



LAMSON, DUGAN AND MURRAY, LLP
ATTORNEYS AT LAW

BUSINESS COUNSELING

UPDATE

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IS LDM ENDORSED ON YOUR EPLI POLICY?

More and more businesses are electing to purchase employment practices liability insurance "EPLI". Companies choose EPLI insurance in order to have insurance coverage in place for employment-related lawsuits.

When a business with EPLI insurance has an employment matter that is turned over to its EPLI carrier, the carrier then becomes involved in deciding what law firm will be representing the company's interests. If Lamson, Dugan and Murray, LLP "LDM" has already been involved in the matter, the carrier may or may not approve our continued involvement.

LDM has worked hard to form relationships with numerous EPLI carriers to enable us to assist our clients with EPLI matters. Our relationships with EPLI carriers generally fall into one of two categories. The first category is "panel counsel." When the EPLI carrier designates LDM as "panel counsel," the carrier may assign your case to LDM, thus assuring you of our continued representation of your interests. The second

category is pre-approved counsel. Carriers for which LDM is not panel counsel may pre-approve LDM to continue to represent your business after the matter has been turned over to the carrier.

Sometimes, the EPLI carrier will not approve LDM to continue representation if LDM is not designated "panel counsel" or has not been pre-approved under the policy.

The terms of your EPLI policy give you the right to request an ENDORSEMENT or RIDER that specifies the law firm you choose to represent and defend your interests. Securing an endorsement or rider that names LDM as your legal counsel will assure you that our firm will be able to continue its involvement in your case.

We have several clients that have successfully secured these endorsements and/or riders. In fact, some insurance carriers have encouraged this process – especially since LDM's billing rates for EPLI work are somewhat lower than most law firms selected by the insurance companies.

Obviously, this process is your ultimate decision, however, unless

LDM is specifically endorsed, you cannot be sure that the carrier will allow LDM to continue your defense. Also, you should know that this endorsement/rider does not obligate you to use LDM. The endorsement/rider merely gives you the ability to utilize our talented and experienced litigation team, versus some potentially unknown law firm chosen by your insurer.

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EMPLOYMENT DISCRIMINATION AND RETALIATION BY EMPLOYERS

For as long as federal law has prohibited discrimination in the workplace, it also has separately prohibited punishing, or “retaliating against,” an employee who opposes the prohibited discrimination. Employment discrimination can occur on the basis of factors such as race, sex and religion. Usually, there is an anti-retaliation provision found in the same laws that prohibit the underlying discrimination.

There are dozens of federal statutes with anti-retaliation provisions. The policy of protecting those who object to what they perceive as unlawful discrimination is so ingrained in federal civil rights law that it has even been read into laws by implication, even though it was not there in black and white. In 2005, the United States Supreme Court ruled that Title IX, which prohibits sex discrimination in educational programs or activities receiving federal financial assistance, also implicitly prohibits retaliation against individuals who oppose conduct that allegedly violates Title IX.

Court Expands Retaliation Claims

In the 2006 term, the Court took the additional step of articulating an expansive standard for determining what types of employer conduct, when accompanied by a retaliatory motive, can support a cause of action for retaliation. The underlying case concerned a claim of sexual harassment, but the ruling has ramifications for all claims based on retaliation for opposing civil rights violations. As the 2006 case itself

demonstrated, with the right set of facts it is possible for a plaintiff to be successful on a claim of retaliation, even though the underlying claim of discrimination has failed. The two types of wrongful conduct are independent of one another.

In this case, the plaintiff was the only woman working in the track maintenance department of a railroad. She asserted that she was subjected to sexual harassment by her supervisor, in the form of insulting and inappropriate remarks. Because the employer took prompt corrective action, including punishment of the harassing supervisor, it had no liability for the harassment claim itself.

However, even as the employer took its corrective action, it also reassigned the plaintiff from her job as a forklift operator to a harder, dirtier and generally less desirable job. Later, the railroad also suspended the plaintiff for over a month without pay for alleged insubordination, although, in time, the railroad’s own grievance committee found no insubordination and awarded her back pay for the period of the suspension.

In a unanimous decision, the Court rejected requirements that some lower courts had imposed for showing prohibited retaliatory conduct, and allowed a jury verdict for the plaintiff on her retaliation claim to stand. Under the now-abandoned tests, the conduct either had to amount to failing to hire, failing to promote, or termination, or it at least had to materially change the “terms and conditions” of employment. Instead, the Court

adopted a rule by which any adverse retaliatory action may support a retaliation claim, as long as it is reasonably likely to dissuade employees from engaging in protected conduct.

Context Is Significant

As the Court put it succinctly, in determining when an employer’s action constitutes prohibited retaliation, “context matters.” In a hypothetical example mentioned by the Court, while a change in the schedule of many employees may have little impact, such a change as a form of retaliation may be so significant to the mother of school-age children that it would deter her from complaining about discrimination at work. Similarly, an employer’s failure to invite an employee to lunch is normally not the stuff of retaliation, unless it was a weekly lunch meeting that was important to any employee’s advancement in the company.

A petty slight or minor annoyance is still not enough to support a claim for retaliation. That said, the risk of confusing such behavior with more significant adverse action is significant enough that employers are now well advised to give their managers the following straightforward direction: Do not do anything to punish someone for having opposed an employer practice that is alleged to be discriminatory.



INTRAFAMILY LOANS SUBJECT TO TAX LAWS

For parents with the financial means to do so, there may be a natural impulse to help a child get started in his or her adult life by making a loan to the child, on terms that are favorable to the child. Notwithstanding the virtues of such generosity, the cold reality is that, if the terms are too favorable to the child, the loan could end up with some undesirable tax consequences.

The better choice may be to go forward with the loan, but with the child repaying the loan with enough interest to avoid the tax bite. Think of this approach as generosity tempered with practicality and as a borrowing position for the child that is closer to the “real world” marketplace.

For a loan from a parent to a child, the IRS measures the interest rate on the loan against a benchmark interest rate, the “applicable federal rate” “AFR”, which it sets each month. To the extent that the interest due on the loan is less than the interest calculated with the AFR, that amount will be “imputed” income to the parent, even though it was not in fact collected by the parent. The IRS will also treat the same amount as a gift to the child, requiring the filing of a gift tax return, if the amount is greater than the annual gift tax exclusion (\$12,000 in 2008). There would be no gift tax due, however, unless the parent had used up the \$1 million lifetime gift tax exclusion. From the standpoint of the child’s taxes, he or she may be able to deduct the amount of the imputed interest on a loan secured by a residence.

Exceptions

There are two important exceptions to this scenario. If the amount of the loan to a relative does not exceed \$10,000, and the loan is not used for an income-producing investment, the IRS will not impute any interest. In addition, loans of up to \$100,000 do not lead to imputed interest if the borrower’s net investment income in a given year does not exceed \$1,000.

To avoid the income tax or gift tax ramifications for all kinds of intrafamily loans, the simplest approach is to use an interest rate that is at least as high as the AFR. Also, although it may seem unduly formal among relatives, it is advisable to set forth the terms of the loan in a written agreement, signed by all parties. Not only does this protect against faulty memories, but it decreases the odds that the IRS will consider the entire transaction to be a gift rather than a loan.

THE POWER OF A POWER OF ATTORNEY

A power of attorney is an instrument that authorizes an “agent” to act on behalf of someone else (the “principal”) in a legal or business matter. When an elderly woman executed a power of attorney that gave her younger sister certain powers, a dispute arose when the younger sister used her power to name herself as the beneficiary of the elderly woman’s life insurance policy. The dispute was with the elderly woman’s children and grandchild, who had been beneficiaries under the policy until the younger sister with the power of attorney put herself in their place.

The children and grandchild argued to no avail that the terms of the power of attorney instrument did not give the younger sister the authority to name herself as the beneficiary of the life insurance policy. Unfortunately for them, the instrument language was broad enough to authorize the agent to change the beneficiaries of the principal’s policy, where it authorized the agent “to transact all insurance business on [principal’s] behalf, to apply for or continue policies, collect profits, file claims, make demands, enter into compromise and settlement agreements, file suit or actions or take any other action necessary or proper in this regard.”

It was significant that the power of attorney did not incorporate by reference the various powers listed in the Uniform Durable Power of Attorney Act or otherwise limit the agent’s authority to change beneficiary designations. In cases in which the powers listed in the Act are incorporated by reference into the power of attorney, or other limiting language is used, an agent is not authorized to change the beneficiary of the principal’s life insurance policy unless the principal has expressly authorized the agent to do so within the power of attorney. Since there was no mention of the Act in the instrument in question, but only a broadly worded grant of authority, the sister had not exceeded her powers.

Although the children and grandchild lost on the issue of how to interpret the agent’s powers, they were still free to raise other arguments if they had factual support. These

included arguments that the elderly woman did not have the mental capacity to execute the power of attorney, that her execution of the instrument was not of her own free will but was rather the result of the duress, coercion, control and/or undue influence exercised by her sister/agent, and that the sister/agent's action in changing the beneficiary of the policy to herself was a violation of her fiduciary duty to the principal.

A power of attorney can be a valuable tool in estate planning, but it should be properly drafted to ensure that the powers contained therein are appropriate. Always consult with a qualified professional before executing a power of attorney.

“HOURS OF SERVICE” UNDER THE FMLA

To be eligible for leave under the federal Family and Medical Leave Act (FMLA), an employee must have been employed by the employer for the preceding 12 months, and the employee must have put in at least 1,250 “hours of service” during that time. Neither the FMLA nor the Fair Labor Standards Act (FLSA) defines “hours of service.”

When a hospital determined that a nurse it employed was about seven hours short of the 1,250 hours threshold, and therefore denied the nurse FMLA leave in connection with her surgery for carpal

tunnel syndrome, the circumstances required a federal appellate court to construe the proper meaning of “hours of service.”

Both sides agreed that, in terms of actual hours spent on the job, the nurse came up just short of the FMLA threshold. But the facts were not that cut and dried. Under a “Weekender” compensation program devised by the hospital to provide an incentive for nurses to work undesirable weekend shifts, for every two-week period during which the nurse worked 48 weekend hours, she was paid as if she had worked 68 hours instead. If the hospital had calculated the nurse's hours in her first year using the “bonus hours” in addition to the hours the nurse was at work, she would have been eligible for FMLA leave.

The court upheld the hospital's decision and declined to find it liable under the FMLA. While the legislation itself provided little guidance for the court, an FMLA regulation on the subject of the requirement of 1,250 hours does state that “[a]ny accurate accounting of actual hours worked under FLSA's principles may be used.” Another regulation states that “all hours are hours worked, which the employee is required to give his employer.” In this case, the court reasoned that the bonus hours for which the

nurse received extra compensation could not count as “hours of service” because she was not required to “give” them to her employer, but rather could spend that time for her own purposes.

The nurse argued to no avail that her case should have had the same outcome as another case decided by the same court, in which the court held that an employee's “hours of service” under the FMLA did include some hours not actually worked. In that case, however, the employee requested FMLA leave after successfully suing for wrongful termination and obtaining a remedy that included full service credit and back pay for the hours she would have worked but for the termination. Thus, the employee could use these hours that would have been worked in calculating FMLA eligibility.

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