contractors and subcontractors to notify employees of their rights under federal labor laws in order to promote economy and efficiency.

FMLA Military Leave Entitlements Expand 4
Congress expands the recently added military leave components to the Family and Medical Leave Act.

FMLA + ADA = A Recipe for Disaster for Some Employers

The Family and Medical Leave Act and the Americans with Disabilities Act can frequently intersect at the end of an employee's medical leave for his/her own serious health condition. As a recent case from the Sixth Circuit Court of Appeals demonstrates, granting an FMLA leave and correctly designating does not necessarily conclude an employer's responsibilities. The employer may also be required to see if there is any accommodation that can be made to return the employee to work at the end of their leave.

In *Lafata v. Church of Christ Home for the Aged,* the Sixth Circuit overturned a summary judgment victory for the employer and remanded the case for a trial to determine whether the employer met its duties under the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). The FMLA requires covered employers to grant eligible employees up to a total of 12 workweeks of unpaid leave during any 12-month period for certain reasons. FMLA cases are often coupled with claims brought pursuant to the ADA which bars employers from discriminating against qualified individuals with disabilities. Included in the definition of "discrimination" is not making reasonable accommodations for the physical or mental limitations of an otherwise qualified employee.

In this case the employee, licensed practical nurse Eleanor Lafata, first injured her shoulder in 2000. After presenting a doctor's note stating limitations due to her injury, Ms. Lafata's employer, an assisted living facility, excluded certain actions from her job description to allow her to perform the position of Health Services Coordinator. In 2003, Ms. Lafata injured her foot while at home in her driveway. On March 31, 2003, Ms. Lafata presented a doctor's note stating that she could not work at all until further notice, and also requested FMLA and disability forms. The facility only provided her with disability forms and no FMLA leave forms. While out on disability leave, Ms. Lafata received a letter stating that her position had been filled. Ms. Lafata then filed a complaint with the Department of Labor (DOL). Following the DOL investigation, the facility gave Ms. Lafata 12 weeks of designated FMLA leave ending on October 20, 2003. Days before Ms. Lafata's return to work, she spoke with the facility's HR director and was informed that the only position being offered was that of Restorative License Nurse. Ms. Lafata argued that it was not an "equivalent position" under the FMLA because it required her to engage in activities

(Continued on page 2)

FMLA + ADA = A Recipe for Disaster for Some Employers

(Continued from page 1)

that she was not required to do as Health Services Coordinator.

First, the Court stated that an "equivalent position" is one that is virtually identical to the former position in terms of pay, benefits, and working conditions. Additionally, it must involve the same or substantially similar duties and responsibilities. The District Court had ruled that Ms. Lafata was not protected by the FMLA in October 2003 and thus not entitled to an equivalent position because her 12-week leave entitlement expired in June 2003. However the Sixth Circuit reversed and held that Ms. Lafata was clearly protected by the FMLA in October 2003 because the facility had failed to designate her earlier leave as FMLA leave and affirmatively designated the leave ending in October 2003 as FMLA leave. In effect, the employer's failure to properly process the employee's request for FMLA leave and to designate the leave as FMLA allowed to take much more time off and made that additional leave protected under the FMLA.

The Court then held that the District Court incorrectly relied on United States Supreme Court opinion *Ragsdale v. Wolverine World Wide, Inc.* to grant summary judgment to the facility. In *Ragsdale,* the Supreme Court invalidated an FMLA regulation providing that if an employee takes medical leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against the employee's FMLA entitlement. According to the Sixth Circuit, *Ragsdale* did not apply and thus the case was remanded for a trial to determine whether Ms. Lafata was offered an "equivalent position" in October 2003.

As for Ms. Lafata's ADA claim, the Sixth Circuit held that the facility was required to engage in an interactive process with Ms. Lafata to determine the limitations resulting from her disability and any reasonable accommodations that could overcome the limitations. While the District Court held that Ms. Lafata was not an employee in October 2003 and thus that the facility did not have to accommodate her disability at that time, the Sixth Circuit held that Ms. Lafata was protected by the FMLA in October 2003 and therefore remained an employee for purposes of the ADA. The Sixth Circuit then remanded the case for a trial to determine whether the facility engaged in the mandatory interactive process of determining Ms. Lafata's limitations and any appropriate accommodations.

This case demonstrates the importance of responding to employee requests for FMLA leave and promptly designated leave, as such, if it is qualified. Failure to do so can cause the employer to allow much more leave than otherwise intended. Additionally, it also highlights an employer's obligation to engage in the interactive accommodation process which has become a focus of the recently passed American with Disabilities Amendment Act.

"This case demonstrates the importance of responding to employee requests for FMLA leave and promptly designated leave, as such, if it is qualified."

Employers subject to the FMLA and the ADA must be familiar with the requirements and limitations placed upon them by the acts. Questions about FMLA and ADA requirements or claims may be directed to Brooke Nixon at (205) 633-0236.

"Worker Freedom Act" Begins Infiltrating at State Levels

Union supporters have been long awaiting the passage of the Employee Free Choice Act (EFCA). Labor interests fought hard and donated millions of dollars to get President Obama elected on the premise that once he was in office the EFCA would be passed immediately. However, Congress has yet to pass the EFCA much to the dismay of union supporters across the country. Moreover, it seems clear that many of the controversial provisions, such as card check recognition instead of secret ballot elections, have been or will be dropped from EFCA before it is passed. Considering the plight of legislation at the national level, labor has taken the fight to the local level where it is more likely to see success in certain regions of the United States.

For example, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a voluntary federation of 57 national and international labor unions, sponsored a model worker freedom act, and in June Oregon became the first state to pass it. Oregon's Worker Freedom Act, also known as the "gag

(Continued on page 3)

"Worker Freedom Act" Begins Infiltrating at State Levels

(Continued from page 2)

rule" bill, was signed into law by the Governor of Oregon without a signing ceremony or an announcement of any kind. The Act prohibits an employer from taking any adverse employment action against an employee who declines to attend or participate in an employer-sponsored meeting or communication with the employer where the primary purpose of the meeting or communication is to communicate the opinion of the employer about religious or political matters. In essence, employees cannot be disciplined for refusing to attend anti-union meetings sponsored by the employer.

These meetings are often referred to as "captive audience" meetings and have been an important staple in an employer's toolbox in combating organizing drives. They allow an employer to take their case for not having a union directly to the employees and to counteract what is likely to have been months of false union promises of a pay raise and other benefits if the employees will just vote "yes" in an election. The Worker Freedom Act would allow employees to not attend these meetings or even stage a dramatic walkout during such meetings with impunity.

Whether Oregon's Worker Freedom Act will withstand legal scrutiny is questionable, especially in light of *Chamber of Commerce v. Brown,* the 2008 decision of the United States Supreme Court to strike down a California law that prohibited companies receiving state funds from speaking out against unions. However, it is the law in Oregon now, and as EFCA stalls in Congress look for other state legislatures to consider similar measure as unions fight to stay solvent and relevant in today's modern workplace.

In the near future, many employers could be faced with union activity and when that time comes, it is imperative that the employer knows what rights the company has and also what it is prohibited from doing. Questions related to union organizing may be directed to Brooke Nixon at (205) 633-0236 or Tom Scroggins at (205) 633-0227.

"The Worker Freedom Act would allow employees to not attend these meetings or even stage a dramatic walkout during such meetings with impunity."

GINA is Just Around the Corner

The Genetic Information Nondiscrimination Act (GINA) was signed into law by President Bush on May 21, 2008, but the part of it that applies to employers, Title II, is just now coming into effect on November 21, 2009. While many have observed that it is a remedy in search of a problem, it would be incorrect for businesses to assume that GINA will not affect them or not require any action on their part.

GINA applies to all businesses that have 15 or more employees which is the same threshold for coverage under Title VII of the Civil Rights Act of 1964. This is regardless of whether the business conducts genetic testing or receives genetic information regarding its employees. It bars employers from acquiring genetic information of an employee or an employee's family member subject to certain exceptions most notably associated with verifying the need for leave under the Family and Medical Leave Act. It also prohibits employers from using individuals' genetic information when making hiring, firing, job placement, or promotion decisions, and the late Senator Ted Kennedy had called it the first major new civil rights bill of the new century.

Additionally, the way genetic information is defined in the bill lays a trap for the unwary employer. It is defined to include the manifestation of a disease or disorder in the employee or a family member. Family member is defined broadly to include family up to the fourth degree of consanguinity which extends to great-great grandparents and first cousins once-removed. Thus, if an employer took action on an application or against an employee because of concerns related to the health of an applicant's or employee's family member a basis for a GINA lawsuit would exist.

At a minimum, businesses will need to add a prohibition on discrimination or harassment on the basis of genetic information to their already existing anti-discrimination policy. There will also be a poster that employers will be required to post in a conspicuous place in the workplace. This poster is not yet available, but it is anticipated that it will be available for download for free from the EEOC's website by the effective date of November 21, 2009.

If you have any questions about GINA or its impact on your workplace, please call Tom Scroggins at (205) 633-0227.

"...the late Senator Ted Kennedy had called it the first major new civil rights bill of the new century."

The Department of Labor Proposes Regulations Mandating Notification to Employees of their Rights Under Federal Labor Laws

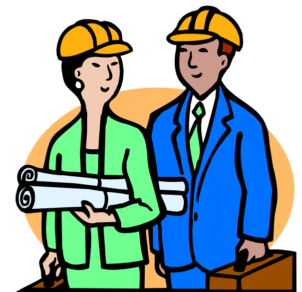
On August 3, 2009, the U.S. Department of Labor proposed regulations to implement President Obama's executive order 13496 (the "Order"), one of three pro-union executive orders issued just two weeks after President Obama took office. The regulations require government contractors and subcontractors to notify and advise their employees of their rights under the National Labor Relations Act to join and form labor unions. The requirement does not apply to contracts involving collective bargaining agreements or contracts involving purchases below the current $100,000 simplified acquisition threshold.

The stated policy of the Order is "to promote economy and efficiency in Government procurement" by ensuring that employees of government contractors are informed of their rights under federal labor laws. The Order emphasizes the National Labor Relations Act's policy of "encouraging the practice and procedure of collective bargaining" and protecting workers' "full freedom of association, self-organization, and designation of representatives of their own choosing." The Order reversed the previous administration's policies that required government contractors and subcontractors to notify their employees of their rights *not* to join unions or contribute agency fees for union expenses not related to representation.

The proposed regulations, found at http://edocket.access.gpo.gov/2009/pdf/E9-17577.pdf, include:

- A summary of federal employees' fundamental rights regarding collective bargaining and union activity under the NLRA;
- A requirement that every contract made after the effective date of the final rule include specific language describing federal contractors' and subcontractors' obligations and an acknowledgment that failure to comply may result in sanctions and other remedies;
- The text of the required notice to employees;
- Enforcement procedures and responsibilities designated to the Office of Federal Contract Compliance Programs, responsible for investigation and resolution, and the Office of Labor Management Standards, responsible for enforcement;
- An employee complaint procedure;
- The various sanctions, penalties, and remedies that may be imposed for failure to comply which include: contract cancellation; potential debarment; ineligibility for further government contracts; and other various sanctions and remedies.

Federal contractors and subcontractors should be aware of the proposed regulations because if enacted as a final rule, covered contractors and subcontractors will be subject to extensive notice requirements and compliance responsibilities. The Department of Labor is currently in the process of reviewing the comments to the proposed regulation. Questions regarding Executive Order 13496 or obligations under the proposed regulations may be directed to Brooke Nixon at (205) 633-0236.



FMLA Military Leave Entitlements Expand

With many employers just now settling in and getting used to the military leave aspects of the Family and Medical Leave Act (FMLA) added in January 2008, the rules have already been changed again. The expansion allows more people the ability to take FMLA leave for military related purposes.

The provisions which were passed as part of the Fiscal Year 2010 National Defense Authorization Act (H.R. 2647) expand both on the exigency leave and the caregiver leave components of the FMLA. Under the new law family members of National Guard and Reservists and active duty service members are eligible to take up to 12 weeks of exigency leave. Previously, family members of active duty military members were not eligible to take

(Continued on page 5)

"Under the new law family members of National Guard and Reservists and active duty service members are eligible to take up to 12 weeks of exigency leave."

FMLA Military Leave Entitlements Expand

(Continued from page 4)
the leave. Additionally, the Act added the provision that family members of veterans who are undergoing medical treatment, recuperation or therapy for serious injury or illness that occurred during the five years preceding the date of treatment are eligible for up to 26 weeks of FMLA leave. The addition of leave to take care of veterans is new.

Congress is expected to attempt even more expansions to the FMLA in the coming year, many of which are more significant than these. If you have questions about this or any other FMLA issue, please contact Tom Scroggins at (205) 633-0227.

Speakers Available

Members of the Tanner & Guin, LLC Workplace Law Group regularly speak before trade associations, business groups, and clients. If you have questions about any programs, please feel free to contact any member of the Workplace Law Group; or if you would like a copy of the handout materials from any seminar, please contact Charlotte Campbell, Practice Group Assistant, at (205) 633-0255 or e-mail ccampbell@tannerguin.com.

Newsletter Registration

Tanner & Guin currently publishes newsletters covering several practice areas. These include the *Alabama "SALT" Newsletter*, *Workplace Law Alert*, *Environmental Special Report*, *Health Law Update*, *Information Security and Privacy Alert and Alabama Business Law and Litigation Alert*.

If you are a current newsletter subscriber and need to update your contact information, please send current information to TGNewsletters@tannerguin.com.

If you would like to become a regular newsletter subscriber to any of our newsletters, please e-mail TGNewsletters@tannerguin.com.

Tanner & Guin On the Web

For past Workplace Law Alerts and articles, go to www.tannerguin.com. In addition, our other practice groups have publications and newsletters on the website. Use our e-mail addresses as another great way to effectively communicate with us. These are located on the first page of this newsletter.

Copyright © 2009 Tanner & Guin, LLC All rights reserved.

This newsletter is intended for general information purposes only and should not be construed as providing legal advice or legal opinions on any specific fact situation. Readers are urged to consult their own legal advisors concerning any specific legal questions involving the issues discussed. Personal opinions of the authors are included. Comments and suggestions are solicited and should be forwarded to any member of our *Workplace Law* Practice Group.

You are being sent the information at your request or the request of someone on your staff. Under the CAN-SPAM federal law effective January 1, 2004, this e-mail may constitute an advertisement or solicitation if its primary purpose is to advertise or promote a commercial product or service. To unsubscribe to this newsletter, please notify tgnewsletters@tannerguin.com with the word "REMOVE" in the subject or notify us at 2711 University Boulevard, Tuscaloosa, AL 35401.

NOTE: The Alabama State Bar requires the following disclosure: "No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers." Mississippi State Bar requires: FREE BACKGROUND INFORMATION AVAILABLE UPON REQUEST.