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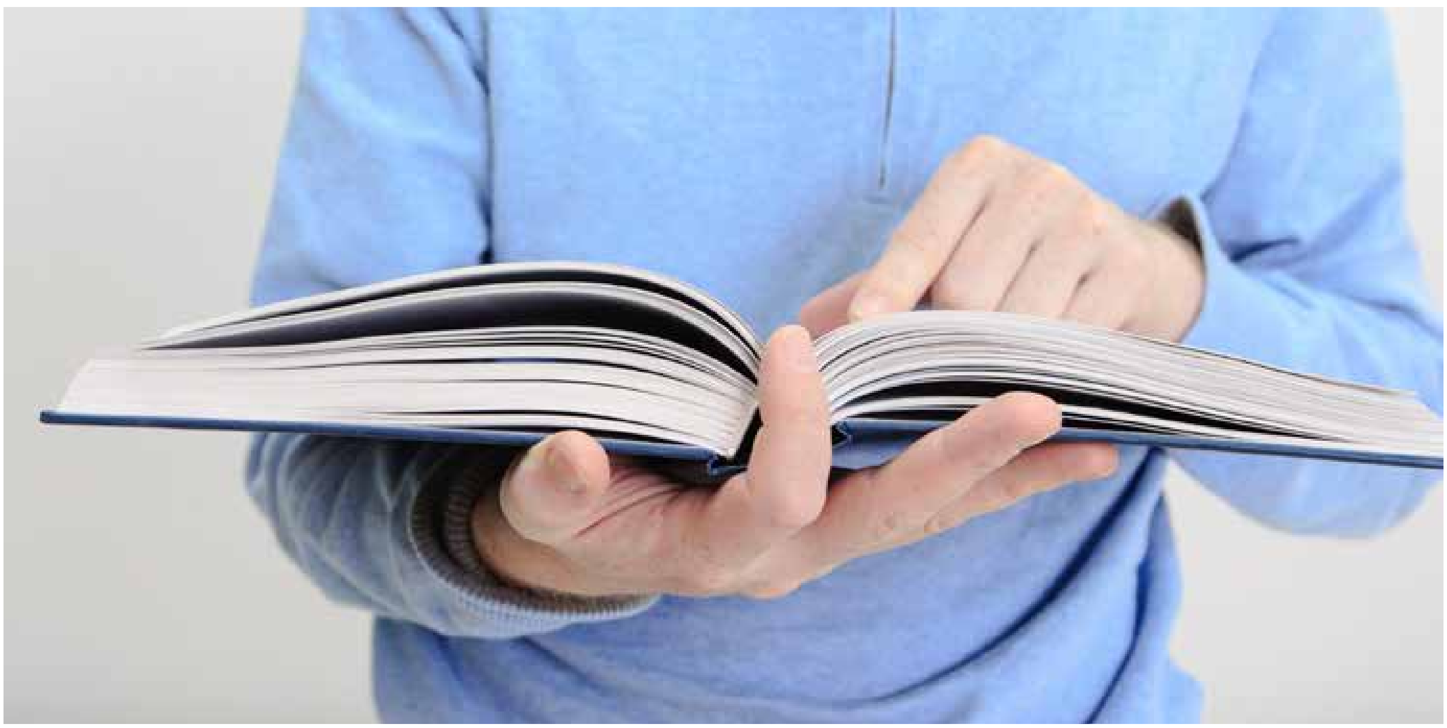
HR Focus

HUMAN RESOURCES NEWSLETTER SPRING 2015



Court Decision Highlights the Importance of Employee Handbooks

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Employers publish employee handbooks to give their workers important information about their rights and responsibilities and, ideally, to help limit the company's exposure to employment related claims and lawsuits. But a recent decision from the U.S. Sixth Circuit Court of Appeals, the federal appellate court whose decisions govern in Michigan, demonstrates that an employee handbook that is not carefully drafted and kept up to date can backfire on an employer, creating legal liabilities that would otherwise not exist.

In *Tilley v. Kalamazoo County Road Commission*, the plaintiff claimed that his employer violated his right to take medical leave provided by the Family and Medical Leave Act. The employer's defense to the claim was simple: Mr. Tilley was not an "eligible employee" under the FMLA. The statute defines "eligible employee"

...Importance of Employee Handbooks

to require, among other things, that the employer have at least 50 employees at, or within 75 miles of, the employee's workplace. The court referred to this as the "FMLA 50/75-Employee Threshold." The employer presented the trial court with uncontested evidence that it did not meet this standard, and the trial court accordingly dismissed the FMLA claim.

After Mr. Tilley appealed, the Court of Appeals agreed that the undisputed facts demonstrated that the employer did not meet the FMLA 50/75-Employee Threshold. Despite that conclusion, the Court of Appeals overturned the dismissal of the case. Why? Because even though Mr. Tilley was not an "eligible employee" under the FMLA, the employer's handbook told him that he was.

The Court of Appeals reviewed the employer's "Personnel Manual," which it concluded "contained a clear misrepresentation as to his eligibility to apply for FMLA benefits." The Personnel Manual, which told employees that it was "a guide to basic benefits, working conditions and policies" of the employer, stated: "Employees covered under the Family and Medical Leave Act are full-time employees who have worked for [the employer] and accumulated 1,250 work hours in the previous 12 months." The Personnel Manual made no mention of the FMLA 50/75-Employee Threshold.

The Court of Appeals concluded this was "an unambiguous and unqualified statement" that employees like this plaintiff, who met these other FMLA requirements, were eligible for FMLA benefits through the employer, without application of the FMLA 50/75-Employee Threshold. The Court of Appeals also made clear that had the employer qualified its statement in the manual by also referencing the FMLA 50/75-Employee Threshold, the result of the case would have been different.

The Court of Appeals ultimately concluded that a reasonable person in Mr. Tilley's position could fairly have believed – based upon the language in the Personnel Manual – that he was protected by the FMLA, and that accordingly the employer could not rely on the defense that he was not actually an "eligible employee" under the FMLA to deny his claim.

WHAT ARE THE LESSONS IN THIS CASE FOR EMPLOYERS?

First, it is important to have an employee handbook that clearly and accurately states the rights and obligations of the employer and its employees. Employers already face myriad requirements under federal, state and local rules and regulations – the last thing any employer wants to do is self-impose additional obligations.

An employee handbook that is not carefully drafted and kept up to date can backfire on an employer, creating legal liabilities that would otherwise not exist.

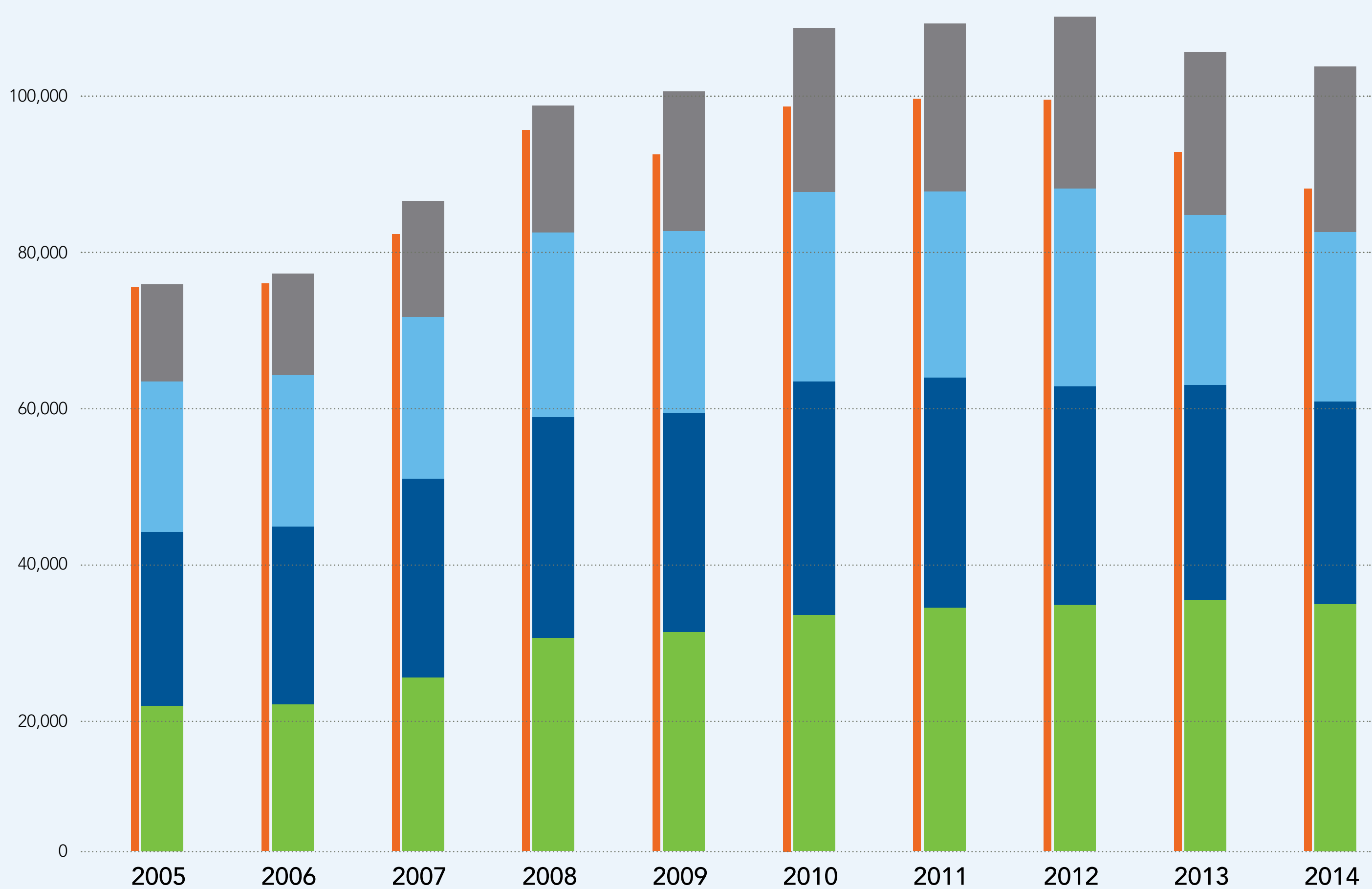
Second, it is very important that employers ensure that their handbooks remain up to date. New laws are passed, statutes get amended, new regulations are issued and all of these are subject to ongoing interpretation by the courts. Employers need to ensure that their handbooks are always up to date – a handbook that served you well a few years ago may not do the trick today. Your attorneys at Warner Norcross & Judd can help you draft an appropriate employee handbook, or review an existing handbook to ensure that it meets current compliance standards.

Tracking EEOC Discrimination Charges: Retaliation Leads the List

Enforcement and litigation data from the U.S. Equal Employment Opportunity Commission for fiscal 2014 shows that, on a percentage basis, charges alleging retaliation reached a record high of 42.8 percent of all charges. The percentage of charges alleging race discrimination, the second most common allegation, remained steady at roughly 35 percent. The EEOC obtained $296.1 million in total monetary relief in fiscal 2014 through its pre-litigation enforcement program.

- Total Charges
- Retaliation
- Race
- Sex
- Disability

	Total Charges	Retaliation	Race	Sex	Disability
2005	75,428	22,278	26,740	23,094	14,893
2006	75,768	22,555	27,238	23,247	15,575
2007	82,792	26,663	30,510	24,826	17,734
2008	95,402	32,690	33,937	28,372	19,453
2009	93,277	33,613	33,579	28,028	21,451
2010	99,922	36,258	35,890	29,029	25,165
2011	99,947	37,334	35,395	28,534	25,742
2012	99,412	37,836	33,512	30,356	26,379
2013	93,727	38,539	33,068	27,687	25,957
2014	88,778	37,955	31,073	26,027	25,369



Source: EEOC

Supreme Court Repudiates Case Law on Retiree Health Care – What Should Employers Do?

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Recently, the U.S. Supreme Court unanimously repudiated 30 years of case law from the U.S. Court of Appeals for the Sixth Circuit, which inferred lifetime vesting of retiree healthcare benefits under collective bargaining agreements that do not specify vesting or the intended duration of the benefits.

The majority opinion in *M&G Polymers USA, LLC v. Tackett* voided any presumption in favor of vesting. In fact, the majority stated there is a presumption against vesting if the agreement is silent on the issue and that neither vesting nor a lifetime promise of benefits is to be inferred from contractual silence on these issues. Unfortunately, the minority concurring opinion left the door open to further litigation, as those four justices would allow review of "extrinsic evidence" to determine whether the parties intended that benefits be vested or continued for life.

In the past, employers have avoided modifying or eliminating these benefits due to fear of protracted and expensive litigation. The inability to modify these benefits has, given accounting standards, also impacted employers' financial statements. Given the more favorable environment for changes or elimination of legacy retiree health care benefits, here are some practical strategies employers can use to eliminate vesting and control the duration and cost of retiree health care benefits.

PLAN DOCUMENT/SUMMARY PLAN DESCRIPTION

ERISA explicitly omits any requirement for vesting of healthcare benefits. Employers should first look to their plan documents and summary plan descriptions. Provisions should be adopted or modified to expressly disclaim vesting of retiree health care benefits and to allow the employer to amend or terminate the plan at any time.

COLLECTIVE BARGAINING STRATEGIES

For existing retirees, the attempt to negotiate limitations on retiree benefits in the context of a collective bargaining agreement is difficult at best. First, the union does not technically represent the retirees and may not negotiate changes in retiree benefits, except as to those retirees who affirmatively consent. Second, the union is often reluctant to negotiate modifications for fear that it will be a defendant in a lawsuit instituted by disgruntled retirees. Last, these benefits are not a mandatory subject of bargaining and become a subject of bargaining only if both sides agree to discuss these issues.

The result is different with respect to active employees/future retirees. Given the strengthened legal position arising from the *M&G* opinion, employers should seek to negotiate the following provisions in bargaining agreements:

- Retiree health benefits do not vest;
- Retiree health benefits continue only during the term of the bargaining agreement or for some other specified period;
- Subject only to the terms of the current bargaining agreement and its duration, the employer is free to amend or modify the retiree health care provisions; and
- The bargaining agreement incorporates by reference an independent plan document providing that benefits do not vest and that the employer, subject only to the terms of the bargaining agreement, is free to amend or terminate retiree benefits.

SETTLEMENT STRATEGIES

Employers wishing to modify healthcare benefits for existing retirees would be wise, in light of the continuing risk of litigation, to negotiate with the retiree group – with or without the involvement of the union. With the recent changes in the law, retiree groups may well be responsive to substantial modifications in the benefit structures, such as first time or increased retiree contributions toward the costs, increased co-pays or deductibles or tying the benefits to those provided to active employees.

Some large employers have sought to make changes through non-opt out class action litigation and a settlement in response to the action which binds all affected parties. For example, one Michigan automotive supplier is currently employing a variant of this strategy in its current litigation involving another supplier and the United Steelworkers.

Another strategy is to approach retirees with an offer to establish and contribute to a VEBA, or voluntary employee beneficiary association IRC 501(c)(9) tax exempt entity. A VEBA is designed to provide funds for the increasing costs to retirees or to entirely fund retiree benefits after a certain date. This entity can also be governed entirely by elected retirees, giving the retirees a direct stake in prudently managing health benefit strategies and controlling costs to assure the longest feasible continuation of retiree benefits.

HRA FOR FUTURE RETIREES ONLY

Whether employers wish to make some provision for or the employees seek retiree healthcare, a retiree-only Health Reimbursement Account (HRA) is a very flexible way to make provisions for these benefits. An individual account is created for each potential retiree. Contributions or credits can be discretionary and can be tiered based on age and service. The plan can be unfunded, consisting only of accounting credits until actual claims for reimbursement are submitted. Even if funding is desired, it can be accomplished through a VEBA. The total accumulation in the account balance can be capped – often at a multiple of annual contributions and retiree-only HRAs are not subject to the Affordable Care Act prohibition on capped lifetime benefits.

Since a retiree-only HRA is an account balance plan, the costs are not subject to medical inflation or adjustment by third parties. Benefits can be limited to employees who terminate employment only after a given age, number of years of service, or a combination of these factors. The individuals' accounts may be limited to payments of medical care premiums, but also may be used to pay any other qualifying medical expense. The plan should provide that benefits are not vested and the plan may be amended or terminated at any time (except, in fairness, as to claims incurred before the date of the modification).

Thankfully, the Sixth Circuit Court of Appeals can no longer be the outlier on the issue of the vesting or modification of retiree health benefits – the cloud on employer actions in this sphere has been lifted. Employers, particularly those in Michigan, Ohio, Kentucky and Tennessee should carefully consider and implement strategies to place reasonable restrictions on these benefits.

Supreme Court's Recent Rulings a Mixed Bag for Employers

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The U.S. Supreme Court's 2013-2014 term was widely heralded as beneficial to business. That may be so with regard to a variety of other issues, but the term resulted in a mixed bag of decisions for employers. The decisions from the current term have so far favored employers, but the justices' questions at oral argument suggest that several of the remaining cases will likely be decided in favor of employees.

Most of the decisions from the Supreme Court's last term addressed very specific employment contexts – public employers, unionized employers, employers whose employment practices are guided by religious beliefs. Two decisions from the last term merit consideration by most employers:

- **In *Lawson v. FMR LLC,* the court held that the Sarbanes-Oxley Act's ("SOX") whistleblower protections apply to protect employees of privately held contractors and subcontractors of publicly traded companies, and not just to the employees of publicly traded companies**. Congress enacted SOX in the wake of Enron's collapse, in an effort to strengthen the Security and Exchange Commission's ability to identify and punish fraud against shareholders of publicly traded companies. To encourage individuals to report suspected fraudulent activity, Congress included provisions in SOX to protect whistleblowers from retaliation. Some federal courts had interpreted the whistleblower protections to apply only to employees of publicly traded companies. The Supreme Court's decision means that employees of privately held companies and even of individuals who work for people who are employed by publicly traded companies are protected by SOX's whistleblower provisions. The court recognized that its decision even covered gardeners and nannies employed by individuals who work for publicly traded companies. The bottom line for employers: if your business is a contractor or subcontractor for a publicly traded company, you have an additional retaliation provision to beware of.

- **In *Sandifer v. U.S. Steel Corp.*, the court held that protective clothing is just a special type of clothing. Under the Fair Labor Standards Act, unionized employers do not have to pay employees for time spent putting on and taking off clothing that is essential to their jobs if the collective bargaining agreement provides that such time is not compensable**. Better still, the court concluded that if the vast majority of the protective equipment falls within the definition of clothes, then the time spent putting on other items, like safety glasses, is also non-compensable. The bottom line for employers: unionized employers with collective bargaining agreements that exclude putting on and taking off protective clothing from compensable time should carefully review whether their practices fall within the court's decision; non-unionized employers should remember that they are always required to pay for time spent putting on and taking off protective clothing and gear.

The current term includes more traditional employment cases, including two cases addressing Title VII and another case about compensable time under the Fair Labor Standards Act.

- **In *Integrity Staffing Solutions, Inc. v. Busk*, the court determined that workers who are required to wait up to 25 minutes after their shift to pass through security before exiting the workplace are not entitled to be paid for that time**. The case arose after employees of the staffing company that provides workers at two of Amazon's storage and order-fulfillment centers sued to be paid for time spent waiting to pass through security. Not surprisingly, Amazon requires workers to pass through airport-like security to ensure that workers were not creating their own "lightning deals." The employees complained that because Amazon would not hire sufficient security screeners, they were stuck waiting for long periods without pay. The Supreme Court concluded that passing through security was not integral to the employees' job, and therefore the employer was not required to pay employees for time spent passing through security. The bottom line: the court reaffirmed that employers are not required to pay employees for time spent getting to and leaving from their work stations unless the employees are engaged in activities that are integral to their jobs.

- **In *M&G Polymers USA, LLC v. Tackett*, the court made a decision that could provide significant financial benefits for long-time unionized employers.** (SEE RELATED ARTICLE ON PAGE 4)

PENDING RULINGS

We are waiting for decisions in the following cases, all of which will almost certainly be decided before the court ends the term at the end of June:

- **In *Young v. United Parcel Service*, the court will decide what the Pregnancy Discrimination Act means when it requires employers to treat pregnant employees the same as non-pregnant employees who are "similar in their ability or inability to work."** The case arose after UPS refused to provide light-duty work for a pregnant driver even though it did provide light-duty work for drivers who were injured on the job. The U.S. government argued in support of the injured worker, but was challenged by the court because UPS had adopted policies that were very similar to those adopted by the U. S. Postal Service. The case should provide employers guidance on what accommodations must be provided to pregnant workers.

- **In *Mach Mining, L.L.C. v. Equal Employment Opportunity Commission*, the court will decide whether the EEOC's statutory obligation to seek conciliate cases with employers before filing suit can be reviewed by the federal courts**. The EEOC is required by Title VII to seek to resolve disputes without resorting to litigation. The EEOC has frequently been accused of interpreting its obligation to be limited to sending a preposterous take-it-or-leave-it settlement demand, refusing to provide any supporting information, and declaring conciliation failed if the employer balks. The federal courts have adopted significantly different standards for reviewing whether the EEOC conciliated in good faith. The EEOC has maintained that judicial review of conciliation is inappropriate – it is the only arbiter of whether its conduct is adequate.

- **In *Equal Employment Opportunity Commission v. Abercrombie & Fitch*, the court will address when employers are liable for failing to hire a potential employee because they anticipate the employee will require a religious accommodation**. The case arose after Abercrombie & Fitch refused to hire an applicant who wore a hijab to an interview.

Warner Norcross & Judd's Labor and Employment Practice Group will provide analysis of the pending cases as they are decided.

Delaying FICA Taxes on Deferred Compensation May Be Costly

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The time to collect FICA taxes on non-qualified deferred compensation may be sooner than expected for some employers. And failing to act soon enough could subject an employer to significant liability in the future.

In early 2015, a Michigan federal court ruled in *Davidson v. Henkel* that an employer is liable for the losses suffered by employees from the employer's delayed approach to collecting FICA, even though the court also found that the law doesn't require withholding at the first possible opportunity. The amount of damages to be awarded was not addressed in the court's decision, yet it appears the employer will be liable for the additional FICA taxes owed by the employees as a result of the employer's approach.

BACKGROUND

The Federal Insurance Contributions Act (FICA) requires an employer and employee to each pay a share of the Social Security taxes (6.2 percent each) and Medicare taxes (1.45 percent each) applicable to the employee's wages. In any one year, Social Security taxes are assessed only on wages up to a certain dollar limit (the wage base). The Social Security wage base is $118,500 for 2015.

The FICA rules addressing the time for taking deferred compensation into account are complex. It differs depending on the type of deferred compensation plan. For example, under an account balance plan, deferred compensation is included in FICA wages when: (1) services relating to the compensation are performed, or, if later, (2) the compensation is no longer subject to a "substantial risk of forfeiture." In other words, FICA must be paid either when the wages are earned or when they are fully vested, whichever is later.

Under a non-account balance plan, deferred compensation generally is included in FICA wages when it becomes "reasonably ascertainable." However, the FICA rules allow for inclusion in FICA wages at an earlier date.

Earlier inclusion may be desirable for a couple of reasons. Once deferred compensation is taken into account for FICA purposes, future payments of that compensation (and related earnings) generally are not subject to FICA. Further, any employee who earns more than the Social Security wage base can avoid paying any Social Security on the deferred compensation if it is taken into account in a year where the employee earns more than the wage base. For either or both of these reasons, an employee may be better off in retirement if the deferred compensation has been taken into account earlier for FICA purposes.

THE *HENKEL* CASE

This case was brought by a group of employees whose employer set up a non-qualified supplemental executive retirement plan (SERP) for the deferral of compensation until retirement. The employees were upset that their employer did not collect FICA sooner and that FICA was instead being subtracted from their plan benefit payments. The lawsuit alleged that their tax liability would have been reduced if the employer collected FICA sooner. Because that did not occur, the employer subsequently reduced the employees' benefit payments to pay their FICA tax liability. Not only did this lower the benefits payable to the employees from the plan, it also meant they had to pay FICA taxes they might otherwise have escaped had the deferred compensation been taken into account sooner.

> FICA must be paid either when the wages are earned or when they are fully vested, whichever is later.

While this may be an alarming result for employers, the court's decision largely turned on the language in the plan document – not the FICA rules. The court held that employers are not required to take deferred compensation into account at the earliest point because the FICA rules contemplate that may not occur. Yet, the problem for the employer in *Henkel* was that its plan document suggested the employer would withhold FICA wages at the time of the compensation deferral. Moreover, the employer sent its employees a letter, admitting that it had not properly taken their benefits into account for FICA tax purposes and would subtract FICA now, even for retirees currently receiving benefits.

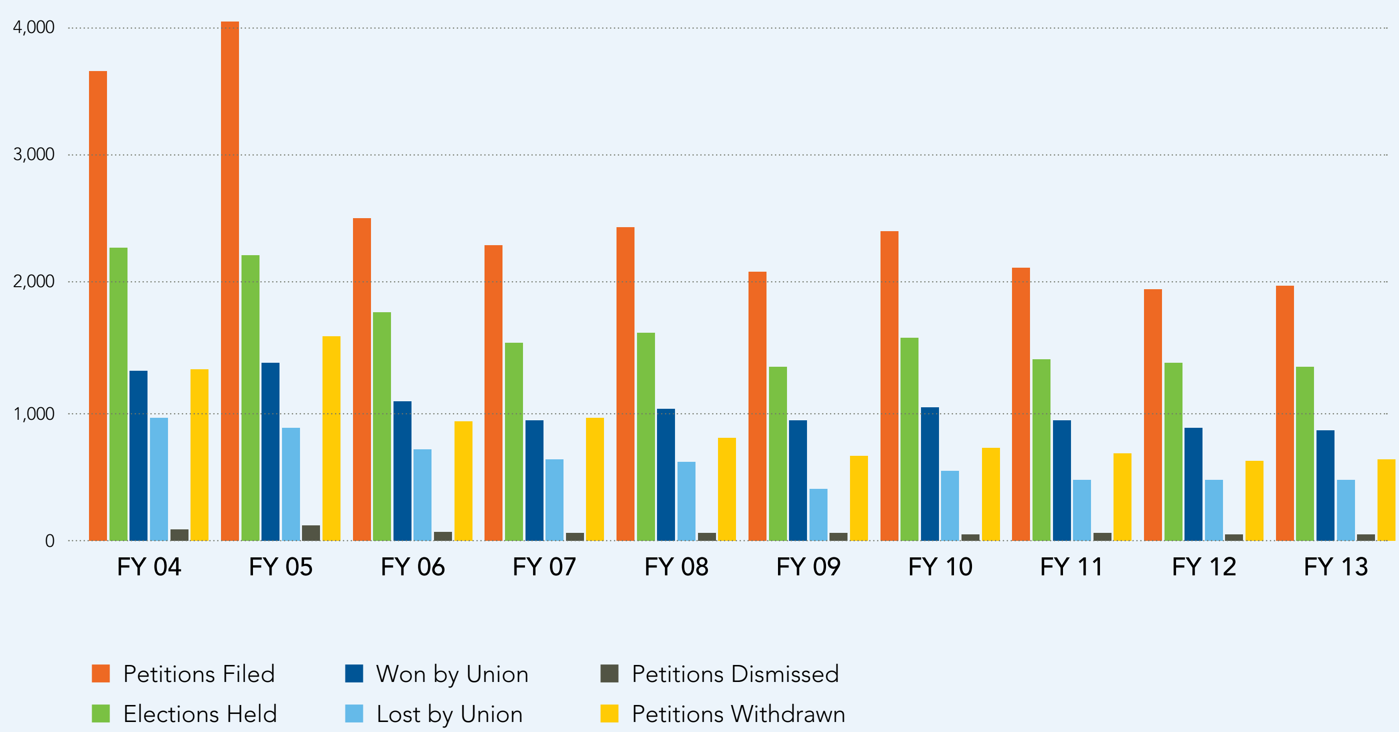
WHAT IT MEANS

Though the *Henkel* ruling recognizes the FICA rules do not require employers to take deferred compensation into account for FICA purposes at the first possible moment, it also signals that a court may find an employer liable if the employer's approach to collecting FICA leads to a reduction in the employee's deferred compensation. Whether a court would find similarly in a case with different plan language remains an open question, but the *Henkel* ruling seems to leave room for that argument.

This development highlights the importance of knowing what your plan document says about FICA and understanding how your approach to collecting FICA on deferred compensation may impact employees. If you are unsure about any of this or would like to discuss this development further, contact your Warner Norcross & Judd employee benefits attorney.

Union Representation Petitions Halt Downward Trend

Employees or a union may file a petition for a representation election (RC) after collecting signatures from at least 30% of workers in the potential bargaining unit. Petitions that are not withdrawn or dismissed result in an NLRB-conducted election. A majority of votes decides the outcome. Please note: Some petitions filed in a given year may not have an election until a subsequent year. Thus, the number of petitions may not equal the total number of dispositions in a given year.



News Digests:

Definition of Same Sex Spouses Added to FMLA

The U.S. Department of Labor issued a final rule on the definition of "spouse" for purposes of the FMLA. The DOL adopted the "place of celebration" rule. An employee may take FMLA leave to care for an ill same-sex spouse, even if the couple resides in a state that does not permit or recognize their marriage, as long as they were married in a jurisdiction that allowed their marriage (the "place of celebration" of the marriage).

NLRB Ruling on 'Quickie Elections' Sparks Legal Battle

The National Labor Relations Board issued "quickie election" rules in December 2014. The rules will substantially shorten the amount of time between the filing of an election petition by a union and the election – a move that is to the benefit of unions. At least two federal lawsuits have been filed seeking to negate those rules. If these suits are unsuccessful, the new rules will be effective April 14, 2015. A detailed outline of these rules can be found on the Warner Norcross website, at http://bit.ly/1N9ubNG.

NLRB Issues New Guidance on Arbitration

The NLRB's general counsel issued new guidance on the circumstances in which the board will defer unfair labor practice charge proceedings to arbitration, based on the board's new standards issued in December 2014. In short, the board will defer to an arbitration decision if the party arguing for deferral proves "(1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) NLRB law reasonably permits the award."

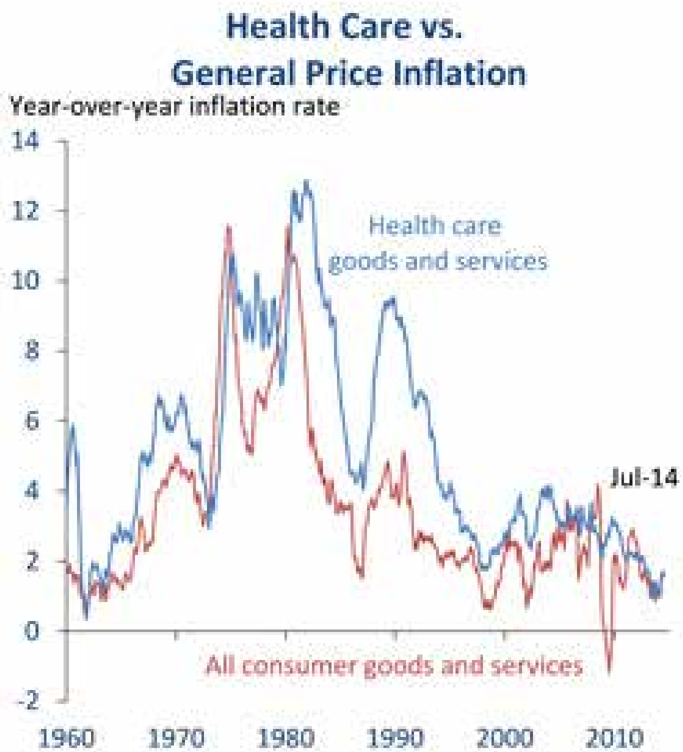
Michigan's Wage Loss Benefit Rate Increases Again

The maximum weekly wage loss benefit rate for Michigan workers' compensation claimants has increased for the fourth consecutive year. The 2015 payment is capped at $820, up from the 2014 top rate of $805. The benefit figure is based on the State Average Weekly Wage (SAWW) as determined by the Bureau of Labor Market Information & Strategic Initiative. The 2015 SAWW is $910.71, a rise of $17.27 from the 2014 SAWW of $893.44. A claimant's weekly wage loss benefit is based on the after tax value of 80 percent of the individual's average weekly wage.

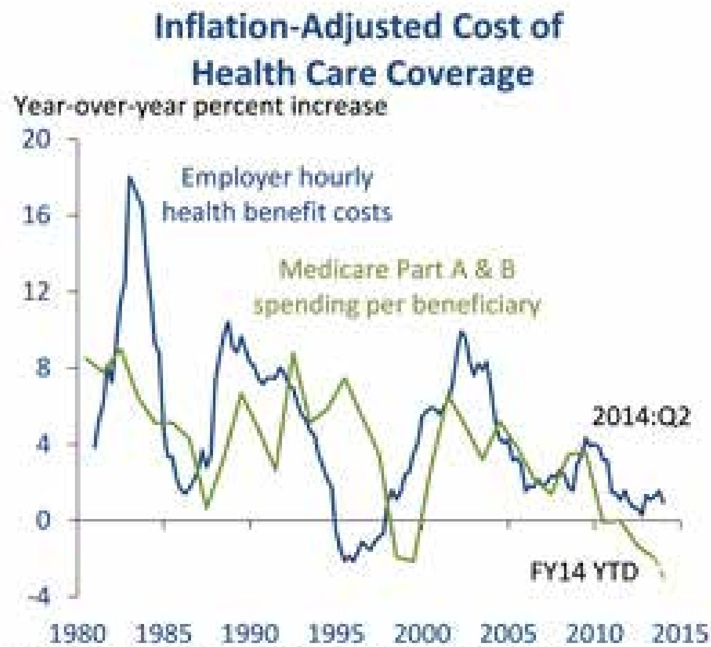
Court Rejects Bid to Replace Manager Under ADA

A Texas court dismissed an ADA complaint in which an employee asked for a change in managers as an accommodation after a doctor's note indicated only a need to be close to a restroom. When the employee didn't get what he wanted, he resigned and sued. Two key points from the court's decision: an employee is entitled to a reasonable accommodation, not the employee's preferred accommodation; and the employee has a duty to engage in the interactive process, as does the employer.

Healthcare Costs vs. Inflation



Source: Bureau of Economic Analysis; CEA calculations.



Note: Fiscal-year-to-date trend also includes Medicare Part D.
Source: Bureau of Labor Statistics, Employment Cost Index; CMS Office of the Actuary, Trustees Report and National Health Expenditure Projections; Bureau of Economic Analysis, National Income and Product Accounts; CBO, Monthly Budget Review; CEA calculations.

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