Constitional Challenges to Parsonage

- Under Internal Revenue Code Section 107(2), “ministers of the gospel” can exclude from the federal income tax cash payments from their congregations and other religious employers for such ministers’ housing.

Constitional Challenges to Parsonage

- A Wisconsin district court found that Section 107(2) violates the Establishment Clause of the First Amendment.
  - The Court's rationale is that all tax exemptions constitute subsidies and the effect of tax exemptions subsidize religion.
  - Relies on the US Supreme Court's decision in "Texas Monthly v. Bullock." Court found unconstitutional Texas' sales tax exemption for religious literature.

Constitional Challenges to Parsonage

- The parsonage allowance controversy will proceed from the Wisconsin trial court to the US Court of Appeals (7th Circuit) and, perhaps, the US Supreme Court.
  - *Walz v. Commissioner* - the income tax exclusion created for parsonage allowances by Section 107(2) is a constitutionally reasonable accommodation between church and state to avoid entanglement between them

Constitional Challenges to Parsonage

- Do not expect to see a 7th Circuit decision this year, and certainly not a Supreme Court decision until 2020.

529 Plans

Implications of Tax Code Changes to 529 Plans

- College savings accounts, named for Section 529 of the Internal Revenue Code, have been around for more than 20 years. Money invested in the accounts grows tax-free, and when you withdraw the money, you don't pay any federal or state taxes, as long as the money is used for "qualified expenses."
- Qualified expenses used to be defined as higher education tuition, room and board, books, and more recently, computers and software. Now, however, the federal tax code says up to $10,000 a year in K-12 private school tuition is also a qualified expense.

Implications of Tax Code Changes to 529 Plans

- Not all states automatically follow the federal definition for their 529 laws, and any gaps between federal and state laws could prove a minefield.

Implications of Tax Code Changes to 529 Plans

- More than 30 states and the District of Columbia offer a benefit at the time money is put into the account: a state income tax deduction or credit for contributions to 529 accounts. Yet some states have language that specifically defines the accounts as being college savings—and that phrasing could prove troublesome unless state laws are amended.
- Many states also have yet to clarify whether investment gains might become taxable in the event of a discrepancy between state and federal law.
- Meanwhile, it's not at all certain that states will rush to match the federal definition.
- While private school enrollment is comparatively small—about 10% of the school population nationally attends private schools, tax-free private school tuition could still cost states millions of dollars in revenue.

Implications of Tax Code Changes to 529 Plans

- For example: The change could reduce New York state's tax base by up to $3 billion. That would cost the state, which allows a $10,000 deduction per couple, as much as $200 million in tax revenue.
- Other states that could take a big hit include Indiana (which could lose $149 million in revenue) and Illinois ($90 million).

Implications of Tax Code Changes to 529 Plans

- California
- Florida
- Illinois – has warned that state law does not allow for it at this time
- Michigan
- New York - has warned that state law does not allow for it at this time
- New Jersey
- Pennsylvania

FMLA/ADA Lawsuits on the Rise

*First “the FMLA Basics”

- FMLA provides for
  - 12 weeks unpaid leave
  - For a Serious Health Condition
    - Self or family member
  - For Eligible Employees
    - Has worked for 12 months
    - Has worked 1,250 hours in 12 months before is leave needed)
  - Continuation of Health Insurance
  - Job Reinstatement

.

*FMLA Documentation

FMLA is very document oriented.*

- Give notice of Rights & Responsibilities within 5 business days of learning of need for leave
  - Supervisors need to know to alert you!
- Ask for medical documentation at the same time
- Employee has 15 calendar days to provide medical documentation from health care provider
- School reviews medical documentation and, if need for leave is confirmed, issues a Notice of Designation of Leave within 5 business days

*We have a kit with instructions that you may want to consider using.

*What Makes The Law So Complicated?

Bob sustains a broken wrist while at work. After six weeks, the worker's comp doctor certifies that Bob can return to work. According to the doctor, Bob's broken bones have healed properly and there will be no residual impairment. Bob claims, however, that he does not believe he can safely do his job because of pain in his wrist. Bob refuses to return to work.

What do you need to consider?

*It's just a request for time off from work. What's the big deal???

- Bob's ailing wrist involves:
  - State workers' compensation laws.
  - FMLA
    - Is Bob's injury a Serious Health Condition?
    - Is Bob an eligible employee under the FMLA?
    - Does Bob have any leave time available?
  - ADA
    - Is Bob's injury a disability?
    - What reasonable accommodation, if any, is required?
  - School policies

*So Where Does This Leave Us?

- The law is a mess and you will not know all the details of every statute.
- You avoid (or better manage) most leave of absence problems by maintaining hyper-communication with the employee and documenting all of these communications – not just for the School's file, but written communications with the employee at every step of the process.
- Most legal problems can be avoided (or at least managed) with good communications.

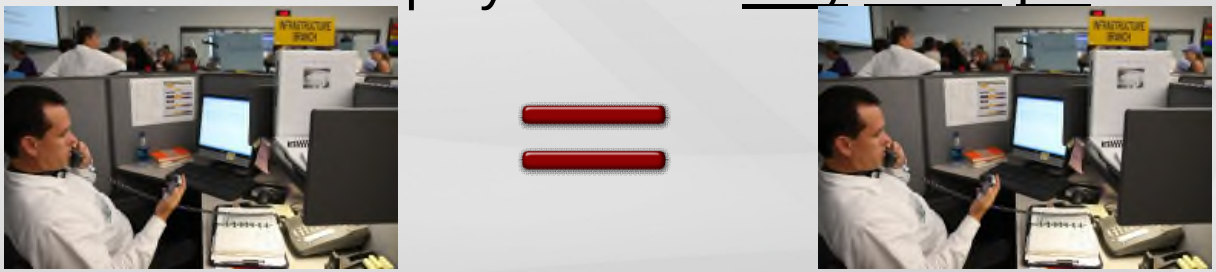
*So What Gets You In Trouble???

Terminating or Not Renewing the Contract of a Leave-Taker

- "Optics" almost always bad
- Timing kills in retaliation litigation
- How close in time will the discharge or non-renewal be?
  - Right after the request for leave
  - While on leave
  - Right after the employee's return date from leave
- The closer the proximity, the greater the inference of retaliation

Failing to Reinstate to the Same Pre-Leave Job

- FMLA doesn't specify that you must return the employee to the "very same job" – it says "equivalent position"
  - "One that is *virtually identical* to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort responsibility and authority."
- One person's "equivalent position" is someone else's "demeaning demotion"
- **Safest move**: Return the employee to the very same job



*Case Study

- John, an AP Calculus teacher, began leave in February due to cancer treatments. John has stayed in close communication with you and has come back for a short period, left again, came back, and is now out again. It is now April. You are issuing contracts for next year. Your sense is that John is not going to be able to return to work due to the aggressive nature of his cancer. You need to ensure you have an AP Calculus teacher for next year.
- You know from discussions John has had with others that he fully intends to return to work in August and that he loves teaching AP Calculus. He is your best AP Calculus teacher.
- What do you do?

Case Study Analysis

- These are difficult decisions.
- If you fill John's position, you run the risk that you have violated the FMLA by not returning him to his job if he is able to return.
- If you don't fill the position, you run the risk that you won't have an AP Math teacher.
- The best process is to have get updated information from John about whether he plans and believes he will be able to return to work. You might have to get updated medical information.
- If he says yes, and his doctor does not say no, you should give John the contract and plan for his return, but arrange for a backup or other process to cover the course until you have definitive information that he cannot return.

The Leave-Taker Who Can’t Return

- Can’t automatically terminate employees who don’t return at the end of 12 workweeks
- Instead, need an individual determination of why employee cannot return
- ADA in the picture if employee can’t perform essential elements of job at end of leave
- Is the employee who had a “serious health condition” also “disabled”?
- Additional leave must be considered as a possible ADA accommodation

*ADA: The Basics

- ADA requires that you provide a reasonable accommodation to an employee with a disability
- A reasonable accommodation could be additional time off to recuperate or recover from a medical condition, surgery, etc.
- The School must enter into the interactive process with the employee when the employee requests an accommodation

*The Requirements of the Interactive Process (in General)

- Conduct initial dialogue with employee, in-person if possible
- Elicit info from employee about abilities, restrictions, limitations
- Ask treating doctor for info on nature and length of restrictions
- Ask employee to identify a desired accommodation
- Consider feasibility of what the employee wants
- Document the process and outcome

*Tips For a Defensible Interactive Process

- Get employee sign-off on essential functions of the job
  - Having an accurate job description is very helpful
- Have employee identify which functions he can't perform
- Don't ask the employee's doc for diagnosis - just get limitations and expected duration
- If employee's doc isn't clear, consider writing letter or sending a form
- Consider an IME (Independent Medical Examination)
  - Must be at no cost to employee

*More Tips

- If employee isn’t offered the accommodation he asked for, provide written explanation – Why?
- If first accommodation doesn’t work, investigate, document why it failed and why #2 ought to succeed
- If no feasible accommodation would enable the employee to perform the current position, identify other vacant positions

*When Can You Declare the Interactive Process Over?

- The accommodation has been successful
- Employee no longer needs an accommodation
- No “reasonable” accommodation can be identified
- The only reasonable accommodation(s) would constitute an “Undue Hardship”
- Employee would be a “Direct Threat” even with (or without) an accommodation
- Employee fails to cooperate with the Interactive Process

*When is an Accommodation "Not Reasonable"?

- Requires lowering a quality or quantity standard
- Excuses an employee from performing an essential job function
- Requires employer to tolerate misconduct
- Creates a new job for the employee
- Slots an employee into a non-vacant position
- Requires employee to be given a new supervisor (or maybe a "kinder, gentler" one)
- Permits an employee to stay out on leave indefinitely

Additional Leave as Accommodation Under ADA

- Employer need NOT grant indefinite, open-ended leave – such a leave is not a "reasonable accommodation"
- Request for limited and finite period of additional leave must be evaluated
- The purpose of the additional leave has to be to allow the employee to recover and be able to return to work within the finite period
- Must be granted unless it would impose "Undue Hardship"
  - Very tough standard to meet
  - 14/30/45 more days almost never likely to sink the school
- Problem: When employee's doc keeps saying he "needs just a little more time"
  - 30 days becomes 60 - 60 becomes 90 - and so on

Dealing With Multiple Requests For Additional Leave

- No real “magic bullet”
- Close communication with employee’s doctor
  - Why will the next bit of leave do the trick?
  - Use counsel to help you draft questionnaire to doctor
- Consider: Are you being “played,” or is the employee’s recovery really that hard to forecast? Sometimes you have unpalatable choices
  - Terminate the process – argue what’s being sought is indefinite, open-ended leave
  - Live with it

*Case Study

- Your teachers are paid over 12 months even though they work 10 months.
- In John's leave scenario, he left in February and did not return for the rest of the school year.
- His pay is easy to calculate – you determine if he has any sick time or banked leave time and pay him for those days off. When he has used up his time, you cut off his pay and pay him the deferred compensation you have set aside for him from August through his last paycheck.

*Case Study

- What if John instead had taken off a month in November (from November 1 through November 30) and then returned to work until February when he took another month off?
- This scenario makes paying John properly more difficult.
- You first have to determine if John has any PTO to use for his days off. When he has exhausted those days off, the school has to make some decisions on how to proceed.

Case Study

- Some schools would continue to pay John for a period of time to see if he is going to return.
- Others would stop John's pay when he has exhausted his PTO. At that point, the School would pay John the amount of compensation that had been deferred to date (i.e., the difference between what John would have earned/been paid if he had been paid 10 months over 10 months vs. what John has been paid).
- Early in the year, less money is in the deferral account.

Case Study

- When John returns and works more, the easiest thing to do is to begin paying John at a rate that would be 10 months over 10 months (rather than deferring). This way, you pay him out at the rate he earns in case he needs to take more time off.
- You can, however, go back to the deferral process so John will have some paychecks over the summer from which you can deduct insurance premiums.
- If you are going to do this, you need to run your calculations for how much would still be potentially owed to John through the end of the actual academic year and then determine how much to defer from each paycheck. Talk with John up front about the options.

*Summary

- FMLA and ADA issues are some of the most complicated issues that all types of employers have to deal with.
- The academic year and need for certainty and continuity in the classroom make it more difficult for schools.
- The pay methods (deferral over 12 months) also makes pay complications for employees taking unpaid leave more difficult.

Final Questions?

THANK YOU

FOR THIS OPPORTUNITY

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