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Management News

RECENT DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW

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LABOR COMMISSIONER ISSUES OPINION LETTERS ON SALES COMMISSIONS AND SICK LEAVE ISSUES

In a pair of recent Opinion Letters, the California Labor Commissioner's Office clarified its position on two important issues facing California employers: (1) the circumstances under which terminated employees must be paid commissions on sales, and (2) whether the "kin care" requirements under state law apply to an employer's paid time off (PTO) policy.

In the first Opinion Letter issued April 30, 2003, the Labor Commissioner addressed the legality of an employer's policy which provided for the quarterly pay-out of sales commissions and the requirement of current employment at the time of the commission pay-outs. If the employee under that policy was not currently employed at the time the pay-outs were made, there was no payment on a pro rata or other basis. The Labor Commissioner concluded that such a forfeiture scheme was illegal because it denied salespeople the payment of commissions earned during their employment. The Labor Commissioner stated that reasonable conditions may be placed on the vesting of commissions, such as the requirement that the contract price be paid before the commission is distributed. However, once vested, commissions may not be forfeited as a result of the fact that the employee terminates employment.

In the second Opinion Letter dated May 21, 2003, the Labor Commissioner addressed the issue of whether PTO can constitute sick leave for the purpose of an employee's entitlement to "kin care," which allows employees to take up to half of their allotted sick leave to care for ill family members. The Labor Commissioner specifically addressed a PTO policy which did not mention sick leave as a reason for paid leave. It concluded that because employees might reasonably have believed that they could use their PTO for sick leave purposes, the employer's program was determined to be a "sick leave policy which could not be subject to an employer's attendance control policy resulting in disciplinary action." The Labor Commissioner reasoned that the employer was responsible for clearly defining the program, and that it should have specifically excluded illness from the PTO policy to prevent the policy from being governed by the "sick leave" rules.

Both of these decisions, as well as all other Opinion Letters issued by the state Labor Commissioner, may be found at that Labor Commissioner's website at ***www.ca.dir.gov***.

SUPREME COURT REFUSES TO ENJOIN EX-EMPLOYEE'S E-MAILS

In a landmark ruling in the area of e-mail usage, the California Supreme Court recently rejected an employer's attempt to enjoin an ex-employee from communicating with its workers through its e-mail system. In the case of ***Intel Corporation v. Hamidi***, the Court found that the ex-employee's use of the company's e-mail system did not actually injure the physical system or owner's rights to it, and was therefore not an enjoinable "trespass" under the state law.

The defendant employee in that case was terminated in 1995, and then proceeded to send six e-mails to the company's 35,000 employees at their company e-mail addresses. After the company's demands that the e-mails cease was ignored, it filed suit alleging a claim for trespass to its property and obtained an injunction against further e-mails on the grounds that it interfered with its proprietary computer network and diminished the productivity of its workers. The Supreme Court overturned the injunction on the ground that there was no evidence that the ex-employee's transmission of messages imposed any

marginal cost on the company's computer operation, or that the ex-employee has used the system in any manner other than that which was intended. This case presents a troubling problem to employers faced with similar conduct in the future, but does not preclude such employers from attempting to block e-mail messages from outside sources in these circumstances.

TERMINATION FOR FAILURE TO MEET STANDARDS OF ATTRACTIVENESS HELD UNLAWFUL

In the recent case of ***Yanowitz v. L'Oreal USA, Inc.***, a California Court of Appeal held that a male executive's order to fire a female employee who failed to meet his standards of sexual attractiveness was sex discrimination under California law. The executive in that case told a subordinate to fire a sales manager because she was "not good looking enough" and to replace her with "somebody hot."

The Court held that this directive and ultimate termination of the sales manager was sex discrimination in violation of the state Fair Employment and Housing Act. The Court reasoned that a termination based on failing to meet the executive's personal standards of sexual desirability was an action "based on sex" in violation of that law, and was hence illegal.

In another ruling on a sexual harassment case, a California Court of Appeal recently held in ***Sheffield v. Department of Social Services*** that an employee could proceed to trial on her claim for a "hostile work environment" based on only a few incidents of harassment which had occurred over a one week period. There, a female employee told the plaintiff that she "liked her like a man likes a woman," and when rebuffed slammed her fist in the palm of her hand in a threatening manner. The offending employee then told the plaintiff that she was "going to get her," and then proceeded to hit her in the back of the head and neck. The employer terminated that employee but was made to stand trial for failing to take all reasonable steps necessary to prevent harassment because two supervisors were aware of the conduct after the plaintiff complained early that week. This case demonstrates the necessity of taking prompt and effective remedial action before either severe or pervasive harassment can occur.

COURT RULES ARTHUR ANDERSON LAYOFFS VIOLATED WARN ACT

In the case of ***Roquet v. Arthur Anderson LLP***, a federal district court in Chicago ruled that Arthur Anderson's cumulative layoff of over 600 employees from its Chicago office during a ninety-day period was sufficient to trigger the sixty-day notice provisions of the Worker Adjustment Retraining and Notification (WARN) Act, resulting in liability to Arthur Anderson for failure to comply with that federal statute. The court relied on a provision of the law that aggregated layoffs during any ninety-day period to meet the statutory minimum required for its application.

To trigger the sixty-day notice requirements of the WARN Act, an employer must lay off 500 workers or at least 50 workers comprising 33% of its total work force during a thirty-day period. However, it also provides that layoffs of two or more groups of employees at a single site of employment must be considered if each is less than the minimum number of employees needed the trigger application of the law, but in the aggregate exceed that minimum number during any ninety-day period. The only exception to that rule is if the employer demonstrates that the employment loss is a result of "separate and distinct actions and causes" and is not attempting to evade the requirements of the law. The court ruled that because the total number of laid off employees over a period of ninety days was over 500, the employer violated the WARN Act by failing to give each of those employees sixty days' notice of the layoff as required by the statute.

California employers should remember that the state WARN Act which became enforceable in January 2003, generally requires that only 50 employees be affected by layoff, plant closing or relocation in order for that statute's notice requirements to be triggered.

NINTH CIRCUIT VOIDS ONE-SIDED ARBITRATION AGREEMENT

In the recent case of ***Ingle v. Circuit City Stores, Inc.***, the U.S. Ninth Circuit Court of Appeals voided an employer's arbitration agreement on the ground that it was so overly one-sided and "unconscionable" as to render it unenforceable. The offensive provisions which rendered the agreement unenforceable in that case were (1) a prohibition on consolidation of individual cases into class actions, (2) a $75 filing fee which was not waivable upon showing of hardship, (3) a cost-splitting provision requiring the employee to pay one-half of the cost of the arbitration following issuance of the arbitration award, (4) a limitation on damages to one year of back pay and $5,000 in punitive damages, and (5) the right of the employer to unilaterally terminate or modify the arbitration agreement on 30 days' notice. The court found that these provisions were so widespread and

numerous that they could not be severed from the arbitration agreement, and that the entire agreement was unenforceable on that basis.

FMLA RIGHTS DENIED TO EMPLOYEES WHO ABUSED FAMILY LEAVE

In a pair of recent rulings, both state and federal appellate courts have denied reinstatement rights to employees under the Family Medical Leave Act for abusing the terms of their leave.

In ***McDaneld v. Eastern Municipal Water District Board***, a California Court of Appeal held that an employer was permitted to deny an employee reinstatement based on its good faith reasonable belief that the employee had abused his FMLA leave. The employee in that case obtained a leave to care for his father but proceeded to play golf and work on his lawn sprinklers during the week that he took the leave. The employer justifiably concluded that the employee had misused his leave and was untruthful, and terminated him.

In a similar ruling, the U.S. Sixth Circuit Court of Appeal held that an employee is not entitled to reinstatement after an FMLA leave when he had violated the employer's policy prohibiting unauthorized work while on leave. The Court reasoned that an employer need not reinstate an employee if application of a "uniformly-applied policy governing outside or supplemental employment" results in the employee's discharge. However, a question remains whether such a policy would be lawful in California, which prohibits employers from disciplining or discharging employees for activities outside of their employment unless they directly conflict with the employer's essential business interests.

In yet another FMLA ruling, a federal district court in Illinois ruled that an employer was not entitled to apply the "rolling method" for calculating an employee's eligibility for leave under the FMLA when it did not notify its employees of that method in its employee handbook. An employee there was accordingly entitled to rely on the more favorable "calendar method" for computing availability of leave, and was thus able to take twelve weeks of FMLA leave the calendar year even though it was within twelve months of the past FMLA leave she had taken the prior calendar year. Relying on the regulations to the FMLA, the court ruled that the employer was required to give notification of the method by which leave time was made available in order to utilize the "rolling method."

EMPLOYEES "REGARDED AS" DISABLED NOT ENTITLED TO ACCOMMODATION

In the landmark case of ***Kaplan v. City of North Las Vegas***, the U.S. Ninth Circuit Court of Appeal recently held that employees who are merely "regarded as" disabled by their employers – are not actually "qualified individuals with a disability" – are not entitled to reasonable accommodation under the Americans With Disabilities Act (ADA). The employee in that case, a peace officer, suffered severe pain in his right hand and was initially diagnosed with rheumatoid arthritis. That diagnosis was later found to be mistaken, however, thereby meaning that he was not actually "disabled" within the meaning of the law. Because he still could not use force to restrain prisoners, grip a gun properly, or perform other duties essential to his position, the city accordingly fired him for inability to perform his duties.

The Circuit Court concluded that non-disabled employees are not entitled to an accommodation under the ADA in these circumstances, because providing them with one would "provide those employees a windfall if they perpetuated their employer's misperception of a disability." Requiring accommodations in this setting would also unnecessarily require employers to waste resources which would be better put to use assisting persons who are actually disabled and in genuine need of an accommodation to perform to their potential. Because the peace officer was not actually disabled, the city accordingly did not have a duty to accommodate him.

INDEFINITE LEAVE HELD NOT A "REASONABLE ACCOMMODATION" UNDER ADA

In ***Wood v. Green***, the U.S. Eleventh Circuit Court of Appeal recently held that the request for indefinite leave from work is not a reasonable accommodation under the ADA. The employee there suffered from cluster headaches which prevented him from doing his job as a court clerk, and requested a leave of absence for an indefinite period of time. The court construed the request for a leave of absence as one that would permit him to "work at some uncertain point in the future," and found that it was not reasonable under the ADA. Rather, the Court concluded that the ADA covers people who can perform the essential functions of the job presently or in the immediate future.

In similar vein, the U.S. Tenth Circuit Court of Appeal held in the case of ***Crano v. Graphic Packaging Corp.*** that an employee whose position had been eliminated while he was on indefinite leave was

not entitled to reinstatement under the ADA. The employer in that case maintained a policy which eliminated the employment status of employees who were absent for more than one year. The Court held that maintaining an employee on indefinite leave while reserving a job opening for his possible return is not a reasonable obligation to be imposed on employers under the ADA, because the statute does not require the creation of jobs or vacancies to accommodate disabled workers.

ADA UPDATE

- The U.S. Eighth Circuit Court of Appeals held in ***Alexander v. Northland Inn*** that a housekeeping supervisor was not a qualified individual with a disability because she could not perform vacuuming functions that were required of that job. The employee was medically prohibited from performing that task, and did not timely request a reasonable accommodation for her inability to vacuum before her termination. Because her vacuuming duties would have been reassigned for an indefinite period even had she made such a request, such an accommodation would not have been reasonable in any event.

- In ***Hamel v. Eau Galle Cheese Factory***, a U.S. District Court in Wisconsin found that an employer did not violate the ADA in firing a legally blind worker, when the employee refused to accept instruction and direction to do the job and had a poor attitude as exemplified by taking too many breaks and working in an unsafe manner. The court reasoned that offering an accommodation would not have made any difference to an employee who was unwilling to exercise care, accept instruction or take responsibility for getting his work done properly, and upheld the termination.

- In a decision of importance to employers in the trucking industry, the U.S. Eighth Circuit Court of Appeals recently held that a truck driver trainee with kidney problems could not establish that he was "perceived as disabled" under the ADA because he failed to obtain the necessary medical certification from the Department of Transportation. The DOT regulations specifically state that a person "shall not drive a commercial motor vehicle" without a medical examiner certificate that the person is physically qualified. Because the trainee never obtained the certificate of physical qualification required by the federal Motor Carrier Safety regulations, the Court refused to consider his claim that he was in fact physically qualified to do the job.

- In a somewhat troubling decision, the U.S. Seventh Circuit Court of Appeals held that a stationary engineer who started to read at work and slept on the job the last two weeks of his employment was entitled to a trial on his ADA claim if he could establish that his work-related problems resulted from depression. The Court faulted the employer for characterizing the employee's final two weeks on the job as "gold bricking," and suggested that it could have placed the employee on a medical leave during that period even though he had not asked for one. This case illustrates how far the courts will sometimes go in order to help preserve an employee's right to proceed to trial on their disability discrimination claims.

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

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