Pacific Employers
MANAGEMENT ADVISOR
49 Years of Excellence!
March 2013

WHAT'S NEWS!

UNLIMITED LEAVE FOR PREGNANCY?

A California Court of Appeal has issued a decision in *Sanchez v. Swissport, Inc.*, addressing whether an employee fired after exhausting her pregnancy disability leave could assert valid claims against the employer for pregnancy discrimination and failure to accommodate a disability. The court said yes.

In *Sanchez*, the employee only worked for Swissport for about a year and one-half when she learned she was pregnant and that she had a high-risk pregnancy requiring bed rest. She informed her employer that she needed a leave of absence from February through at least her due date in October. Her employer provided her with the full 4 months of pregnancy disability leave required under California's pregnancy disability leave law. The employer also allowed her to use an additional three weeks of accrued vacation, bringing the employee's total leave to 19 weeks. The employee was unable to return to work at the end of that 19 weeks, as it was only July and she was not due to give birth until October. Swissport terminated her employment and the employee sued.

Swissport promptly moved to dismiss the case, arguing that because it provided the maximum leave required for pregnancy disability in California, the employee's claims for pregnancy discrimination, gender discrimination, and failure to accommodate a disability were invalid as a matter of law. The trial court agreed and threw out the case but the employee successfully appealed.

In its decision, the California Court of Appeal held that the trial court should not have thrown out the case at the motion to dismiss stage. The court held that an employer's providing of the 16 weeks of leave for pregnancy disability does not automatically shield the employer from claims for failure to accommodate a disability or for gender/pregnancy discrimination under FEHA. The court reasoned that an extended leave of absence (beyond 16 weeks of pregnancy disability leave) may be a "reasonable accommodation" for a disability required under FEHA, and that Swissport may have been required to provide the additional leave time absent a showing of undue hardship. The case was, therefore, remanded to the trial court level so that the employee's FEHA claims could be litigated.

The *Sanchez v. Swissport* case is a good reminder for employers that simply complying with maximum leave entitlements provided under laws such as California's pregnancy disability leave law and/or FMLA/CFRA does not necessarily satisfy an employer's obligation to a disabled employee.

Employers who terminate disabled employees simply because they have exhausted statutory leave entitlements are likely to face claims for failure to accommodate and disability discrimination. Employers should always engage in an interactive process with the employee at or near the expiration of the leave to assess how much additional leave time (or other accommodations) the employee needs and determine whether additional leave can be provided as a reasonable accommodation and without undue hardship to the employer. [PE]

Labor Law Update and FMLA Poster Enclosed!

President's Report
~Dave Miller~

EEOC "Hire a Criminal"

Employers could be pressured to hire more workers with a criminal background under recent guidelines issued by the federal government.

The Equal Employment Opportunity Commission's guidelines warn businesses about rejecting minority applicants who have committed a crime and recommend they eliminate policies that "exclude people from employment based on a criminal record."

The EEOC says civil rights laws already prohibit different treatment for job applicants who are of a different ethnic background but have identical criminal histories. The update was issued out of concern that employers might disproportionally exclude minorities from getting hired because more African Americans and Hispanics are getting arrested and going to prison, according to the guideline report. [PE]

MORE DOGS IN THE WORKPLACE

California employers should be prepared to welcome support dogs and other animals into the workplace as a reasonable accommodation for disabled workers requiring support under new disability regulations issued by the California Fair Employment and Housing Commission.

The new regulations significantly expand protections for disabled workers and outline new requirements regarding reasonable accommodations, the interactive process, and proof of discrimination.

Employers may set minimum standards for assistive animals, such as requiring the animal:

- To be free from offensive odors and displays habits appropriate to the work environment, for example, the elimination of urine and feces;
- To not engage in behavior that endangers the health or safety of the individual with a disability or others in the workplace; and
- To be trained to provide assistance for the employee's disability.

If an employee asks to bring an assistive animal into the workplace as a reasonable accommodation, the employer may require the employee to provide a medical certification from the employee's "health care provider" stating the employee has a disability and explaining why the employee requires the assistive animal as an accommodation. [PE]

Remember, anything is possible if you don't know what you're talking about. (Lachlan McLachlan)

Recent Developments

Random Alcohol Tests Don't Violate ADA

A federal judge has held that U.S. Steel had the right under the Americans with Disabilities Act to conduct random alcohol tests on probationary employees at a coke plant, granting summary judgment to the company in a class action that had been filed by the Equal Employment Opportunity Commission.

"This is the first time that any court has addressed this issue."

The court found, in a "case of first impression," that the random tests were "job related and consistent with business necessity," the ADA standard that applies when an employer requires a current employee to undergo any type of medical examination.

This is a major change unless, of course, the decision is reversed on appeal. The EEOC says it is considering its options. It would be a surprise if they don't appeal, especially since the court specifically rejected the EEOC's Enforcement Guidance on this topic.

U.S. Steel had problems with tippling/hung over employees at its plant in Gary, Indiana, and with the full cooperation of its union, adopted a mandatory random alcohol testing policy for probationary employees in safety-sensitive positions. The stated rationale for limiting the testing to probationary employees was that the newbies might not fully appreciate the safety implications of coming to work drunk or hung over while the more experienced employees would. [PE]

CA Health Exchange Releases Standard Plans

Covered California, the state-run program that oversees implementation of the Affordable Care Act, released the standards for benefit plans that will be made available to Californians who do not rely on employer-provided insurance or Medi-Cal for health care coverage.

Four plan levels will be available: bronze, silver, gold and platinum. The percentage of coverage to be paid by the health plan ranges from 60% for bronze to 90% for platinum.

More than 2.6 million Californians will be eligible for subsidies, according to Covered California.

Households earning less than 250% of the federal poverty level can receive financial help if they enroll in a silver plan; the less income they earn, the more financial assistance they can receive.

For example, individuals earning between 150% and 250% of the federal poverty level can expect to pay $20 to see their primary care physician, while those earning 100% to 150% would pay $4.

To be eligible for financial assistance, consumers must purchase plans from Covered California's marketplace.

The state is requiring that all carriers offer these same standard designs to all individuals and small businesses, whether inside or outside of Covered California.

Higher-income individuals choosing one of these plans would not be eligible for financial help, but would be assured that the plan contains the same essential health benefits offered, and the same benefit design so they can make true comparisons.

Examples of benefits, their costs, and typical premium costs are available on the newly launched Covered California website, www.CoveredCA.com.

A fact sheet for small business, and another fact sheet explaining the small business tax credit, also are available.

The site includes a cost calculator to help consumers estimate the potential financial support for which they are eligible and the estimated cost of insurance. Fact sheets are available in both English and Spanish. Additional fact sheets and translation of the materials in 11 more languages is expected to be added.

The open enrollment period begins this fall for coverage that starts January 1, 2014.

Covered California also announced it has launched a social media presence on Facebook, Twitter, YouTube and Google+.

Covered California identified critical next steps as selecting insurance carriers that will be allowed to participate in Covered California, and determining plan pricing. [PE]

Enclosed - New Poster for 50 or More EE's

Employers with 50 or more employees are required to display an updated federal family leave poster starting March 8.

The final rule outlining the requirement was issued just last week by the U.S. Department of Labor (DOL) to implement federal laws expanding Family and Medical Leave Act (FMLA) protections.

Family Leave Notice Change

The final regulation requires a change to the federal FMLA notice/poster entitled "Employee Rights and Responsibilities Under the Family and Medical Leave Act," prepared by DOL.

This is "Notice C" on the California Chamber of Commerce California and Federal Employment Notices Poster.

All covered employers (50+ employees) must display the **Enclosed** poster summarizing the major provisions of the FMLA and telling employees how to file a complaint.

The FMLA includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember during a single 12-month period.

Definition Clarified

The revised federal FMLA poster clarifies that in addition to those currently serving, a "covered servicemember" also includes veterans discharged in the last five years.

Among the mandatory revisions on the federal poster is a note that the FMLA definitions of "serious injury or illness" for current servicemembers and veterans "are distinct from the FMLA definition of 'serious health condition.'"

A second mandatory note states that special hours of service eligibility requirements apply to airline flight crew employees.

Although the new poster has a revision date of February 2013, the DOL specifically noted that employers may either start using the new poster immediately or may use the old FMLA poster through March 7, 2013.

Changed requirements taking effect on March 8, according to the DOL, include "military caregiver leave for a veteran, qualifying exigency leave for parental care, and the special leave calculation method for flight crew employees."

Revised Poster

The mandatory changes to the FMLA Notice C affect: private-sector employers, with 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including a joint employer or successor in interest to a covered employer; public agencies, including a local, state, or federal government agency, regardless of the number of employees; or public or private elementary or secondary schools, regardless of the number of employees.

As implementation of workers' compensation reform measures continues, there is the potential for additional mandatory changes later this year. [PE]

Human Resources Question with Candice Weaver

The Month's Best Question

Dealing With ObamaCare

Q: ***"Our firm has over 50 employees, will we be required to give them all health insurance or pay a penalty in 2014? What can we do?"***

A: If your 50 workers are full time, providing healthcare or possible fines are the law.

The Wall Street Journal reports a new trend: part-time "job sharing," not only within firms but across different businesses.

It's already happening across the country at fast-food restaurants, as employers try to avoid being punished by the Affordable Care Act. In some cases we've heard about, a local McDonalds has hired employees to operate the cash register or flip burgers for 20 hours a week and then the workers head to the nearby Burger King or Wendy's to log another 20 hours. Other employees take the opposite shifts.

Full-Time Equivalent Workers

The law requires firms with 50 or more "full-time equivalent workers" to offer health plans to employees who work more than 30 hours a week. (The law says "equivalent" because two 15 hour a week workers equal one full-time worker.) Employers that pass the 50-employee threshold and don't offer insurance face a $2,000 penalty for each uncovered worker beyond 30 employees. So by hiring the 50th worker, the firm pays a penalty on the previous 20 as well.

These employment cliffs are especially perverse economic incentives. Thousands of employers will face a $40,000 penalty if they dare expand and hire a 50th worker. The law is effectively a $2,000 tax on each additional hire after that, so to move to 60 workers costs $60,000.

Because other federal employment regulations also kick in when a firm crosses the 50 worker threshold, employers are starting to cap payrolls at 49 full-time workers. These firms have come to be known as "49ers." Businesses that hire young and lower-skilled workers are also starting to put a ceiling on the work week of below 30 hours. These firms are the new "29ers." Part-time workers don't have to be offered insurance under ObamaCare.

Measurement Period

The mandate to offer health insurance doesn't take effect until 2014, but the "measurement period" used by the feds to determine a firm's average number of full-time employees started last month. So the cutbacks and employment dodges are underway. [PE]

Sexual Harassment Prevention Training

Visalia Chamber of Commerce and Pacific Employers, will jointly host a state mandated Supervisors' Sexual Harassment Prevention Training Seminar & Workshop with a continental breakfast on April 23rd, registration at 7:30am
Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

RSVP Visalia Chamber - 734-5876
PE & Chamber Members $35 - Non-members $50
Certificate – Forms – Guides – Full Breakfast
Future 2013 Trainings on 7-24-13, 10-23-13

No-Cost Employment Seminars

The Tulare-Kings Builders Exchange and Pacific Employers host this Seminar Series at the Builders Exchange at 1223 S. Lover's Lane at Tulare Avenue, Visalia, CA. RSVP to Pacific Employers at 733-4256.

These mid-morning seminars include refreshments and handouts.

2013 Topic Schedule

♦ **Equal Employment Fundamentals -** Harassment & Discrimination in the Workplace - The seven (7) requirements that must be met by all employers. "The Protected Classes."
Thursday, March 21st, 2013, 10 - 11:30am

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, April 18th, 2013, 10 - 11:30am

♦ **Family Leave -** Federal & California Family Medical Leave, California's Pregnancy Leave, Disability Leave, Sick Leave, Workers' Compensation, etc.; Making sense of them.
Thursday, May 16th, 2013, 10 - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 20th, 2013, 10 - 11:30am

♦ **Hiring & Maintaining "At-Will" -** Planning to hire? Putting to work? We discuss maintaining "At-Will" to protect you from the "For-Cause" Trap!
Thursday, July 18th, 2013, 10 - 11:30am

There is No Seminar in August

♦ **Forms & Posters -** as well as Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?
Thursday, September 19th, 2013, 10 - 11:30am

♦ **We have established a strategic partnership with California Employers Association.** Our Guest Speaker Seminar will feature **Kim Parker, Executive Vice President, Sacramento office, and Craig Strong, Regional Director of the Madera office**.
Thursday, October 17th, 2013, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 21st, 2013, 10 - 11:30am

There is No Seminar in December

Dinner for 2 at the *Vintage Press!*

That's right! When a business that you recommend joins Pacific Employers, we treat you to dinner for two at the *Vintage Press*.

Call 733-4256 or 1-800-331-2592.

Labor Law Update and FMLA Poster Enclosed!

Pacific Employers
306 North Willis Street
Visalia , CA 93291
559 733-4256
(800) 331-2592
Fax 559 733-8953
www.pacificemployers.com
email - peinfo@pacificemployers.com

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Uncooperative Manager Fired

Affirming the dismissal of a manager's wrongful termination and gender discrimination claims, the California Court of Appeal has held that an at-will employee may be terminated for being uncooperative or deceptive in an employer's internal investigation of a discrimination claim. *McGrory v. Applied Signal Technology, Inc.*

The company, during an investigation of a complaint against supervisor McGrory, accusing him of discriminating against her on the basis of her gender and sexual orientation, found McGrory uncooperative during the investigation, that he refused to answer questions regarding how he ranked his subordinates and who had complained about an employee he gave a warning for poor work performance.

McGrory argued that California's public policy protects anyone who participates in an internal investigation from discrimination and retaliation, even if the participant is uncooperative. As no California state law addresses this issue, the Court looked to analogous federal case law under Title VII of the Civil Rights Act of 1964. Federal courts have determined that the immunity for participating is limited to "sincere participation," the Court found.

In other words, the prohibition against discriminating against an individual for participating in an investigation does not prohibit an employer from imposing discipline for an employee's misbehavior during an internal investigation, such as attempting to deceive the investigator. Likewise, refusing to cooperate with an investigation into a discrimination claim is not a protected activity.

Following the reasoning in the federal decisions, the Court concluded that California's public policy does not protect deceptive activity or withholding information during an internal investigation. "Such conduct is a legitimate reason to terminate an at-will employee." [PE]

American Idol Contestants Sue

Nine former American Idol contestants have accused the show of racism and are claiming violation of Title VII and California law, both of which limit the use of arrest information and records in making employment decisions in certain circumstances.

These accusations come on the heels of EEOC enforcement guidance issued in 2012 that clarifies the EEOC's longstanding position as to potential disparate impact caused by the use of arrest history. [PE]

Employee Fired for Discussing Salary

The National Labor Relations Board (NLRB) has found that a Texas engineering firm, Houston-based Jones & Carter, Inc., unlawfully terminated an employee for discussing salary information with co-workers.

The NLRB ordered reinstatement of the employee and back wages for the time out of work. The company must also rescind its policy of forbidding employee discussion of salaries.

The National Labor Relations Act (NLRA) protects the rights of workers to discuss their terms and conditions of employment, including wages. During trial, company officials said the employee – a training coordinator - was fired for "harassing" other workers. But the judge noted that the same company officials told state unemployment investigators a different story, including that the employee was fired for discussing salaries with other workers, and that sharing such information was a "pet peeve" of the company. As a result of the Board action, Jones & Carter offered the employee reinstatement to her former position, which she declined.

The employer agreed to make the former employee whole by paying her backpay, 401(k) contributions, medical expenses and interest in the total amount of $107,000, to revise its policy to delete the prohibition on employees of discussing their salaries, and to post a Board Notice describing these actions. [PE]