



What's Inside

- Firm to Hold Client Meeting On Retaliation, Injured Workers on February 9, 2006
- Court Clarifies Standards For Retaliation Claims
- Court Permits Claim Against Sears' Extended Leave Policy
- Illegal Aliens May Receive Workers' Compensation Benefits
- Workers' Comp. Claim Of Traveling Manager Rejected
- Marijuana Users May Be Denied Employment Under State Law
- Court Rejects Claim By Laid Off Employees Under California WARN Act
- Two Million Dollar Verdict For Sexual Orientation Harassment Upheld
- High Court Upholds "Donning and Doffing" Claim
- Court Issues Rulings On Meal Breaks, Executive Exemption
- NLRB Issues Rulings On Picketing, Employee Transfers
- DOL Issues Opinion Letters On Professional Exemption And Other Issues

The meeting will provide practical examples of the most common kinds of problems that arise in these areas, as well as guidance on how to respond in ways that will minimize the risk of exposure for retaliation or disability-related claims. We will also provide an opportunity for you to have your questions answered on these important topics, and will provide materials outlining an employer's obligations under the various laws relating to retaliation and the rights of injured workers.

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

Firm To Hold Client Meeting On Retaliation, Injured Workers on February 9, 2006

The Firm's Labor and Employment Department will hold a breakfast meeting for clients and friends of the Firm on Thursday, February 9, 2006 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 particular interest to employers: *how to prevent and defend against retaliation claims* brought by employees who have made a complaint of discrimination or harassment or who otherwise engaged in legally protected activity; and *how to deal with the long term injured employee* who has either filed a workers' compensation claim or exhausted their available leave under the state and federal leave laws and their employer's policies.

Court Clarifies Standards For Retaliation Claims

In *Yanowitz v. L'Oreal, Inc.* [briefly reported in the last issue of *Management News*], the California Supreme Court addressed a number of important issues relating to claims of retaliation arising under the California Fair Employment and Housing Act (FEHA). First, the Court held that an employee's refusal to follow a supervisor's

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.

order that she reasonably believes to be discriminatory constitutes “protected activity” for purposes of a claim for retaliation. Second, the Court held that an employer may unlawfully retaliate against an employee on the basis of such protected conduct when the employee’s communications to the employer sufficiently convey the employee’s reasonable concerns that the employer is acting or has acted in a discriminatory manner. Finally, the Court held that the proper standard for defining an “adverse employment action” for the purpose of a retaliation claim is whether an employer’s actions materially affect the terms and conditions of employment.

The *Yanowitz* case involved a claim by a sales manager of a national cosmetics line that she was retaliated against for failing to terminate a female salesperson who her manager wanted to be fired because she “was not hot enough.” The sales manager did not complain about the request to terminate the salesperson, but contended that she had been asked to terminate other female salespeople for their appearances before then and that male employees were not subjected to that kind of treatment. Although the Court stated that “vague or conclusory remarks which fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct,” it nevertheless permitted the sales manager to proceed with her retaliation claim because in the court’s view, it was reasonable under the circumstances for the employee to believe that she had actually opposed discrimination

by refusing to fire the salesperson.

The Court also held that even though a materially adverse employment action is required to establish a retaliation claim, such relatively minor actions as negative performance reviews, solicitation of negative employee feedback, unwarranted criticism, and the denial of necessary resources can suffice to establish that element. The Court concluded that such actions must be “reasonably likely to adversely and materially affect an employee’s job performance or opportunity for advancement in his or her career,” as opposed to “merely commonplace indignities typical of the workplace.” But the Court did not draw any lines to specifically demarcate what kind of conduct would satisfy this test, outside of “ultimate employment decisions” such as termination or demotion.

We will be addressing the practical impact on the Yanowitz case in our February 9 meeting.

Court Permits Claim Against Sears’ Extended Leave Policy

Some employers have leave policies that provide for the automatic discharge of employees who are absent from work for any reason for a certain period of time, such as one year. In the recent case of *EEOC v. Sears Roebuck & Co.*, a federal court in Illinois permitted a claim by the Equal Employment Opportunity Commission to proceed against Sears for

violation of the American With Disabilities Act (ADA), based on an allegation that it discriminated against disabled employees by maintaining an inflexible workers’ compensation leave policy under which employees were automatically terminated after one year. The EEOC specifically alleged that the leave policy failed to provide reasonable accommodation of employees with disabilities who may need a leave of absence for longer than that period.

This case highlights the difficulties that employers may confront in determining how to treat employees with lingering injuries or workers’ compensation claims. *We will be addressing how to most effectively deal with the problems posed by long-term injured workers at our February 9 meeting.*

Illegal Aliens May Receive Workers’ Compensation Benefits

In the recent case of *Farmers Brothers Coffee v. Workers’ Compensation Appeals Board*, a California appellate court held that the immigration status of an injured employee is not relevant to the issue of whether they are able to receive benefits under the workers’ compensation laws. The court ruled that even though it may be illegal under federal law to employ an unauthorized alien, the California laws which extend the protections of workers’ compensation benefits to such persons do not conflict with the federal law and are

enforceable. The court reasoned that the issue of the legality of such a worker's employment was different from that of whether they sustained a compensable injury, and that permitting illegal aliens to recover workers' compensation benefits would further the goal of promoting a safe work place for all employees in the state.

Workers' Comp. Claim Of Traveling Manager Rejected

Employees are generally entitled to receive workers' compensation benefits when they are injured while traveling at the request of their employer or for a business purpose that benefits their employer. However, in the recent case of *Fleetwood Enterprises, Inc. v. Workers' Comp. Appeals Board*, a California appellate court refused to permit a design manager of a recreational vehicle company to obtain workers' compensation benefits for injuries sustained in an auto accident he sustained in Rome, Italy, when the accident occurred during a vacation he was taking with his wife after the business purpose of his trip had ended.

The manager flew into Düsseldorf, Germany to attend a major RV show in that city, and later drove to Northern Italy to meet with a supplier. From there, he traveled to Florence and Rome with his wife, staying overnight in each city, before being required to return the car to Germany. The manager claimed that during the vacation portion of his trip, he continually looked

for various RVs driven in Europe to see what kind of artistic designs they had, and that this served the employer's "business purpose" for that portion of the trip. He also contended that he was entitled to workers' compensation benefits because his employer paid for all the expenses of the trip, including the rental car.

The court rejected these contentions, framing the issue as to whether the accident occurred at a time when the employee was on a "special mission" for the employer or engaged in some act benefiting the employer. The court noted that there was no evidence that the employer expected or required the manager to continue the vacation portion of the trip of any business-related purpose, and that it was irrelevant whether the employee kept his eye out for various RV designs during his trip through Italy. The court stated that to extend the benefits of the workers' compensation laws to such activities would present "unacceptably rich opportunities for fraud," because employees could always contend that they were pondering some work-related issue while traveling.

Marijuana Users May Be Denied Employment Under State Law

If an employer discovers that an applicant or employee is using marijuana, even for medicinal purposes, may it terminate that employee under California law? Yes, held a California Court of Appeal in *Ross v. Ragingwire*

Telecommunications, Inc., in a case decided in September 2005. The Court concluded that employers have legitimate interests in not employing persons who use illegal drugs, as such use often results in increased absenteeism from work, diminished productivity, greater health costs, and increased problems with respect to safety in the workplace.

The holding does not conflict with the state's Compassionate Use Act, which simply permits a person to use marijuana for medicinal purposes in California without violating state criminal law. The court specifically stated that an employer "lawfully may refuse to employ a person who fails a drug test that is a precondition of employment, even if the person has begun to work for the employer prior to taking the drug test," and that an employer need not accommodate a disability by allowing an employee to use illegal drugs. The court accordingly held that an employer had good cause to discharge an applicant when it learned that he had failed his pre-employment drug test, and that it did not violate the state's anti-discrimination law in doing so.

Court Rejects Claim By Laid Off Employees Under California WARN Act

In *MacIsaac v. Waste Management Collection*, a California Court of Appeal recently issued the first published opinion interpreting the state WARN statute which was enacted in 2002. The court

concluded that 42 waste hauling employees who worked for Empire Waste under a contract with the City of Santa Rosa were not entitled to “pay in lieu of notice” after being transferred to a new employer with the same pay and benefits. The lay off of these employees by Empire, along with 20 other employees, did not constitute a “mass layoff” of 50 or more employees within the meaning of the statute, requiring sixty days’ advance notice, because the term “layoff” is defined in the law as a “separation from a position for lack of funds or lack of work” – and the 42 waste hauling employees were not separated from their positions because they continued working in the same jobs for their new employer.

In an important footnote, the court expressly did not decide whether employees who are separated from their employment as a result of a plant termination (as opposed to a mass layoff) resulting from the sale of a business, and who are re-employed by the purchaser, are entitled to notice under the California WARN law. However, certain language in the court’s opinion should assist employers in arguing that such notice is not required, in view of the fact that the essential concerns of the law – including notifying cities of the need to offer re-training and placement services, and workers of the need to seek employment and educational opportunities – are not implicated when no one actually loses work as the result of a “seamless transition” to a new job offering the same pay, benefits and working conditions.

Two Million Dollar Verdict For Sexual Orientation Harassment Upheld

In the recent case of *Hope v. California Youth Authority*, a California appellate court upheld a jury verdict for approximately \$2 million to a food service worker who was harassed based on his sexual orientation by a security officer on almost a daily basis at a state youth prison. The officer, who was assigned to maintain security for the food service employees at the prison, made constant derogatory comments about the employee, demeaned him in front of prison wards, and frequently threw food or trash in his work area. Complaints were made to no fewer than six supervisors and managers at the prison, but no investigation was conducted and management did not take any corrective action to stop the harassment.

As a result, the court upheld a jury verdict for approximately \$1 million for economic damages, and \$1 million for non-economic damages (including emotional distress), plus attorneys’ fees. The case demonstrates the potential liability that employers can be exposed to for failing to take prompt remedial action to end workplace harassment and to fully and promptly investigate harassment claims.

High Court Upholds “Donning and Doffing” Claim

The United States Supreme Court recently addressed the issue of what kind of activities an employee must be engaged in before the start of their work shifts in order to be compensated. In *IBP, Inc. v. Alvarez*, the Court held that employees who worked in a meat packing plant were required to be compensated for time spent in “donning and doffing” specialized protective gear before their regular work shifts began, and for walking to their work areas, because those activities were an “integral and indispensable part of their principal [work] activities.” The Court thus held that the employees were entitled to pay for those activities under the Fair Labor Standards Act, and that time spent engaging in those activities was not excluded from working time under the federal Portal to Portal Act. The Court further stated that during a continuous work day, any walking time that occurs after the beginning of the employee’s first principal activity and before the end of the employee’s last principal activity is compensable.

However, the Court rejected a claim by the employees that time spent waiting to don and doff the protective gear was also compensable. Accordingly, under the *Alvarez* ruling, certain pre-shift activities may still be excluded from an employee’s compensable working time, if they are not “integral and indispensable” to a principal activity of the job.

Court Issues Rulings On Meal Breaks, Executive Exemption

The Wage Orders issued by the California Industrial Welfare Commission uniformly require employers to record their employees' meal breaks. In the recent case of *Cacairos v. Summit Logistics, Inc.*, a California appellate court was confronted with the question of whether a trucking company was responsible for its drivers' alleged missed meal periods when it did not provide an activity code for the drivers to record their meal breaks or otherwise keep a record of when the drivers took them. The employer also did not schedule meal breaks for the drivers, or monitor compliance with the requirement that the drivers be given a thirty-minute duty free meal period, even though its union agreement provided that lunch periods would be scheduled by the company. Based on these facts, the court ruled that the employer had not established that it provided its drivers with meal breaks, and that it was responsible for the one hour per day penalty claimed by the drivers for missed meal periods.

In another recent case, however, another California appellate court issued a very favorable ruling to employers by holding that the one hour per day premium for missed meal and rest breaks is a "penalty" as opposed to a "wage" under California law, and that a one year statute of limitations applies to those claims. The court's holding in *Murphy v. Kenneth Cole Productions, Inc.*

also means that employees are not able to claim attorneys' fees for collecting meal and rest period penalties, and that they may not seek to recover penalties for missed meal or rest periods in claims made under the state's Unfair Competition law.

The *Murphy* court also upheld a claim for unpaid overtime in the amount of approximately \$64,000 to a store manager who did not have the actual power to hire, fire, transfer personnel, or determine pay rates. The manager spent most of his time engaging in such non-exempt tasks as sales, processing shipments of products, and cleaning the store, and management did not give him the "time or assistance that he needed to accomplish primarily management tasks." The court described the store manager as a "menial coxswain who performed most of the time as an oarsman alongside the rest of the crew," and decided that he was therefore not covered by the executive exemption. This case highlights the dangers of treating employees with managerial titles as salaried exempt personnel, without ensuring that they are primarily engaged in duties which meet the tests for the administrative, executive, or professional exemptions.

NLRB Issues Rulings On Picketing, Employee Transfers

The National Labor Relations Board recently issued two rulings of importance to employers. In *Macerich Management Co.*, the Board held that a shopping

center's rules banning picketing activities that identify the names of the mall owner, manager or tenants, as well as signage that interferes with the "commercial purpose" of the mall, were unlawful because they impermissibly interfered with a union's ability to request consumer boycotts of specific stores. However, the Board upheld "time, place and manner" restrictions on such picketing by permitting a ban on the carrying or wearing of signs, exclusions of pickets from exterior areas including outside sidewalks, and a prohibition of picketing activities during "peak traffic" days. The Board reasoned that the mall's interests in protecting public safety and avoiding traffic congestion justified these restrictions.

In *Nott Company*, the Board ruled that a company which purchased the assets of the competitor, and hired the competitor's employees to perform the same type of work the employer performed in its facility, could terminate its agreement with a union representing its employees when the number of new employees integrated into its facility equaled or exceeded the number of existing employees. The Board concluded that in such circumstances it would be improper to require the newly-transferred employees to be covered by a union agreement when they had no choice as to whether or not the union should represent them. The Board distinguished the purchasing transfer situation from one in which an employer with an existing union contract relocates its facility or expands its existing

business by hiring new employees, under which circumstances its duty to honor the contract would continue to apply.

DOL Issues Opinion Letters On Professional Exemption, Other Issues

In a spate of recent opinion letters, the U.S. Department of Labor has issued the following rulings:

- Social workers may be considered exempt under the professional exemption from the overtime laws, but case workers employed by the same employer may not be. The social workers were required to obtain graduate degrees in a required field of specialized academic training by obtaining a masters degree in social work, education, counseling or psychology. They also made independent decisions about the course of therapy best suited to the needs of the patients and their families, and worked to develop treatment plans. The case workers, on the other hand, were merely required to have a bachelors degree in social sciences, and provided more routine case management services such as providing in-person supervision of volunteers and facilitating services for adolescents in foster care. The ruling was based on the requirement that the learned professional exemption

requires advance knowledge that must be customarily acquired by a prolonged course of specialized intellectual instruction, as opposed to on-the-job experience.

- Volunteers need not be paid for their services, so long as they offer their services freely and without coercion and are not otherwise employed by the same employer to provide the same kinds of services for which they volunteer. The DOL accordingly ruled that after-work volunteers who provide peer review functions for other employees need not be compensated, because their activity occurs outside the usual work day and is not the kind of work they are regularly paid to perform. In another ruling, the Department concluded that an assistant school athletic coach who was paid a small stipend for volunteering his coaching time was not owed wages for that activity, because he was not required to coach the team as a condition of his employment and the stipend was not dependent on a specific number of hours spent coaching or the performance of the team.
- Recertification of an employee's serious health condition, or that of the employee's ill family member, may be required by an employer for each new twelve-month leave period, depending on the method the employer uses to measure the

twelve weeks of unpaid FMLA leave that its employees are eligible to take each year. The ruling recognizes the employer's ability to reassess the employee's eligibility for FMLA leave in a new leave year when the employee is continuing to request time off for the same condition they have taken FMLA leave for in the past.

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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