



Hill, Farrer & Burrill LLP

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MANAGEMENT NEWS

Recent Developments in Labor & Employment Law



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Firm To Hold Client Breakfast Meeting On February 26

The Firm's Labor and Employment Department will hold a breakfast meeting on Thursday, February 26, 2004 from 8:00 a.m. to 10:00 a.m. at the DoubleTree Hotel located at 100 The City Drive in Orange. The meeting will provide clients and friends of the Firm with an update of recent developments in employment law and new laws going into effect on January 1, 2004.

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This occasional newsletter is published by Hill, Farrer & Burrill LLP as a service to clients, friends and colleagues.

Each publication summarizes recent developments in state and federal law affecting employers, but should not be relied upon as an opinion or advise of the Firm regarding any specific matter.

We will specifically be reviewing the details of new legislation affecting California employers, and will also be providing sample language to be included in employment handbooks for legislation enacted in this and prior years, including paid family leave going into effect in 2004. In addition, we will be addressing problems that employers are routinely confronted with in accommodating injured workers under the workers' compensation, disability discrimination, and medical leave laws. This program will focus on both job reinstatement rights and entitlement to benefits for employees who are on those kinds of leave.

If you are interested in attending, please call Sherry Hill, secretary to Ronald W. Novotny, at (213) 620-0460.

Summary Of New Laws Affecting California Employers

AB 223 – lowers the standard for employees to recover costs and attorneys' fees in appeals from Labor Commissioner decisions, by providing that the employee is the "prevailing party" if they recover any amount after the trial de novo. Previously, employees could only recover attorneys' fees if they obtained a more favorable outcome in court than they did before the Labor Commissioner.

SB 796 – provides an incentive for employees who are subject to Labor Code violations to sue and recover 25% of the civil penalties assessed for such violations as well as reasonable attorneys' fees. It also provides for civil penalties of \$100 per employee per first pay period, and \$200 per employee per subsequent pay periods, for Labor Code

violations not already subject to civil penalties.

SB 478 – allows employees who are crime victims or immediate family members of crime victims time off to attend judicial proceedings involving the crime. "Immediate family members" include step relations and domestic partners, as well as their children. Available sick or vacation time may be used to cover such absences, which are not limited in length.

AB 76 – amends the state Fair Employment and Housing Act by extending employer liability for harassment to acts engaged in by clients or customers. In order to be liable for such harassment, it must be established that the employer "knew or should have known of such harassment, and failed to take immediate and appropriate corrective action."

AB 196 – amends FEHA to prohibit discrimination or harassment based on an employee's actual or perceived gender. Gender-specific dress codes are still legal, so long as employees are allowed to appear and dress consistent with their "personal gender identity."

SB 2 – mandates that employers of 20 or more employees provide health care coverage beginning in 2006 by paying fees into a statewide insurance pool. Employers with 200 or more employees must also provide health care for their employees' dependents.

AB 17 – prohibits a state agency from entering a contract for goods or services in the amount of \$100,000 or more unless the contractor provides benefits without discrimination for domestic partners.

Supreme Court Adopts "Avoidable Consequences" Defense To Sexual Harassment Claims

In the landmark case of *State Department of Health Services v. Superior Court*, the California Supreme Court recently announced a new defense available to employers to claims of sexual harassment by their supervisors. The Court confirmed that employers are strictly liable for supervisory harassment. However, the Court announced an "avoidable consequences" defense, under which a plaintiff may not recover damages for conduct which she could have reasonably avoided without undue risk, expense, or humiliation.

The defense may be established by showing that (1) the employer took reasonable steps to prevent and correct workplace sexual harassment, (2) the employee unreasonably failed to use the preventive and corrective measures that the employers provided, and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered. The defense is founded on the principle that a party must make a reasonable effort to mitigate her damages, and enables the employer to avoid paying damages for harm the employee could have avoided by making a timely complaint. California employers who have adopted and enforced adequate sexual harassment policies should accordingly be able to more easily defend themselves against damage claims brought by employees who claim harassment under this important case.

State Agency Avoids Liability For Harassment By Employee's Co-Worker

Although employers are strictly liable for harassment by supervisors, they remain liable for harassment engaged in by co-workers only if they knew or should have known of the harassment and failed to take immediate and appropriate corrective action to end it. In the recent case of *McClung v. Employment Development Department*, the state EDD prevailed in a sexual harassment claim brought by a female employee who worked as a state auditor, when it removed the alleged harasser from the project they were working on and no further harassing conduct occurred.

The case arose out of a three-day trip to San Diego by the female auditor and her male lead, who made suggestive comments to her in a night club and asked her questions about her sex life. Upon their return to the office, the female auditor immediately made a complaint, and the male lead ended up resigning. Although the agency was faulted by the female employee for failing to transfer or reassign the male lead to another office before he resigned, the court noted that the male lead was not at his work station for a significant portion of a three-week period prior to his resignation, and that the action of removing him from the audit they were working on effectively ended the harassment. The state agency was accordingly not liable for the alleged harassment, because it had no prior knowledge of the male lead's harassing conduct.

Employer's Bonus Plan Held Illegal

In the recent case of *Ralph's Grocery Company v. Superior Court*, a state appellate court held that an incentive compensation (or bonus) plan for non-exempt employees may not include deductions for cash shortages or workers' compensation costs. The court relied on a state regulation which prohibits deductions from non-exempt employees' pay for losses resulting from either "cash shortage, breakage or loss of equipment" not caused by dishonest or willful acts, as well as a state law requiring that employers bear the costs for securing workers' compensation coverage. The Court reasoned that the employer was not permitted to require its non-exempt employees to be the "insurers of its business losses and expenses" with respect to these items.

However, the court also concluded that a bonus plan for exempt employees may take into account cash and inventory shortages for the purpose of calculating the amount of a bonus, because those employees have the ability to impact such costs and may be motivated to do so. But such a plan may still not include deductions for workers' compensation costs. Companies should accordingly begin excluding such costs in calculating profit-based bonuses for their managers.

DLSE Issues Opinion Letter On Employee Meal And Break Periods

In an opinion letter issued November 3, 2003, the DLSE stated that in the case of employees working alone, the employer may not deny such employees a 30-minute duty-free meal period unless the conditions for an on duty meal period are satisfied. The letter also confirmed, however, that employers are not liable for missed rest breaks if employees are authorized and permitted to take their rest periods but choose not to do so. The opinion letter can be found at the DLSE's website at www.dlse.ca.gov.

In another opinion letter issued in 2002, the DLSE also confirmed that employees are entitled to 30-minute meal periods after every five hours worked, and that the meal period cannot be staggered at the start of a shift so as to avoid this requirement. Compliance with the requirement that employees be provided a daily duty-free 30-minute meal period continues to be essential in view of the one-hour per day penalty which has been in effect for failing to provide such meal periods since 2001.

Ninth Circuit Issues Important Decisions in Overtime Cases

In the case of *Chao v. A-1 Medical Services*, the U.S. Ninth Circuit Court of Appeals held that two home health service providers which were controlled by the same persons were to be considered a single enterprise for the purpose of the Fair Labor

Standards Act (FLSA), and were jointly liable for unpaid overtime to employees. The court reviewed the test for establishing a single enterprise under that statute, and determined that the two companies had related activities, unified operation or common control, and a common business purpose. More significantly, one individual oversaw the work of the employees of both companies, and the two companies had common supervisors who were under the control of a single manager.

In another ruling under the FLSA, the Ninth Circuit held in the case of *Alvarez v. IBP, Inc.* that employees of a meat packing plant in Washington state were entitled to compensation for time spent changing into and out of the required specialized protective clothing and safety gear. The "donning and doffing" of such gear, which included hats, hair nets, goggles, earplugs, boots and gloves, was found to constitute "work time" because it was an integral and indispensable part of the employee's principal activities and was necessary to the principal work performed and done for the benefit of the employer. The work in question did not fall under the exclusion of "clothes changing and washing" time for employees covered by collective bargaining agreements, because the specialized protective gear in issue was different and more extensive in kind than normal clothing.

Employer's Anti-Dating Policy Enforced

Anti-dating and "anti-fraternization" policies have been the subject of continuing debate in legal circles, given the privacy

concerns that may arise when such policies are enforced. But in the recent case of *Barbee v. Household Automotive Finance Corp.*, a state Court of Appeal gave employers some needed solace in being able to lawfully adopt and enforce such policies, at least against managerial employees who date their subordinates.

In *Barbee*, the employer adopted a policy requiring any supervisor who wanted to maintain an intimate relationship with a subordinate to bring the matter to the attention of management in order to allow it the opportunity to take appropriate action to avoid any potential conflict of interest. A national sales manager who began dating a salesperson accordingly had advance notice that the relationship could violate the company's policies unless the relationship was disclosed. Accordingly, the court concluded that the sales manager did not have a legally protected privacy interest in the relationship, and could not claim a violation of his constitutional right of privacy when he was terminated for maintaining the relationship after it was discovered and he was given the option of either ending the relationship or resigning.

The court also made a very important pronouncement with respect to Labor Code Section 96(k), which prohibits employers from taking adverse action against employees for any "lawful conduct occurring during working hours away from the employer's premises." The sales manager argued that this statute constituted a public policy that the employer violated by terminating him. However, the court concluded that this statute does not set forth an independent public policy that provides

employees with substantive rights, but rather merely lists the types of claims over which the Labor Commissioner may exercise jurisdiction in taking claims for assignment of wages. Employers will thus further benefit by this decision, by its rejection of section 96(k) as a basis for wrongful termination claims brought by employees who are fired for moonlighting activities or other conduct outside the workplace.

Court Rejects Section 132a Claim By Injured Worker

Over the years, Labor Code Section 132a has been increasingly used by employees who file workers' compensation claims to attempt to obtain reinstatement and back pay for any adverse actions that are taken against them. In the recent case of *State Department of Rehabilitation v. Workers' Compensation Appeals Board*, the state Supreme Court held that employees who make such claims are required to actually prove that they are treated differently, just as other discrimination claimants are.

In that case, a rehabilitation counselor made a claim for workers' comp. benefits based on work-related stress and depression, and was required to see a doctor during regular working hours for continued treatment. His employer required him to use accrued sick and vacation time for those appointments, and the employee filed a section 132a claim in response. The Supreme Court concluded that the employee had no claim because he could not establish that other employees were permitted to leave the office for medical appointments related

to non-industrial injuries without being required to use accrued vacation or sick leave in those circumstances. Because the employee could not prove that he was treated any differently than others who had either sustained industrial injuries or filed workers' compensation claims, he could not proceed with a section 132a claim.

Injunction Held Properly Issued Against Threatening Employee

Faced with increasing threats by potentially violent employees in the work place, employers are resorting more and more to the courts in seeking injunctions against such employees for threatening conduct. In the case of *USS-Posco Industries v. Edwards*, a California Court of Appeal affirmed the issuance of an injunction against an employee who credibly threatened his co-workers with violence, notwithstanding his contention that he was only joking when the comments were made.

The employee in that case frequently mentioned that he carried a gun, and invited a supervisor to "go out there and take care of this" when confronted for not wearing safety equipment. He later made comments to employees in a lunchroom that he was going to "come in gunning" and that he would "take care of some of the managers there before he went to jail." He also said that he was "going to kill all" the managers there, although his co-employees at the time did not take the comment seriously. The

appellate court held that an injunction prohibiting further threats of violence was properly issued, even though the threats were not made against any specific individual at the plant.

Court Construes "Three Calendar Day" Provision Of FMLA

The Family Medical Leave Act allows eligible employees to take up to 12 work weeks of leave during a 12-month period because of a serious health condition that makes them unable to perform their jobs. A serious health condition is defined as an illness, injury, impairment or physical or mental condition that involves either in-patient care in a hospital or residential medical care facility, or "continuing treatment by a health care provider." The U.S. Department of Labor has issued regulations interpreting the phrase "continuing treatment" to consist of "a period of incapacity of more than three *whole* consecutive calendar days." In the case of *Russell v. North Broward Hospital*, the U.S. Court of Appeals for the 11th Circuit confirmed that this means three calendar days, and not partial days, so that an employee who did not allege that she suffered from an incapacity that lasted three or more full days could not take advantage of the FMLA leave provisions.

Employee's Disability Claim Fails For Failure To Cooperate

In the recent case of *Allen v. Pacific Bell*, the Ninth Circuit rejected an employee's claim under the Americans With Disabilities Act (ADA) because

he failed to cooperate in the job search process which could have led to a reasonable accommodation. The employee in that case, a service technician, claimed that he was unable to climb poles and ladders and submitted a doctor's note that stated that he was only qualified to do sedentary work with minimal walking. Because there was no position available which could accommodate this restriction, the company asked him to submit additional medical evidence that would serve to modify his doctor's report. The employee failed to submit such evidence, however, and was therefore found to have failed to engage in the interactive process which could have led to an accommodation. In addition, he also failed to appear for a keyboard test which might have led to another job. His disability claim was accordingly dismissed.

ADA Update

- The U.S. Eighth Circuit Court of Appeals in St. Louis ruled that an employer did not violate the ADA by enforcing a "last chance agreement" with an employee who had recurring substance abuse battles. The employee entered into an agreement providing that if he successfully completed a drug treatment program he would be allowed to return to work, but was later arrested for driving while intoxicated. The court enforced a Last Chance Agreement, which expressly stated that any future use of mood altering chemicals would result in immediate termination. The court specifically held that this kind of agreement does not violate the ADA on the grounds that it treats employees with chemical substance problems

differently, due to the fact that all return to work agreements impose employment conditions different from those of other employees. (*Longen v. Waterous Co.*)

- In another case decided by the 8th Circuit, the court held that a former ready-mix concrete driver could not establish an ADA claim because there was no causal connection between the limitation on his "major life activity" of procreating (due to permanent nerve damage) and his request for a non-driving position. The court found that there must be a causal connection between the major life activity that is limited and the accommodation being sought, which the employee could not provide. In this instance, the employee did not request a non-driving job because of his inability to procreate, but because of the limitations on his ability to lift, bend, stand and walk – which were only moderate and not severe in nature. This case would have

likely had a different result under California law, in which a life activity need only be "limited," as opposed to "substantially limited," in order to establish a disability discrimination claim. (*Wood v. Crown Redi-Mix, Inc.*)

- Finally, the U.S. Sixth Circuit Court of Appeals in Cincinnati ruled that a Dupont paint manufacturing operation did not violate the ADA by refusing to accommodate a factory worker with severe hip and back problems in a temporary job. The employee suffered from a herniated disk and resulting back pain, and was unable to return to his previous job as a dispersion operator. He requested that he be placed in a temporary data input position, but the court held that an employer is not required to reassign a permanently-disabled employee to a temporary position for recuperation purposes. (*Thompson v. Dupont*)

If you have any questions about these issues or any other labor matters, please contact any member of the Labor & Employment Department at Hill, Farrer & Burrill LLP -- we're here to help.

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