Roemer Wallens Gold & Mineaux LLP
Counsellors at Law

13 Columbia Circle
Albany, New York 12203
(518) 464-1300
www.rwgmlaw.com

MANAGEMENT RIGHTS

A Labor Relations newsletter for clients of ROEMER WALLENS GOLD & MINEAUX LLP designed to provide relevant information to public sector managers on matters relating to the labor relations environment in government.

Fall 2014

FMLA and COBRA

What events qualify an employee (and/or their spouse and dependents) for continuation of their health insurance coverage under the Consolidated Omnibus Budget Reconciliation Act ("COBRA")? Specifically, what would be the outcome if an employee has exhausted their Family Medical Leave Act ("FMLA") leave, and is now on an unpaid leave of absence. The extension of unpaid leave to an employee beyond 12 weeks guaranteed by the FMLA may be granted based on an employer policy, contract provisions, or as an accommodation to the employee under the American's with Disabilities Act ("ADA"). An employee on an unpaid leave of absence has, arguably, had their hours reduced (to zero), which will constitute a "qualifying event" under COBRA *if* it results in the employee's loss of health insurance coverage. The terms of the specific health plan (a municipal practice or contract provision) must be consulted to determine whether the reduction in hours disqualifies the employee from coverage, thus triggering eligibility for COBRA continuation coverage.

COBRA and Unpaid Leave - It is key to remember that the FMLA requires an employer to continue an employee's health insurance benefits while on FMLA. Therefore, if an employee is entitled to FMLA, the employee's entitlement to COBRA coverage is delayed until that leave is exhausted. Once an employee has exhausted their FMLA leave, they are no longer entitled to the protections of that Act, even if the employer grants additional unpaid leave.

If the unpaid leave of absence is guaranteed or granted pursuant to a provision of a collective bargaining agreement or employer policy, the employer should consult the governing contract or policy, as these may guarantee the continuation of coverage during an unpaid leave of absence.

Unlike FMLA, the ADA does not require the employer to continue providing health insurance benefits. Therefore, if an employee is granted unpaid leave as an ADA accommodation, it is permissible to discontinue coverage for an employee who is no longer eligible and invite the employee to enroll under COBRA.

COBRA Qualifying Events - Upon the occurrence of a "qualifying event" resulting in the loss of coverage, the employee and their qualified beneficiaries become eligible for continuation coverage under COBRA. The employer is required to notify the employee and/or the employee's qualified beneficiaries of their eligibility for COBRA continuation coverage upon the occurrence of the qualifying event. The term "qualifying event" with respect to a covered employee means any of the following which, but for continuation coverage under COBRA, would result in loss of coverage for the employee or their qualified beneficiaries.

The following are qualifying events for employees if the event causes the employee to lose coverage:

- Voluntary or involuntary termination of employment (for reasons other than gross misconduct)
- Reduction in the number of hours worked

The following are qualifying events for spouses if the event causes the spouse to lose coverage:

- Voluntary or involuntary termination of the covered employee's employment for any reason other than gross misconduct
- Reduction in the hours worked by the covered employee
- Covered employee's becoming entitled to

- Medicare
- Divorce or legal separation from the covered employee
- Death of the covered employee

The qualifying events for dependent children are the same as for the spouse with one addition:

- Loss of dependent child status under the plan rules

Reduction in Hours - It is important to note that the occurrence of a qualifying event only triggers COBRA eligibility *if it would result in the loss of coverage.* Courts have consistently found that placement on a leave of absence constitutes a "reduction in hours" (to zero) under COBRA. The employer is required to notify the "plan administrator" within 30 days of the death, eligibility for Medicare, termination or reduction in hours of an employee. Health plans have different requirements for coverage which must be examined in order to determine whether an employee's coverage can continue upon the occurrence of an event listed above. One case has held that it is the terms of the health plan which defines the "triggers" for COBRA continuation coverage. Therefore, the reduction in hours will not constitute a qualifying event "if it is not so designated in the plan, even if it *might have been* designated as such, and regardless of the fact that it may ultimately have *led to* the eventual occurrence of a 'qualifying event' which was so designated." For example, reduction in the employee's hours from 40 to 35 will not trigger eligibility for COBRA continuation coverage if the health plan provides coverage for all employees working 30 hours a week or more.

Stray Remarks

On March 11, 2014, the NYS Appellate Division (1st Judicial Department) upheld the termination of one who claimed his termination from employment was based upon his race and his past criminal history of conviction.

NYS Human Rights Law prohibits employment decisions that are made based upon one's race [Executive Law § 296]; the law also prohibits decisions made based upon prior criminal acts – arrests or criminal convictions [Executive Law § 296.15, 16]. If, however, there is a clear nexus between the past criminal history and the job at-issue, employment decisions made on such basis may be upheld.

In the case at-hand, Godbolt v. Verizon New York, Inc., (115 A.D.3d 493 (1st Dept. 2014)), the court found that the employer was consistent in its termination of any employee who had falsified their employment application or failed to include key/pertinent information. Note that Mr. Godbolt readily admitted that he falsified his employment application by failing to indicate his prior criminal convictions. The Court further found that Mr. Godbolt was treated no "differently from similarly situated employees."

Mr. Godbolt next argues that one of the individuals who made the decision leading to termination exhibited "discrimination" in the form of a "stray remark." The Court found that:

> One remark made in an email exchange that took place weeks after the decision to terminate was made, [indicated that the employer] declined to reconsider the penalty because of the nature of [Mr. Godbolt's] convictions and concern about the liability the [employer] would assume if [Mr. Godbolt] committed a similar crime while on [the Employer's] time. (Emphasis added)

The Court indicated that based upon prevailing case law (and logic):

> Stray remarks such as this, even if made by a decision maker, do not, without more, constitute evidence of discrimination.

115 A.D.3d 493, at 494.

Mr. Godbolt would have had to establish that there was some connection ("nexus") between the stray remark and the decision to terminate in order to find any discrimination or discriminatory intent.

Moral: Be cautious when emailing about employees.

Breastfeeding: Rights and Obligations

The NY Civil Rights Law provides that:

> A Mother may breastfeed her baby in any location, public or private, where the Mother is otherwise authorized to be …

The law has been in place since 1994 (ch. 98, § 2, Laws of 1994). In 2007, the NYS Legislature amended the NYS Labor Law to place an obligation upon the employer so that:

> An employer shall provide reasonable unpaid break time or permit an employee to use paid break time or meal time each day to allow an employee to express breast milk for her nursing child for up to three years following childbirth.

The law goes on to maintain that:

> The employer shall make reasonable efforts to provide a room or other location, in close proximity to the work area, where an employee can express milk in privacy.

Finally,

> No employer shall discriminate in any way against an employee who chooses to express breast milk in the workplace.

(§ 206-c, NYS Labor Law). To determine the proper leave (paid or unpaid), we advise a review of your municipal policies and/or Collective Bargaining Agreement (CBA). For example, if your CBA provides for a 15-minute paid break, or a one-hour unpaid lunch, either of these established leaves/breaks may be selected as time-off to breast feed, in accordance with the State Law.

In 2010, the federal government enacted the Patient Protection and Affordable Care Act (PPACA); in response, the federal Department of Labor issued a Fact Sheet entitled: "Break Time for Nursing Mothers Under the FLSA" (Fact Sheet #73). The PPACA required all employers to give "reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth …" Note here that this federal language, enacted at least 3 years after NYS created its statute, provides for the same employer obligations but for only one year (NY Law is for 3 years after the child's birth). The federal law does not set up for a compensated break; however, it expressly states that any state law which provides the same or greater coverage will control. (i.e., a state law, collective bargaining agreement, or municipal policy which provides for compensated break time).

Further, while the state statute calls for the provision of "a room or other location" (§ 206-c, Labor Law), the federal law requires

> A place other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public …

Note, as with all FLSA matters dealing with compensation, the employee must be <u>completely</u> relieved from duty during this break, or else the time must be compensated as FLSA work-time. Finally, as we find in the NYS law, this federal legislation prohibits discrimination and/or adverse employment action taken against any employee utilizing the PPACA.

<u>On Duty Motor Vehicle Accident: Municipal Liability?</u>

Here is a "You cannot make this stuff up" case, coming to us by way of St. Paul, Minnesota. A Parks and Recreation employee ("MC") was assigned to and was driving a supply van back to her work sight from the City storage building. As she came around a corner she struck a parked vehicle, causing "serious front bumper damage to the parked car." What makes this accident unique is that the parked car belonged to MC! MC filed a Notice of Claim against the City of St. Paul seeking "$1600.00 to $1900.00" as compensation for the damage caused to her personal vehicle. MC is quoted as stating: "Because I was working for the City and driving the City vehicle, I feel [the City is] responsible for paying the damage done to my car." In its "defense," the City of St. Paul is, among other things, looking at the fact that City policies may not have been adhered to such as,

- The Safety and Security Coordinator was not timely made aware of the accident.
- The Parks and Recreation Department Incident Reports were not forthcoming.

The City of St. Paul has an Accident Review Board that, in its normal course of business, will review the accident and determine the next steps … including potential disciplinary action (not in retaliation to the Notice of Claim but based upon possible failure to follow established protocol).

Congratulations:
RWGM gives a hardy "Congratulations" to Jay Plumley on the achievement of passing the NYS bar!