



ONE WAY TO LOWER THE COST OF SEVERANCE PROGRAMS



Jeffrey G. Jones...

"SUB plans have been around for many years and have been common in the automotive industry."

The recent U.S. Supreme Court's decision in *United States v. Quality Stores, Inc.* resolved a disagreement among the U.S. Courts of Appeal about whether severance payments are subject to taxes required under the Federal Insurance Contributions Act (FICA). The Court held that severance payments are taxable "wages" for FICA tax purposes. This decision means that an employer who pays severance to a terminated employee must withhold and pay the employee's share of the FICA taxes, and must pay the employer's share of the FICA taxes on the severance pay.

The Court, however, did not rule on whether the requirement for FICA tax withholding applied to severance payments which are part of a supplemental unemployment benefits (SUB) plan. A SUB plan provides additional payments to employees who are receiving unemployment benefits because of an employee's involuntary separation from employment (whether or not such separation is temporary) due to a reduction in force, the discontinuance of a plant or operation, or other similar conditions. SUB plans have been around for many years and have been common in the automotive industry. Years ago the IRS ruled that severance payments made in connection with SUB plans are not "wages". Based on this IRS ruling, severance payments from a SUB plan have not been subject to FICA and income tax withholding. Because an employee might be subject to a big income tax bill for the tax year, Congress passed a law that required income tax withholding, but Congress did not address FICA tax withholding.

In summary, it appears that employers have the option of using a SUB plan to eliminate FICA tax obligations and thereby reduce severance program costs, at least until the IRS changes its position on this issue.



Fredrick J. Bissinger

"Recent regulations ... create two safe harbors that an employer, particularly an employer with high turnover, may wish to consider."

RECENT HEALTHCARE REGULATIONS GIVE AN EMPLOYER TWO WAYS TO MINIMIZE THE IMPACT OF THE 90-DAY LIMIT ON WAITING PERIODS

The Affordable Care Act (ACA) prohibits an employer from imposing a waiting period of more than 90 days before an otherwise eligible full-time employee can begin participating in the employer's health plan. Recent regulations, however, create two safe harbors that an employer, particularly an employer with high turnover, may wish to consider.

Regulations issued in February (26 CFR § 54.9815-2708(c)(3)(ii)) allow a health plan to impose up to a 1,200 hour-of-service requirement before starting the waiting period. The employer would need to track the hours precisely and start the waiting period on the first day after the employee completes the 1,200 hour-of-service requirement.

And regulations issued in June (26 CFR § 54.9815-2708(c)(3)(iii)) allow an employer to impose an orientation period of not more than one month minus one day, before the waiting period begins. The orientation period must begin on the employee's start date.

An employer should consult with legal counsel to make sure that these or other methods for minimizing the impact of the 90-day limit on waiting periods do not create legal problems. For example, large employers may find that adopting either method would result in employer taxes.

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JOKES ABOUT AGE FORCE EMPLOYER TO FACE AGE DISCRIMINATION TRIAL



Jeffrey M. Cranford

"This case demonstrates how discriminatory comments can come back to "bite" an employer... ."

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A 43-year-old head of sales was hired by a start-up internet technology company, and was employed only three months before being terminated for failing to meet sales quotas. At only 43, he was the oldest employee in the company, as most employees in the start-up company were in their 30's. The Defendant employer's chief executive made a remark to Plaintiff that he needed "to get in shape to keep up with us young guys," and later referred to Plaintiff's hernia as an "old man injury" and said, "Look what happens when you try to keep up with the thirty-year-olds."

While normally a 43-year-old would not seem to be a good candidate for an age-discrimination case, particularly when hired at the same age just three months earlier, in this case the discriminatory remarks were made very close to the date the decision was made to terminate the Plaintiff, and the court found that a reasonable juror would find that the employer viewed Plaintiff as falling into a different age category than other employees and believed this inhibited his ability to perform in a fast-paced start-up environment. Consequently, the court denied the employer's motion for summary judgment and found that, while the comments were said to have been intended as jokes, whether they demonstrated discriminatory animus was for a jury to decide.

Editor's Note: This case demonstrates how discriminatory comments can come back to "bite" an employer, even where the comments may be intended as jokes. The judge even quoted Shakespeare's King Lear, in which we read: "Jesters do oft prove prophets." While courts often find such comments

to only be "stray remarks," sometimes they are considered as evidence of discriminatory motivation. The case is Brown v. Crowdtwist, 122 F.E.P. Cases 846 (S.D.N.Y. 2014).



KNOW YOUR ATTORNEY **SUSAN S. DAVIS**

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Please join us in welcoming Susan S. Davis to the Firm. Susan is Of Counsel with the Knoxville, Tennessee office of the Firm, which she joined in August 2014. Ms. Davis concentrates her practice exclusively in the area of Business Immigration Law. Ms. Davis is a graduate of Duke University and received her J.D. from University of Tennessee College of Law. She is an active member of the American Immigration Lawyers Association, serving as two-term Secretary for the five-state Mid-South Chapter. She has also served as Chair of the Immigration Committee for the General Practice &

Solo Division of the American Bar Association for two terms, and as Chair of the Tennessee Bar Association Immigration Section.

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WHAT DO EMPLOYERS DO ABOUT LEGAL MARIJUANA?



T. Joseph Lynch III.....

“Employers are ... confronting developing issues with off-duty marijuana use by employees.”

New problems are emerging for employers as more and more states are considering laws allowing use of medical marijuana. In at least three states, state law allows the legal use of marijuana for recreational purposes. Even in states which still prohibit the use of marijuana, a new type of “synthetic” marijuana has arisen which is not prohibited by many laws.

Employers are, therefore, confronting developing issues with off-duty marijuana use by employees. For example, some states have laws protecting employees who take part in legal activities outside of the workplace. How do such laws apply when state law permits marijuana use, but federal law prohibits it? Certainly, federal contractors and those employers covered by the federal Department of Transportation drug testing requirements must still comply with the applicable federal drug testing standards.

With regard to the state law subject, a recent court in Colorado, where recreational use of marijuana is legal, held that marijuana usage is not a protected “lawful activity.” This finding was based upon the fact that although the state law permitted use of marijuana, the use of marijuana was still prohibited by federal legislation. In that case, the plaintiff was a quadriplegic who was authorized to use the drug medically, and had a particularly sympathetic case in some respects. Nevertheless, the appeals court, in a divided ruling, upheld the employer’s application of its drug testing policy. The case is currently on appeal to the Colorado Supreme Court. A decision is expected by early fall 2014.

..... Most commentators believe that as long as marijuana usage is prohibited by federal law employers may prohibit its use by employees and may discipline or discharge employees who test positive. Those employers who have operations in states that have legalized marijuana use may want to take extra care to communicate their policy and standards to employees in those states.

The law in this area is continuing to develop, so stay tuned. But at least so far, the courts have generally upheld an employer’s right to prohibit the use of marijuana, and to take action based on the violation of that prohibition.

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OBAMA ADMINISTRATION ANNOUNCES OTHER NEW FEDERAL CONTRACTOR REQUIREMENTS



Jerome D. Pinn....

"The Administration intends to deny contracts to firms with the most egregious track records."

It looks like announcements are steadily coming from the Obama Administration, setting forth additional requirements for federal contractors. On July 21, 2014, President Obama signed an executive order banning job discrimination against gay and lesbian American workers of federal contractors.

In making the announcement, the President stated that Congress has debated such legislation for decades without agreeing to it, and so he indicated he was going to exercise executive authority to take the step for federal contractors. The executive order also protects workers based not just on sexual orientation, but also gender identity, meaning transgender employees. There are no exemptions for religious groups in the executive order. However, the Obama executive order leaves in place exemptions that religious contractors enjoy regarding ministerial positions. It appears that the sexual orientation and gender identity discrimination bans, like the general prohibitions on race, sex, religion and national origin bias, will apply to all contractors with ten (10) or more employees. Affected employers will get a chance to comment on regulations implementing this new order before they become final.

The President noted that 18 states and more than 200 cities have already banned discrimination based on sexual orientation. Currently, Title VII of the U.S. Constitution bars employers from discriminating against workers based on sex, but does not expressly prohibit sexual orientation or gender identity bias in the workplace.

In addition, on July 31, 2014, the President signed an executive order requiring prospective contractors to disclose to agencies violations of 14 federal wage and hour, discrimination, health and safety, family and medical leave, labor and other workplace laws. Known as the "Fair Pay and Safe Workplaces Executive Order," it applies to new federal contracts for \$500,000.00 or more starting in 2016. It will require companies to reveal all such workplace violations in the past three years before becoming eligible for a contract. The Administration intends to deny contracts to firms with the most egregious track records. Each agency will appoint a labor compliance advisor who, under Department of Labor guidance, will review disclosures and consult with contracting officers to disqualify the worst violators from contract consideration.

This executive order also requires contractors to provide their employees with accurate pay documents showing their hours worked, overtime hours, pay, and any additions or deductions made from pay. If the contractor is treating an individual performing work under a contract as an independent contractor, rather than an employee, the contractor must provide a document informing the individual of that status.

Further, employers with contracts for \$1 million or more may not require workers who are not covered by a collective bargaining agreement with a union to arbitrate claims under Title VII or any tort related to, or arising out of, sexual assault or harassment.

The current executive orders follow a February executive order, which currently is in the rule-making process, to raise the minimum wage of federal contractors' employees to \$10.10 per hour.

National employer organizations immediately announced concern about this form of "black listing" companies from federal contracts possibly due to minor infractions of complex labor laws. However, government officials said that minor offenses would not disqualify a company, and that the agencies would provide guidance to companies that have been identified as having a history of labor law violations. Such firms would have an opportunity to remedy their legal practices, which the contracting officer would take into account in awarding contracts. President Clinton tried a similar approach with an executive order barring the government from giving federal contracts to companies that hired permanent replacements of striking workers. However, the D.C. Circuit Court of Appeals rejected that effort.

There is some good news for contractors, in that a number of items were left out of the new executive order -- items pertaining to the adoption of a fair compensation preference to employers that pay a "living wage," and/or creation of a contracting preference for employers that "respect collective bargaining rights."