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Civil Unions in Illinois – What Does It Mean For Your Employee Benefit Plans?

By Rebecca L. Dobbs

On January 31, 2011, Governor Quinn signed the Illinois Religious Freedom and Civil Union Act (IRFCUA). The Act takes effect as of June 1, 2011. Although the law will add a few wrinkles to existing equal employment opportunity laws, Illinois has already recognized sexual orientation as a protected class. Therefore, the most significant impact on employers will be in the employee benefits arena. While employers are already trying to muddle their way through the numerous requirements of Health Care Reform, the Act will add additional complications and considerations in determining how to properly administer and offer benefits to employees.

Generally, the Employee Retirement Income Security Act (ERISA) is a federal law that serves to preempt state laws affecting employee benefits. In other words, in the realm of employee benefits, federal law trumps state law. However, ERISA does not preempt states from issuing laws that effect and govern insurance. Accordingly, states can issue laws that regulate insurance which indirectly affect those employers who sponsor insured plans.

IRFCUA mandates that “[a] party to a civil union is entitled to the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses, whether they derive from statute, administrative rule, policy, common law, or any other source of civil or criminal law.”

Thus, where an employer maintains an insured health plan (versus a self-insured plan) and that plan allows for coverage of spousal dependents, the plan will be required to extend the same coverage to an employee’s civil union partner. Federal law and state law do not currently mandate coverage of spousal dependents. However, the majority of plans allow employees to enroll their spousal dependents. For insured plans, employers will need to amend their health plans to include civil union partners and modify enrollment and other plan-related materials accordingly.

Keep in mind that continuation coverage provided under federal law, the Consolidated Omnibus Reconciliation Act (COBRA), will not be affected by the state law. Accordingly, civil union partners will not be entitled to continuation under COBRA.

That said, Illinois Continuation Law and Illinois Spousal Continuation Law, which affect insured plans regardless of size, will apply to civil union partners. Illinois Continuation Law can operate to provide continuation up to a period of 12 months where an employee is terminated or experiences a reduction in hours. Under Illinois Spousal Continuation Law, a civil union partner will be eligible to continue coverage

up to two years where benefits are lost due to divorce from the employee, death of the employee or retirement of the employee. Where a civil union partner is over the age of 55, Illinois Spousal Continual Law can potentially provide him or her with the ability to continue coverage until eligible for Medicare where the qualifying event relates to divorce, death or retirement. Plan documents and qualifying event notices will need to be changed accordingly.

Beyond these changes, an employer will also have to consider the tax implications of the new law. Benefits provided to civil union partners will not be taxable for Illinois state income tax purposes. However, civil unions are not recognized under federal law for purposes of federal income tax considerations. As a result, employers will have to calculate the fair market value of the coverage provided to an employee's civil union partner and count it towards the employee's total taxable wages when determining the appropriate federal income tax to withhold. That is, unless the civil union partner otherwise qualifies as a "dependent" of the employee as defined in

Section 152 of the Code. And, for those employers allowing their employees pre-tax deductions for the cost of benefits, adjustments must be made to ensure that employee contributions for civil union partner benefits are done on an after-tax basis, pursuant to Section 125 of the Code.

Non-government retirement plans such as 401(k) plans are regulated solely by federal law. As such, private employers will not be required to extend spousal benefits to employees in regard to federally-regulated pension benefits and retirement plans.

The first step in navigating how IRFCUA may implicate your benefit plans is to thoroughly review and assess all benefits currently being provided to determine which, if any, require amending. From there, any necessary changes to communication materials and plan documents will need to be addressed. Finally, tax ramifications must be taken into consideration.

If you have any questions about this or any other employee benefit related matter, please contact Rebecca Dobbs at (630) 587-7928 or rdobbs@salawus.com.

7th Circuit Paves Way For More Wage and Hour Class Actions

By Jeffrey A. Risch and Sara S. Zorich

The 7th Circuit's recent decision in *Ervin v. OS Restaurant Serv*, 09-3029 (7th Cir. Jan. 18, 2011), is certain to change the landscape of wage and hour lawsuits in Illinois, Indiana and Wisconsin. Ervin brought a minimum wage and overtime claim under the Fair Labor Standards Act ("FLSA") and the Illinois Minimum Wage Law ("IMWL"). The question on appeal was whether both a collective action under the FLSA and a class action under the IMWL could be maintained in the same lawsuit. The problem, as the lower court saw it, stems from the fact that the FLSA requires potential plaintiffs to "opt in" to participate in such an action, while the plaintiffs in a Rule 23(b)(3) class action are included in the lawsuit unless they affirmatively "opt out." The Appellate Court overturned the District Court and held that there was no categorical rule against certifying a Rule 23(b)(3) state-law class action in a proceeding that also includes a collective action brought under the FLSA. Therefore, the Appeals Court held that Plaintiffs may be granted class certification in actions brought under both state and federal law (aka combined actions).

Employers should be aware that if they find themselves engaged in a wage and hour dispute, it could lead to a combined action with complicated and challenging mechanisms for case management and settlement. If an employer is subject to such a combined action, potential class members may receive notice of the lawsuit which will require the employee or former employee to (1) decide whether to opt in and participate in the federal action and (2) decide whether to opt out and not participate in the state-law claims. The class sizes of the collective action and class action may vary greatly depending on the employees' choices which will impact handling and management of the lawsuit. This much is clear; combined actions can and most likely will increase an employer's litigation costs in wage and hour matters.

If you have questions regarding state wage laws or federal wage laws, please contact Jeffrey A. Risch at (630) 587-7922 or jrisch@salawus.com, or Sara S. Zorich at (312) 894-3265 szorich@salawus.com.

Employer I-9 Audits Continue to Be DHS Focus in 2011

By Sara S. Zorich

The Department of Homeland Security ("DHS") Secretary Janet Napolitano recently unveiled the DHS' top four priorities for the coming year which included boarder security and immigration enforcement. To no surprise, the government is continuing its focus on immigration enforcement through I-9 audits. These audits led to substantial fines directed against employers in 2009 and 2010.

The government shows no signs of slowing its audit process, and, to the contrary, is adding additional enforcement officers. Employers

should ensure they are complying with all applicable laws when hiring and employing workers. Worker authorization status is a growing problem that can be remedied prior to a government crackdown at your business. Employers must know the rules and be in a position to proactively manage the I-9 process.

If you have questions regarding workplace enforcement or I-9 issues, please contact Sara S. Zorich at (312) 894-3265 or szorich@salawus.com. Sara is particularly adept in helping employers conduct private I-9 audits.

H-1B Deadline Fast Approaching!

By Jacqueline Lentini McCullough

The H-1B visa category is used by employers hiring a foreign national in a professional level position (“specialty occupation”) requiring at least a bachelor’s degree or the equivalent. This year, the U.S. Citizenship and Immigration Services (“USCIS”) will begin accepting H-1B petitions on April 1, 2011, with a start date of October 1, 2011 (FY 2012). There is an annual cap of 65,000 new H-1B petitions permitted per fiscal year, with an additional 20,000 H-1B’s available for foreign nationals who have earned a U.S. master’s degree or higher, who are exempt from the H-1B cap.

While last year the H-1B cap was not reached until January 2011, it is anticipated that the quota will be reached earlier this year given the cautious signs of an economic recovery. Consequently, it is advisable to file an H-1B petition by April 1 or as soon as possible thereafter. A delaying factor in meeting this filing deadline is that the first step

of the process, the Labor Condition Application (“LCA”) filed with the Department of Labor (“DOL”), is currently taking approximately *seven* days or longer to be certified the closer it is to the April 1 filing deadline.

Petitions for new H-1B employment are exempt from the annual cap if the foreign national will work at an institution of higher education or related or affiliated nonprofit entities, nonprofit research organizations or governmental research organizations. Typically, H-1B petitions are filed for foreign nationals hired from abroad, or for F-1 and/or J-1 students who are currently working in the U.S. pursuant to student status work authorization.

If you have any questions regarding the H-1B process, please contact Jacqueline Lentini McCullough at (630) 262-1435 or jlentini@salawus.com.

California Court Strikes Down Law Allowing Union Picketing on Private Property

By Terry A. Fox

An intermediate appellate court in California has struck down two state statutes that applied to labor union picketing. Generally, the statutes precluded injunctive relief, except under higher burdens than applied to non-union activities. In *Ralphs Grocery Company v United Food and Commercial Workers Union Local 8*, Doc.No. F058716 (5th Dist. Cal. 1/17/11). The case arose from an unsolicited union picketing on the private sidewalk areas outside the Fresno Grocery Company operated by Ralphs Grocery. The organizers carried placards, distributed leaflets, and attempted to engage customers in discussions regarding the non-union workforce and lower benefits paid to them. There appear to have been confrontations.

The grocery store filed a lawsuit to obtain an injunction against such activities, specifically using the store’s private property for expressive activity at a time or place or in a manner prohibited by the grocery store’s rules. California’s “Moscone Act” limits the state’s courts in

order to provide non-monetary relief for labor activity. The other law prohibits temporary or permanent injunction in a dispute arising out of a labor dispute, except after taking testimony of witnesses in open court. The statute otherwise provided procedural requirements for court action.

In a unique argument, the business owner argued that the laws at issue were content-based regulation of speech. Under the California constitution, the legislature could not promote one form of speech over another. The Ralphs Grocery court agreed and found that “. . . there is no compelling reason for the state to single [labor speech] out as the only form of speech that can be exercised despite the objection of the owner of private property upon which the speech activity occurs.” Slip Op., at 6.

For more information on this decision or assistance with any other employment law related issues, please contact Terry Fox at (312) 894-3343 or tfox@salawus.com.

Engineer Who Refused to Work for Supervisor Cannot Maintain Age Claim

By Terry A. Fox

James Haigh was an engineer for Gelita USA, Inc., and assigned to various supervisors over the course of his six years of employment. After he was transferred to his final supervisor, and after the two had meetings to discuss Haigh’s work, the employee went to human resources and advised that he could not understand his supervisor’s expectations and essentially refused to work for that supervisor. *Haigh v. Gelita USA, Inc.*, Ca.No. 09-3479/10-1647 (8th Cir. 1/28/11). Haigh contended that he did not refuse to work for the supervisor, but that he had refused to be held accountable when the supervisor set him up to fail because of impossible expectations.

In reviewing the grant of summary judgment for the employer in Haigh’s

age discrimination lawsuit, the Eight Circuit Court of Appeals held that the judgment was proper in part because Haigh could not prevail merely by pointing to his justification for not meeting expectations. That was not enough to raise a question of fact for the case to go to a trial. The Haigh court also noted that Haigh was hired at age 60 and terminated at 66, thereby creating a presumption against age discrimination because it would be unreasonable for an employer to hire someone of advanced age, then discriminate against them based on age.

For more information on this decision or assistance with any other employment law related issues, please contact Terry Fox at (312) 894-3343 or tfox@salawus.com.

CALENDAR OF EVENTS - March 2011

<p>Legal Updates/Developments Presenter: Jeffrey A. Risch</p> <p>The discussion will focus on key case law and statutory developments with an emphasis on what's taking shape in Springfield, IL and Washington D.C. for 2011. Key labor law, Wage/hour issues and immigration enforcement updates will be examined and discussed.</p>	<ul style="list-style-type: none"> ■ Date: March 9, 2011 ■ Time: 7:30 am - 9:00 am ■ Location: Batavia, IL (Lincoln Inn) ■ To register or for additional information, please visit http://www.viaassn.org/ or call (630) 892-4228.
<p>Associated Builders & Contractors of Illinois - 2011 Tour Stops Top 5 Legal Pitfalls Non-Union Contractors Make Every Year Presenter: Chapter Labor Counsel, Jeffrey A. Risch and Jonathon D. Hoag</p> <p>Presented to the Associated Contractors and Builders of Illinois, this discussion will feature topics such as:</p> <ol style="list-style-type: none"> 1. Allowing Picketers to Picket and Banners to Banner 2. Failing to Recognize Key Legislative Action (in one's own backyard) 3. Allowing Private Information to Become Public 4. Retaliating against Union Salts (there's a better way) 5. Securing Public Work Without Knowing the Rules 	<ul style="list-style-type: none"> ■ Locations & Dates: <ul style="list-style-type: none"> ■ Decatur, IL March 10, 2011 ■ Elk Grove Village, IL March 24, 2011 ■ Peoria, IL March 29, 2011 ■ Effingham, IL March 31, 2011 ■ Springfield, IL April 5, 2011 ■ Quincy, IL April 7, 2011 ■ Visit www.abcil.org for more information or to register. For details by phone, please call (217) 523-4692.
<p>Employment Law from A-Z Presenter: Jeffrey A. Risch, Allison L. Chaplick, Jeffrey M. Glass and Sara S. Zorich</p> <p>In conjunction with Lorman Education Services, Jeffrey Risch, Allison Chaplick, Jeffrey Glass and Sara S. Zorich will present on employment compliance and policy creation best practices.</p>	<ul style="list-style-type: none"> ■ Date: March 23, 2011 ■ Time: 8:30 am - 4:30 pm ■ Location: Naperville, IL ■ For more information and to register, visit http://www.lorman.com/seminars/387233.
<p>Prevailing Wage Law Presenter: Jeffrey A. Risch</p> <p>Jeffrey Risch will moderate the discussion as a panel of professionals discusses practical guidance to avoid costly litigation. All the nuts and bolts of prevailing wage law and what you need to know about it will be discussed.</p>	<ul style="list-style-type: none"> ■ Date: April 13, 2011 ■ Time: 8:30 am - 4:30 pm ■ Location: Naperville, IL ■ For more information and to register, visit www.lorman.com/seminars/386908.
<p>Fair Labor Standards Act Presenter: Jeffrey A. Risch, Allison L. Chaplick, Heather A. Bailey and Sara S. Zorich</p> <p>As wage/hour lawsuits and class actions reach an all time high, Jeffrey Risch, Allison Chaplick, Heather Bailey and Sara S. Zorich, in conjunction with Lorman Education Services, will discuss staying up-to-date on new laws and critical legal developments, how policies and practices can minimize claims, how to determine which employees are exempt from federal and Illinois wage and hour laws and what compensable working time really is.</p>	<ul style="list-style-type: none"> ■ Date: May 6, 2011 ■ Time: 8:30 am - 4:30 pm ■ Location: Naperville, IL ■ For more information and to register, visit www.lorman.com/seminars/387420.
<p>Employment Law from A-Z Presenter: Jeffrey A. Risch and Jeffrey M. Glass</p> <p>In conjunction with Lorman Education Services, Jeffrey Risch and Jeffrey Glass will present on employment compliance and policy creation best practices, protecting yourself and your organization and common pitfalls.</p>	<ul style="list-style-type: none"> ■ Date: May 13, 2011 ■ Time: 8:00 am-4:30 pm ■ Location: Rockford, IL ■ For more information and to register, visit www.lorman.com/seminars/380234.