Mountain States Employers Council, Inc.
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Bulletin

EMPLOYMENT AND LABOR LAW • HUMAN RESOURCES • MANAGEMENT DEVELOPMENT & TRAINING • SURVEYS

Mountain States Employers Council is the professional, cost-effective resource for employers in all areas of employment law, human resource consulting, training, and surveys.

In This Issue

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Employers Win FMLA Case at High Court

The U.S. Supreme Court decided *Ragsdale v. Wolverine World Wide, Inc.* on March 19, 2002. *Ragsdale* is the Supreme Court's first FMLA opinion and it is an important decision for employers. This case significantly impacts day-to-day FMLA administration for employers.

Background The Department of Labor's (DOL) FMLA regulations state that employers must designate time off, paid or unpaid, toward the FMLA by giving individualized, written specific notice to employees. This specific notice obligation is the single-greatest administrative burden for employers under the FMLA. The DOL maintained that such notice of FMLA-qualifying leave is prospective only, that is, the 12-week FMLA period commenced on the date of notice, even if the employee had been out for some time, since time not designated toward the FMLA did not count against the FMLA leave entitlement. In other words, failure to give notice entitled the employee to 12 weeks more of leave. That was Ms. Ragsdale's argument in the case before the Court. Her employer failed to give her notice of FMLA rights and she wanted 12 more weeks of leave following a lengthy absence.

Result in the Case

The Supreme Court invalidated the DOL's prospective-notice-only rule. In a 5-4 decision, Justice Kennedy, writing for the Court, basically stated that the FMLA regulations go too far. Under the regulations, the employer's failure to designate creates an "irrebutable presumption" the employer harmed the employee by failing to designate FMLA leave and, reading the rule literally, the employee deserved more than 12 weeks of leave due to this lack of notice by the employer. This takes the burden away from the employee of having to show failure to give notice somehow harmed the employee's FMLA rights. In the case, although she did not receive notice of FMLA leave, Ms. Ragsdale received 30 weeks of unpaid sick leave - more than twice as long as the FMLA allows — under her employer's very generous policies! When she asked for more leave, the request was denied. Ms. Ragsdale was fired when she was unable to return to work after seven months' off. Even if the employer had followed the FMLA's rules, the employee would have greatly exceeded her FMLA entitlement.

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Professional Employer Organizations Panacea Plague

The last decade has seen a new business entity promising human resources nirvana for small to medium-sized businesses. Professional Employer Organizations, or PEOs, as they are commonly known, are profit-oriented service businesses that offer traditional HR services through a percentage fee structure based on the wages paid to your employees. For the fee, a PEO will promise payroll, benefits, recruiting, compliance and risk management service. However, the panacea PEOs promise often turn out to be plagued with difficulties.

This new industry grew out of the employee leasing companies of the 1980s. Employee leasing companies had a rocky start due to some bad actors who took money from employers and failed to pay taxes and premiums.

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Professional Employer Organizations

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The PEO industry has attempted to distance itself from the employee leasing companies but the few states that have specific laws governing PEOs equate PEOs directly with employee leasing. Fifteen states have enacted laws to regulate PEO companies in an attempt to stop the mismanagement and fraud that caused difficulty for the industry in the past. PEOs go unregulated in the remaining states.

A primary force behind employee leasing and PEOs is the desire of employers to reduce the premiums they pay for insurance, particularly workers' compensation insurance. This is highly questionable. The National Council on Compensation Insurance, Inc. (NCCI) has found that the loss ratios of PEO clients have deteriorated from 1997-1999. Thus, PEO clients have not reaped the benefits they expected. Further, NCCI has difficulty tracking the history of clients who leave PEOs and potential experience modification ratings. Other problems identified by NCCI are proper employee classification and payroll determination. Another complicating factor is the variation in state laws on workers' compensation insurance policy issuance, endorsements, data reporting and experience ratings. Failure to follow the specific rules of each state could result in some form of sanction or penalty for the employer.

It is in the area of legal liability, however, that a PEO co-employer relationship can be most troubling. As a general rule, a PEO contract creates a relationship that results in a partnership of liability. Both the business client and the PEO are considered employers of an individual employee. The co-employment relationship can affect workers' compensation, civil rights and other areas of legal compliance such as OSHA, FMLA, NLRB, wage/hour, ERISA and unemployment. Even though the client maintains co-liability in these legal areas, they have generally given up the right to control how the pending litigation is addressed. This lack of control in times of crisis can affect not only the immediate situation but also the morale and attitude of the remainder of the client's workforce over time.

Considering the monumental impact legal compliance issues present to an employer, it is essential that the legal advice and assistance available is quick, comprehensive and current. PEOs usually do not provide legal advice, the support they offer is often in a distant state unfamiliar with local laws and reportedly, obtaining advice can be difficult.

The Infamous "Which Restroom?" Question

At MSEC we find that, about once a month, a member will call wanting to know what restroom a transgendered employee should be required to use. In Minnesota, this issue was brought before the court. The male-to-female transgendered employee was using the women's restroom and female employees were complaining.

The court held that the transgendered employee may be required to use the restroom of his biological gender. It went on to explain that a workplace rule barring a transgendered worker from choosing a restroom based on "self-image of gender" was not sexual-orientation discrimination. *Goins v. West Group* (Minn. 2001).

Avoid the Pitfalls

In order to avoid the pitfalls of a troubling PEO relationship, a business should be vigilant in its analysis of whether the outsourcing of its human resources function should be undertaken. When assessing the efficacy of hiring a PEO, you should:

1. Carefully analyze your human resource and risk management needs from both a human and financial perspective. Are employees important to your success? If so, what message does it send if they are no longer a part of your company?
2. Scrutinize the potential PEO vendor's financial background by obtaining banking and credit references as well as the procedure used by the PEO to prove that insurance premiums have been paid. Will the PEO guarantee any financial savings they promise?
3. Research the potential PEO vendor's personnel for experience and certifications, for memberships in associations, and licenses/registrations.
4. Gather references from other clients of the PEO and other professionals who have contact with the PEO. Require the PEO to give you references of clients who decided to stop using their services.
5. Require information on the funding of employee benefits and insurance as well as information on the insurance companies and claims administrators that may be involved in the processing of claims.
6. Review any service agreement diligently and obtain clarification or legal advice on any uncertain terms or conditions.

Like any decision affecting the vitality and longevity of your business, using a PEO could have profound and long lasting ramifications that could make the difference between success and failure. MSEC is available to help you assess this difficult decision.

Bearing the Burden *New HIPAA Privacy Regulations*

Employers thinking about becoming self insured to contain skyrocketing insurance costs may want to reconsider. Self-insured employers (as well as all health-related entities such as healthcare providers, HMOs, claims processing and administration firms, utilization firms, and plan sponsors) will be subject to stringent new procedures in the handling and transmission of "protected health information" (PHI) under the new HIPAA privacy regulations.

The new regulations will go into effect on April 14, 2003 for plans of $501 million or more, and for all other plans covering at least 50 participants on April 14, 2004. The regulations require these entities to guarantee the privacy of PHI and to guarantee that plan participants will have the right to access and revise their own information, to restrict its use for purposes other than treatment or payment, and to receive an accounting of all disclosures of their PHI. Computer systems containing PHI must be encoded and procedures must be put in place to create a "firewall" between employees dealing with PHI and other employees in the organization. Finally, covered entities must appoint a "privacy official" who will have comprehensive responsibility to oversee privacy procedures, who must run an ongoing training program to train all staff routinely handling PHI in privacy compliance, and who will take complaints of privacy violations and document the disposition of such complaints.

Penalties for noncompliance are stiff. Civil penalties may be assessed up to a yearly cap of $25,000; criminal actions, such as disclosing PHI for commercial advantage, may be punished with $250,000 in fines and prison terms of up to ten years.

An overview of HIPAA legislation and compliance issues will be presented at the Benefits Management Breakfast Briefing Session on June 7th.

A comprehensive program designed to give employers the tools to implement HIPAA requirements will be presented at our Denver location on August 21st and in Colorado Springs on September 10th. Watch for upcoming details or call Gwen Huber at 303.223.5373 if you have questions.

FYIs...LAWs...REGs

MSEC staff have developed two new white papers for our members.

Staffing:

"What Do I Ask the Candidate?" Behavioral Interview Questions

Internet Recruiting: A Guide for Building an Effective Internet Recruiting Program

To access and view white papers on employment laws and other human resource topics and the text of employment laws visit us at *www.msec.org/references/fyi_law_reg* or call 303.839.5177

Employers Win FMLA Case at High Court

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Why is this case important?

Employers cannot be penalized solely for failure to give specific notice of FMLA rights to employees. Employers can be penalized for interfering with or restraining FMLA leave rights. For now, assuming the DOL is not going to alter its existing regulations, giving specific notice as soon as practicable is a good idea for employers. First, the Supreme Court did not say that employers never have to give specific notice of FMLA rights. More importantly, specific notice remains the best evidence of employers' compliance with the law. However, and this is the best news, if employers do not discover the employee is on an FMLA-qualifying absence until weeks (or months) have gone past, the employer can now go back and designate the entire absence toward the FMLA. In other words, employees are not entitled to receive more than twelve weeks of FMLA leave.

As an example, an employee is injured seriously on the job and has been out, and receiving workers' compensation benefits, for the past six weeks. The injury meets the definition of a serious health condition under the FMLA. The employer can notify the employee today, six weeks into the leave, that the entire absence counts toward the FMLA and he or she has only six weeks of job-guaranteed time off remaining. Moreover, under *Ragsdale,* an employer could technically never give notice of FMLA leave and still be able to defend itself if it gives the employee the full twelve weeks off under the FMLA. MSEC would still encourage giving notice, however, for obvious self-defensive reasons. Remember that Ms. Ragsdale's case was easy. She was incapable of working for more than seven months; therefore, at the end of twelve weeks of FMLA leave, she would not have been able to come back to work anyway. As a practical matter, notice was meaningless in her case. But what about the employee who is out just twelve, thirteen or fourteen weeks? If the employer did not give notice of FMLA rights, can the employee argue that failure to give notice interfered with his leave rights since he might have attempted to come back earlier if he had known his job protections would expire at twelve weeks?

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Illegal Immigrants Lose in High Court

In the *Hoffman Plastic Compounds* case, the Supreme Court ruled five to four on March 27, 2002 that the National Labor Relations Board (NLRB) could not award back pay to an undocumented alien following unfair labor practices. The employee, an undocumented alien from Mexico, was allegedly laid off along with others for supporting a union organizing drive. He had obtained employment initially by using a birth certificate he borrowed from a friend who was born in Texas. The employee had been awarded back pay by the NLRB for the unfair labor practice charge. On appeal by the employer, the Court commented that awarding backpay in a case like this "trivializes" the immigration laws and condones and encourages future violations. In addition, since the only way the employee could qualify for the backpay award was to stay in the country illegally, the prospect of a large backpay award acts as an inducement for someone to prolong their stay. The Court also noted that it would be impossible for the undocumented alien to mitigate their damages as required by law without further violating the Immigration Reform and Control Act (IRCA) by either tendering false documents to a future employer or finding one who was willing to ignore the requirements of the law.

This case presents a significant hurdle for undocumented aliens in pressing their claims under employment laws.

You Asked For It

Q. What are the special rules to waive claims of age discrimination?

The Older Workers Benefit Protection Act (OWBPA) amended the Age Discrimination in Employment Act of 1967 (ADEA) to clarify protection given to individuals 40 and older. The OWBPA addresses the procedures that must be followed for older individuals to waive rights under the ADEA.

Under the OWBPA, a waiver of claims under the ADEA is not considered knowing and voluntary unless at a minimum:

- the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
- the waiver specifically refers to rights or claims arising under this ADEA;
- the individual does not waive rights or claims that may arise after the date the waiver is executed;
- the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
- the individual is advised in writing to consult with an attorney prior to executing the agreement;
- the individual is given a period of at least 21 days within which to consider the agreement (or if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement);
- the agreement provides that for a period of at least seven days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired; and
- if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer at the commencement of the period specified above informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and time limits applicable to such program; and the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

Accordingly, any agreement to waive an age claim should meet the above criteria in order to pass muster under the ADEA.

The Workforce of the Future

The workforce of tomorrow will be changing and companies will need to be aware of what these changes will bring on for them. Companies can expect to see a workforce that is growing in terms of age. The Bureau of Labor Statistics provides the following five key concerns with the changes in an aging workplace:

- There will not be enough middle-aged employees to replace retiring employees.
- A decreasing fertility rate shows that this trend will continue.
- The ratio of men and women in the workforce has leveled off projecting problems in finding another source to expand the labor force.
- People are living longer and thus are available to work past traditional retirement ages.
- Retirement ages projected to increase as the longer life expectancy increase so does the need for additional source of funding for the longer years of life.

All of these projected trends mean that the workforce of tomorrow will change appearance from that of today. These changes affect organizations in many ways. An older workforce has different desired benefits than the young and middle-aged groups. They are seeking an environment in which their experience and skills will be valued and appreciated. Employees of different ages come to work with different expectations. Understanding the preferences and descriptors of each generation group will help a company manage and maintain a work environment where many different ages can work and contribute. Examples of common work differences are, workers in their 20 and 30's seek challenges and growth opportunities, whereas workers in their 50's and 60's are more concerned with building relationships with co-workers and working in a structured environment with well defined lines.

While many things vary depending on the age group, some trends will form congruence within the workforce. Elder Care will be a growing concern as the population ages. Not only will employees be seeking financial assistance in the form of benefits from employers but also alternative working arrangements, communication and education on elder care as well as support groups that help employees deal with the challenges and stress of caring for a family member. Concerns with retirement plans will also spark the interest of employees. With the uncertain future of Social Security and the replacement of pension plans with employee contribution plans, the workforce will show enthusiasm in retirement options offered by an organization.

All of these employee concerns are important to keep in mind when deciding which benefits to offer, how to establish a work environment that pleases the array of ages represented, and how to retain employees in a time when the labor market is expected to shift. Smart companies are aware of the changes and will be ready to act and retain employees when the labor shortage is in swing.

Strategic Thinking in Human Resources

The role of Human Resources (HR), already critical to the ongoing success of the organization, plays an even more important role during difficult times. We have all been asked to assist in reducing expenses during the economic down turn. HR has to be present to ensure that things are done right when it comes to elimination of positions, severing employment relationships and organizational restructuring. The effect of all of this is that there is a tendency to be reactive, to focus on short term cost reduction as opposed to the long term goals and objectives of the organization. While HR needs to assist the organization in reacting to current events, it also needs to keep an eye on the future, to be strategically proactive. "Strategically" refers to plans that will be put into place during the next 3-5 years and "proactive" refers to acting in anticipation of future problems, needs or changes. Actions taken by an organization today will impact the organization for years to come.

What future problems, needs or changes will you encounter in the next 3-5 years due to actions taken today? Look at staffing practices. There will again be a time where it is hard to find good people. Companies without key staff will find it difficult to compete. Organizations that communicated things effectively with their employees during the down turn will find employees less likely to leave when the recovery arrives. Those employees dissatisfied with how their organizations have dealt with things will be more likely to move on, typically the best employees first. How will you then find and replace good talent? Higher salaries, incentives, etc. Sound familiar? This concept holds true in all facets of HR, from compensation to benefits, from employee relations through training.

Organizations are having to make tough decisions because of the down turn. As a professional in Human Resources, you can positively affect your organization by helping people focus on the strategic decisions made today. Make sure to utilize your membership at MSEC by asking your staff representative for input on decisions, which may impact your organization now and in the future.

2002 Colorado Health & Welfare Plans Survey

This annual survey provides detailed information on health insurance, dental plans, life insurance, accidental death and dismemberment, short and long term disability and retirement/investment plans. The 560 participants in the survey represent employers located in the six-county Greater Metropolitan Denver area, Northern Colorado, Colorado Springs, Pueblo, the Western Slope, and Colorado Resort areas. Data in the final report detail each geographic area in addition to an All Colorado data line.

2002 Survey Highlights

Health Coverage

New in the survey are historical health coverage premiums.

- The average monthly COBRA rate for single coverage is $252.82 - up 60% from the 1998 rate of $151.00.
- The overall average percent of single health coverage paid by the employer is 85% — consistent with the 1998 rate of 86%.

Retirement Investment Plans

This year, in addition to the 401k plan specifics, data were also collected for 403b and 457 plans. Of those organizations contributing to a 401k plan:

- 32% of the organizations match 100% of the employee contribution with an average maximum of 5%.
- 38% match less than 100% of the employee contribution. Of the 154 organizations in this category, 45% match 50% to a maximum 6%.
- 8% contribute flat dollar/percentage.

Surveys will be mailed to participants in early May - or go to www.msec.org now to view this survey by geographic location or by employment size. For more information, call the MSEC Surveys Department, 303.839.5177. MSEC will continue the statewide benefit comparisons in 2002 with the Colorado Paid Time Off Policies Survey to be published later this year.

2002 Colorado Ski Areas Compensation and Benefits

This survey provides wage and salary data for 171 positions. The 14 Colorado ski areas participating also reported wage and salary increases and average entry level hiring rates for the 2001-2002 ski season and salary projections for the 2002-2003 season. Benefit data were also reported for health, dental and life coverage; paid time off (vacation, holidays, sick leave); and miscellaneous benefits.

2002 Parks and Recreation

This survey summarizes wage and salary data for 86 benchmark jobs in the parks and recreation industry and is reflective of 30 organizations with employees located in the Denver/Boulder area.

2002 Winter Health Care

This report updates wage data for 30 benchmark jobs previously surveyed in the 2001 Summer Health Care Compensation Survey. These jobs were updated as they have exhibited the most movement due to supply and demand in the labor market. Participation included 43 hospitals and clinics located in Metro Denver, front range Colorado and Wyoming. In addition, this survey includes percent increases in pay and pay ranges for 2001 and projections for 2002 for the following categories: Nurses, Managers/Supervisors, and All Other Employees. Also included are average hire-in rates for nursing new graduates and the average 2001 turnover rate for Registered Nurses.

Surveys Online Index

MSEC will make available online all surveys as they are published. To find this information on the MSEC web site - www.msec.org - select "Surveys." Under "Surveys Online" select "Survey Data" or "Questionnaires."

Survey Data

2001 Cost of Benefits

2001 Colorado Miscellaneous Benefits
Reported by geographic location or employment size

2002 Colorado Health & Welfare Plans
Reported by geographic location or employment size

2002 Colorado Newspaper Comp.

2002 Colorado Personnel Pulse
Includes 2001 data for Turnover, cost per hire and job absence rates.

2002 Colorado Ski Areas Comp. & Ben.

2002 Construction Industry Comp.

2002 Country Club Comp.

2002 Health Care Comp. - Winter

2002 Needle Trades Comp.

2002 Parks & Recreation Comp.

2002 Planning Packet
Compensation projections, economic indicators, general planning data

Colorado Front Range Briefing

Survey Results and Economic Forecast

Two Sessions - June 6, 2002

9:00-11:00 a.m. and 1:30-3:30 p.m.

Plan now to attend this briefing session to review findings from this comprehensive survey, which includes data from the Greater Metro Denver, Northern Colorado, Colorado Springs and Pueblo areas. Mike Mauer, Economist for the Colorado Legislative Council, will also present an economic overview for Colorado. There is no charge for this session but space is limited. To register call…

303.894.6732

ECONOMIC PERSPECTIVE

UNEMPLOYMENT RATE Figures reported for Denver, Colorado and U.S. are from the Current Population Survey [Federal Method].)	DENVER MSA (1)	COLORADO (1)	UNITED STATES (2)
Latest Date	01/02 PN	01/02 PA	02/02 A
Latest Figure / Year Ago	6.0% / 2.2%	5.7% / 2.5%	5.5% / 4.2%
WEEKLY HOURS (MFG.)			
Latest Date	01/02 P	01/02 P	02/02 PA
Latest Figure / Year Ago	42.1 / 41.2	39.8 / 40.9	40.7 / 40.6
HOURLY EARNINGS (MFG.)			
Latest Date	01/02 P	01/02 P	02/02 P
Latest Figure / Year Ago	14.23 / 14.22	15.54 / 15.56	15.15 / 14.65

CONSUMER PRICE INDEX (2)	DENVER 1982-84 = 100	UNITED STATES 1982-84 = 100	UNITED STATES 1967 = 100
CPI-W Revised CPI for Urban Wage Earners & Clerical Workers			
Latest Date	Jul - Dec 2001	02/02	02/02
Latest Figure / Year Ago	175.8 / 169.8	173.7 / 172.4	517.5 / 513.4
% Change	+3.5%	+1.0%	+1.0%
CPI-U All Urban Consumers			
Latest Date	Jul - Dec 2001	02/02	02/02
Latest Figure / Year Ago	181.8 / 175.1	177.8 / 175.8	532.7 / 526.7
% Change	+3.8%	+1.0%	+1.0%

DEFINITIONS & SOURCES

(1) Colorado Dept of Labor & Employment
(2) Bureau of Labor Statistics, U.S. Dept. of Labor

P = Preliminary Data
A = Seasonally Adjusted
N = Not Seasonally Adjusted

NOTE: Denver Metropolitan Statistical Area (MSA) includes Adams, Arapahoe, Denver, Douglas and Jefferson Counties

For more information - www.bls.gov

NLRB ELECTION RESULTS

TWENTY-SEVENTH REGION ELECTION RESULTS

Code	Company	Union	City	Union	Company	Result
RC	U.S. Food Service, Inc.	IBT	Denver, CO	13	17	Company
RC	Public Service/Excel Energy	IBEW	Denver, CO	3	0	Union
RC	Public Service/Excel Energy	IBEW	Denver, CO	2	0	Union

RC - Petition filed by union for election to represent employees for collective bargaining.

RD - Petition filed by substantial number of employees who claim current bargaining representative is no longer their representative.

RM - Petition filed by employer when a union claims to represent employees by a card check.

Call MSEC First

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Compensation Consulting Solutions

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Your Strength lies in the power of the MSEC group.

Human Resource Audits

If you are guiding your HR function through compliance and employee relations issues, you know how challenging your work can be. So how do you know if you are on a solid foundation? With the MSEC Human Resource Audit, you can determine where you are, prioritize what you have to do, and know for certain you have looked at the right issues.

So…Call MSEC first

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1799 Pennsylvania Street
P.O. Box 539
Denver, Colorado 80201-0539

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