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EMPLOYMENT LAW ALERT

Fall 2009 Issue

WORKERS' COMPENSATION UPDATE: BENEFITS AVAILABLE TO UNAUTHORIZED WORKERS

Tennessee courts have long held that unauthorized workers are entitled to workers' compensation benefits under Tennessee law. Before the recent enactment of Tenn. Code Ann. § 50-6-241(e), however, employers in Tennessee risked increased financial exposure if they chose to terminate an injured employee who was discovered to be an unauthorized worker under federal immigration law.

For example, for injuries occurring between July 1, 2004 and July 1, 2009, section 50-6-241(d) provided that if an employee returned to work for his or her pre-injury employer at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability ("PPD") benefit that the employee could recover was 1.5 times the employee's medical impairment rating. If the employee did not return to work for his or her pre-injury employer at a wage equal to or greater than the wage the employee was receiving at the time of the injury, however, the employee could recover PPD benefits of up to six times the medical impairment rating. Because the statute did not provide any exceptions for unauthorized workers, an employer who discovered that an injured employee was not authorized to work in the United States faced a difficult choice: it could either continue to employ an unauthorized worker in violation of federal law, or it could terminate the employee at the risk of exposing itself to an award of PPD benefits up to six times the employee's medical impairment rating.

The enactment of section 50-6-241(e) resolves this conflict by providing that, for injuries sustained by an unauthorized worker on or after July 1, 2009, the maximum award for PPD benefits that the employee may recover is capped at 1.5 times the employee's medical impairment rating, provided the employer did not knowingly hire the employee at a time when he or she was not authorized to work in the United States. The employer is entitled to a presumption that it did not knowingly hire an unauthorized worker if it can show that it complied in good faith with the employment eligibility and identity verification requirements of federal law when the employee was hired:

- (i) By ensuring the employee completed Section 1 of Form I-9 at the time the employee started work;
- (ii) By reviewing the documents provided by the employee to establish the employee's identity and eligibility to work;
- (iii) By making a good faith determination that the documents presented by the employee for employment and identity authorization appeared to relate to the employee, appeared to be genuine and that the documents provided were in the list of acceptable documents on Form I-9; and
- (iv) By re-verifying the employment eligibility of the employee upon the expiration of the employee's work authorization and by completing Section 3 of Form I-9, if applicable.

The employee can rebut this presumption, however, by showing that the employer had actual knowledge of the unauthorized status of the employee at the time of the employee's hire or injury. In the event the employee rebuts the presumption, he or she is still only entitled to recover PPD benefits of up to 1.5 times his or her medical impairment rating, and such amount is to be paid in a lump sum to the employee by the employer's insurer. The employer, however, then becomes subject to an additional payment in an amount up to 3.5 times the employee's medical impairment rating, which shall be **paid by the employer** to the Tennessee uninsured employers fund. The statute specifically states that such sum shall be paid by the employer itself and not the employer's insurer.

Thus, pursuant to section 50-6-241(e), an employer who discovers that an injured employee is not authorized to work in the United States can now terminate that employee without increasing its risk of financial exposure in a workers' compensation claim, if the employer initially complied with the employment eligibility and identity verification requirements set forth above. If the employee proves that the employer had actual knowledge of the unauthorized status of the employee, however, the employer will be subject to an additional penalty of up to 3.5 times the employee's medical impairment rating, which must be paid directly out of the employer's own pocket.



EMPLOYMENT LAW ALERT

Fall 2009 Issue

BEFORE PURCHASING OTHER COMPANIES, EMPLOYERS SHOULD CONSIDER PAST WORKERS' COMPENSATION CLAIMS

Employers considering purchasing another ongoing company should take steps to identify all individuals who suffered a work-related injury while working for the target company after July 1, 2009 as part of pre-purchase due diligence. For injuries occurring before July 1, 2009, the sale of a company generally triggers the rights of that company's employees who have sustained prior work-related injuries to immediately seek reconsideration of their prior worker's compensation claims against the company that is being sold. Pigue v. Liberty Mut. Ins. Co., 2009 WL 585962 (Tenn. Work Comp. Pan. March 9, 2009). Under recent changes to Tenn. Code Ann. § 50-6-241(c), however, the burden of such reconsideration cases will shift from the selling employers and their insurers to the purchasing employers. The revised law prohibits employees from seeking reconsideration of prior awards from the pre-injury employer upon sale of the company if: (1) the injured employee continues to be employed by the successor employer at the same or higher pay or (2) the employee declines an offer of employment with a successor employer at the same or higher pay. Therefore, employers who sell their companies and their insurers will not hereafter be subject to a litany of reconsideration requests from their former employees.

Conversely, however, purchasing employers and their insurers will be responsible for any amount awarded if an employee, previously injured on the job and eligible for reconsideration, loses his employment with the successor employer during the employee's reconsideration period. The increased award given upon reconsideration will be assessed against the successor employer and its insurer – not the pre-injury employer. Therefore, employers that purchase other ongoing companies, and their insurers, must consider the cost of these potential reconsideration claims when completing their due diligence surrounding the sale.



DOUGAN

The Firm is pleased to announce that **JOSHUA B. DOUGAN** has joined the Firm and will be practicing in the Jackson office. Joshua is a member of the Firm's Tort and Insurance Practice Group.



BROWN

The Firm is pleased to announce that **CORY A. BROWN AND MICHAEL BURNETT JOINER**



JOINER

have joined the Firm and will be practicing in the Memphis office. Cory is a member of the Firm's Healthcare Practice Group, and Michael is a member of the Firm's Tort and Insurance Practice Group and Employment Law and Civil Rights Practice Group.



DEXTER

The Firm welcomes **V. LATOSHA DEXTER** to its Memphis office.

Ms. Dexter first joined RKR B upon graduation from the University of Tennessee College of Law in 2000. In 2006, she left for a short period to work as a Program Management Advisor with Federal Express Corporation. During her time at FedEx she was responsible for advising management in FedEx's nationally recognized human resources department and for developing and monitoring employee relations' processes. Ms. Dexter is SPHR certified and a 2008 recipient of the Federal Express Human Resources Award of Excellence award. With her diverse experience in employment litigation as well as human resources she is well versed in the area of employee relations. Her practice will focus primarily in the areas of employment law, municipal law and federal civil rights litigation.

RAINEY • KIZER • REVIERE & BELL PLC

presents

WORKERS' COMPENSATION UPDATE
WAGE & HOUR/FLSA ISSUES
SOCIAL NETWORKING ISSUES IN THE WORKPLACE

– seminar is free of charge –

WEDNESDAY, NOVEMBER 11, 2009
8:00 AM - 12:00 PM

UNION UNIVERSITY

BAREFOOT STUDENT UNION BUILDING – HARVEY AUDITORIUM
1050 UNION UNIVERSITY DRIVE • JACKSON, TN 38305

REGISTRATION AND BREAKFAST BEGIN AT 8:00 AM

RSVP BY NOVEMBER 9, 2009, AT 731.425.7951 OR arobinson@raineykizer.com

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