



The Strategic EMPLOYER

EMPLOYMENT LAW & HR CONSULTING SERVICES ~ WWW.WAAGANDCO.COM

Mid-Year Employment Law Update

Managers, business owners and human resource personnel must be ever-vigilant in crafting policies that not only satisfy their business objectives, but also comply with the law. It grows tiresome to continue to refer to California employment laws as a minefield, but sadly, that is what they have become.

WAAG AND CO. makes it a goal to track federal and state employment-related legislation as it makes its way through our legal system and possibly into law. This newsletter documents that process, and provides the information necessary to guide our clients and friends through the aforementioned minefield!

The mass of pending California state

legislation contained on page two and three of this newsletter gives clues as to which way the "employment wind" is currently blowing, though only a minority of it typically ends up passed into law. This "preview of coming attractions" serves to prepare us for what may lie ahead for California businesses.

It doesn't end once the bill is passed into law, either. Lawsuits may be launched, resulting in case rulings that serve to clarify those laws, or as in many cases, cause further confusion. Lack of clarity in the law, as well as incredible complexity of many employment law situations, gives rise to uncertainty about how to run a business.

Further, interactions between the various rules and regulations create an even more complex level of uncertainty. An example of that would be the article on page 6, "Required Use of Paid Time Off Questioned." The case in the article highlights pay issues related to the interactions of FMLA, SDI, PFLI, and LTD.

WAAG AND CO. is ready to assist businesses of all types navigate through the minefield that is California employment law. ✓

About Waag and Co.

We take great pride in our reputation as one of the Central Coast's leading providers of employment law and human resources consulting services, working exclusively with employers. We believe that the success of our practice is based on our ability to provide practical, timely, accurate advice to employers of all sizes and industries.

Since 1998, WAAG AND CO. has worked with over 300 different employers with great success. These include companies engaged in industrial, high-tech, medical, dental, legal, non-profit, service, retail, wholesale, service, construction, engineering, government, hospitality, agriculture, ranch, communications, and media industries.

SUSAN WAAG has substantial experience as an employment law attorney and human resources consultant. Since 1985, she has devoted her practice exclusively to serving employers. MS. WAAG has provided expert consultation to more than one-third of the 75 largest employers in San Luis Obispo County.

WAAG AND CO. provides a variety of problem prevention services, including: Supervisor and Employee Training, Internal Investigations, Personnel Policy Manuals, Employment Relations Audits, Human Resources Consulting Services and Employment Contracts. Our services cover a broad range of expertise in the matters most important to employers.

For more information or additional printed materials on the services we provide, please contact WAAG AND CO. or see WWW.WAAGANDCO.COM. ✓



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NO REST FOR THE HUMAN RESOURCES DEPARTMENT!

PENDING California State Legislation

Discrimination

AB 14: Would add sexual orientation as a protected class across a number of current laws prohibiting discrimination in various business practices.

AB 435: Wage discrimination law would be amended to require longer retention of wage and classification records (five years, up from the current two) and extend the time for filing suit to four years (or five for willful violations), up from the current two years (three for willful violations.)

AB 1708: Would require the Department of Fair Employment and Housing to adopt a targeted enforcement and education program to address age discrimination issues.

SB 11: Would delete the same-sex or age eligibility requirement from the existing law permitting unmarried adults to register as domestic partners.

SB 836: "Familial status" would be added to the list of prohibited bases of discrimination under the Fair Employment and Housing Act. Would protect a person caring for or supporting a family member.

Employee Records

AB 703: Records containing Social Security Numbers would need to be encrypted or in locked storage, or else discarded or destroyed in a specified manner. Employers would be prohibited from using Social Security Numbers as identifiers, except when they are required by law to do so.

AB 1298: Existing law requires disclosure of any breach of the security of a person's unencrypted computerized data if it contains personal information. This bill would add private medical and healthcare records to the definition of "personal information."

AB 1707: Would require employers to maintain each employee's personnel file for four years after termination, and grant a current or former employee's request to

inspect a personnel file within 21 days of the request. It would impose a \$750 penalty for not allowing an inspection request. Employer would be required to provide a copy of the file if the employee requests.

Contractors

AB 306: Public works contractors would need to: report to the State all Labor Code complaints (status and resolution); conduct random audits of payroll records of subcontractors; visit jobsites; and provide annual reports on labor compliance programs.

AB 377: Farm labor contractors would need to include on pay stubs the name and address of the entity that secured the services for which the employee is being paid.

Health and Safety

AB 652: Would prohibit an employer from discharging or refusing to hire an employee or applicant because the individual legally stores a firearm in his or her vehicle at the worksite, locked up and out of public view.

AB 1045: Cal-OSHA Standards Board would adopt a standard to protect workers from excessive indoor heat exposure.

AB 1467: Would remove various current exceptions to California's no-smoking prohibition in places of employment. The ban would be extended to employee break rooms, warehouses meeting/banquet rooms, hotel lobbies, bars and certain owner-operated businesses.

Healthcare Coverage

AB 8 & SB 48: New versions of the "play or pay" rejected by voters in 2004 (see *The Strategic EMPLOYER*, November 2004, page 6). Employers would be required to spend 7.5% of Social Security wages on health insurance for full-time and/or part-time employees and their dependents, or to pay a fee into a state purchasing pool. Employees would be

required to maintain insurance for themselves and their dependents, and carriers would be required to offer individual plans on a guaranteed-issue basis. Employers would be required to set up Section 125 accounts for each employee's premium payments.

AB 1 & SB 32: Would provide healthcare coverage for many California residents, including by expanding eligibility requirements for Medi-Cal and the Healthy Families Program and by deleting citizenship and immigration status requirements in current law.

AB 71: Qualified small employers would receive a tax credit for a percentage of each dollar paid for employee health insurance.

AB 84 & SB 25: Would allow a tax deduction for health savings account contributions, in conformity with federal law.

AB 343: Each year, the Department of Health Care Services would submit a report to the Legislature regarding the number of employees enrolled in state-funded public health programs and the cost to the state, identified by each employer of 25 or more employees. The goal would be to pressure employers who do not provide insurance. Employers would not be required to provide information.

AB 1072: Would establish the California Health Insurance Exchange. Starting 9/1/08, would allow an employer who sponsors a cafeteria plan and enters into an agreement with the California Managed Risk Medical Insurance Board to pass-through the cafeteria plan and the Exchange the premium payments to insurers for individual insurance policies obtained by employees.

SB 840: Proposal for single-payer health care coverage, with all California residents eligible. Would establish several new State agencies, one of which would negotiate or set fees for services and pay claims.

Pending Legislation: cont'd on next page

Pending Legislation

Continued from previous page

Wage and Hour

- AB 448:** Clarifies the discretion of the Labor Commissioner to award liquidated damages for claims of failure to pay minimum wage.
- AB 510:** Would permit an individual non-exempt employee to request an alternative work schedule of up to four 10-hour days in a workweek, without overtime payment. Current law only permits such arrangements for designated work groups following a secret ballot election.
- AB 948 and AB 1247:** State enforcement agency would study overtime exemptions for highly compensated employees and for commissioned employees.
- AB 1034:** Meal break rules would be amended to allow collective bargaining agreements for commercial drivers to permit drivers work up to six hours before a meal break.
- AB 1469:** Currently, not more than ten hours per day is permitted in an alternate work schedule (without overtime) within a 40-hour week and 2/3 of the voting employees must approve. This bill would permit alternate work schedules of up to 12 hours per day without overtime, with 55% of voting employees approving.
- SB 622:** Non-exempt employees who are paid on a fixed salary could collect new penalties if that salary results in less pay than if the employee were paid hourly with overtime properly paid.

Leaves of Absence

- AB 537:** Coverage under the California Family Rights Act would be expanded to entitle employees to take leave to care for an ill child (regardless of age or dependency), parent-in-law, grandparent, grandchild, sibling, or domestic partner. "Parent-in-law" would include the parent of a domestic partner.
- SB 549:** Would entitle employees to take up to four days of unpaid

bereavement leave for the death of a spouse, child, parent, sibling, grandparent, grandchild, or domestic partner, as well as prohibit discharging or discriminating against an employee who inquires about, requests, or takes bereavement leave.

SB 727: The list of seriously ill family members covered by the Paid Family Leave Insurance ("PFLI") program would be expanded to include grandparents, grandchildren, parents-in-law, and siblings. Also, if a leave covered by PFLI is taken within Family Medical Leave Act / California Family Rights Act, then the employee would be required to take PFLI concurrently.

SB 942: Return-to-work for employees out for workers' compensation leave. Would require reinstatement of employee to pre-injury job within 5 working days from: (a) employer's receipt of notice that the employee is able to perform essential functions of job without risk of further injury due to effects of injury / illness (normal job risks notwithstanding), and (b) when the employee is willing and available to return to work. Would prohibit employer from requiring new physical duties unless reasonably required to accommodate employee's disability. Employer would need to pay lost wages for any time employee cannot work due to added duties, plus \$100 per day penalty. New presumption of discrimination if employer has denied employee the right to pre-designate a treating physician.

Temp Employee Wages

Current law requires immediate payment of wages to terminated employees, even if the employee is hired as a temporary worker — no matter how brief the assignment. A number of bills seek to provide some flexibility.

- AB 592:** Urgency legislation to exempt temporary employees working through temp agencies from immediate payment, so long as wages are paid weekly.
- AB 1097:** Wages earned by licensed healthcare professional employed by a temp agency would be deemed "paid immediately" if paid by the next regular payday following completion of assignment.

AB 1425: Payment of wages to a temporary employee working through a temp agency would be due on the next payday if the assignment ends, and the employee remains ready for reassignment. Payment would be due within 24 hours (excluding weekends and holidays) if such employee is unconditionally terminated.

Immigration

AB 735: Non-U.S. citizens would have to pay to get a work permit to work in California. Such workers would pay a fee for the permit and an 8% payroll tax on wages. State would set up a database to check for permits prior to hiring.

Miscellaneous

- AB 613:** Required workplace postings would be revised to be understandable and written in "plain English."
- AB 1043:** Would void any employment contract provision requiring an employee, as a condition of obtaining or continuing employment, to use a court other than one in California or to agree to a choice of law other than California law to resolve employment-related disputes that arise in California.
- SB 180:** Agriculture workers could become unionized without a secret-ballot vote if the majority of the unit signed union-authorization cards.
- SB 357:** Currently, to establish a "group" life insurance plan, employers must have a minimum group of ten employees and, if employees pay any portion of the premiums, then 75% of the eligible employees must participate. This bill would allow minimum groups of two and delete the 75% requirement.
- SB 622:** Deals with misclassification of workers as independent contractors when they should have been employees. Would create new penalties for willful misclassification. Harmed workers or their labor union could bring action for penalties.



SUPREME COURT DECISION MAY BE ANNULLED BY CONGRESS

Employers Win in Pay Discrimination Claim

Employees who complain of discrimination under Title VII, the federal anti-bias law, have a limited time to file a claim with the Equal Employment Opportunity Commission ("EEOC"). In California, claimants have 300 days following an act of discrimination in which to bring such a claim before the federal EEOC and one year to go to the State's enforcement agency. This "countdown" of the time in which to bring a claim is called the "limitations period."

Recently, the U.S. Supreme Court resolved the question of what action triggers the start of the limitations period in a pay discrimination case: Is it the date of the discriminatory pay-setting decision, or the date of the employee's last paycheck? The Supreme Court ruled in a 5-4 decision that the limitations period is triggered by the date of the pay-setting decision.

Congress to Step In? This ruling was good news for employers, but it could be short-lived. The dissenting opinion called upon Congress to change the law in response to the Court's majority decision. Plans are underway in Congress to amend Title VII to

provide that the time clock for filing a charge is reset with each payment of a discriminatory wage. WAAG AND CO. will keep you posted on any developments.

Case Description: In *Ledbetter v. Goodyear Tire & Rubber Co.*, Lilly Ledbetter complained that she received smaller raises than her male counterparts, resulting in a huge gap between her pay and theirs. She retired in early 1998. In July 1998, she filed a pay discrimination claim with the EEOC. Although her last paycheck was sufficiently recent to be within the limitations period, the last pay-setting decision was not.

Ledbetter contended that each new paycheck is impacted by a past discriminatory pay decision and each new paycheck triggers a new limitations period. Goodyear contended that a pay-setting decision, like a termination or demotion, is "a discrete act" forming the basis of a Title VII claim and thus triggering the limitations period in which to file a charge.

The Court agreed with Goodyear, stating that "current effects alone cannot breathe life into prior, uncharged discrimination." Noting that in disparate

pay cases, "the employer's intent is almost always disputed, and evidence relating to intent may fade quickly with time," the Court also emphasized the importance of statutory time limitations in protecting employers from having to defend allegations of intentional discrimination based on conduct that allegedly occurred many years before.

The Court found it significant that "Ledbetter has not adduced evidence that Goodyear initially adopted its performance-based pay system in order to discriminate on the basis of sex or that it later applied this system to her within the charging period with any discriminatory animus..."

Warning: While the *Ledbetter* decision is a victory for employers, plaintiffs and their attorneys will look for ways around it. Because the dissent noted that employees will normally have difficulty discovering any pay inequities, it is likely that plaintiffs will argue that the limitations period should be suspended based on their inability to discover the discrimination within the limitations period.

Another response may be a shift toward filing claims for gender-based disparate pay under the Equal Pay Act, since such claims do not require the filing of an EEOC charge or proof of intentional discrimination. It is unclear if the *Ledbetter* ruling will have an impact on Equal Pay Act claims. Since that is a possible opening, attorneys will likely flock to it.

Senators Edward Kennedy and Hillary Clinton, among others, already have announced that they intend to introduce bills to overturn the Court's ruling and allow employees to challenge pay decisions made at any time during their employment.

Recommendations: Regardless of how matters proceed in Congress, employers must exercise constant vigilance over the design and implementation of their pay practices to assure fairness and reduce the potential for discrimination claims. ✓

✓ PROPOSED State Regulation

Expense Reimbursement: State law requires employers to indemnify employees for all expenses incurred in connection with their employment. To clarify this requirement, California's Division of Labor Standards Enforcement ("DLSE") has proposed new travel and expense regulations. Most significantly, the proposed regulations would create a presumption that the IRS mileage reimbursement rate is a "reasonable rate" for reimbursement to employees. If an employer believes that an employee's mileage expenses are less than the IRS rate, the employer must prove the employee's actual lower expenses for the vehicle's use and must maintain complete records of these expenses. Likewise, if an employee believes that his actual expenses are greater than the IRS rate, the employee must prove that the actual costs for the vehicle's use exceed the IRS rate. The regulations would also impose limited options for handling other travel expenses and require employers to notify employees in writing of any travel reimbursement policies (such as per diem rates) in advance of travel. Employers who fail to give such notice must reimburse the employee's actual travel expenses.



DENIAL OF SECRET-BALLOT UNION ELECTIONS AMONG THE PROPOSALS

PROPOSED Federal Legislation

Paid Sick Leave: Senator Edward Kennedy and Representative Rosa DeLauro have introduced a bill that would guarantee seven paid sick days per year to employees working at least 30 hours per week at companies with 15 or more employees. Part-time employees would be entitled to prorated paid sick time. Employees would be entitled to use paid sick time for their own medical condition or medical appointments, or to care for an ill family member.

Unionization: Amid a promised veto by President Bush, HR 800 is organized labor's biggest priority this year. Current law entitles workers to a secret-ballot vote on the decision to unionize.

The "authorization cards" that organizers try to get workers to sign are generally considered only a showing that there is sufficient interest to compel such a vote. Workers are frequently told that signing a card does not mean they want to unionize, but merely that they are interested in exploring the possibility.

Additionally, there is always the potential that workers will sign cards due to peer pressure. Either way, many people sign cards, but vote "no" to unionizing when given a secret ballot.

HR 800 would mandate the use of signed authorization cards as a replacement for a secret ballot election. The bill also would require binding arbitration to resolve disputed terms for a first contract, if the employer and the union cannot reach an agreement within 120 days. The House already passed HR 800 by a margin of 241-185, and it is now at the Senate.

Immigration: A number of immigration reform proposals have been debated throughout the year. Despite many differences, all would impose some level of increased responsibility on employers for screening out unauthorized workers.

Genetic Discrimination: Congress is finalizing differences in bills passed overwhelmingly by both the House and Senate for prohibiting the use of

"genetic information" in employment decisions. President Bush has indicated his support for the proposed law.

Federal Contractor Debarment: The "Honest Leadership and Accountability in Contracting Act" (S. 606) has been put forth as a response to concerns about contracting practices and poor performance on contracts related to Iraq. The bill would permit debarment of contractors that do not have a satisfactory record of "business integrity and ethics."

Critics have raised concerns about the vagueness of the trigger for debarment and the extent to which unproved allegations, unresolved litigation and inconclusive investigations may lead to debarment. The standards in the bill are unrelated to performance on the contract, and debarment may result from non-compliance with labor and employment laws, health and safety regulations or environmental standards. A similar bill (HR 1362) is moving through the House.



HARASSMENT COMPLAINTS CANNOT BE IGNORED

Supreme Court to Rule On "Me Too" Evidence

Among the most challenging issues in defending a discrimination or harassment case is when the plaintiff tries to put forth what is known as "me too" evidence. This is testimony by non-party workers who claim that they, too, were victims of workplace bias or harassment. In the case of *Sprint / United Management Co. v. Mendelsohn*, the Supreme Court will decide whether a district court must admit "me, too" evidence — testimony by nonparties, alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff.

The 10th Circuit Court of Appeals held that such evidence should be admitted. However, other Circuit Courts

have disagreed — four holding that such evidence is wholly irrelevant, and five excluding it under the federal rules of evidence. Although the *Sprint* case involves an age discrimination claim, the issue is a recurring question of proof in many discrimination cases and most harassment cases.

While any decision by the Supreme Court will have a major impact on how cases are handled, the issue raises a practical matter for employers before any litigation even arises. Even if the Court holds that "me too" evidence is not admissible, there are other ways such evidence may be entered. For example, such evidence may relate to whether punitive damages should be awarded (i.e., harassment was rampant

and ignored).

Recommendations: Many employers seem to think that if the complaining employee no longer works for the company, there is no need to address the complaint. It is still important to address all discrimination and harassment complaints immediately and appropriately, regardless of who raised the concern. What if the harasser moves on to other victims? Employers have an obligation to prevent harassment for the remaining employees. It will be difficult to argue the employer met such obligation if any complaints were ignored.

WAAG AND CO. will keep readers posted on any developments in this area.



FEDERAL MINIMUM WAGE STILL LOWER THAN CALIFORNIA'S

NEW Federal Laws

Medical Industry Fraud Detection

Starting January 1, 2007, health care providers who receive \$5 million or more in revenue from Medicaid must now provide training for their employees on fraud detection. Hospitals, nursing homes, and large physician groups, must teach employees how to be "whistle blowers" and create policies for responding to employee reports of suspected Medicaid fraud and abuse. Compliance is a prerequisite to Medicaid reimbursement, so employers who fail to comply risk losing this funding.

Additionally, as the law empowers individuals to sue as "whistle blowers,"

employers may find themselves defending claims of wrongful discharge or retaliation related to an employee's belief of Medicaid fraud. The new law amends the Social Security Act, 42 U.S.C. 1396a(a), and requires employers to:

- 1. establish written policies for all employees informing them about the federal False Claims Act;
- 2. provide a mechanism for detecting, preventing and reporting any suspected fraud, waste or abuse; and
- 3. provide a discussion of these policies and the employees' rights as "whistle blowers" in employee handbooks.

Federal Minimum Wage

Since California's minimum wage is already higher, this new law will have no impact in California. For those outside of California, however, HR 2206 will be significant. The new law was signed by President Bush on May 25, 2007, and the federal minimum wage (currently \$5.15 per hour) will increase in steps as follows: July 24, 2007, to \$5.85; July 24, 2008, to \$6.55; July 24, 2009, to \$7.25. Currently, minimum wage in California is \$7.50 and will increase to \$8.00 on January 1, 2008.



OTHER BENEFITS CREATE CONFUSION

Required Use of Paid Time Off Questioned

Generally, time off under the Family Medical Leave Act ("FMLA") is unpaid. However, pay issues do arise. Employers have the right to require employees to use paid sick time or vacation during FMLA leave, and employees have the right to elect to use it. But what if the employee is receiving other wage-replacement benefits, such as State Disability Insurance ("SDI"), Paid Family Leave Insurance ("PFLI"), Long-Term Disability Insurance ("LTD") or workers' compensation benefits covering the absence? The federal 7th Circuit Court of Appeals recently answered this question.

The Case: Roadway Express employee Alice Repa was granted a medical leave that was covered by FMLA. She was also granted six weeks' worth of LTD benefits under a union benefits plan, paying her \$300 per week. Roadway notified Repa that she was required to use her accrued paid sick time and vacation during her absence. Roadway paid out her five

days of sick time and two weeks of vacation, which she received on top of the LTD benefits.

Paid Leave at Issue: Repa sued claiming that Roadway violated the FMLA by requiring her to use paid time off while she was already receiving other wage-replacement benefits. She cited the federal Department of Labor regulations that permitted employers to require the employee to substitute paid time off during any **unpaid** FMLA leave. Specifically, the DOL regulations provide: "because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision [in FMLA] for substitution of paid leave is inapplicable."

Court Ruling: The Court agreed with Repa, stating that the DOL regulations limit an employer's right to require use of paid leave whenever the employee is receiving any other wage-replacement benefits, whether the benefits are provided by the employer or a third party. Accordingly, the Court

held that Roadway's policies violated the FMLA.

Application to California Employers: The *Roadway* case did not arise in California, and the 7th Circuit does not have jurisdiction over California. Nevertheless, federal courts around the country will look at this decision for guidance, since it is the first opinion issued on the subject of requiring employees to use paid leave when the employee is receiving other wage-replacement benefits.

Recommendation: It is possible that other courts may rule differently, since it is not clear that the FMLA and the DOL regulations intended such an extensive interpretation. However, employers would be wise to take the safer approach and adjust their policies in accordance with this ruling.



Paperwork Failure Burns Employer

To say that understanding the various laws that entitle employees to time off can be difficult is an understatement. Failing to comply with the details of such laws can result in liability, even when it seems like nothing more than a “paper-work” problem.

That is what happened to the California Portland Cement Company (“CPCC”) after it fired Michael Faust for failing to provide the type of doctor’s certification it requested as support for his absence under the California Family Rights Act (“CFRA”).

Legal Requirements for Family Leave: Employers with 50 or more employees are subject to the CFRA as well as a similar federal law entitling eligible employees to take up to 12 weeks off for the employee’s own illness, the illness of an immediate family member, or to bond with a new child. Both laws require employers to post a notice regarding these rights and to include specifics in any written employee policies.

When an employee goes out for a purpose covered by these laws, the employer is required to provide a specific notice to the employee designating the employee’s leave as covered by these laws, explaining the employee’s rights and benefits, and informing the employee of any communication requirements.

Medical Documentation Issue: An employer has the right to require the employee to provide an appropriate doctor’s note supporting a medical leave, including certification that the employee is medically unable to work and the doctor’s best estimate of the likely duration of the absence. Faust had been absent for about a month on an approved medical leave and requested an extension.

CPCC questioned the adequacy of the certification of the extension and left messages for Faust to contact the company. Faust’s wife called back twice, leaving messages with CPCC’s HR manager stating that CPCC could

speak with her, the chiropractor, or Faust’s workers’ comp lawyer, but Faust was too stressed to speak directly with CPCC.

What is HR to do? The HR manager, however, again left a message at Faust’s home stating that she needed to speak to Faust. She then sent him a letter stating that the chiropractor certification was incomplete. Faust didn’t respond, assuming CPCC would just contact his workers’ comp attorney, which it did not do. He was terminated the next week, less than seven weeks after the leave first began.

Faust sued, claiming that the termination violated the CFRA. CPCC countered that Faust didn’t give proper CFRA notice and refused to cooperate with the company’s efforts to obtain additional information. While there were questions regarding the adequacy of Faust’s communications with his employer, the Court noted that the employer had several options available to it for obtaining the information it needed regarding Faust’s absence, and should have attempted those before firing Faust.

Failure to Give or Post Notice: What was most significant about the Court’s ruling, however, was its conclusion that CPCC’s failure to comply with CFRA’s “paper-work” requirements meant that CPCC lost its right to take action against Faust for failing to do his part. Failure to give or post required notices precludes an employer from taking adverse action against the employee, including denying the leave.

The Court found that CPCC did not post the required CFRA notice or tell Faust about his CFRA rights or notice requirements. In fact, the HR manager admitted that she didn’t inform Faust of his CFRA or federal Family Medical Leave Act (“FMLA”) rights. Accordingly, the Court ruled that the termination was improper and in violation of the CFRA.

What to do:

1. Provide notice. Both CFRA and FMLA require covered employers to post

a notice summarizing employee’s rights under these laws. Your specific policies regarding such leave (e.g., communication requirements, definition of “Leave Year,” etc.) must be included in your employee handbook. Also, when you have information suggesting an employee may need family and medical leave, you must give the employee something in writing designating the absence as covered (or potentially covered) as CFRA/FMLA and informing the employee of his/her rights and responsibilities.

2. Follow up. If an employee notifies you of the need for a leave that might be covered by CFRA or FMLA, it is your duty to follow up if you need more information to determine whether the leave does qualify, such as by requesting a certification if the employee hasn’t already provided one or requesting more information if the certification is incomplete. If the employee is unable to provide the information, seek it directly from the health-care provider. Do not seek any confidential medical information, such as diagnosis; you only want certification regarding the employee’s medical inability to work (if the leave is for the employee’s own medical condition) and the likely duration of the leave.

3. Train managers and supervisors. Make sure that managers, supervisors, and HR employees know the notice rules and the procedures to follow when an employee requests a leave. To help achieve consistent compliance, require managers/supervisors to notify HR any time an employee is out for three days or more (or repeatedly for the same purpose) for reasons other than pre-approved vacation.

4. Get help navigating the rules. Unless you have had substantial experience handling difficult leave issues, you may want to double-check your legal obligations with a qualified employment attorney when an employee-absence issue arises.



CAREFUL WORDING OF HARASSMENT POLICIES REQUIRED

Non-Fraternization Policy Yields Liability

All employers in California are required to have anti-harassment policies. To reduce the likelihood of claims, many include non-fraternization provisions, generally focused on barring romantic relationships, particularly between supervisors and subordinates, or other clear conflicts of interest.

Restrictive Harassment Policies: However, a federal court recently held that an overly broad policy violated the National Labor Relations Act ("NLRA"), which guarantees all employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."

It is important to note that these rights are held by all workers, unionized or not. Additionally, California law specifically protects the rights of all workers to discuss their wages, terms and conditions of employment with each other and their representatives. That means non-unionized employers are affected by this issue.

Guardsmark LLC, a security guard company, included a rule in its policy handbook stating that guards "must **not** fraternize on duty or off duty, date or become overly friendly with clients' employees or with co-employees." The guards' union complained that the rule violated the guards' rights under the

NLRA. The company defended by asserting the rule was narrowly intended to target personal entanglements that could cloud a security guard's judgment, and that there was no intention to apply the rule to restrict employees' NLRA rights.

Court Ruling: The Court held in favor of the union. Although the Court did not doubt the employer's intentions, it explained that the standard for determining whether the rule violated the NLRA was if the rule would tend to have a "chilling effect" on employees' exercise of their NLRA rights.

The Court noted that a rule will violate the NLRA if it explicitly restricts protected activity. If not, then it will violate the NLRA if any of the following three conditions exist: (1) employees would reasonably interpret the rule's language to prohibit the protected activity; (2) the rule was issued in response to union activity; or (3) the employer has applied the rule to restrict protected activity.

In the *Guardsmark* ruling, the Court held that employees could reasonably understand the policy as restricting something other than romantic or personal entanglements. Because the policy specifically barred "dating" and becoming "overly friendly," the

requirement not to "fraternize" could reasonably be viewed as relating to something else. If an employee thought he would be violating company policy by uniting or cooperating with co-workers, this would chill his rights under the NLRA.

Not Just Any Policies Will Do: The *Guardsmark* case illustrates once again the precision necessary in drafting personnel policies. While *Guardsmark* thought it was forcefully driving home its policy against romantic entanglements by phrasing this in several ways, the Court held that each term must have meant something different, making the policy illegally broad.

Similar problems have occurred when employers have overly bloated disciplinary action policies, adding different categories of "offenses" that will result in different levels of discipline. Courts have routinely held that such policies create a binding contract not to terminate employment without good cause, thereby negating "at-will" status.

Recommendation: Personnel policies are very important tools for protecting against liability; however, they must be drafted with great care by a qualified employment attorney, or at the very least, reviewed by one.

EEO-1 Deadline in September

Employers with 100 or more employees, and employers with federal government contracts of \$50,000 or more plus 50 or more employees, must file the EEO-1 report each year with the Equal Employment Opportunity Commission (EEOC). The deadline for filing is September 30, 2007, and employers must use the new version of the form (Standard Form 100, rev. 1/06).

Although not required, the EEOC prefers that EEO-1 Forms be filed online. Details regarding how to complete the form and where to send it are available at the EEOC website (www.eeoc.gov).

The Strategic EMPLOYER

July 2007 ~ Susan S. Waag, Esq. ~ (805) 783-2300

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