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they experience a "qualifying exigency," as determined by the U.S. Department of Labor ("DOL"). An employer faced with a request for leave under this category may require that the employee certify the call to duty. Until the DOL issues final regulations defining "qualifying exigencies" it does not intend to enforce this category of leave, though employers are encouraged to begin providing active duty leave in the interim.

Injured Servicemember Leave allows employees who are the spouse, parent, child or next of kin (closest blood relative) of an active member of the Armed Forces who has suffered a serious injury or illness in the line of duty to take a leave of absence of up to 26 weeks in a single twelve-month period to care for their injured family member. Note that an employee who takes a leave of absence on these grounds will not be able to take an additional 12 weeks for other FMLA reasons in the same year; rather, the employee's available leave is capped at 26 weeks in a 12-month period. Employers are also expected to comply with this category of leave in good faith pending the publication of DOL regulations.

These two new provisions work in conjunction with the other FMLA requirements such as continued group health plan coverage, the availability of intermittent leave and reduced work schedules, and return to work requirements. They also supplement California laws regarding leave, including a

### FMLA Amendment Provides Up to Six Months Leave to Family of Military Personnel

Effective immediately, certain employees with family members in the military may be eligible for an additional six months of leave under amendments to the Family and Medical Leave Act of 1993 ("FMLA"). The new law, which was signed into effect on

January 28, 2008, affects private employers with 50 or more employees and public agencies of all sizes.

The amendment creates two new categories of FMLA leave: active duty family leave and injured servicemember leave. Active Duty Family Leave allows employees with a spouse, parent or child who has been called to active duty in the United States Armed Forces to take up to twelve (12) weeks of leave when

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.

newly-minted California law requiring that employers of more than 25 employees provide up to 10 days of unpaid leave to employees whose spouses returns home on leave from deployment.

Should you have questions regarding compliance with these provisions, please contact Ron Novotny at (213) 620-0460 or your attorney at Hill, Farrer & Burrill, LLP.

## Employers May Deny Employment to Medical Marijuana Users

In a 5-2 decision, the California Supreme Court ruled that employers may consider medical marijuana use in their decisions regarding employment without violating the California Fair Employment and Housing Act (FEHA). Gary Ross, the plaintiff in *Ross v. Ragingwire Telecommunications Inc.*, claimed that Ragingwire wrongfully denied him employment because he tested positive for marijuana. However, the Court opined that Proposition 215 solely protected patients from criminal sanctions for the use of marijuana for medical reasons, and did not provide a universal right of use.

Justice Werdegar, writing for the Court majority, stated: "Plaintiff's position might have merit if the Compassionate Use Act gave marijuana the same status as any legal prescription drug. But the Act's effect is not so broad." Instead, the Court held that California's voters "merely exempted medical users and their primary caregivers from criminal liability under two specifically designated state statutes" – those prohibiting the possession and cultivation of marijuana. "Nothing in the text or history of the Compassionate Use Act suggests the voters intended

the measure to address the respective rights and obligations of employers and employees."

In dissent, Justice Kennard warned that the decision would leave many Californians with a choice of continuing to use marijuana to treat their illnesses and become unemployed, or continue their employment and "try to endure their chronic pain or other condition for which marijuana may provide the only relief." The dissent countered that this choice was neither the intent of the Compassionate Use Act nor permitted under FEHA. Instead, according to the dissent, an accommodation should be made under FEHA for medical marijuana users. The dissenters did agree with the majority, however, that because federal law prohibits marijuana possession, discharging an employee for off-site medical marijuana use would not support a claim of wrongful discharge in violation of public policy.

Counter-legislation that specifically protects the employment rights of medical marijuana users has already been proposed. Assembly Bill No. 2239 would declare it unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment or otherwise penalize a person if the discrimination is based upon the person's status as a "qualified patient" under the law. It would also authorize a person who has suffered discrimination in violation of the bill to institute and prosecute a civil action for damages, injunctive relief, and any other appropriate equitable relief. The bill remains pending at this time.

## California Supreme Court Rejects Individual Liability for Retaliation

Under California law, employees may be held personally liable for acts of harassment, but not for discrimination, for which the company is solely responsible. In the landmark decision of *Jones v. The Lodge at Torrey Pines*, the California Supreme Court deemed a claim of retaliation akin to a claim of discrimination, concluding that under the Fair Employment and Housing Act ("FEHA") only the employer and not individual employees may be held liable.

The Court majority stated that the reasons for not imposing individual liability for discrimination apply equally to retaliation, namely that: (1) supervisors can avoid harassment but cannot avoid personnel decisions, (2) it is incongruous to exempt small employers from retaliation claims but to hold individual nonemployers liable, (3) sound policy favors avoiding conflicts of interest and the chilling of effect on management, (4) corporate employment decisions are often collective, and (5) it is bad policy to subject supervisors to the threat of a lawsuit every time they make a personnel decision.

The Court noted that it was not ruling on whether an individual who is personally liable for harassment might also be personally liable for retaliating against someone who opposes or reports that same harassment, as such a situation was not presented by the appeal. However, in the recent case of *Hammond v. County of Los Angeles*, a state appellate court applied the same reasoning to a retaliation claim resulting from a report of harassment, holding that individuals cannot be held

personally liable in those circumstances, either.

## Supreme Court Enlarges Remedies Available to Defined Contribution Plan Participants

May a defined contribution plan participant recover individual account losses resulting from a breach of fiduciary duty under ERISA? According to the recent U.S. Supreme Court decision of *LaRue v. DeWolff, Boberg & Associates*, the answer is yes.

*LaRue*, a participant in a defined contribution pension plan, alleged that the plan administrator failed to follow his written investment directions regarding his 401(k) account, resulting in losses of around \$150,000. *LaRue* alleged a breach of fiduciary duty, and the Supreme Court agreed. The Court explained that relief is available under ERISA regardless of whether the alleged fiduciary breach diminishes plan assets payable to all participants or just a single participant's individual account. Given the *LaRue* decision, defined contribution plan administrators should create or revisit their procedures to ensure plan participant elections and directions are followed so as to keep a ministerial error from turning into a fiduciary breach.

## Court Validates Employee's CFRA Claim Despite Continuance of Part-Time Job

In *Lonicki v. Sutter Health Central*, the California Supreme Court allowed a hospital technician with work-related depression to pursue her claim that her discharge violated the California Family Rights Act ("CFRA"),

despite the fact that she continued working part-time at another hospital while she was on leave from her full-time job.

After her new supervisor changed her start time and denied her request for vacation, Lonicki left work and sought medical authorization for leave. She then received a note for one month's leave and a referral to a therapist, and was required by the company to obtain a second opinion from a doctor selected by the company. That doctor concluded she was capable of returning to work without restrictions. Based on the assessment of the doctor and the knowledge that Lonicki was still working a part-time job, Lonicki's supervisor told her to return to work or face discharge, but she did not return. Instead, she stated she would follow her doctor's orders and take the full month off. She then obtained the opinion of a psychiatrist that she take another month off for "major depression." During this period, she was discharged for failing to return to work.

While the lower court granted summary judgment to Sutter and the appellate court affirmed, the Supreme Court reversed the judgment, holding that Lonicki's continued performance of her part-time job was inconclusive as to the question of whether she was capable of continuing to perform her full-time job, and that her continued employment elsewhere was only one piece of evidence the jury should consider in making its determination. The Court also held that Sutter's failure to seek a binding opinion from a third-party health care provider after its doctors had disagreed with Lonicki's doctors over whether Lonicki could return to work did not bar Sutter from asserting that Lonicki was not entitled to a medical leave because she did

not suffer from a serious health condition.

This case highlights the importance of obtaining third medical opinions under the Family Medical Leave laws when an employer's and employee's doctors disagree on the extent of an injury or how it affects the employees' ability to do their job.

## FMLA Is Applied to Contract Employee

Can an employee referred by an employment agency sue an employer for violation of their rights under the Family Medical Leave Act ("FMLA"), when their assignment is allegedly terminated in response to taking family or medical leave? Yes, said the U.S. Court of Appeal for the Sixth Circuit in *Grace v. USCAR*. The employee in that case, Rosalyn Grace, held an IT position for eight years for USCAR, a research and development company. All of USCAR's employees were contractors or agency personnel. After Grace developed asthma which resulted in hospitalization, she was terminated and told that her position had been eliminated. She sued, contending that the termination was in retaliation for her exercising her FMLA rights.

The court found that even though Grace had not been employed by the employment agency for the twelve months required to be eligible for FMLA leave, her lengthy employment at USCAR qualified her to exercise her rights under the law. The court specifically found the employment agency and USCAR to be joint employers who were both responsible for ensuring that Grace was provided the leave available under the statute, for reinstating her to her position following the leave, and for not

retaliating against her for exercising her leave rights. The court also concluded that the employment agency could not avoid liability under the FMLA due to Grace's eleven month period of employment because it was a successor-in-interest to a prior agency and benefited from the employees' prior experience with that agency. The court reasoned that it would undermine the purpose of the law by allowing temporary agencies to hire employees of other agencies and to avoid liability by the mere technical change in the identity of the employer.

### **Starbucks Ordered to Pay \$105 Million to Baristas for Illegal Tip Sharing**

On March 19, 2008, the San Diego Superior Court ordered \$105 million to be paid to approximately 100,000 "baristas" employed by Starbucks in California, for requiring the pooling of their tips with supervisors. Shift supervisors shared in the tips because they also serviced customers and managed by a "teamwork" approach as opposed to direct orders. However, because they had the power to "supervise, direct, or control the acts of employees," the court ruled that they were not permitted to share in the tips under Labor Code Section 351 (which prohibits employers and their "agents" from sharing in tips).

The ruling will certainly be appealed, and the case will hopefully provide some guidance to employers regarding which employees may actually share in tips under state law. Employers such as Starbucks are sometimes caught in the position of not being able to treat employees such as the shift supervisors as exempt, while still

permitting them to share in tips because they directly service customers.

### **Court Rejects Unfair Competition Claim Against Ex-Sales Manager**

In the recent case of *Cintas Corp. v. Perry*, the U.S. Seventh Circuit Court of Appeals rejected an unfair competition claim made by an industrial laundry company against a former sales manager, and awarded the ex-sales manager over \$300,000 in attorney's fees and costs for being required to defend the case. The company sued for breach of contract to enforce a non-competition agreement when its former sales manager went to work for a competitor, based on his use of two computer disks full of information downloaded from its computers. The court, however, found nothing confidential or proprietary in the computer disks or the forms the sales manager gave to his new company, and ruled that it only contained dated information that would not have provided an advantage to a competitor within the terms of the non-disclosure agreement. In addition, the court awarded the ex-manager his attorney's fees and costs under the fee shifting provision of the non-competition agreement, even though his attorney's fees were paid by his new employer.

### **Employer May Be Vicariously Liable for Employee's Assault of Customer**

Juan Rodriguez Flores, the plaintiff in *Flores v. Autozone*, went to an Autozone store to purchase motor oil. After exchanging words with Erwin

Gomez, the Autozone employee Flores had asked about the price of a case of oil, Gomez struck Flores in the head with a steel exhaust pipe. Flores sued Autozone claiming that it was vicariously liable for his injuries, because Gomez had been acting in the course and scope of his employment. Flores also alleged that Autozone had been negligent in its hiring, training or retention of Gomez as an employee, based on his prior run-ins with customers

Reversing summary judgment by the trial court, the California Court of Appeal reasoned that Gomez's job duties included answering customers' questions and assisting customer with finding products. While Autozone argued that Gomez's attack on Flores could only be described as "perverse and beyond any human decency" and therefore outside the scope of his employment as a matter of law, the court explained that some willful and malicious acts may fall within the scope of employment for the purposes of "respondent superior" liability if they have a "causal nexus" to the employee's work. The court concluded that the appropriate test was whether "an employee's physical eruption, stemming from his interaction with a customer, is a predictable risk of retail employment," and that a jury could reasonably infer that Gomez's anger arose during the discussion over oil prices.

However, the Court of Appeal upheld the trial court's ruling that there was insufficient evidence to support Flores' contention that his injuries were caused by Autozone's negligent hiring, retention and training of its employee. An employer need not run a background check or conduct personality testing simply because an employee will have contact with the public.

Moreover, Autozone was not placed on notice of Gomez's aberrant behavior merely because he had previously had a verbal altercation with a customer, and could not be held liable for failing to obtain his juvenile delinquency court records because they could not have been lawfully obtained.

## Undistributed Arbitration Agreement Held Unenforceable

In the recent case of *Metters v. Ralphs Grocery Co.*, the California Court of Appeal held that an arbitration agreement referred to in a dispute resolution form given to employees who request their employer to investigate and resolve harassment, discrimination or retaliation complaints was unenforceable.

In *Metters*, an employee claiming harassment and discrimination signed a form entitled "Notice of Dispute & Request for Resolution," which included a section on the company's mediation and binding arbitration policy and incorporating it into the form by reference. The arbitration policy, however, was not attached to the form and was only made available to the employee through the Company's Manager of Employee Relations. By signing the form, the employer argued that the employee had submitted to the Company's binding arbitration policy, even though the policy was not a part of the agreement.

The court disagreed. Because the dispute form signed by the employee did not look like a contract and referred to an unattached policy, the court found that there was no meeting of the minds between the employer and the employee

regarding the unattached arbitration policy, and, therefore, no enforceable arbitration agreement existed.

The case provides an important reminder that agreements to arbitrate should be prominently featured in employment or hiring documents, and not be buried in small print or contained in unattached materials.

## Director of Network Operations Held Exempt

In the recent case of *Combs v. Skyriver Communications, Inc.*, a California appellate court held that a Director of Network Operations ("DNO") for a wireless broadband internet service provider was exempt from the state overtime requirements under the administrative exemption, when his main duty was "maintaining the well-being of the network."

The DNO was responsible for maintaining, developing and improving the company's network and his duties involved high level "problem solving" and "troubleshooting." He was also responsible for preparing reports for the Board of Directors, planning to integrate the required networks into the Company's network, and equipment sourcing and purchasing.

The court found that because the DNO was responsible for purchasing, procurement, computer network, internet and database administration, he performed the specific kinds of functions that are recognized as administrative in nature under the federal regulations, which are relied upon in applying the exemptions under California law. The fact that he was also responsible for consulting and providing expert advice to management, planning long and

short term business objectives, and investigating and resolving matters of significance on behalf of the company, was also significant to his exempt status. The kind of high level problem-solving that the DNO was responsible for engaging in when performing his troubleshooting duties was also distinguished from the more "routine and unimportant" types of "production work" that can detract from exempt status.

## Store Manager Found Exempt Under FLSA

In *Thomas v. Speedway SuperAmerica, LLC*, the U.S. Sixth Circuit Court of Appeal held that a store manager qualified for the executive exemption because his "primary duty" consisted of managing a gas station and convenience store. The store manager was supervised by a district manager and was required to comply with detailed company policies and standardized operating procedures in running the store. He spent approximately 40% of his time performing managerial tasks such as supervising, interviewing, hiring, training and disciplining employees, and spent the other 60% of his time performing non-managerial tasks such as stocking merchandise, cleaning restrooms, and ringing up customers at the cash register. The court concluded that because the store manager's "primary duty" was supervising employees and engaging in management activities, he qualified for the exemption under the federal law.

Please note the decision would likely have been different in California, because the state courts also use a quantitative test to deny application of the exemption if over 50% of the time is not spent performing exempt management duties.

## Resident Property Managers Not Entitled to Pay for “On-Call” Time

In the case of *Isner v. Falkenberg/Gilliam & Associates, Inc.*, a husband and wife who were employed as apartment managers sued their employer, a property management company, for unpaid time spent when they were “on-call” to respond to emergencies between 5:00 p.m. and 8:00 a.m. The husband and wife team contended they were “always on duty and on-call together and alternated their on-call time with the other resident employees,” and that they should therefore have been paid for all such time even though they slept, ate, talked on their personal phones, used the internet, played computer games, and read magazines or watched television in their apartment when they were not responding to emergencies. The managers contended that they could not leave the premises to go to a movie or shopping together when they were “on-call,” and were sufficiently under their employer’s “control” to be entitled to compensation for all such on-call time.

The managers filed a class action against the property management company on behalf of all resident managers and assistant managers who were “required to stay within an earshot of their apartments or the main office during their off hours in order to hear a buzzer to respond to tenant and other requests.” The suit sought back pay for all the hours they were on-call and confined to their apartment or building office. The trial court rejected the claim, finding that the managers were entitled to compensation for all hours of work actually

performed, but not all hours they were required to be on the premises.

In a reported decision, a state Court of Appeal affirmed the state trial court’s decision and held that as managers they were only entitled to be compensated for time spent performing physical, mental or other specified tasks. The trial court relied on section 2(K) of the applicable Wage Order, which states that property managers and others (such as motel clerks) who are obligated to reside on the work premises are only required to be paid for “time spent carrying out assigned duties.” The court specifically ruled that apartment managers who are required to reside on the employment premises need not be compensated for time during which they are free to engage in personal activities, regardless of any geographical restrictions imposed by the employer on such activities.

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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.

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