

The Labor Relations Advisor

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Federal Appeals Court Approves Excluding Contraceptive Coverage

Union Pacific Railroad's exclusion of health benefits for any contraception used by women or men did not comprise sex discrimination, ruled the United States Court of Appeals for the Eighth Circuit (*In re Union Pac. R.R. Employment Practices Litig.*, 8th Cir., No. 06-1706, 3/15/07). The Appeals Court found that Title VII of the 1964 Civil Rights Act, as amended by the Pregnancy Discrimination Act of 1978 (PDA), does not require coverage of birth control. The split decision reversed a lower court ruling on a 2001 class action suit.

The five health benefit plans at Union Pacific exclude allergy and immunization shots, infertility treatments, and contraception. All contraception, including prescription, non-prescription, and surgical

(Continued on page 2)

Employers Challenged by FMLA Rules

Administering the Family and Medical Leave Act (FMLA) presents "significant challenges" to most companies according to recent surveys by the Society for Human Resource Management (SHRM). On behalf of the National Coalition to Protect Family Leave, SHRM interviewed more than 600 human resources personnel nationwide to identify problems with the FMLA regulations. Based on the surveys, the Coalition has made recommendations to the Department of Labor (DOL) for improving the FMLA should new regulations be issued. Suggestions include clarifying the definition of "chronic health condition," and requiring that intermittent leave be used in half-day increments instead of the current minimum of 15 minutes. The Coalition also recommended simplifying record-keeping rules.

SHRM found that tracking intermittent leave is one of the most problematic FMLA requirements, reported by 80 percent of respondents. The survey identified other frequent difficulties in administering the FMLA, including

- determining whether a health condition is "serious" (57 percent of respondents);
- administering episodic FMLA leave (47 percent); and
- granting FMLA leave due to the regulations, even if managers believed the employee's requests were not legitimate (40 percent). ■

In This Issue

| | |
|---|-------|
| Federal Appeals Court Approves Excluding Contraceptive Coverage | pg. 1 |
| Employers Challenged by FMLA Rules | pg. 1 |
| Delta Details Pay Plan to Share Success | pg. 1 |
| AFA Seeks to Compel OSHA Rules for Aircraft Crew | pg. 3 |
| Court Denies Individual Standing for Claim on Arbitration Award | pg. 3 |
| News Briefs | pg. 4 |
| UAW Sets Bargaining Goals | pg. 5 |
| Cintas' Confidentiality Rule Violates NLRA, Federal Court Rules | pg. 5 |

Delta Details Pay Plan to Share Success

Delta will provide nonmanagement employees about \$480 million in stock and cash payments shortly after the airline exits Chapter 11 bankruptcy in May. The payouts are part of the company's new "pay for performance" plan filed with the bankruptcy court. Covering approximately 39,000 non-contract workers, the program generally excludes union-represented pilots and dispatchers, as well as managers who are covered by separate compensation programs.

Highlights of the plan are as follows:

- Stock Ownership – Award of approximately 3.5 percent of outstanding shares of Delta newly issued common stock, with an estimated value of \$350 million.
- Cash Lump Sum – Payment valued at 8 percent of 2006 earnings, with an estimated total value of \$130 million. The average total lump sum and equity payout for non-contract employees is estimated at \$12,000.

(Continued on page 4)

Contraceptive Coverage *(continued from page 1)*

methods, are excluded by the plans for both male and female employees when used for the sole purposes of birth control. Four individual female employees filed suit against the railroad in 2001, alleging sex discrimination under the PDA because the company's benefit plan did not provide reimbursement for their prescription contraception used for birth control purposes.

In March 2001, the separate lawsuits were consolidated and certified as a class action. The class was comprised of approximately 1,500 female employees of reproductive age employed by the company after February 9, 2001, who were enrolled in a health plan and used prescription contraception to prevent pregnancy and were not reimbursed by the plan. The U.S. District Court granted summary judgment to the class, finding that the company's policy violated Title VII "because it treats medical care women needed to prevent pregnancy less favorably than it treats medical care needed to prevent other medical conditions that are no greater threat to employees' health than pregnancy."

On appeal the district court was reversed. "Contraception is not related to pregnancy for PDA purposes, because ... contraception is a treatment that is only indicated prior to pregnancy," wrote Judge Raymond W. Gruender for the majority. Furthermore, since the PDA and its legislative history are silent on contraception, the law cannot be interpreted to cover birth control. The Judge also explained that because the company's health plans do not cover contraception for any employees – regardless of gender – there is no disparate treatment based on sex.

In dissent, Judge Kermit Bye asserted that the company's lack of insurance coverage for prescription contraception "only medically affects females, as they bear all of the health consequences of unplanned pregnancies." To provide equal preventative health benefits, "a plan would have to cover for the uniquely female risk of pregnancy, although this required giving women additional benefits men would not receive," Bye explained.

In a side note, following the lower court's ruling Union Pacific independently decided to provide health plan coverage for contraception. The company has announced that it has no plans to eliminate the benefit. ■

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AFA Seeks to Compel OSHA Rules for Aircraft Crew

The Association of Flight Attendants (AFA) and the AFL-CIO have petitioned a federal appeals court to require the Labor Department to issue safety rules for flight attendants and other aircraft workers (*Association of Flight Attendants-CWA, AFL-CIO v. Chao*, D.C. Cir., No. 0605190, oral argument 3/26/07). Currently, the Federal Aviation Administration (FAA) holds jurisdiction for the health and safety of personnel on operating aircraft. A lower court had dismissed AFA's lawsuit alleging that the Occupational Safety and Health Administration (OSHA) and the FAA had failed to ensure the safety of airline employees (*Ass'n of Flight Attendants-CWA v. Chao*, D.D.C., No. 1-05-CV-01850-RCL, 5/22/06).

The case arose in 1990 when AFA petitioned the FAA to apply OSHA standards to aircraft crew. The union asked the FAA to adopt OSHA standards on recordkeeping, hazardous materials, and personal protective equipment for airline personnel working on commercial flights. The FAA denied the petition in 1997, noting that flight attendant issues did not pose an immediate safety concern. Three years later, the FAA and OSHA signed a memorandum of understanding to investigate whether OSHA standards could be applied to aircraft personnel. The FAA never issued a policy to define circumstances under which OSHA standards would apply, as required by the memorandum. In their 2005 lawsuit, the AFA and AFL-CIO alleged that the "demonstrated inaction" of the two federal agencies had exposed flight attendants and cockpit crew to "avoidable injuries and illnesses." In 2006, the district court ruled that the case was not "ripe" because parties had not exhausted administrative remedies.

Reviewing the district court's decision, Judge David B. Sentelle observed that the plaintiffs were seeking an "extraordinary" remedy by petitioning for a writ of mandamus to compel rulemaking. The plaintiffs' efforts had not established "futility" of seeking administrative remedies, Judge Sentelle pointed out, because the union had petitioned the agencies only once, and had never asked for judicial review after the FAA denied the 1990 petition. ■

Court Denies Individual Standing for Claim on Arbitration Award

Union-represented employees under the Railway Labor Act (RLA) lack the standing as individuals to seek court review of an arbitrator's award, according to the United States Court of Appeals for the Fifth Circuit (*Mitchell v. Continental Airlines Inc.*, 5th Cir., No. 05-20791, 3/7/07). The court found that seeking judicial review of an arbitration award would undermine the dispute resolution procedure established by the collective bargaining agreement.

The case originated from a 2002 arbitration award regarding seniority issues between Continental Airlines and its flight attendants, represented by the International Association of Machinists (IAM). The union-company system board, chaired by a neutral party, released its decision establishing procedures for seniority grievances. After issuing the award, the system board determined that the flight attendants' complaints were untimely and denied relief to the employees.

Marilyn Mitchell and several other flight attendants petitioned a federal district court to review the arbitration award, claiming that it violated their rights and failed to comply with the RLA. When the court granted summary judgment to Continental and the IAM, the employees filed an appeal.

The Fifth Circuit affirmed the lower court's ruling. Writing for the court, Judge Jacques L. Wiener drew parallels between the RLA and other labor statutes that restrict individual lawsuits challenging grievance decisions. In 1985, a Fifth Circuit court found that under the Labor-Management Relations Act (LMRA), a postal worker normally lacked standing independently to challenge grievance outcomes. Similarly, in 1969 the Fifth Circuit court ruled that the National Labor Relations Act requires that the interests of individuals be subordinated to the interests of the bargaining unit as a whole. Judge Wiener explained that the only exception to the restriction on individual lawsuits would be an employee alleging that a union had breached its duty of fair representation. In this case, however, the plaintiffs made no such charge against the IAM. ■

NEWS BRIEFS...

REPRESENTATION... Mechanics at **Champion Air** have voted for **IBT** representation by a 65 percent margin. The parties had signed a neutrality agreement for the duration of the election...The NMB has certified the **Teamsters** to represent **PSA** dispatchers, who voted for the union on March 22nd. The NMB has revoked the Teamster's certification to represent PSA stock clerks following the union's disclaimer of interest in that group, however an election is underway for the **IAM** to represent the stock workers...**LEGISLATION/REGULATION...**To facilitate union organizing of **FedEx** workers, the AFL-CIO will push for a change in the **FAA reauthorization bill** that would remove the company's FAA classification as an "express

carrier." Because of this designation, the parcel delivery company's labor relations are governed by the Railway Labor Act, which requires union representation on a nation-wide basis. Union officials contend that the company's trucking operations should fall under the jurisdiction of the National Labor Relations Act, which permits unions to organize smaller collective bargaining units on a local basis...Companies employing at least 15 workers would be required to provide at least 7 paid sick days per year under the **Healthy Families Act** introduced by Sen. Edward Kennedy (D-Mass.) and Rep. Rosa DeLauro (D-Conn.). Employees could use the leave for their own or a family member's illness or medical appointment. ■

Delta *(continued from page 1)*

- Profit Sharing – Payout based on 15 percent of the airline's annual pre-tax profit, with no requirement for a minimum profit threshold.
- Shared Rewards Program – Monthly incentive pay for achieving operational goals including on-time performance, completion rate, and baggage handling.
- Base Pay Increases – Movement towards industry pay structures, beginning with 4 percent increases for the top of the pay scales in the summer of 2007.
- Retirement – A new 401(k) plan with company contributions of up to 7 percent of pay, including an automatic company contribution of 2 percent.

On a related note, Delta has voluntarily contributed \$50 million to help fund the frozen defined benefit pension plan covering ground workers and flight attendants. The plan was frozen in 2005. As required by law, the airline will make an additional \$50 million contribution during the balance of 2007, and will contribute \$100 million per year, on average, for the next several years.

Delta's 6,000 flight dispatchers and pilots, covered by collective bargaining agreements, will participate in the profit sharing and the shared rewards programs, but will not receive the lump sum and equity shares detailed above. Dispatchers will receive substantial value from proceeds of the general, unsecured claim from the bankruptcy proceeding. In exchange for a second round of concessions, the Air Line Pilots Association (ALPA) negotiated future pay rate increases for pilots based upon the company's operating profit margin, as well as a \$2.1 billion unsecured bankruptcy claim, a \$650 million note, and a defined contribution retirement plan. The pilots' defined benefit plan was terminated.

The airline has tied management compensation more directly to performance of both the airline and the individual. Equity awards include restricted stock, stock options, and performance shares. The company's 1,200 management employees will receive approximately a 2.4 percent stake in the company, averaging \$200,000 per person. Roughly 1,000 managers will receive the 8 percent lump sum payment.

Officers and directors will earn equity awards over a period of up to 3 years following exit from bankruptcy. This group will not receive across-the-board pay increases until front-line employees are paid competitive rates. Executives will be covered by the same retirement benefit plan as other non-contract employees, and can participate in an incentive plan. ■

UAW Sets Bargaining Goals

The United Auto Workers (UAW) will seek “maximum possible protections” for jobs, wages, and benefits in upcoming negotiations with the “Big Three” auto companies. The 1,500 union delegates to a special bargaining convention in late March approved bargaining priorities for talks with General Motors, Ford, and DaimlerChrysler. Contracts with the major automakers, covering 175,000 workers, will expire in mid-September.

The 103-page resolution asserts the following key bargaining principles:

- Protect jobs. Bargaining issues include workplace closures, employee relocations, as well as temporary and contingent workers. The union also will press to prevent the misuse of bankruptcy laws as a means to dump workers and union contracts.
- Expand bargaining rights, including enactment of the Employee Free Choice Act. Passed by the House and awaiting action in the Senate, this legislation would make it easier for workers to form unions.
- Improve workers’ standard of living. The union vowed to resist company efforts to compete in a global economy by “cutting wages to Third World levels.” Among the bargaining issues are pay rates, elimination of two-tier wage schemes, profit sharing, gain sharing, and supplemental unemployment benefits.
- Provide health and retirement security. Goals include enhanced health plans and prescription drug coverage, as well as continued health benefits for retirees and laid-off workers. The resolution strongly supports defined benefit pension plans, and opposes employer efforts “to escape health and pension obligations” by offering 401(k) plans and health savings accounts. ■

Cintas’ Confidentiality Rule Violates NLRA, Federal Court Rules

A confidentiality policy of Cintas Corp. constituted an unfair labor practice under the National Labor Relations Act, a Federal Appeals Court has ruled (*Cintas Corp. v. NLRB*, D.C. Cir., No. 05-1305, 3/16/07). The court agreed with a ruling of the National Labor Relations Board (NLRB) that the company’s policy statement interfered with employees’ rights to discuss the terms and conditions of their employment. The company was ordered to comply with the NLRB order to revise its written policy and to post NLRB notices concerning employee rights.

Cintas’ 2002 employee handbook required employees to protect the “confidentiality of information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters.” The company used the term “partners” to refer to all employees. The manual also warned that employees would be subject to discipline for releasing confidential information without authorization. UNITE HERE filed charges with the NLRB alleging the policy constituted an unfair labor practice. Both a 2004 decision by an NLRB administrative law judge and a 2005 ruling by the board found the confidentiality rule was illegal. According to the decisions,

the company’s rule could be interpreted as interfering with workers’ rights to engage in concerted activities for mutual aid or protection, as guaranteed by Section 7 of the NLRA. The company’s petition for a review of the NLRB’s ruling was denied.

Arguing its case in the Court of Appeals, Cintas pointed out that the handbook did not explicitly prohibit employees from engaging in protected activities, and that there was no evidence that employees interpreted the confidentiality rule to prohibit Section 7 rights. The appeals court rejected Cintas’ claims. Regardless of whether any employee actually interpreted the rule as restrictive, the rule violates the NLRA because an employee can reasonably construe the policy to prohibit protected activity, Judge Thomas B. Griffith wrote. The court also rejected the company’s argument that the rule was never applied coercively. Merely publishing an “overbroad” rule that infringes on Section 7 rights would violate the NLRA, whether or not the rule had ever been enforced, the court determined. Cintas Corp, a supplier of workplace uniforms, employs approximately 27,000 workers. ■

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