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action basis, including work classification, off the clock, and meal and rest period claims, as well as the kinds of results and settlements that have been reached.

The meeting will provide practical examples of the most common types of reasonable accommodations available to disabled employees, as well as training and how to effectively engage in a "interactive process" that is required before determining what accommodation is appropriate. We will also provide an opportunity for you to have your questions answered on both reasonable accommodation and wage and hour law matters, and will provide materials outlining the employer's obligations under both disability and the overtime pay laws.

If you are interested in attending, please call Janice Warren, Secretary to Ronald W. Novotny, at (213) 620-0460.

Have You Reviewed Your EPLI Policy Lately?

Changes have been made in recent years to standard Employment Practice Liability Policies that employers should continue to pay strict attention

Firm To Hold Breakfast Meeting On Reasonable Accommodation, Wage & Hour Update on February 8, 2007

The Firm's Labor and Employment Department will hold a breakfast meeting for clients and friends of the Firm on Thursday, February 8, 2007 from 8:00 a.m. to 10:00 a.m. at the Anaheim Hilton Hotel located at 777 Convention Way in Anaheim. The meeting

will address two topics of current interest to employers: **the duty to reasonably accommodate disabled employees and engage in the "interactive process,"** and **recent developments in wage and hour law** including a review of cases and opinion letters on minimum wage obligations, commuting time considered "under the control" of the employer, and application of the administrative exemption. We will also review trends of cases that have recently been filed on a class

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.

to. There has been a general narrowing of the kinds of claims covered, the definition of “related claims” which may be subject to one “deductible” amount, and an employer’s ability to choose counsel to defend it in a claim covered under the policy. Hill Farrer & Burrill, LLP has been approved as acceptable defense counsel under a number of EPLI policies, and has been designated by numerous clients as their counsel of choice under such policies. Please contact our EPLI specialist, Sean McLoughlin, if you desire to learn more information on how to go about adding the Firm as approved counsel under your EPLI policy.

FEHC Finalizes Regulations on Mandatory Sexual Harassment Training

On November 14, 2006, the California Fair Employment and Housing Commission (“FEHC”) voted to approve its proposed regulations regarding California Law AB 1825, which required employers to begin implementing harassment prevention training programs on January 1, 2006. If approved by the Office of Administrative Law, the regulations will become effective in February 2007.

Any business that employs or engages 50 or more employees or contractors for each working day in any 20 consecutive weeks in the current or preceding calendar year is covered by the law. It is not required that the 50 employees or contractors work at the same location or even that they all work or reside in California. Simply stated, even if only one of the 50 employees works in California, the employer is covered under the regulations

and must provide the harassment prevention training. New businesses and businesses that grow to 50-plus employees after the regulations have taken effect have six months to provide training and become compliant. Thereafter, training is required once every two years.

Only supervisors located in California require training under the regulations. Under the proposed regulations, attending the training does not create an inference that the employee is a supervisor. New supervisors must be trained within six months of assuming their position and trained thereafter once every two years. If the new supervisor was trained in compliance with the regulations by a prior employer during the previous two years, they need only be required to read and acknowledge receipt of the current employer’s anti-harassment policy within six months of assuming the position.

The regulations specifically provide that the training may take the form of classroom, e-learning, or webinar sessions of at least a half hour, and that the instructors shall “include questions that assess learning, skill-building activities that assess the supervisor’s application and understanding of the content learned, and numerous hypothetical scenarios about harassment.” The content of the training must also include a description of the resources available to harassment victims, the limited confidentiality of the complaint process, the employer’s obligation to conduct an effective workplace investigation of a harassment complaint, and training on what to do if the supervisor is personally accused of harassment.

Many employers have already started implementing training in

response to AB 1825. Under the FEHC final rule, any employer which made a “substantial, good faith effort to comply” prior to the effective date of the regulations will be deemed in compliance and will not need to redo their training to comply with the final regulations.

Should you have any questions regarding the new regulations or your company’s compliance requirements, please do not hesitate to contact any of our attorneys.

Court Rejects CFRA Retaliation Claim

In the recent case of *Neisendorf v. Levi Strauss & Co.*, a California appellate court dismissed the claim of a human resource professional who contended that she was fired for taking an eight-week disability leave. After being medically cleared to work by her doctor (who diagnosed her as suffering from a panic disorder), the employee requested several accommodations including hiring a job coach to facilitate the reestablishment of a “harmonious and peaceful working relationship” with her supervisor, a “job redesign” to enable her to work only a 40-hour work week so she could take time off to complete treatment, and a reporting relationship to another supervisor for a period of “three months or more.” The company accommodated her by assigning a return-to-work specialist to work with the employee, but later terminated her for being unwilling to acknowledge the existence of a number of performance development issues including her failure to be able to work constructively with others.

The court held that the employee was clearly terminated for ongoing performance deficiencies which she willfully failed to address, and not because she had taken a leave of absence under the California Family Rights Act (CFRA). Of significant help to the company was its continuing documentation of the employee's performance problems both in her evaluations and disciplinary warnings, which pre-dated the CFRA leave.

Secret Taping of Employees Supports Privacy Claim

Can an employer's placement of a video camera in an office area where employees have reportedly accessed pornographic websites violate the privacy rights of the employees who occupy the work space, if they are not informed of the surveillance? Yes, held a California appellate court in the recent case of *Hernandez v. Hillside, Inc.*, in which a residential facility for abused children placed such a camera in an office area, even though the employees' activities were neither actually videotaped or viewed by the employer or its agents.

The case turned on whether the employees had a "reasonable expectation of privacy" in their work space. The court found that while the employees did not enjoy "complete and absolute privacy in their office," it was reasonable for them to expect that images of them in their office with the door closed would not be transmitted to another portion of the building, which the surveillance equipment had the capability to do. The court further found that "a reasonable jury could

conclude that the intrusion into plaintiff's office is highly offensive," and permitted them to proceed to trial on their invasion of privacy claims.

This case highlights the dangers of implementing unannounced surveillance procedures in the workplace, and the necessity of consulting with counsel to avoid the dangers of invasion of privacy claims being filed by employees in this setting.

Courier Employees Found Not To Be Independent Contractors

Another case decided by a California appellate court in August 2006 demonstrates the dangers of treating employees as independent contractors when the employees do not exercise sufficient control over the manner and means of their work. A courier service business in that case had its employees sign independent contract agreements, use their own vehicles to deliver the company's packages, and paid them on a mileage, time and volume of delivery basis on assigned routes. However, because the courier service dispatched the employees to do pickups and deliveries, obtained the clients in need of the courier service, and the pick-up and delivery of papers and packages did not require a high degree of skill, the courier service was determined to have retained all necessary control over the operation as a whole, and to have mistakenly classified the employees as independent contractors. The court noted that the parties' characterization of the relationship as one of independent contractors was not determinative of their status, and rejected the company's independent contractor

contention because the functions of the couriers constituted an integral part of the business as opposed to a specialized or skill function that is more routinely contracted out to a third party.

U.S. Ninth Circuit Rejects Exclusion Of Deaf Drivers

In *Bates v. United Parcel Service, Inc.*, UPS categorically excluded individuals from employment positions as "package car drivers" because they could not pass a U.S. Department of Transportation hearing standard. Although that standard did not actually apply to the vehicles in question, UPS argued that the safety requirements of the position necessitated the exclusion of deaf or partially deaf drivers from that job. The key question in the case was whether UPS had established that there existed a "business necessity" for the exclusion of employees who did not meet the DOT hearing standards.

The U.S. Ninth Circuit Court of Appeals ruled against UPS because it failed to meet its burden of establishing a "business necessity defense." UPS could not prove that either (1) substantially all deaf drivers presented a higher risk of accidents than non-deaf drivers, or (2) that there were no practical criteria for determining which deaf drivers presented a heightened risk and which it did not. Although UPS relied on crash risk studies, a human factor study, and expert testimony regarding the abilities of deaf drivers to avoid safety dangers, the court nevertheless labeled such evidence as "subjective" and insufficient to support the blanket exclusion. In doing so, the court noted that

the deaf and hard of hearing are licensed in every state to drive passenger cars and vehicles as large as the UPS “package cars” in question, and that UPS had not shown that it was impossible to conduct a valid study comparing the relative risks posed by deaf drivers. The blanket exclusion of deaf drivers was accordingly held to violate the ADA and the state Fair Employment and Housing Act because it unlawfully discriminated against disabled persons based on their hearing.

This case demonstrates the extreme lengths that employers must go to in order to categorically exclude persons with a certain disability from an employment position, as opposed to making “individualized assessments” of the risks posed by each individual’s limitations.

Court Rules GI Was Retaliated Against For Taking Military Leave

In the recent case of *Wallace v. City of San Diego*, the U.S. Ninth Circuit Court of Appeals held a police officer could claim retaliation in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA) based on a pattern of discrimination against him following his returns from duty. The court looked at the City’s actions occurring around times that the officer (Wallace) returned from duty, such as reassigning Wallace to a location far from his home, reducing his responsibilities and failing to promote him, its excessive discipline of Wallace in comparison to its treatment of other officers, its initiation of disciplinary proceedings for his being absent from work while on military duty, its refusal to

approve military leave, and its issuance of an “unacceptable” rating and extended performance review.

The court found that a jury could reasonably conclude that a person in Wallace’s position would have felt compelled to quit despite any improvements in working conditions over the final months of employment. The court’s holding also suggests that former supervisors may be liable for discriminating against former employees if their actions have a “continued effect” on employment, such as issuing a negative performance review post-transfer. Moreover, retaliatory behavior by a supervisor may be imputed as condoned by the employer if the supervisor is not disciplined for his actions.

Advance Of Commissions Is Not Wages, Court Decides

A California Court of Appeal recently held that advanced commission payments do not constitute “wages” under California Labor Code Section 221, which prohibits employers from collecting wages previously paid to employees. In *Koehl v. Verio, Inc.*, sales representatives of Verio challenged the company’s policy of “charging back” commissions on orders cancelled by the customer within a specified time period by deducting the commission from a future commission payment.

While California law makes it illegal to take back already paid wages – which are defined as “all amounts for labor performed” and may include commissions – an employer may expressly limit the right to commissions by the terms of its

compensation contract. If the contract specifies that excess advances on commissions are to be repaid by the salesperson, such a contract is valid. Here, in concluding that advanced commission payments do not constitute wages, the court explained that the salespeople were informed in writing of the company policy that commissions were unearned until the conclusion of the charge back period, and the this policy was explained in both formal and informal meetings, ultimately concluding in the employee signing an acknowledgement agreeing to the plan. The court found that the ongoing responsibilities of the salespeople to their accounts during the interim period made such a plan reasonable.

This ruling demonstrates the importance of characterizing a sales commission as an advance in contracts with salespeople, as well as stating clearly defined terms upon which commissions will be advanced or charged back. The ruling also emphasizes the need to explain a charge back system to salespeople and commit their understanding of the terms to writing.

Employer May Be Liable For Harassing Conduct Of Non-Employees

In the recent decision of *Freitag v. Ayers*, the Ninth Circuit Court of Appeals upheld a jury verdict in favor of an employee on her hostile work environment and retaliation claims, holding the State Department of Corrections liable for its failure to correct a hostile work environment resulting from male prisoners’ sexual harassment of female guards. This case presents a new hurdle faced by

employers in handling harassment claims – diffusing sources of harassment outside one’s employ.

The complaint, brought by a former female prison guard (Freitag) at Pelican Bay State Prison against various Department of Corrections officials, alleged a failure by the department to correct a sexually hostile work environment, including a “pervasive practice at Pelican Bay of inmate exhibitionist masturbation directed at female officers.” Freitag asserted that the Department failed to respond to her efforts to remedy the situation and that her discipline of prisoners who exposed themselves or masturbated in front of her was countermanded by male superiors.

In ruling for Freitag, the court suggested that “even in an inherently dangerous working environment, the focus remains on whether the employer took reasonable measures to make the workplace as safe as possible.” Such a case instructs employers to address behavior that employees find harassing, whether the source of the behavior is another employee or a third-party, and to take corrective action, where possible, to control offensive conduct.

Board Concludes Mandatory Arbitration Policy Must Expressly Exclude NLRB Charges

Must a mandatory employment arbitration policy applicable to nonunion employees expressly exclude unfair labor practice charges filed with the National Labor Relations Board under the National Labor Relations Act? The Board’s decision in U-Haul

Company of California instructs that it must.

U-Haul, a nonunion employer, adopted a mandatory arbitration policy in its employee handbook that was challenged by the Machinists’ Union, which had initiated an organizing campaign at one of the company’s facilities. The arbitration clause at issue purported to cover all disputes relating to or arising out of employment with the company or the termination of that employment, including “claims and causes of action recognized by local, state or federal law or regulations.”

The Board majority held that the policy violated the Act because it would reasonably hinder employees from filing charges with the Board, a protected activity under the Act. The Board concluded that the broad language of the policy could be “reasonably read to require employees to resort to the Respondent’s arbitration procedures instead of filing charges with the Board.” U-Haul was ordered to rescind its policy and remove any signed agreements from its files.

The Board’s ruling is currently being appealed to the U.S. Court of Appeals for the District of Columbia. Ultimately, despite the pending nature of the appeal, cautious employers should consider amending their mandatory arbitration policies for nonunion employees to expressly exclude from coverage the filing of charges with the Board, so as to remove a possible challenge that the policy is unenforceable on this ground.

NLRB Decides Important Cases Defining Who Is A Supervisor

On September 29, 2006 the National Labor Relations Board decided three significant and long-awaited cases defining who qualifies as a “supervisor” under the National Labor Relations Act. Determining who is a supervisor is important, because supervisors cannot form or join unions under the Act’s protections, and they cannot vote in NLRB elections to decide whether employees will be represented by a union. The issue of who qualifies as a supervisor has been frequently disputed in the health care field involving charge nurses.

The Board in *Oakwood Healthcare, Inc.* determined that regular charge nurses were supervisors and could not vote in an NLRB election. The Board focused on the charge nurses’ authority to assign work and responsibly direct other employees utilizing independent judgment. The Board found that charge nurses used independent judgment to match the appropriate nurse to a patient in assigning work, stating: “Matching a nurse with a patient may have life and death consequences. Nurses are professionals, not widgets, and may possess different levels of training and specialized skills.” The Board also found that rotating charge nurses, who did not regularly act as charge nurses, were not supervisors and were entitled to vote in the NLRB election.

In the companion cases, the Board found that the employees in question were not supervisors. The Board in *Golden Crest Healthcare Center* found that charge nurses were not supervisors

because they were not held responsible for the direction of subordinate employees, and they could not require employees to work overtime or extra shifts. In *Croft Metals, Inc.*, the Board concluded that leadpersons were not supervisors, because they did not utilize independent judgment in assigning work, but merely followed pre-established schedules.

DOL Issues Opinion Letters On Mortgage Loan Officers, Respiratory Therapists

- In an Opinion Letter dated September 18, 2006, the U.S. Department of Labor concluded that mortgage loan officers who work with customers to assist them in identifying and securing a mortgage loan appropriate for their individual financial circumstances are exempt from the overtime requirements under the Fair Labor Standards Act based on the administrative exemption. The mortgage loan officers responded to and followed up on customer inquiries, checked and analyzed the customers' financial information, and advised the customers about the risks and benefits of loan alternatives. The Department concluded that the loan officers qualified for the exemption

because they performed work directly related to assisting with the running or servicing of the business by marketing, servicing, and promoting the employee's financial products. Loan officers also exercised independent judgment and discretion by evaluating the products, options, and variables available to determine which mortgage products might serve the customers' needs.

- In another Opinion Letter issued September 27, 2006, respiratory therapists were held to not qualify for the learned professional exemption, because the occupation did not require knowledge "of an advanced type that is customarily acquired by a long course of specialized intellectual instruction." The Department noted that an advanced degree is normally not required for employees in that position, and that only 12% of accredited respiratory care educational programs in the country are at a bachelor degree level. The Department noted that it is possible for professions to move into the learned professions status if there are changes in certifications or educational requirements within the profession or industry, but that in the case of respiratory therapists that has not yet occurred.

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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