New Legislation, (Non)-Quirky Question # 135
February 14, 2010 | Posted by Ginsburg, Roy | Topic: Legislation Comments/Questions

There are a variety of legislative initiatives being considered by Congress that could impact the employment relationship. At the present time, however, it is difficult to predict whether any of these legislative efforts will be successful. The recent Massachusetts Senate election and the resulting loss of the Democratic super-majority in the Senate may result in the delay or indefinite postponement of some of the initiatives currently underway. Moreover, the current focus on the nation’s health care debate and the polarization caused by that debate also may affect the passage of some or all of these bills, especially if the mid-term elections further alter the composition of the House and Senate. Nevertheless, there are at least ten significant bills that are being contemplated at the present time of which employers should be aware. In alphabetical order, they are described briefly below:

1) Employee Free Choice Act (EFCA): This bill has received the most attention of all the potential employment legislation and has been the subject of numerous lobbying efforts and advertising campaigns. The legislation is key to the union movement, which contributed strongly to President Obama’s election victory. Conversely, it is strongly opposed by various employer and business groups.

EFCA was introduced in the House and Senate in March 2009, approximately one year ago. There are two critical features of the legislation of which employers should be aware. First, in its current form, EFCA would eliminate the right in unionization campaigns for secret ballot elections. A union could be certified as a bargaining representative for the affected employees if a majority of the employees in the relevant bargaining unit have signed "authorization" cards. Fifty percent, plus one, would suffice to result in unionization of the bargaining unit. The principal concern that employer groups have expressed about this prospect is that undue pressure may be brought on employees to sign the authorization cards and that the union "campaign" will be over before an employer even knows it is underway.

Second, in the context of a “first contract” negotiation, if the employer and employees cannot agree within 90 days on the contract terms, those terms may be determined through binding arbitration. Again, the concern articulated by employer groups is that an arbitrator, who may or may not fully understand a business, will be empowered to impose contract terms on the employer and employees alike.

There are other features of the bill that, if passed, would affect the employer/employee relationship for those employers with unionized employees or with employees who seek to organize. Given the publicity associated with this bill from both its advocates and detractors, you can be confident that you will learn much more about it if it is resuscitated. [Note: We have been monitoring EFCA quite closely and have presented seminars on this evolving legislation. If you would like a copy of the PowerPoint materials we have generated in connection with our most recent seminar on EFCA, please send me an email with your contact information – name, company, position, address, and email. I then will forward you the referenced materials.]

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2) **Employee Non-Discrimination Act**: This legislation was introduced in the House and Senate in August 2009. Simply summarized, if passed it would prohibit discrimination against any employee with respect to his or her terms or conditions of employment based on actual or perceived sexual orientation or gender identity.

As with so many other pieces of legislation, until the competing bills are passed by the House and Senate and reconciled, it is difficult to predict accurately the full ramifications of the potential statute. Note, however, that many states (including, for example, Minnesota) already prohibit discrimination on the basis of sexual orientation, and many companies that do business in all fifty states already have internal policies prohibiting sexual orientation discrimination. Thus, while the potential statute could create new rights in states that do not currently provide this protection, it likely will not change the way companies do business in many states throughout the U.S.

3) **Fairness in Arbitration Act**: This Bill, which was proposed in July 2009, would invalidate arbitration agreements in employment, consumer and franchise contracts between parties of unequal bargaining power, unless both parties voluntarily agree to use arbitration after a dispute arises. The legislation exempts collective bargaining agreements. Otherwise, however, it would have extremely broad ramifications. In my view, this proposed legislation is perhaps the most significant of all the legislation being considered, and has the potential to eviscerate well-established arbitration programs that many companies utilize to handle workplace disputes.

4) **Family Friendly Workplace Act**: This legislation was introduced in early 2009. It is one of the proposals currently being considered to amend the Fair Labor Standards Act (FLSA). This legislation would allow private sector employers to offer employees the option of taking "comp time" PTO rather than receive cash wages for all overtime hours worked at a rate of 1.5 hours per hour for which the overtime premium would be due. The maximum accrual of "comp time" would be 160 hours (essentially, one month's work). There are certain prerequisites that must be met for an employee to be eligible. Of course, as with the other legislation discussed in this analysis, until the final provisions of the legislation are agreed upon and the bill is converted into a statute, the specific prerequisites will not be fully known.

5) **Family Medical Leave Act (Expansion)**: This legislation is, as the name implies, an expansion of the existing statute, the FMLA. As proposed, the expansion would mandate leave for employees to address the effects of domestic violence. In addition, the modified FMLA would provide employees up to 24 hours of unpaid leave per year to attend school activities, or to take family members to regular dental or medical appointments.

6) **ForeWARN Act**: As the name of this legislation implies, it too represents an expansion of an existing statute (WARN). The proposed modification of this statute, introduced in June 2009, would amend WARN by expanding the scope of covered employers, expanding the scope of what constitutes a "plant closing," and expanding the scope of automatically covered "mass layoffs." Employers would be required to provide employees covered by an employment loss with 90 days advance notice. Moreover, the scope of the notice would be expanded.

7) **Healthy Families Act**: This legislation, introduced in May 2009, would require employers with more than 15 employees to provide workers up to 56 hours of paid sick leave annually.

8) **Paycheck Fairness Act**: The most recent version of this legislation was passed in the House in January 2009. This bill would amend the Fair Labor Standards Act "to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex." Essentially, the Paycheck Fairness Act would make it more difficult for employers to defend pay discrimination claims, creating the risk of punitive damages and establishing an "opt-out" rather than an "opt-in" class for class action claims alleging differential compensation based on gender.


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9) **Protecting Older Workers Against Discrimination Act:** This proposed legislation is a Congressional response to last year's Supreme Court decision of *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009). [To see my prior analysis of the *Gross* decision, use the "View By Topic" tab on the upper left-hand side of this page and go to "Age Discrimination."] In October 2009, following the *Gross* decision, legislation was advanced that essentially would undo that Supreme Court decision and treat age discrimination cases in the same manner as discrimination cases under Title VII. Specifically, the legislation would reinstate the "motivating factor" standard that was previously used for age discrimination cases and repudiate the "but for" analysis adopted by the U.S. Supreme Court. (Again, keep in mind that the "motivating factor" framework still may be the governing law under state anti-discrimination statutes, regardless of the Supreme Court's interpretation of the ADEA and regardless of whether this legislation is passed.)

10) **Working Families Flexibility Act:** This legislation was first introduced in December 2007, and reintroduced in March 2009. Under current law, employers have considerable flexibility to determine whether to offer flexible work arrangements and if so, what kinds. The proposed legislation would give employees the rights to request flexible work options, including changes in the number of hours the employee is required to work, the times when the employee is required to work, and the location where the employee is required to work. Employees also would have the right to seek reconsiderations of employer decisions on these issues. To the extent that employers do not comply with the requirements imposed, employees could file complaints with the Department of Labor, which could impose penalties and damages for infractions.

As the ten examples above illustrate, Congress is debating a number of pieces of legislation that could affect significantly the employer/employee relationship. Employers and employees alike should monitor these legislative proposals to determine which, if any, of these bills become law. If any (or all) of these proposals become statutes, I will provide additional details regarding the final versions of these statutory schemes.
Supreme Court Decisions, (Non)-Quirky Question # 138
March 8, 2010 | Posted by Ginsburg, Roy | Topic: Recent Decisions Comments/Questions

In 2009, the U.S. Supreme Court rendered a number of important decisions involving employment issues (Crawford – retaliation issue; Gross – age discrimination; Ricci – affirmative action; 14 Penn Plaza – arbitration of discrimination claims in union context). While 2010 may not bring decisions of comparable significance from the nation’s high court, there are a number of cases before the Supreme Court that could be important to employers and employees alike. We are monitoring four cases in particular.

In City of Ontario vs. Quon (review granted on December 14, 2009), the Court is considering several interrelated employee privacy issues. The facts of the case are relatively straightforward. The City of Ontario police department provided pagers to certain employees, including members of its SWAT team. The City did not have an official policy regarding text messaging with the pagers but did have a policy providing that information sent via email on City communications systems was not confidential. However, at least one official in the Department allowed the employees to use the pagers for personal use. The City conducted an audit of employees who regularly exceeded monthly character limits on their pagers. During this audit, the City reviewed the transcripts of the texts sent on the pagers.

As a result of this audit, the City’s employees brought suit against the City for conducting an unreasonable search under the Fourth Amendment. The Ninth Circuit held that the search was unreasonable.

The Supreme Court is reviewing three issues:

a) Does a SWAT team member have a reasonable expectation of privacy in messages transmitted on his SWAT pager, when police department has official no-privacy policy but non-policymaking lieutenant announced informal policy of allowing some personal use of pagers?

b) Did Ninth Circuit contravene the Supreme Court’s Fourth Amendment precedents and create circuit conflict by analyzing whether the police department could have used “less intrusive methods” of reviewing text messages transmitted by SWAT team member on his SWAT pager? and,

c) Do individuals who send text messages to SWAT team member’s SWAT pager have reasonable expectation that their messages will be free from review by recipient’s government employer?

The Supreme Court’s resolution of these issues should be instructive both for public and private employers and should provide employers some guidance regarding employees’ privacy rights with respect to employer issued electronic devices and electronic media.

Another case we’re monitoring is Lewis v. Chicago (oral argument occurred on Feb. 22, 2010). Lewis is another case involving a test that had a disparate impact on minority applicants for firefighters; though the

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issue in Lewis focuses on the timeliness of the Charges of Discrimination. The Seventh Circuit held that the plaintiffs' EEOC charges were untimely because the applicants were required to file their charges within 300 days after they learned that their test scores had placed them in the "qualified" category, and that the city would only be hiring "well-qualified" applicants.

Plaintiffs filed their administrative charges 420 after learning those facts, but within 300 days of the City actually beginning to hire the "well-qualified" applicants. The question presented in Lewis is: When an employer adopts an employment practice that discriminates against African Americans in violation of Title VII's disparate impact provision, must a plaintiff file his/her EEOC charge with 300 days after the announcement of the practice, or may a plaintiff file his/her charge within 300 days after employer's use of discriminatory practice?

Here, too, the Supreme Court's analysis is very likely to have ramifications beyond the public employer context and should help define the appropriate statute of limitations with regard to discriminatory practices that are announced but not immediately implemented or put into practice.

A third case before the nation's high court is Rent-A-Center West Inc. v. Jackson (review granted Jan. 15, 2010). In Rent-A-Center West, an employee brought suit against his employer under § 1981 alleging race discrimination and retaliation. The employer had an arbitration agreement in place that governed discrimination claims. Based on this agreement, the District Court granted the employer's motion to dismiss and compel arbitration, notwithstanding the employee's argument that the arbitration provision was unconscionable. The Ninth Circuit reversed, holding that whether a mandatory arbitration provision within a larger contract is "unconscionable" is for a court, and not an arbitrator, to decide.

The specific question presented in the Rent-A-CenterWest case is whether a district court is required in all cases to determine claims that an arbitration agreement subject to the Federal Arbitration Act is unconscionable, when the parties to the contract have clearly and unmistakably assigned this 'gateway' issue to the arbitrator for decision? The decision has significance for any employer that uses mandatory arbitration agreements with its employees because it has the potential for shifting the issue of unconscionability from the arbitral to the judicial forum.

The last case currently before the U.S. Supreme Court that we're monitoring is Granite Rock Co. v. Int'l Bhd of Teamsters (oral argument occurred on Jan. 19, 2010). This case focuses on the interaction between a local and international union, and implicates additional arbitration issues.

In Granite Rock, the employer sued the local union and international union under Section 301(a) of the Labor Management Relations Act (LMRA) claiming that (1) the international union tortiously interfered with a collective bargaining agreement (CBA) between the employer and the local union, and (2) the local union breached the CBA by going on strike. The Ninth Circuit held that the employer failed to state a claim under Section 301(a) against the international union because the tortious interference claim did not "arise under" the CBA between the employer and the local. The Court also held that the entire dispute between the employer and local union should go to arbitration because both parties consented to arbitration whether or not CBA had been ratified: the employer by suing under the contract and the union by moving to compel arbitration.

The two specific questions presented are:

a) Does a federal court have jurisdiction to determine whether a collective bargaining agreement was formed when it is disputed whether any binding contract exists, but no party makes an independent challenge to the arbitration clause apart from claiming it is inoperative before the contract is established?
b) Does Section 301(a) of the LMRA, which generally preempts otherwise available state law causes of action, provide a cause of action against an international union that is not a direct signatory to the collective bargaining agreement, but effectively displaces its signatory local union and causes a strike, breaching a collective bargaining agreement for its own benefit?

While these issues may not be critical to non-unionized employers, for employers with employees working pursuant to a collective bargaining agreement, the decision has the potential to clarify some important issues affecting the employer/unionized employee relationship.

As we all have seen in the last 12 months, the U.S. Supreme Court is ideologically divided. We will have to see how the complex issues described above play out in the Court but if one made predictions solely on the basis of parties and ideology, one might predict the following outcomes:

*Quon:* Employer wins; no violation of employees' Fourth Amendment rights against unreasonable search and seizure by public employer's review of text messages sent on pagers;

*Lewis:* Employer wins; charges untimely because they were not filed within 300 days of the adoption of the policy;

*Rent-A-Center West:* Employer wins; the issue of the unconscionability of an arbitration agreement should be decided in the first instance by the arbitrator, not the federal courts; and,

*Granite Rock:* Employer wins (but likely not on all issues). It's hard to imagine that this high court is going to do any favors for the labor movement.

We'll see how these cases are decided within the next several months and you can assess whether my predictions, based largely on the general ideology of the majority of the Court, were accurate or misguided. As the Court renders its decisions on these four cases, we will provide you additional analyses to ensure that you understand the decisions and their practical consequences.
FMLA Leave, Quirky Question # 7

November 5, 2007 | Posted by Ginsburg, Roy | Topics: Family and Medical Leave Act (FMLA), FMLA Eligibility

Several years ago we employed an individual at our auto dealership. He resigned voluntarily. About eight months ago, we rehired him. During the course of the last eight months, he has worked more than 1250 hours. He recently injured his back at home and has missed 13 days of work. Because we cannot afford to have an employee miss that much time, we fired him.

He’s now claiming that we violated the Family and Medical Leave Act (FMLA) and is threatening a lawsuit. We realize that he has met the 1250 hours requirement under the FMLA but he did not work for us for 12 months, another FMLA requirement. Should we tell him to pound sand, and then lawyer-up in case he sues? Will our lawyers be able to obtain sanctions if he pursues this bogus claim?
FMLA Leave, Quirky Question # 7

November 5, 2007 | Posted by Ginsburg, Roy | Topics: Family and Medical Leave Act (FMLA), FMLA Eligibility

Not so fast!

Believe it or don’t, your discharged employee’s prior employment with your company, even though it was several years ago, enables him to meet the requirements of the federal Family Medical Leave Act (FMLA). As you noted correctly, that statute comes into play when the employee has worked at least 1250 hours and has been employed for at least a 12-month period.

At the end of 2006, the federal Court of Appeals for the First Circuit explored what the 12-month requirement means. (Take a look at the case of Rucker v. Lee Holding Co., d/b/a Lee Auto Malls, No. 06-1633 (1st Cir. December 18, 2006).) In that decision, the First Circuit held that the FMLA was “ambiguous as to whether previous periods of employment count toward the 12-month requirement...” (Emphasis added.)

In the case of first impression (i.e., the court had not previously analyzed and decided this issue), the appellate court held that a five-year gap in an employee’s employment with the same employer did NOT prevent him from satisfying the FMLA’s 12-month requirement. The court found that both the statutory language and the language of the Department of Labor regulations were susceptible of differing interpretations. In the Rucker decision, the court decided to give that language an expansive reading that benefited the discharged employee.

While I recognize the statutory and regulatory language are less than perfectly clear, I thought the Rucker decision was a stretch. The analysis simply did not seem like a common sense interpretation of the statute. Silly me! In 2007, there have been two decisions that make Rucker seem eminently reasonable. In O’Connor v. Busch’s Inc., 492 F. Supp.2d 736 (E.D. Mich. 2007), the federal district court adopted the Rucker analysis, applying it to a fact pattern where there was a 20-year gap between the employee’s initial employment for the company and her rehiring. After working for the company in the 1980s, the employee left her employment. She was rehired in 2005 as the VP of Finance. Later the same year, she was injured in an automobile accident. Suffering from headaches and depression as a result of her accident-related injuries, she requested time off. Although the company advised her that it would provide her time off after the end of the year reconciliation of the company’s books, this proposal was not satisfactory to the employee, leading to her resignation. The employee then sued under the FMLA.

In the words of the modern day philosopher, Ferris Bueller, the court “bought it,” even while paying lip service to the notion that it was “troubled by the potential consequences of permitting Plaintiff... to combine periods of employment separated by nearly twenty years.”
Similarly, in the case of *Thomas vs. Mercy Memorial Health Center, Inc.*, 2007 WL 2493095 (Aug. 29, 2007, E.D. Okla.), the employee had worked for the defendant-employer's predecessor company in 1991, 1992 and 1994. She also worked for defendant in 2002 and early 2003. She returned to work in April 2004 but only worked for about eight months before she was fired for absenteeism relating to her own and her husband's health problems. The district court combined the prior periods of employment, concluding that the employee had worked for more than 12 months and therefore was FMLA eligible.

In light of these cases, telling your employee to "pound sand" would likely be imprudent. Although it is counter-intuitive, your former employee seemingly has a legitimate claim. So, while I generally endorse the idea of "lawyering-up," in this instance your resources may be better spent trying to resolve your differences with your ex-employee on an amicable basis.

As for "sanctions," not this time.
Sexual Harassment -- Employment of Minors, Quirky Question # 12
December 10, 2007 | Posted by Ginsburg, Roy | Topics: Sexual Harassment, Recent Decisions, Employment of Minors

Our company employs a lot of minors. We have a policy prohibiting sexual harassment. It is written for our work force as a whole and is not tailored toward the high school students we employ. A friend of mine recently told me that our policy has to be understandable by the high school students for it to be valid. Is that true? Also, we occasionally get complaints from the parents of the kids who work at our firm. I don't pay much attention to those complaints since some of these parents are overprotective and I figure that kids will let me know if they truly have a concern. In your view, are there any problems with this approach?
**Sexual Harassment -- Employment of Minors, Quirky Question # 12**

December 10, 2007 | Posted by Ginsburg, Roy | Topics: Sexual Harassment, Recent Decisions, Employment of Minors

Although I generally believe there are risks associated with relying too heavily on legal advice from friends, here you have been provided useful guidance. Your company policies (whether sexual harassment or any other policies) should be tailored to your company's workforce. If that workforce is predominantly teenagers, you need to consider that fact when crafting your policies. If your workforce comprises a significant number of individuals for whom English is a second language, you need to tailor your policies to that component of your workforce.

In a very recent federal appellate court decision, *EEOC vs. V & J Foods, Inc.*, No. 07-1009 (7th Cir. November 7, 2007), the court addressed a number of issues relevant to your inquiry. In the V & J case, a 16-year-old girl was employed by Burger King. She was sexually harassed in a variety of ways by the 35-year-old male manager of the restaurant (propositions, offers to pay her for sex, unwelcome touching, etc.). She made efforts to complain about his conduct, which resulted in her being fired by the store manager on pretextual reasons. She was rehired soon afterwards but the problems persisted. Her mother then attempted to intercede on her behalf by registering complaints with the Assistant Manager of the restaurant. This was promptly reported to the Manager, who fired the employee a second time in response.

The EEOC sued on the employee’s behalf, claiming both hostile work environment sexual harassment and retaliation. Somewhat surprisingly, the District Court granted the employer summary judgment, dismissing the EEOC’s case. The lower court found that the young employee had failed to avail herself of the reporting mechanism provided by the employer and that she could not bring a retaliation claim based on the actions of her mother. The appellate court reversed.

There are at least four important principles addressed in the 7th Circuit opinion, each relevant to the questions you’ve posed. First, the appellate court stated emphatically that the trial court’s analysis misconstrued the Faragher/Ellerth affirmative defense requirement. That affirmative defense only is available to employers when the employee has not suffered "tangible economic harm." In this case, the employee was fired (twice). In a context involving actions by a supervisor, resulting in tangible economic harm, there is strict liability.

Second, to the extent the employee was seeking damages corresponding to the time period when she was still employed, the appellate court found that the affirmative defense could apply. The court, however, rejected its application because the sexual harassment policy and its reporting mechanism were not reasonable. While recognizing that an employer "is not required to tailor its complaint procedures to the competence of each individual employee," the court emphasized that "[k]nowing it has many teenage employees, the company was obligated to suit its procedures to the understanding of the average teenager." The court found that the "known vulnerability of a protected class has legal significance."
Applying this analysis to the facts of the V & J case, the court found numerous deficiencies with the mechanism set forth in the company's Employee Handbook with regard to reporting sexual harassment problems.

Third, the court reiterated the well-recognized principle that "[a] policy against harassment that includes no assurance that a harassing supervisor can be bypassed in the complaint process is unreasonable as a matter of law." V & J's policy did not create a mechanism that would allow its employees to circumvent the harasser, when that harasser was the store manager.

Fourth, the appellate court rejected the district court's analysis of the retaliation issue. The appeals court found that the employee's mother was acting as her agent. The court noted that minors "must act through agents in any legal matter, and their agents are their parents or guardians." Comparing the mother's action to that of an attorney acting on a client's behalf, the court found that the employee's mother was "opposing a practice" prohibited by law. The manager's decision to terminate the employee as a result of the mother's complaints were, therefore, retaliatory.

As you can see, this analysis applies directly to your situation. Given that your company employs "a lot of minors," you need to be sure that your policies, including your sexual harassment policy, are written in a way they can understand. Ensure that you avoid the problems encountered by V & J. The policy must be clear. It must be easily understood. It must identify the individuals to whom a complaint can be brought if a problem arises. The policy must not compel the employee to report the problem to the harasser himself. If you are sensitive to these common sense steps, you should not encounter problems.

As for complaints by a parent, take them seriously. Recognize that in this context, the parent is acting as an agent for his/her child. You certainly need to avoid any punitive action toward the minor employee based on the parent's behavior, especially when the parent is trying to alert you to conduct that he/she considers unlawful. If you take punitive action against the employee, you risk a legitimate retaliation lawsuit.
Marital Status Discrimination, Quirky Question # 145

May 10, 2010 | Posted by Ginsburg, Roy | Topic: Marital Status Discrimination

I know you've written about the issue of terminating family members in other Blog posts. And I know you recently discussed the nuances of terminating a family member in a closely held company. We have a more vanilla issue.

Can we terminate a spouse of another employee we are terminating? We just don't think it would be a good idea to retain someone related to an embittered ex-employee. Does this plan implicate anything relating to marital status? (We are not terminating this individual because of her status as "married.") Your guidance would be appreciated.

Roy’s Analysis of Quirky Question # 145, Marital Status Discrimination

May 17, 2010 | Posted by Ginsburg, Roy | Topics: Recent Decisions, Marital Status Discrimination

You pose an interesting question., which is related to a number of questions I’ve previously addressed in this Blog. In past analyses, I’ve explored whether terminating a spouse or family member of someone pursuing a discrimination claim could expose a company to potential liability. (To access these articles, use the “View By Topic” bar on the upper left-hand side of this page, and scroll down to “Associational Discrimination.”) I also have analyzed whether the termination of a spouse or family member might constitute retaliation, either against the employee already pursuing a claim or against the spouse him- or herself. (See the articles under the "Retaliation" category.)

In your question, however, you have not suggested that the employee you first decided to terminate has brought any claims against the company at all. In this context, you inquire, would it constitute “marital status” discrimination for the company to end its employment relationship with the terminated employee’s spouse.

As you likely know, there is no federal law prohibiting marital status discrimination. Therefore, whether an employer may discharge someone because he or she is married to an employee being terminated is dependent on state law. Some state statutory schemes, including Minnesota’s, prohibit “marital status” discrimination. Historically, at least in Minnesota, courts limited the scope of this legal theory to contexts relating to the “status” of being married, i.e., an employer was precluded from basing a hiring or firing decision, or some other job action, on whether a person was single, married, separated or divorced.

A recent decision from the Minnesota Court of Appeals, however, has given the Minnesota prohibition on marital status discrimination a far broader interpretation. In Taylor v. LSI Corporation of America, No. A09-1410 (April 27, 2010), Minnesota’s intermediate appellate court, the Minnesota Court of Appeals, rejected a narrow reading of the statutory proscription.
The Taylor facts were relatively straightforward. The appellant, LeAnn Taylor, began working at LSI in 1988. LSI was acquired in 1999 by Sagus International (Sagus). Shortly thereafter, Sagus appointed Gary Taylor as President of its LSI subsidiary. The following year, Gary Taylor started dating LeAnn, and the two were married in 2001. (The appellate court suggests that LeAnn Taylor may have received some undeserved beneficial treatment at the company once her relationship with Gary Taylor commenced, but these facts really have no bearing on the narrow question examined by the appellate court.)

In 2006, Sagus’ CEO became concerned about the performance of LSI, based in part on numerous complaints by the company’s customers and suppliers. These complaints led to a thorough assessment of LSI’s management and performance, followed by the terminations/resignations of six of LSI’s top 25 managers, including its President, Gary Taylor.

According to appellant, when the CEO accepted her husband’s resignation, he advised her husband with respect to her, ”it would probably be uncomfortable or awkward for [your wife] to stay.” Appellant further alleged that in a direct conversation with her, the CEO stated that because her husband was leaving LSI, “he probably will be [relocating], which means you’ll be relocating as well. So we just decided to eliminate your position.” Sagus disputed these allegations, though the CEO conceded he did ask Gary Taylor whether his wife would welcome the opportunity to resign rather than be terminated in order to “save face.”

Appellant’s employment ended in August 2006 and she sued LSI soon thereafter based on the Minnesota Human Rights Act (MHRA) § 363A.08, subd. 2 (2006), the prohibition against marital status discrimination. The District Court granted LSI’s motion for summary judgment and LeAnn Taylor appealed.

As the Court of Appeals pointed out, the Minnesota legislature did not define “marital status” when it initially passed this statutory provision. After the statute was enacted, the Minnesota Supreme Court has had two opportunities to analyze and apply this statutory prohibition. In one case, the state’s high court broadly defined “marital status” and found that a company’s anti-nepotism policy violated the statute when the company precluded an employee from moving from part-time to full-time employment because she was married to another employee of the company. (Kraft, Inc. v. State by Wilson, 284 N.W.2d 386 (Minn. 1979)). A few years later, however, the court decided not to extend the definition of “marital status” to protect an employee from discrimination based on her spouse’s political views or associations. (Cybyske v. Indep. Sch. Dist. No. 196, 347 N.W.2d 256 (Minn. 1984)). The Cybyske court distinguished Kraft, stating, "the anti-nepotism policy in that case amounted to a refusal to hire a married couple, which was a direct attack on the husband and wife as an entity and is contrary to the legislative judgment [that] reflects the protected status the institution of marriage enjoys in our society." (Quoting Kraft; citations omitted.)

Following the Cybyske decision, the Minnesota legislature amended the MHRA’s marital status provision for employment discrimination claims. Marital status was defined to “include[] protection against discrimination on the basis of identity, situation, actions, or beliefs of a spouse or former spouse.” This 1988 version of the statute had not been challenged in any case that has reached the Minnesota Supreme Court.
Although the Minnesota Court of Appeals recognized that courts in other jurisdictions had reached different conclusions on parallel factual patterns (citing to decisions from Alaska and Michigan), the court found that the statutory language in those states was not the same as the language of the MHRA. As the court observed, "By its clear terms, Minn. Stat. § 363A.03, subd. 24, prohibits an employer from discriminating against an employee based on the identity or situation of the employee’s spouse. The crux of appellant’s claim is that LSI terminated her based on the identity and situation of her spouse, a co-employee whose forced resignation was occurring at the same time. This claim falls squarely within the statutory definition of "marital status.”" (Emphasis added.) The appellate court reversed the grant of summary judgment and remanded the case for further development of the record.

As the Taylor case illustrates, in Minnesota at least, an employer faces potential liability if it terminates an employee solely because it also is terminating the employee’s spouse. If you act on your concern that it would best to discharge your employee merely because you consider it imprudent to "retain someone related to an embittered ex-employee," you are exposing your company to a claim for marital status discrimination.

There is no need to assume that risk. In Taylor, for example, LSI apparently thought Gary Taylor might relocate and that this would mean the end of LeAnn’s employment as well. Rather than make assumptions, LSI should have let these events play out. If their prognostication was correct and Gary and LeAnn Taylor relocated, the problem would have been resolved. Similarly, if LeAnn had concluded that she did not want to work for the company that had terminated her husband, again the situation would have been resolved amicably and without litigation.

The Taylor decision adds another arrow to the employment plaintiff’s quiver. In addition to potential claims of associational discrimination and retaliation in contexts where the first-fired spouse already is asserting claims, an unsupported or ill-conceived discharge of the other member of the couple also may implicate claims under the MHRA’s prohibition of marital status discrimination. In short, you should move cautiously in this area.

Finally, for reasons I have previously discussed and won’t repeat at length here, there may be beneficial reasons to retain the non-fired spouse. First, he or she may be a terrific employee who would be hard to replace. Second, there may be strategic reasons for retaining the spouse of the discharged employee. If you would like to explore some of those reasons, see, Quirky Question # 62, accessible under the "Retaliation" category above.