Labor & Employment News

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EXPERIENCED. EFFICIENT. EFFECTIVE.

Thompson Coe

Contents

Save The Date

Jan 27, 2006 | Austin

Firm attorneys will conduct a seminar entitled "Employment Law From A to Z in Texas" at the Crowne Plaza Austin Hotel, 500 North IH 35, Austin, Texas. Registration begins at 8:00 am and the seminar ends at 4:30 pm with lunch at noon. Additional information about this seminar is available online at www.thompsoncoe.com.

Celebrate

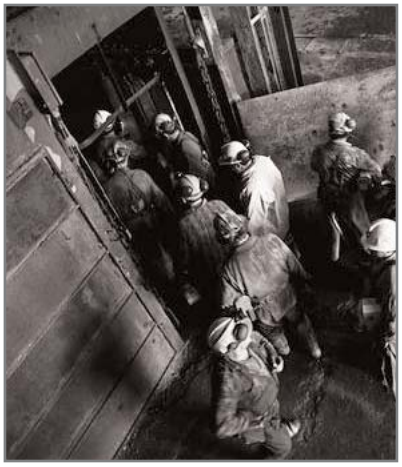
Thompson Coe's Labor & Employment Practice Group is pleased to celebrate the seventh anniversary of this newsletter. We have enjoyed sharing our expertise with valued clients and business colleagues.

With this new issue, we also introduce an updated newsletter format, designed for ease-of-use.

Texas Workers' Compensation Commission Abolished

We've all heard the saying, "if it ain't broke, don't fix it." Unfortunately, that saying could not be applied to Texas' workers' compensation system for the last several years. Texas' workers' compensation system has had some of the highest medical care costs and missed work statistics in the nation. The system has been broken for quite some time, but the legislature has recently taken significant steps to fix it.

Step one: abolish the Texas Workers' Compensation Commission. House Bill 7, which addressed what could turn out to be sweeping changes in the system, started by throwing the baby out with the bathwater. Effective September 1, 2005, workers' compensation functions are now performed by the Division of Workers' Compensation, which is a new arm of the Texas Department of Insurance. Albert Betts, Jr., formerly the Chief of Staff of the Texas Department of Insurance, has been appointed as the Commissioner of the Division.



In addition, the Office of Injured Employee Counsel (OIEC) has been created as a separate state agency charged with assisting injured workers. Not only will the OIEC assist injured workers with complaints they have filed through the Division, it will also provide other services, such as rehabilitation and work placement programs.

Obviously, just changing the construct of the Commission is not enough. Legislative and agency rules changes designed to have an impact on the workers' compensation system are in the works and are expected to be forthcoming as the Division's operations are put into place. As a result, it will probably take some time to see the full impact of House Bill 7. Be that as it may, given the ineffectiveness and bureaucracy of the Texas Workers' Compensation system, these changes are expected to bring nothing but improvement from a system that simply was not working.

Information about newly adopted or proposed rules will be posted periodically on the Texas Department of Insurance Website (www.tdi.state.tx.us).

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Gotcha! Texas Legislature Applies New Standard to Non-Subscribers Seeking to Obtain Post-Injury Claim Waivers

There is a new mousetrap for the unwary non-subscriber (an employer who does not provide workers' compensation coverage). If an employee of a non-subscriber to the Texas workers' compensation system is injured on the job, he or she can sue their employer for negligence. By contrast, employers that carry workers' compensation insurance generally cannot be sued for negligence; instead, their employees must seek relief through the workers' compensation system. To prohibit non-subscribers from bullying their employees into waiving their one right of redress—filing a suit against their employer—the Texas Legislature has long prohibited non-subscribers from obtaining *pre-injury* suit waivers from their employees. In fact, former § 406.033(e) of the Texas Labor Code simply made pre-injury suit waivers void. However, that section did not specifically address the validity of post-injury waivers.

The Legislature recently acted to fill that void. House Bill 7, which is now in effect, places strict statutory limitations on the validity of post-injury waivers signed by employees of non-subscribers. Under the newly revised § 406.033, a non-subscriber is still prohibited from requiring an employee to waive suits against the employer before the employee's injury or death occurs. In addition, the revised section places specific limitations on an employer's ability to obtain post-injury waivers. Specifically, suit may be waived by an employee after the employee's injury occurs only if all the following conditions are met: (a) the employee voluntarily enters into the waiver with an understanding of the waiver's effect; (b) the waiver is entered into no earlier than the 10th business day after the date of the initial report of injury; (c) the employee, before signing the waiver, has received a medical evaluation from a non-emergency care doctor; (d) the waiver is in writing and the true intent of the parties is specifically stated in the document; and (e) the waiver provisions are conspicuous and appear on the face of the agreement in a type larger than the type contained in the body of the agreement or in contrasting colors.

In all likelihood, courts will construe these conditions stringently. This means non-subscribers should discard (or at least severely modify) their old form post-injury waivers. A proper post-injury waiver will—in writing—track the language of the statute by requiring the employee to specifically acknowledge (1) they are voluntarily entering into the agreement with full knowledge that they are waiving their right to sue; (2) their injury was reported more than 10 days before the waiver was signed; (3) they have seen a non-emergency room physician and obtained that physician's medical evaluation of the injury; (4) they can read and understand the terms of the waiver and the effect of the waiver, *e.g.*, they understand they are forever giving up their right to file suit and have a jury consider their claim.

To ensure the waiver will stand up in court, it should be written in the language of the employee (*e.g.*, Spanish, French, *etc.*), in plain, easy-to-understand terminology; further, the actual waiver language must be in large, bold or other conspicuous print. Ideally, the employee's signature on the waiver should be witnessed by a notary public. While it is not required by the statute, the waiver might also contain language stating the employee has had time to consider the waiver and consult with a lawyer of their choosing. Perhaps, the waiver might even provide a short grace period during which the employee can rescind the agreement. Of course, the employee should receive something of real value in exchange for signing the waiver.

In sum, drafting a post-injury waiver is a daunting prospect: there are many issues to consider. You should consult with knowledgeable employment counsel before entering into any binding agreement with an employee.

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EEOC Issues Guidance Regarding ADA Association Claims

The Americans with Disabilities Act (ADA) prohibits employers with fifteen or more employees from discriminating against an individual with an actual or perceived disability that substantially impairs that individual's ability to perform major life activities such as working, walking, reading, *etc.* The ADA also protects applicants and employees from discrimination based on their relationship or association with a disabled person. This provision is known as the "association provision" and is the latest subject on which the Equal Employment Opportunity Commission (EEOC) has issued interpretative guidance.

The association provision is intended to prevent employers from taking adverse personnel actions based on unfounded assumptions and stereotypes about individuals who associate with disabled applicants or employees. The provision is broad in scope and applies to family members, as well as anyone else with whom the disabled individual has a relationship or association. The ADA does not require a family relationship for an individual to be protected.

The Q&A explains the ADA's association-related requirements and provides examples as to how it applies to various employment situations. For instance, it would be a violation of the association provision for an employer to refuse to hire an applicant who volunteers at an AIDS treatment center because the employer fears the applicant may contract HIV/AIDS. Similarly, an employer cannot refuse to hire an applicant who cares for a disabled family member because the employer believes the applicant's caretaker responsibilities will interfere with job attendance. An employer is also barred from taking an adverse personnel action against an employee for these types or similar types of reasons.

For further information about this topic, please see *Questions and Answers about the Association Provision of the Americans with Disabilities Act* on the EEOC's web site <http://www.eeoc.gov/facts/association_ada.html>.

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Department of Labor Issues Final Rules Regarding Military Service

The US Department of Labor (DOL) has issued its final interpretative rules under the Uniformed Services Employment and Reemployment Rights Act (USERRA). <http://www.dol.gov/vets/regs/fedreg/final/USERRA_Final_Rule.pdf>

USERRA is the federal law that regulates employment rights for military service members. The rules are written in an easy-to-read Q & A format and encompass nearly 300 pages. Key provisions address reinstatement rights and obligations, employee benefits, and notice requirements. The regulations affirm USERRA's strong pro-military member intent and its corresponding broad definition of "employer" which, unlike most federal employment discrimination statutes, includes individual supervisors and managers.

Effective January 18, 2006, employers must comply with DOL's new notice requirements which substantially track the interim notice obligations we discussed in our March 2005 newsletter. Employers may satisfy their notice obligations by posting DOL's revised model poster which can be downloaded on-line at <http://www.dol.gov/vets/programs/userra/poster.htm>.

QuickTips

- Given that an ounce of prevention is worth a pound of cure, take extra steps to document employee performance issues and violations of company policy. If a terminated employee's deficiencies were not properly documented, it may be difficult to mount an effective defense to a wrongful termination claim, especially when the allegations implicate others who no longer work for the company and may not be cooperative.
- Now is an ideal time to consider a new employee handbook containing policies and procedures consistent with current employment law and developing trends. For instance, you may find it beneficial to implement specific policies regulating internet usage in the workplace and cell phone usage while operating a motor vehicle for business purposes.
- While a small company employing less than 15 persons is not subject to Title VII of the Civil Rights Act of 1964, the company may still be sued for racial discrimination in employment pursuant to 42 United States Code Section 1981, which prohibits intentional racial discrimination in the making and enforcing of contracts.

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The Attorneys in the Labor & Employment Section of Thompson Coe counsel public and private sector management in connection with all federal, state and local laws regulating employment. Our experienced attorneys can help clients by simplifying the employment law maze, resolving sensitive employment-related issues and reducing the risk of costly lawsuits.

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How to Reach Us

If you would like more information about the issues discussed in this newsletter, or have a suggestion for a future article, please contact Mark Blaha at mblaha@thompsoncoe.com or 214.880.2598

This issue of *Labor & Employment News* may also be found online at www.thompsoncoe.com