

Labor and Benefits Lawyers Brothers and Sisters In Arms

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Areas in which our Practices Overlap

- The National Labor Relations Act
- Mergers and Acquisitions
- Employee Hirings and Firings
- Employee Investigations
- ERISA Litigation
- Employment Policies

The National Labor Relations Act

- The NLRA is the federal law governing the employer-union relationship
- Requires employers to bargain in good faith regarding terms and conditions of employment of the employer's employees represented by a union
- Employer must bargain over the terms and conditions of a collective bargaining agreement, that is the employment contract between the employer and union covering the union-represented employees
- Employer cannot unilaterally change these terms

The National Labor Relations Act (cont.)

- Terms of CBA includes those related to benefits (health, pension, etc.)
- Like any changes to terms of employment, employer must bargain over benefit changes
 - Recent Case: *UNITE Here v. NLRB*, 546 F.3d 239 (2d Cir. 2008) (Oct. 14, 2008) -- Substantial evidence supported NLRB's finding (with one member dissenting) that employer's unilateral award of stock to employees, including union-represented employees, in connection with IPO did not violate the NLRA; award did not constitute wages because it was not "so tied to remuneration" and therefore was not a mandatory subject of bargaining

The National Labor Relations Act (cont.)

- Any time an employer is changing benefits (whether for better or worse) of employees represented by a union, likely need to negotiate changes with the union
- Depending on wording of CBA, may include administrative (e.g., carrier) changes
- Terms of CBA may also dictate vesting of benefits
 - *Winnett v. Caterpillar, Inc.*, 553 F.3d 1000 (6th Cir. 2009) (Jan. 27, 2009) – In case involving vesting of retiree medical benefits, the Sixth Circuit reversed the district court, holding that expiration of CBA providing free health care coverage for life to retirees did not provide vested benefits to employees who were eligible to retire, but did not retire, prior to expiration

Mergers and Acquisitions

- Many overlapping labor/benefit issues
 - Effects of seller's collective bargaining agreements
 - Termination of employees by seller
 - Re-hiring of employees by buyers
 - Terms of successor's employment of employees

Mergers and Acquisitions (cont.)

- **Collective Bargaining Agreements**
 - Often dispute by seller and buyer of assets regarding assumption of CBA by buyer
 - If assumed, buyer limited by bargaining duty from unilaterally changing terms, including benefits

Mergers and Acquisitions (cont.)

- Termination of Employees
 - Not uncommon to agree that employees will not be hired by buyer until the employee is ready to return from leave (and often within a certain period of time)
 - For employees on disability leave, such an agreement raises issues under the ADA and ERISA
 - *Lessard v. Applied Risk Management, et al.*, 307 F.3d 1020 (9th Cir. 2002) (agreement in an asset purchase that buyer would not employ those employees of seller on medical or other extended leave violated the ant-discrimination provisions of ERISA for which both buyer and seller can be liable)

- **Re-Hiring of Employees**

- Purchase agreement often provides for continuation of benefits at substantially same type and level
- Includes vacation pay which is a quirky benefit, subject to varying State laws
 - California, for example, does not permit forfeiture of accrued vacation and requires payment of accrued vacation at termination
 - In Texas, employer's policy determines vacation rights at termination
- Labor lawyers deal with these issues in the normal termination context and can often provide helpful guidance as to how to handle the vacation portion of benefits continuation in a transaction

Employee Hirings and Firings

- Labor lawyers often assist employers in establishing hiring procedures and firing procedures, and advise employers concerning risks associated with terminations
- Issues often include severance, incentive compensation and other benefit entitlements at time of termination
- These benefits are established through agreements, plans and policies

Employee Hirings and Firings (cont.)

- Typically, benefits lawyers will be more skilled in identifying issues associated with these agreements, plans and policies
 - Severance plan (calculations, eligibility, deference to administrator, meeting ERISA requirements)
 - Incentive compensation issues
 - Deferred compensation issues
- Labor lawyer is more skilled in handling the termination aspect of the matter
- Point is that the client-employer often needs advice from both in connection with a termination
- New Issue – COBRA Subsidy

Employer Investigations

- HIPAA restricts the disclosure of information between a group health plan and its plan sponsor unless the plan sponsor amends the plan to prohibit the disclosure of protected health information by the plan to the plan sponsor for any employment-related actions or decisions
- Consequently, if the plan sponsor obtains claim information in the course of administering the plan it cannot use that information to make employment decisions with regard to a plan participant (45 CFR § 164.504(f)(2)(ii)(C))

Employer Investigations (cont.)

- In connection with employer investigations of employees, the employer should not use or rely on information obtained while wearing its plan sponsor hat

- Most ERISA litigation involves one of the following types of claims
 - Benefits
 - Fiduciary duties
 - Funding, contribution, or withdrawal liability
 - Plan terminations:
 - Overfunded plans (e.g., asset reversions)
 - Underfunded plans
 - Discrimination and retaliation

Employment Policies

- Typical for labor lawyers to review employment policies
- Policies often include information related to benefits
 - Summaries but not summary plan descriptions
 - Educational reimbursement plans
- Sometimes include severance policies
- Preferred course of action
 - Reference summary plan descriptions
 - Do not summarize benefits
 - Establish severance plan in accordance with ERISA