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EMPLOYMENT, BENEFITS & LABOR RELATIONS QUARTERLY

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Employment, Benefits & Labor Relations Quarterly is a newsletter addressing current issues written by attorneys who regularly provide counsel in these changing areas of law.

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Teacher Evaluation System Represents Big Change for Wisconsin

By: Kevin Terry

In November of 2011, State Superintendent Tony Evers outlined a statewide system for evaluating teachers and principals. The framework is intended to shape the development of a state model that will guide the training, piloting, and implementation of the Wisconsin's educator effectiveness system. The system is not scheduled to be implemented statewide until the 2014-15 academic school year. Still, the proposed change is a major shift for the state, and represents the type of fundamental changes to education that many have been calling for.

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Is Your Handbook Ready for 2012?

By: Sara Ackermann

Start the new year off right by reviewing your existing policies thereby protecting your company in 2012. Companies should look at three policies in particular as they head into the new year.

1. Social Media Policy

Employee use of social media can affect the workplace. Whether it is Facebook, LinkedIn or blogging, employers need to establish guidelines regarding do's and don'ts for employees in the social media arena. At a minimum, social media policies should address the following issues:

- Are employees permitted to access social media while using company resources, such as company-issued laptops, iPhones or desktop computers?
    - If so, what are the limits regarding employee access during working time?
- Are there restrictions on an employee's use of social media while the employee is off-duty and using personal resources?
    - If so, what are the limits regarding disclosure of company information?
    - If so, what are the limits regarding commentary about the company?
- What should an employee do if subjected to harassment by coworkers via social media?
- Should supervisors "friend" subordinates?

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Key Design Features of the Framework for the Evaluation System

The Wisconsin Framework for Educator Effectiveness is a performance-based evaluation system that is intended to be the state model. The framework for this system was designed through collaborative work with leaders representing state professional education organizations, educator preparation programs, Governor Walker's office and the Wisconsin Department of Public Instruction. In the public release, the report outlines a number of design features aimed at both the formative and summative processes involved in a teacher evaluation system.

Guiding Principles

The design listed three guiding principles of the educator evaluation system:

1. Student Learning – First and foremost, the system states a goal of improving educators to ultimately improve the student learning within the state.
2. Continuous Individual and System Effectiveness – The system must be well articulated, manageable, reliable, and sustainable.
3. Delivery of Essential Information – The documents associated and the tests used are intended to be credible, valid, reliable, comparable, and uniform across districts.

Defining Effective Educators

- Effective Teacher – An effective teacher consistently uses educational practices that foster the intellectual, social, and emotional growth of children, resulting in measurable growth that can be documented in meaningful ways.
- Effective Principal – An effective principal shapes school strategy and educational practices that foster the intellectual, social, and emotional growth of children, resulting in measurable growth that can be documented in meaningful ways.

The glaring question that follows from these definitions is: How will social and emotional growth be tested and documented?

Educator Practices

Measures of educator practices will account for 50% of the overall rating for educators.

- Teachers – The 2011 Interstate Teacher Assessment and Support Consortium (InTASC) Model Core Teaching Standards will be used to evaluate teachers. Rubrics for observing teacher practices will be developed, adapted, or identified to address each component of Charlotte Danielson's "A Framework for Teaching."
- Principals – The 2008 Interstate School Leaders Licensure Consortium (ISLLC) Education Leadership Policy Standards will be used to evaluate principals. Based on ISLLC standards, rubrics for observing principal practices will be developed, adapted, or identified at the component level.
- Districts – Will have flexibility to create their own rubrics of educator practices, but they must apply to the State Superintendent through an equivalency review process.

Student Outcomes

Measures of student achievement will account for 50% of the overall summative rating for educators. Multiple measures of student outcomes will be used.

- Teacher – Student data that will be included in teacher evaluations will be statewide standardized assessments, district-adopted standardized assessments, Student Learning Objectives (SLOs) established by teachers, reading scores (elementary/middle schools), and graduation rates (high schools).
- Principals: Student data that will be included in principal evaluations will be school wide data from statewide standardized assessments, district-adopted standardized assessment results, School Performance Outcomes (SPOs) established by principals and administrators, reading scores (elementary/middle schools), and graduation rates (high schools).

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Is Your Handbook Ready for 2012?, Continued from Page 1

During 2011, the NLRB launched a campaign against employers who discipline employees for violating social media policies that ban certain behavior. The NLRB believes that such policies go too far and suppress workers' NLRA rights. Employers are well-advised to narrowly draft social media policies so as not to chill an employee's ability to voice legitimate workplace complaints.

In light of this, employers should consider adding a disclaimer that makes it clear that nothing in the handbook is intended to interfere with employee's NLRA rights.

2. iPhone/Blackberry Policies

The company's old cell phone policy probably needs updating. Now more than ever before, employees are texting, emailing, picture-taking and even making videos on their mobile devices. Such policies may vary depending upon whether the device is personal or company-owned.

For example, if a device is company-owned, the employer may want to give employees notice that there is no expectation of privacy regarding use of that device and, as such, that the company may review text messages and other communications made by an employee at any time.

Safety issues are another major concern. More and more employers are banning the use of mobile devices while employees are driving during the course of employment—or requiring the use of hands-free devices.

3. Reasonable Accommodation

By now all employers should know about the Americans with Disabilities Act Amendments Act (ADAAA), which expanded the definition of "disability." In 2011, the EEOC issued its new regulations regarding the ADAAA and now, when investigating an employee's claim for reasonable accommodation, the EEOC routinely asks to review an employer's policy in this area.

Such policies should, at minimum, include the following:

- A statement regarding the employer's willingness to accommodate employees and applicants
- The procedure for requesting an accommodation
- A statement regarding how employee medical-related information is stored and confidentially maintained

Wisconsin Tax Code Amended to Follow Federal Tax Treatment of Coverage of Adult Children

By: Mary Ellen Schill

Human resources and benefits professionals working for Wisconsin employers will now have one less thing to worry about with respect to Health Care Reform. On Friday, November 4, 2011 Governor Scott Walker signed legislation which conforms Wisconsin's tax code to the Federal tax code for purposes of determining the tax treatment of employer-provided coverage of adult children. In a legal update issued on May 11, 2010, "Federal Agencies Issue Important Guidance on Health Care Reform's Extension of Health Coverage to Young Adults," we pointed out the fact that while the Federal tax code excluded the value of employer-provided health coverage to children through the end of the year in which the child turned age 26, the Wisconsin tax code had not yet been so amended.

The newly enacted Wisconsin legislation will retroactively amend Wisconsin's tax code effective January 1, 2011, to mirror the Federal tax treatment of employer-provided health coverage to adult children. This means that for both Federal and Wisconsin tax purposes, any health coverage provided by an employer to an employee's adult children will not be taxable. As a reminder, for the coverage to be nontaxable, the child must be the employee's son, daughter, stepchild, legally adopted child (or placed for adoption), or an eligible foster child and the child must not have attained age 27 during the calendar year.

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Proposed Worker's Compensation Agreed Bill
By: Russ Wilson

The Wisconsin Worker's Compensation Advisory Council ("WCAC") has reached tentative agreement on an agreed bill to amend the Worker's Compensation Act ("WCA"), which reached the age of 100 years during 2011. As of this time the tentative agreed bill has not been reduced to writing. The significant features of the proposed agreed bill concern Work Injury Supplemental Benefit Fund ("WISBF") and the ongoing effort to reduce the impact of rising costs for medical care.

Work Injury Supplemental Benefit Fund

The WISBF is a separate fund that is funded by insurers and self-insured employers through several statutorily prescribed payments. For example, when an industrial injury results in death but the deceased employee has no dependents, the death benefits that would otherwise be payable to dependents are paid to the WISBF. The name of this fund is self-descriptive: it makes certain payments as a supplement to those paid directly by insurers and self-insured employers. As one example, the WISBF is available when an otherwise payable claim is barred by the applicable statute of limitations.

Demands have been made on the WISBF that have jeopardized is sustainability, and the Worker's Compensation Division ("WCD") of the Department of Workforce Development made several proposals, to which labor and management have agreed, to return the WISBF to a sustainable course. Among these proposals are:

- A technical revision to the statute of limitations that will ensure that in the future the WISBF will continue to be available for payment of certain otherwise barred claims after the expiration of 12 years;
- The WISBF will be able to share in the proceeds of third party lawsuits;
- Insurers and self-insured employers will have a six-month window in which to make certain claims for reimbursement from the WISBF;
- Clarification that an employee may seek WISBF benefits only once;
- The Wisconsin Department of Justice will represent the WISBF at hearings; and,
- The WCD will be authorized to prioritize claims whenever known claims exceed 85% of the cash balance in the fund.

Efforts to Reduce the Impact of Rising Costs for Medical Care

To nobody's surprise, the rate of medical care costs have outstripped the rate of indemnity payment increases, and for quite some time the total cost of medical care under worker's compensation has exceeded the cost of indemnity payments. Currently the point beyond which "reasonable" costs for medical care become "unreasonable" is 1.4 standard deviations above the norm in the treatment costs databases used by the WCD. As a result of the proposed agreed bill the reasonableness standard will be reduced to 1.2 standard deviations. In addition, a three-person audit committee will be formed comprised of a representative from labor, management, and the WCD. The audit committee must commence a study of the applicable data bases within six months of the date the agreed bill becomes law. In the event the audit committee fails to meet that milestone, the standard deviation will be increased to 1.3, but the maximum permanent partial disability rate will be increased by only $5 in 2013.

Various Other Agreed Provisions

Other significant agreed-upon proposals are:

- Vocational loss claims based on disfigurement will no longer be premised upon the potential loss of wages, but will be restricted to the actual loss of wages;
- A study committee will evaluate the payment of prosthetics and implants;
- The maximum permanent partial disability ("PPD") rate will be increased by $10 in 2012 and another $10 in 2013 (unless the audit committee fails to commences its activities in a timely manner, in which case the 2013 increase would be limited to $5);
- Vocational retraining benefits will be enhanced by the requirements that insurers will be liable to pay for tuition, books, and fees; the temporary total disability earned income offset during retraining will be eliminated; and, administrative law judges will have the ability to issue prospective retraining orders;
- A study committee will assess several items, including long term supplemental benefit payments, inclusion of group health insurance as a "benefit" for purposes of calculating average weekly wage, and future permanent and total disability benefit increases;
- Clarification that the payment of medical treatment or burial expense will not extend the statute of limitations for occupational disease or conditions.

On the administrative side, the certificate of readiness ("COR") form has been revised so as to allow defense counsel to object to inaccuracies in the COR submitted by the applicant's counsel. A controversial proposal by management fell by the wayside: management direction of medical care during the first 90 days of treatment. In summary, the agreed-bill process has not produced any cataclysmic results. Rather, the process has yielded refinements that focus on returning the WISBF to a sustainable course, reducing the cost of treatment, revitalizing retraining, increasing benefit rates modestly, and removing subjectivity from disfigurement claims.

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Government Considers Changes to State and Federal Employment-Discrimination Laws -- Reasons to Cheer and Jeer

By: Bryan Symes

As calendar year 2011 came to a close, several pieces of proposed legislation at the state and federal levels—each designed to modify existing employment-discrimination laws—continued to have the potential to positively and negatively impact Wisconsin employers in 2012 and beyond. As explained below, the proposed legislation, if enacted, will expand state and federal employment-discrimination protections to prohibit discrimination on the basis of employment status ("unemployment discrimination") and credit history, and will narrow the scope of prohibited discrimination on the basis of conviction-record status under the Wisconsin Fair Employment Act ("WFEA").

The Good News

First, the good news—2011 Assembly Bill 286 is designed to narrow the scope of prohibited "conviction-record" discrimination under the WFEA. If enacted, 2011 Assembly Bill 286 will eliminate the application of the much-maligned "substantial relationship" standard to situations where convicted felons (where such felony convictions have not been pardoned) are denied employment opportunities as a consequence of such past convictions. Under current law, Wisconsin employers generally cannot discriminate (e.g., refuse to hire, terminate employment) on the basis of past convictions (including felony convictions), unless convictions "substantially relate" to the circumstances of the job sought or held. In other words, only under the right circumstances—where a particular job provides a context within which a convicted felon is exposed to opportunities to engage in criminal activity similar to that for which he or she was convicted, and creates an unreasonable risk of future criminal activity—may Wisconsin employers choose to deny or terminate employment. For example, alleged conviction-record discrimination has been found not to violate the WFEA where an employer discharged one of its package-delivery drivers after discovering he was convicted of second degree sexual assault of a child.

Significantly, 2011 Assembly Bill 286 eliminates the "substantial relationship" test in connection with unpardoned felony convictions. Thus, if enacted, 2011 Assembly Bill 286 would allow employers to deny or terminate employment based on felony convictions (again, unpardoned felony convictions) even if the particular circumstances of the job do not create unreasonable risks of recidivism. Even if 2011 Assembly Bill 286 passes, it would not eliminate the application of the "substantial relationship" test in connection with misdemeanor convictions, other non-felony convictions and pardoned felony convictions. Application of the "substantial relationship" standard can be complicated, and must be evaluated on a case-by-case basis. Thus, employers are strongly discouraged from adopting a "one-size-fits-all" approach.

The Not-So-Good News

2011 Assembly Bill 350

2011 Assembly Bill 350 is designed to add yet another so-called "protected class" to the WFEA—"credit history." If enacted, 2011 Assembly Bill 350 would, with few exceptions, prohibit Wisconsin employers from relying upon information from within consumer reports (as defined in the federal Fair Credit Reporting Act) to make hiring or other adverse employment decisions (e.g., demotion, termination of employment, etc.). A "consumer report" is any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit, insurance, employment or other authorized purposes.

Under 2011 Assembly Bill 350, employers could make employment decisions based on credit history if an individual applicant's or employee's credit history is substantially related to the circumstances of the particular job sought or held. Also, if credit history affects an individual's eligibility to be bonded, it would be lawful for an employer to rely on credit history in making an employment decision if bondability is required by state or federal law, administrative regulation, or established business practice of the employer

2011 Senate Bill 249

Like 2011 Assembly Bill 350, 2011 Senate Bill 249 is designed to expand prohibited discrimination under the WFEA. Specifically, 2011 Senate Bill 249, if enacted, will add so-called "employment status" discrimination to the list of protected classes—a fairly innocuous euphemism for "unemployment discrimination." Under 2011 Senate Bill 249, not only would refusing to hire an unemployed individual constitute impermissible discrimination, but so too would "printing or circulating or causing to be printed or circulated any statement, advertisement, or publication, using any

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Teacher Evaluation System, Continued from Page 2

Performance Ratings

Three categories of performance ratings will be given to all educators:

1. Developing – Describes professional practices and impact on student achievement that does not meet expectations and requires additional support and directed action.
2. Effective – Describes solid, expected professional practices and impact on student achievement.
3. Exemplary – Describes outstanding professional practices and impact on student achievement.

If an educator is rated as developing over a time period, the educator will undergo an interventional phase to improve on the areas rated as developing. Completion of the intervention phase with a rating of developing will result in the District moving to a removal phase. An appeals process shall be developed by the School District to afford teachers who are subject to the removal phase an opportunity to challenge the evaluation.

Educator Performance Ratings

The design team recommends that individual teacher and principal evaluation ratings not be subject to open records requests to ensure that they are not tainted by public reaction.

Differentiation

Both new educators (first three years in a district), and those educators who receive "developing" ratings will be evaluated annually. Veteran and non-struggling educators will be evaluated once every three years.

Evaluators

All evaluators will be required to complete a comprehensive certification training program provided by the state. Teachers' immediate supervisors will be evaluating teacher practice and all principals' immediate supervisors will evaluate principal practice.

State Involvement

DPI will be responsible for developing, piloting, implementing, evaluating, and maintaining the evaluation system. Districts are also encouraged to collaborate with DPI on the system's development, pilot, and training phases. Districts will also be able to implement the new system early if they are prepared to do so.

What does this new evaluation system mean for school districts?

This new evaluation system represents a tool to implement two specific actions for School Districts. First, because of Act 10 and the Budget Repair Bill, School Districts now have more flexibility in how they choose to pay their educators. While collective bargaining has been limited to base wages, districts now have flexibility to provide incentive-based pay and performance pay. An educator evaluation system provides districts with a tool to utilize when seeking to pay educators based on performance in the classroom.

Second, because of Senate Bill 95 which was recently signed by Governor Walker, School Districts now have the ability to make employment decisions based in part on an educator's performance evaluations. This new evaluation system provides the process and standards of teacher performance.

A national movement seems to have finally reached Wisconsin and the educator employment relationship has drastically changed. Many of the constraints placed upon school districts are no more. School Boards must now decide how they will use the tools available to them to address the educational, financial, and social concerns facing their district.

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Reasons to Cheer & Jeer, Continued from Page 5

form of application for employment, or making any inquiry in connection with prospective employment that states or suggests that the qualifications for a job include currently being employed, that the employer…will not consider or review an application for employment submitted by an individual who is currently unemployed, or that the employer… will only consider or review an application for employment submitted by an individual who is currently employed."

If enacted, 2011 Senate Bill 249 has the potential to open the floodgates to a tidal wave of administrative charges filed with the Wisconsin Department of Workforce Development. In the author's opinion, a complainant alleging "employment status" discrimination will have much difficulty demonstrating that the status of being unemployed contributed to an employer's decision to select another candidate. However, notwithstanding the evidentiary challenges, claims based on "employment status" will undoubtedly prove to be attractive to those who are inclined to abuse the system.

President Obama's American Jobs Act of 2011

President Obama's American Jobs Act of 2011, like 2011 Senate Bill 249, contains provisions designed to prohibit "unemployment discrimination," but on a federal level. More specifically, President Obama's jobs bill would create the Fair Employment Opportunity Act of 2011, which would provide expansive rights and protections to the unemployed, including whistle blower/retaliation provisions and generous remedies (including $1,000 for each day an employer is in violation, and recoupment of attorneys' fees and costs).

High School Diploma Requirement May Violate the ADA

By: Dean Dietrich

In a recent "informal discussion letter," the EEOC suggested that a minimum requirement of a high school diploma for applicants for a position may violate the Americans with Disabilities Act. It was suggested that for the high school education requirement to be a proper qualifier for a position, the employer must show that the essential functions of the job cannot be effectively performed by someone who does not have a high school diploma. If that cannot be done, an argument exists that a high school diploma as a minimum requirement for a position is not "job related and consistent with business necessity."

This information was provided in an informal discussion letter and is not binding on all employers but is a signal of how the EEOC will look at minimum qualification requirements for a position. Because of this, employers should be careful when establishing minimum qualifications for a position.

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